Naming Names: The Pseudonym in the Name of the Law

Carole Lucock* and Michael Yeo**

PSEUDONYMS ARE OF COURSE NOTHING NEW under the sun. We know of them in a good many and diverse range of figures, including resistance fighters, saboteurs, gangsters, heroes, vulnerable parties to a lawsuit, authors, and actors. However, behind this surface familiarity is a very complex phenomenon. And it appears increasingly complex as one takes into account the proliferation of pseudonym use as facilitated by rapidly developing information and communication technologies.

In this paper we canvass the main areas of law in which the pseudonym appears and extract and explicate key legal principles and considerations. This legal analysis is augmented by consideration of social, cultural, and political dimensions of naming practices. We survey the phenomenon of pseudonym use to reveal a vast variety of different uses of the pseudonym, for different purposes, and under different conditions. We propose a conceptual framework for managing the multiplicity of meanings that the term "pseudonym" has taken on in use today. This framework, we believe, is useful not only for better understanding what is going on in the phenomenon of pseudonymity today but also for normative analysis, discussion, and debate about how law and public policy should approach the pseudonym.

LES PSEUDONYMES, BIEN SÛR, NE SONT RIEN DE NOUVEAU sous le soleil. Nous savons qu'une grande diversité de gens y ont recours, par exemple des personnes s'opposant à la résistance, des personnes participant à des tactiques de sabotage, des gangsters, des héroïnes et des héros, des parties vulnérables lors d'instances judiciaires, les femmes et les hommes du monde de la publication ou de la scène. Derrière cette familiarité apparente, toutefois, il y a un phénomène très complexe. Ce phénomène semble même encore plus complexe, lorsqu'on tient compte de la prolifération des pseudonymes dont l'utilisation est facilitée par le développement rapide des technologies de l'information et des communications.

Dans le présent article, nous explorons les principaux domaines du droit où est soulevée la question du pseudonyme. Nous en dégageons, en les expliquant, les principes et les considérations juridiques. Cette analyse du droit est complétée par une étude des considérations sociales, culturelles et politiques qui entrent en jeu de la pratique de l'attribution de noms. Nous faisons un survol du phénomène des pseudonymes afin de découvrir la grande diversité de leur utilisation, à des fins fort variées et dans toute une panoplie de conditions. Nous proposons un cadre conceptuel pour gérer les significations multiples du pseudonyme dans notre monde actuel. Cet encadrement est utile, selon nous, nous seulement pour mieux saisir la tendance actuelle en la matière, mais aussi pour faire une analyse normative de ce phénomène et pour amorcer un débat sur la réponse juridique et politique à ce phénomène du pseudonyme.

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> … there is an ancient saying that "hard is the knowledge of the good." And the knowledge of names is a great part of knowledge.[1]
>
> –Socrates, Plato, *Cratylus*

1. INTRODUCTION

DONALD W. FOSTER, IN A POLEMICAL ARTICLE taking issue with trends in contemporary literary theory concerning authorship and attribution, has written: " … until such time as our literary and critical discourse disappears into the abyss of anonymous internet chat, when we read a text that really matters, it will matter who's speaking."[2] We ask: Why does it matter? To whom? And how does it matter to the law?

Foster does not say enough about what might count as a "text that really matters" to determine whether the text above attributed to him is such a text. If it is, then, according to its author, it matters who is speaking.[3] In this case, the one speaking is Donald W. Foster. At least, the text is attributed in that name. Certainly it is the name that is used, in effect, to sign the article. Presumably, it is the author's name—his "real" name.

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1. Plato, *Cratylus*, trans. Benjamin Jowett, in Edith Hamilton & Huntington Cairns eds., *The Collected Dialogues of Plato* (Princeton: Princeton University Press, 1961) at p. 422, n. 384b, <http://www.archive.org/details/crtls10>.
2. Donald W. Foster, "Commentary: In the Name of the Author" (2002) 33:2 New Literary History 375 at p. 395. Foster's article is a summary commentary for a special issue devoted to anonymity. Foster takes particular issue with Michel Foucault, whose essay "What is an Author?" in Donald F. Bouchard, ed., *Language, Counter-Memory, Practice* (Ithaca, NY: Cornell University Press, 1980) challenged conventional modes of theorizing about authorship.
3. As the text in question is published in a *bona fide*, indeed prestigious, literary journal, and not in the "abyss of anonymous Internet chat," it may be reasonable to suppose that the author would count it among texts "that matter."

We have not sought to authenticate this name, but in principle we could. For example, we could contact the editors of *New Literary History,* in which the article attributed to "Donald W. Foster" appears. If we Google "Donald W. Foster," among our first hits is a document bearing the rather grave title "Declaration of Donald W. Foster, PhD" dated 11 April 1997.[4] It begins: "I, Donald W. Foster, declare as follows," and goes on to list academic credentials and experience relevant to his expertise in "authorial attribution." If this declaration can be trusted, and the fact that it appears on the internet may raise a doubt, this is a submission Donald W. Foster made as an expert witness in connection with the trial of one "Theodore ("Ted") Kaczynski," alias, "The Unabomber." Kaczynski was before a court on charges related to a series of bombings in the United States. That court wanted to know if certain documents published under the name of the Unabomber were in fact written by Kaczynski. As an expert, Donald W. Foster was called upon to render opinion on this matter.

Experts in authorial attribution work with a text, the authorship of which is in question or doubt, to identify its author. If the text we began by quoting had not been attributed, or there was reason to doubt its attribution, we might compare it to the declaration to investigate whether both texts were authored by the same person. If it appeared that they were, and we were reasonably certain of the identity of the author of the declaration, we would have reasonable grounds for concluding that Donald W. Foster is indeed the author of the quoted text. And if we really wanted to be certain, we could enlist the service of someone like Donald W. Foster, PhD, an expert in attribution, who does precisely this sort of thing!

Of course, there is good reason to believe that Donald W. Foster is the author's "real" name, and not, for example, a pseudonym, or a false name. In fact, we do not believe that the attribution of the text we began by quoting is anything more than a rather ordinary instance of authorship in which the name attributed to the work happens also to be the name—the "real" name—of the author. Yet, as unreasonable as it would be under the circumstances to suppose otherwise, it must be admitted that this is possible. People like Donald W. Foster have built a career around this very possibility.

Let us suppose that the attribution of the text were indeed dubious. For example, suppose "Donald W. Foster" were a pseudonym, what would it matter who was speaking? Why? To whom? Certainly, it mattered to the court when Donald W. Foster came before it as an expert witness in the Unabomber case. Indeed, it mattered enough that Foster was compelled to conclude his declaration, above his name and legal signature, with the solemn words: "I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge and belief. Executed this 11th day of April 1997, at Poughkeepsie, New York." The "I" who declares *is* Donald W. Foster, and it matters to the court.

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4. "Declaration of Donald W. Foster, Ph.D" *The Sacramento Bee* (11 April 1997), <http://www.unabombertrial.com/documents/donfoster041197.html>.

However, as we open this paper with reference to a text attributed to Donald W. Foster, it does not matter to us who is speaking in or behind this text. Indeed, even if in fact Donald W. Foster were a pseudonym (and we repeat that we have no reason to believe that it is, and are almost certain that it is not) this would not matter for our purposes. On the contrary, for our purposes this would be quite felicitous. Our purpose in opening this paper with the quotation from Foster about texts that matter, and for which it matters who is speaking, is to introduce a certain line of questioning about why and how naming matters, and in particular as concerns the pseudonym and the law. The text serves this purpose equally well, whether "Donald W. Foster" is a pseudonym or not.

The purpose of our paper is to bring pseudonymity into view as the pseudonym is in question, or may come into question, in law and public policy. Pseudonyms are of course nothing new. We know of them in a good many and diverse range of figures, including resistance fighters, saboteurs, gangsters, heroes, vulnerable parties to a lawsuit, authors and actors. However, behind this surface familiarity is a very complex phenomenon. And it appears increasingly complex as one takes into account the proliferation of pseudonym use as facilitated by rapidly developing information and communication technologies.

In this paper we will canvass the main areas of law in which the pseudonym appears and extract and explicate key legal principles. However, before coming to this we will situate the law of the pseudonym in the broader law of the name. Thus the first part of the paper is a brief summary of the law as it pertains to personal naming. It includes commentary and discussion of the social and cultural dimension of naming practices and, surrounding these practices, the politics of the name.

The second part of the paper is the aforementioned canvass of the law as it pertains to pseudonyms. This analysis is broken down into six main focal points in the law. We elaborate each of these with paradigmatic cases, extract key legal principles, and discuss questions and issues of concern.

In the third part of the paper, aided by our canvass of the law and in the service of enriching policy discussion about the pseudonym, we discuss issues of definition and nomenclature relevant to law and policy. We propose and describe five main sets of variables or considerations that we believe are useful and important, not only for understanding what is going on in the phenomenon of pseudonymity today, but also for normative analysis, discussion and debate about how law and public policy should approach the pseudonym.

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2. IN THE LAW OF THE NAME

PERSONAL NAMING IS AN EVERYDAY OCCURRENCE that may seem to have nothing especially remarkable about it, even as expectant parents excitedly search the internet in pursuit of a name for their child. However, it is not as innocent as it might appear at first glance. As Kahn says, "identity can never be a wholly unmarked or neutral category." Rather, "ways in which identity is marked, elided

or taken for granted inevitably implicate existing networks of power and social meaning."[5]

Indeed, each of us has many names. Different names carve out or mark different identities—some discrete, some overlapping—for different interests, purposes and contexts. Tensions arise between and among the multiplicity of names and identities we may have as different interests and purposes clash in the name. Naming matters, and matters most when names are personal.[6]

The analysis in this section begins with a brief consideration of the law of the present legal naming regime and the history of this law in antecedent traditions of naming. This opens up several lines of enquiry concerning identity, the legal subject, power, subjection, assimilation, and so on. We discuss changes in naming conventions over time, differences between naming conventions from one society to another, and differences within the same society. This discussion brings to light a great multiplicity and diversity of naming practices and conventions. Against the background of a certain taken-for-grantedness of naming, it also reveals the contingency of naming practices, bringing home the fact that these practices are naming *conventions*.

That naming practices are governed by naming norms or conventions means that they are law-like. But this is not to say that they have the force of law. It is important to distinguish a naming convention as such—as this convention has come about in whatever tradition or cultural context—from the law of the name. The latter pertains to a naming convention insofar as it is recognized or even prescribed by or in the law, for the purposes of the law, and with the force and right of the law.

The norms governing naming—the naming conventions or formulae for name giving and transmission—express underlying, and sometimes taken for granted, relationships of power and identity. This is so even, and especially, when these conventions or formulae are prescribed and legitimated in right or law. The law understandably privileges the legal name—the name by which someone is recognized as subject of or to the law.

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5. Jonathan Kahn, "What's in a Name? Law's Identity Under the Tort of Appropriation" (2001) 74:2 Temple Law Review 263 at p. 266.

6. The theory of the name goes back at least as far as Plato's *Cratylus*, *supra* note 1, and remains very much a question in contemporary philosophy, linked to difficult and even disturbing puzzles about personal identity. Derrida and Kripke exemplify two quite different intellectual traditions and theoretical approaches. See Jacques Derrida, *On the Name*, ed. Thomas Dutroit (Palo Alto: Stanford University Press, 1995); Jacques Derrida, "Aphorism Countertime" in Derek Attridge, ed., *Acts of Literature* (New York: Routledge, 1992); and Saul A. Kripke, *Naming and Necessity* (Oxford: Basil Blackwell, 1980).

2.1. The Present Naming Regime in Canada

A name is attached to a person soon after birth. Typically, it is a statutory requirement that a birth be registered and a name be given.[7] The law does not give this name, but it does require that one be given, and even prescribes a naming convention or formula for doing so. In the law of the name in Canada, the name *must* consist of a surname (which in some jurisdictions *must* be a family name as represented through the current or former surname of one or both of the parents)[8] and at least one forename.[9] Through the process of birth registration, a person's official connection to, and identity in, a name becomes established. After the birth has been registered and a name given, a birth certificate is issued, which becomes the key official document for claiming the rights and privileges of citizenship.[10] This registration and certification process also marks the State's assertion of jurisdiction over the citizen. Henceforth, this name is the legal name, even if it is *given* by the family and remains the family name. Although the legal name can be replaced by another name, this requires a special process that is prescribed by legislation.[11] Except in the case of name changes associated with marriage or common-law relationships (and their dissolution), the name-change process is fairly extensive and cumbersome.

The Supreme Court of Canada has determined that, in general, both biological parents have the right to have their surname associated with their child.[12] In reaching this conclusion the Court notes:

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7. For example, in Ontario, the *Vital Statistics Act*, R.S.O. 1990, c. V-4, <http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90v04_e.htm>, requires notification of the fact of birth (s. 8), certification of the birth (s. 9) and the naming of the child in prescribed form (s. 10). In the case of a child who is adopted, there is a more complex process that culminates in the issuance of a birth certificate in the name of the adoptive parents (or a replacement birth certificate if the adoptee's birth had been registered in the name of the birth parents). See s. 28 of the *Vital Statistics Act*, which combines with part VII of the *Child and Family Services Act*, R.S.O. 1990, c. C-11, <http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90c11_e.htm>, to affect this process.
8. *Vital Statistics Act, ibid.*, s. 10(3). The British Columbia statute provides greater flexibility to choose a surname that is not that of the parents; however, in the event of a dispute (and the general default), the surname of the parents will be used, see *Vital Statistics Act*, R.S.B.C. 1997, c. 479, <http://www.qp.gov.bc.ca/statreg/stat/V/96479_01.htm >, at s. 4.
9. *Vital Statistics Act, supra* note 7, at s. 10(1).
10. In giving information concerning registration of births, the Ontario Ministry of Government Services information described the birth certificate as "a foundation identity document." See <http://www.cbs.gov.on.ca/mcbs/english/births.htm>. See also, Passport Canada, *Proof of Canadian Citizenship*, <http://www.pptc.gc.ca/passports/proof_of_citizen_e.asp>.
11. See, for example, *Change of Name Act*, R.S.O. 1990 c. C-7, <http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90c07_e.htm>.
12. *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, <http://scc.lexum.umontreal.ca/en/2003/2003scc34/2003scc34.html>, [2003] 1 S.C.R. 835 [*Trociuk* (*SCC)* cited to LexUM/S.C.R.], which is a case that determined that legislative provisions that permitted a woman to un-acknowledge the father of a child and thereby prevent him from being named on the registration of birth documents and/or to make decisions about the child's surname infringed equality rights contained in s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, <http://laws.justice.gc.ca/en/charter/index.html> [*Charter*].

> Contribution to the process of determining a child's surname is another significant mode of participation in the life of a child. For many in our society, the act of naming a child holds great significance. As Prowse J.A. notes, naming is often the occasion for celebration and the surname itself symbolizes, for many, familial bonds across generations.
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> The significance of choosing a surname is particularly evident if viewed in light of the rationales for reforms, which extended to mothers the ability to transmit their surnames to their children.[13]

The earlier decision of the British Columbia Court of Appeal in this case[14] had recognized the power of the naming system to reflect societal norms, to confer legitimacy and title to property and, in the common law system, to privilege the paternal link and lineage.[15] The Court of Appeal had also noted that, in some instances, naming expresses a desire to maintain a connection to heritage, whereas in others it is "an expression of individuality or dissociation from the past, and a matter of some importance for those reasons."[16] Additionally, the Court of Appeal had recognized the power of the naming system to prevent "aliens" from assimilating into the mainstream culture by changing their name (which appears to be the original rationale behind the change of name acts).[17]

The complexity of the link between family, name, law and identity, and the contentiousness of these links, is illustrated by current debates in the law of the name. For example, Canada and other countries have seen recent changes and proposed changes to adoption rules[18] to open up sealed birth and adoption records, ensuring a right of access to these records by adoptees and birth or "natural" mothers. These initiatives have come about largely as a result of lobbying by adoptees and birth mothers, who claim that the system of sealed records is harmful and unnecessary.[19] In fact, the sealing of birth and adoption records is of fairly recent origin and was introduced during a time when illegitimacy and infertility were stigmatized.[20] The records were originally sealed

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13. *Trociuk SCC, ibid.* at paras. 17–18 [references omitted].
14. *Trociuk v. British Columbia (Attorney General)*, 2001 BCCA 368, <http://www.courts.gov.bc.ca/jdb-txt/ca/01/03/2001bcca0368.htm>, [*Trociuk (BCCA)*], concurring decision of Newbury J at para. 171.
15. *Ibid.* at paras. 30–64.
16. *Ibid.* at para. 140.
17. The British Columbia Court of Appeal describes the introduction of change of name acts at the end of the thirties, which sought to restrict name changes (a departure from the common law rule). The court recognizes that these restrictions may have been enacted during a time of war and out of a desire to prevent "enemy aliens from hiding their origin." *Ibid.* at para. 53. However, the court also makes note of objections expressed after the war relating to preventing "foreigners" from passing themselves off as of "indigenous racial descent and ancestry" in the interests of preventing "mongrelism which science deplores, and which our experience condemns because of its destruction of good blood lines and values." *Ibid.* at para. 51.
18. See, for example, *Adoption Information Disclosure Act, 2005*, S.O. 2005, c. 25, <http://www.e-laws.gov.on.ca/DBLaws/Source/Statutes/English/2005/S05025_e.htm>.
19. See, for example, Bastard Nation, <http://www.bastards.org>.
20. Elizabeth J. Samuels, "How Adoption Grew Secret in America (and Canada): Birth Records Weren't Closed for the Reasons You Think" *Washington Post* (21 October 2001) B05, <http://www.originscanada.org/how_adoption_grew_secret.html> [Samuels, "How Adoption"]; and, Bastard Nation, "A History of Adoption and Sealed Records in Canada," <http://www.bastards.org/mediaroom/printRecordsInCanada.html> [Bastard Nation, "A History"].

from public view to protect the adoptee from the stigma of illegitimacy. It was only subsequently that the records became sealed to the adoptee herself.[21] Among other things, those seeking the opening of sealed records and a reversal of existing policy claim that this policy reinforces and perpetuates the aura of shame that once surrounded adoption.[22]

Another area in which the law of the name is in question or in flux is new reproductive technologies. In view of the possibilities afforded by these technologies, impetus has been given to challenge the dominance of the link between blood and name and of naming conventions based on traditional conceptions of familial relationships premised on a man and a woman in a marriage-type relationship. Gays and lesbians who have used these technologies have been recognized as entitled to be registered as parent and to name the child.[23]

Indeed, the giving of a name (or the concealing of it) may be charged with all manner of significance for the recipient and those who give the name. A different and important point we wish to emphasize here is that this act of naming at birth—charged as it is with meaning and significance for the name-givers and the child—is also the act by which the child receives his or her *legal* name, and *legal i*dentity. Not only is the child brought into a family, and beyond that a tribe and a community—the child is also brought into and under the jurisdiction of the law. The registration of the given name as required by law, and henceforth the law's recognition of the child by this name, is an event quite distinct from the event as per the tradition in which the name is given.

2.2. Historical Antecedents

The requirement to register birth and to register a name that conforms with legislatively prescribed conventions did not occur until the late eighteenth and early nineteenth centuries. Before this time, records of birth, the giving of a name, and other significant events (like marriage and death) occurred only through and under the auspices of the local community, church or parish.[24]

The state's requirement to register birth and name occurred around the same time as the institution of more formal state mechanisms to quantify and identify its population, through such vehicles as a census.[25] In *Trociuk*, the British Columbia Court of Appeal traces the legal history of common law and legislative

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21. Samuels, "How Adoption," *ibid.*

22. Bastard Nation, "A History," *supra* note 20.

23. See, for example, *K.G.D. v. C.A.P.* (Ont SCJ 2004), [2004] O. J. No. 3508; *Gill and Maher, Murray and Popoff v. Murray*, 2001 BCHRT 34, <http://www.bchrt.bc.ca/decisions/2001/pdf/gill_and_maher_murray_and_popoff_v_ministry_of_health_2001_bchrt_34.pdf>; see also, *Rypkema v. H.M.T.Q. et al.*, 2003 BCSC 1784, <http://www.courts.gov.bc.ca/jdb-txt/sc/03/17/2003bcsc1784.htm>, a case of gestational surrogacy.

24. Library and Archives Canada, Canadian Genealogy Centre, "Civil Registration," <http://www.collectionscanada.ca/genealogy/022-906.006-e.html>.

25. Canada's first national census occurred in 1871 and the requirement to hold a census every ten years forms part of Canada's constitution. See *Constitution Act, 1867*, <http://laws.justice.gc.ca/en/const/c1867_e.html#pre>, s. 8. See also, Statistics Canada, "History of the Census of Canada, <http://www.statcan.ca/english/census96/history.htm>. The civil registration of births occurred between the late nineteenth and early twentieth centuries (varying in date by province and territory), see *ibid.*

naming provisions. The court notes that the state's purpose in requiring this registration was "to ensure that live births are recorded accurately and promptly so that the information may be used for a myriad of governmental and statistical purposes."[26] These "governmental and statistical purposes," it is important to note, are not identical to the purposes that inform the antecedent traditions of naming that the state incorporates into its naming regime. "The naming of a child," the court continues, "should also be carried out promptly, since names are generally how persons are *identified for public and private purposes* in our society."[27] These "public purposes" may or may not coincide with the purposes that inform antecedent naming traditions, which would be "private," and which, moreover, may or may not coincide with other "private purposes" for which the name may be used.

Before the introduction of legislation prescribing a particular formula for naming and name change, at common law a person was free to use any name "*in addition to or in substitution for* his original name."[28] The "original" or Christian name was considered the correct or proper name and could not be displaced.[29] However, this did not prevent the use of another name or an additional first name, which was recognized for legal purposes (for example, executing an instrument).[30] The surname could be changed at will, since it was arbitrarily assumed in the first place.[31]

In Europe during the Middle Ages, the emergence of a surname and the two-name system appears to have developed from the need to differentiate two or more people with the same name. The surname might be based on place, occupation, first name (including familial relation) or a natural referent.[32] Over time, the surname and the process of its acquisition was used to distinguish and fix desirable characteristics associated with identity and to eradicate or hide undesirable ones. In English history, the common practice of using a surname is traced to the end of the fourteenth century.[33]

The history of the law of the name fades back into the mists of time, becoming more and more obscure. In Genesis, in its beginning and in the beginning of which it speaks of, something remarkable is thought to happen when God calls light and darkness by the names day and night (1:5), and later when God brings every living creature before Adam, the name of each to be

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26. *Supra* note 14 at para. 176.
27. *Ibid.* (emphasis added).
28. *Ibid.* at para. 32, quoting from *Halsbury's Laws of England*, vol. 23 (London: Butterworths, 1936) (emphasis added).
29. *Ibid.* This was clearly linked to church and religion, and there is an acknowledgement that the name could be changed, either at confirmation or by Act of Parliament.
30. *Supra* note 14 at para. 32.
31. *Ibid.*
32. Guy Brunet & Alain Bideau, "Surnames: History of the Family and History of Population" (2000) 5:2 The History of the Family 153 at p. 158 [Brunet & Bideau, "Surnames"]; see also AAG International Research, "Surnames: Origin and History" (2004) <http://www.intl-research.com/surname.htm>. In *Trociuk (BCCA)*, *supra* note 14, at para. 33, Southin J cites from *Barlow v. Bateman* (1730), 3 P. Wms. 65, 24 E.R. 971 (Ch.), which says of naming, "in ancient times the appellations of persons were by their Christian names, and the places of their habitation; as Tomas of Dale, *viz.* the place where he lived."
33. *Trociuk (BCCA)*, *ibid.* at para. 32.

whatever Adam calls it (2:19-20).[34] From early times, naming, and the giving and receiving of proper names to or by persons, has been charged with tremendous meaning and significance and power. It remains so today, and may be no less mysterious.

2.3. The Politics of Naming

Naming is a norm-governed activity. Brunet and Bideau, observing different practices relating to the transmission of the male and female surnames and the assumption of the other gender's surname in the case of marriage, insist that the way surnames are transmitted (in the act of naming) must be understood as a "form of cultural behavior."[35] They describe instances when a surname is indicative of social standing and class as, for example, with the French nobility. In such instances, "rules of attribution and of transmission … were very strict."[36]

The legal naming regime—the exercise of power in the name of the law with respect to naming—may be virtually invisible in those cases where the law merely recognizes, and does not prescribe anything different from, naming conventions and traditions that are independent of, and antecedent to, the law's recognition of the name. Thus, people naming a child in Canada today, to the extent they follow an extra-legal tradition of naming that has been recognized by or incorporated into the law, may proceed as if the law had no interest in the matter.

However, if the law is all but invisible in such cases, this does not make it any less the law, nor any less an instrument of power. For example, many people of Inuit ancestry living in the far north viewed the arrival in their communities of "Project Surname"—launched in the 1970s by the Canadian government to give legal surnames to the Inuit—as an act of domination or assimilation, however benign its express intentions were.[37] The concern is not

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34. "And out of the ground the LORD God formed every beast of the field, and every fowl of the air; and brought *them* unto Adam to see what he would call them: and whatsoever Adam called every living creature, that *was* the name thereof." (Genesis, 2:19-20, Bible, King James Version).The text is silent on the question of how Adam came to receive his proper name.

35. Brunet & Bideau, "Surnames," *supra* note 32, at pp. 155-158. For example, whereas it is common practice in Western societies to transmit the male's surname, in other cultures a female might retain her mother's surname. The authors note that this supports the function of familial memory.

36. *Ibid.* at p. 158.

37. This project was preceded by a much earlier government initiative in which not names as such but numbers were assigned to Inuit people for the purposes of identification and to promote "accountability." Noting that the antecedent Inuit naming tradition was "confusing to the people who arrived from the south," Brown writes: "So in the early 1920s, they decided that each Inuit needed an identity that the government could understand. They passed out numbers, carved on dog tags. Most of the numbers began with the letter E, meaning East. From that day forward, each Inuit would carry what they called an 'Eskimo' number. They were told to keep the numbers tied around their necks, to not get the tags dirty or lose them. For some, those numbers with those leather strings became seared in their minds. Akaka Sataa recalled the day government workers appeared in his community and counted the people there. He was the 37th person they pointed to. 'When they got to me, they gave me number E7-37,' said Sataa, who was born on the land outside the community of Kimmirut 84 years ago." DeNeen L. Brown, "In Old Names, a Legacy Reclaimed" (13 July 2002) 65 Canku Ota: An Online Newsletter Celebrating Native America, <http://www.turtletrack.org/Issues02/Co07132002/ CO_07132002_Nunavut_names.htm> [Brown, "In Old Names"]. See also, Valerie Alia, "Inuit Women and the Politics of Naming in Nunavut" 14:4 Canadian Woman Studies 11.

just with whatever new, and perhaps unwanted, identity may be part of the new name but also with the diminishment of the former identity associated with the Inuit name. The Inuit name becomes, in contrast with the new legal name, *an alternative name* relative to the law—not forbidden, to be sure, but no longer absolute as it once was. The rich meaning invested in the antecedent naming tradition becomes threatened with oblivion.

The imposition of new identities and the erasure of old in the context of the exercise of law is a central theme in the politics of the name. Brunet and Bideau note that when Africans were forced into slavery their surnames were lost, which negated "individual legitimacy and … cultural origins"[38] and supported a characterization of them as "things" rather than as having a legal existence or personality. Along similar lines, they recount the experiences of Latvian peasants (or serfs) who were not free, and known only by their Christian names and the land to which they belonged. When slavery was abolished and serfs became free persons, they were required to acquire a surname, but restricted in the surname that they could acquire. They were not allowed to assume surnames used by existing citizens, and surnames proposed to them were sometimes mocking or derisive (in part to discourage the adoption of a surname and hence the attainment of legal identity and citizenship). Brunet and Bideau reference other instances in which ethnic or cultural characteristics are suppressed or become hidden through policies requiring that the surname "sound" like the dominant language,[39] often with the stated goal of integration or assimilation. Others have noted a similar (and arguably more voluntary) pattern in those who emigrated to the United States.[40]

Many complexities arising in connection with naming, power and identity are brought out by Michael Aceto in a study of the routine use of two personal names by an island community in Panama with two robust naming systems: one concerning the "official" name (Spanish derived) and the other an "ethnic" name (Creole derived). [41] The Creole name has its "own unique social correlat[ion] related to issues of ethnic identity, cultural maintenance, solidarity, and resistance."[42] It has several purposes, which include: resistance to and individuation from the dominant culture, the maintenance of ethnic and linguistic identity, the accommodation of the dominant power structure and the ability to adopt a context-specific identity.

The name is an important component in enabling the development and maintenance of context-specific (and at times competing) identities. In the Panama community Aceto reports on, these names are "salient markers of the

38. Brunet & Bideau, "Surnames," *supra* note 32, at p. 155.

39. *Ibid.* The authors cite examples in Italy, Bulgaria and France where such policies were, if not implemented, at least seriously considered.

40. Michael Aceto, "Ethnic Personal Names and Multiple Identities in Anglophone Caribbean Speech Communities in Latin America" (2002) 31:4 Language in Society 577 at pp. 584-585 [Aceto, "Ethnic Personal Names"].

41. *Ibid.* at p. 590.

42. *Ibid.* at p. 586.

dominance of one language/culture over another in specific contexts."[43] Dual identities established through the use of the ethnic name and the official name enable the holder to navigate between two distinct worlds and to individuate from the dominant culture. Yet other kinds of names, such as nicknames, add complexity to this dual naming system. Aceto comments that "alternative names and multiple naming practices signal the emphasis or construction of an imminent or latent identity (or, inversely, in some cases, the rejection or concealment of a previous identity) correlated with one or more socially constructed components, such as language, kinship, social status, ethnicity, nationality, spirituality, or gender."[44]

2.4. Summary Comments

In all of the instances we have considered, identity is fundamentally at issue. Names serve to uniquely identify persons—this particular one, and not the other. But they do much more than that. As unique identifiers, proper names attach to persons as they do to individual animals or even to individual objects. This identification function is becoming increasingly prevalent in view of the desire of third parties—enhanced by increased technological capacity—to link records and databases across the various contexts in which persons appear or act, and for a variety of purposes (*e.g.*, administrative, commercial, research). In consequence, the name as that and by means of which one is or can be called—being called by a name in the double sense of having that name and having the capacity to be called or summoned and to respond in one's name—is being eclipsed or displaced.

The main point we wish to emphasize, in view of a tendency to see it as homogenous throughout, is that naming is highly complex, multifaceted and charged with meaning. Although examining a remote community in Panama or elsewhere can be helpful for bringing some of these complexities to light, one need not look very far from home to see multiple naming practices, governed by different norms, and serving different interests and purposes. They are not all of a single piece: the differences between and among them matter.

Issues of power, domination, totalization, and subjection may be more or less implicated in naming practices, and not least of all when the law privileges a legal name. The legal name is the name by which someone is recognized as subject of or to the law, or under the dominion of law, whatever other names he or she may have, or used to have. For example, it is the name a court will use to call the person, *qua* legal subject, who enters its jurisdiction to answer to a charge, advance a claim, give testimony, or bear witness. It is not necessary that the legislature prescribe the naming convention or formula for this name, although as we have seen it has done so in Canada since shortly after Confederation. It is sufficient that the court recognizes the person by this name,

43. *Ibid.* at p. 590.
44. *Ibid.* at p. 582.

however the person has come to have it, even if it has been given according to a convention or formula prescribed entirely by some tradition or cultural practice. What we are called and who we call ourselves matters to the law—in the name of the law, and in the law of the name.

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3. THE PSEUDONYM AND THE NAME IN LAW

FROM THE LAW'S PERSPECTIVE—which is not to say that this perspective is to be privileged as *the* perspective—the legal name is *like* the "real" or the "true" name. In relation to it, other names are *alternative*.[45] The legal name overarches and links the multiplicity of names and identities that a person may have and it is decidedly privileged among them. Whatever interest the law has in the pseudonym is subordinate to its interest in the legal name, of the legal person, who may be called to or by the law. In relation to the legal name, a pseudonym is a pseudo-name—not "real," not "true," and perhaps even "false."

In this part we canvass the pseudonym in law, or rather, the law insofar as it pertains to pseudonyms, to extract key concepts, distinctions, and principles in this law and to discuss questions and issues of concern.

Our canvass of the law is broken down into six main areas: (1) permitted use of a pseudonym in legal proceedings; (2) revealing the identity behind the pseudonym; (3) maintaining a link between the legal name and pseudonym; (4) prohibiting the use of a pseudonym; (5) promoting or facilitating the use of a pseudonym; and (6) the pseudonym and the author.

3.1. Permitted Use of a Pseudonym in Legal Proceedings

The pseudonym as used in legal proceedings today typically presupposes a legal name, in place of which it stands.[46] It functions to conceal the legal name and identity from public view. Sometimes this extends to concealing it from other parties before a court.[47]

The use of a pseudonym for the purpose of concealing identity in legal proceedings is a relatively recent development in the courts. Steinman notes:

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45. Of course, the "real" or the "true" name—if there is such a thing——is beyond the law, and no doubt beyond any name that a person may be given or assume. Although the inclination to assume that the "legal'" name amounts to the "real" name is, serendipitously, revealed in advice to authors provided by the Canadian Intellectual Property Office, where the language slides from "real" to "legal" almost imperceptibly. See *infra* note 156.

46. The court's limited allowance of the use of a pseudonym *in place of* the legal name should not be confused with its recognition of names that a person is "also known as" (a.k.a.) *in addition to* his/her legal name. Publicizing these additional names serves the court's purpose of notice to the community at large, in part to enable persons to come forward with information that might be relevant.

47. See for example, *R. v. Mousseau*, 2002 ABQB 210, <http://www.albertacourts.ab.ca/jdb/1998-2003/qb/Criminal/2002/2002abqb0210.pdf> [*Mousseau* cited to Alberta Courts website], where the court allowed the name of a victim of sexual assault to be concealed from the accused.

> This is without precedent in English or early American common law, when the pseudonym "John Doe" was used only to designate a defendant in the pleadings until his real name could be ascertained or to designate the fictitious plaintiff in the action of ejectment. Today such pseudonyms are used to avoid identification.[48]

Steinman editorializes that "[i]n addition to being inconsistent with the long tradition of identified parties, pseudonymous litigation to some extent undermines the values served by open civil proceedings."[49]

When the court allows the use of a pseudonym to conceal identity, it is making an exception to the general rule that the legal name be known and used openly in legal proceedings.[50] Words given in evidence must be publicly linked to a legally recognized person who, in his or her legal name, is unequivocally under the jurisdiction of the court and subject to its institutional norms.

Naming the person before the court by legal name serves several important purposes. In the legal name, a specific and unique person can be called to account publicly for his or her words. The importance of accountability and openness is underscored by constitutional and common law principles that place a high value on freedom of the press, which presupposes openness and knowledge.[51] An Ontario court in *Canadian Newspaper Co. Ltd. v. Isaac* noted that the "identity of a witness is a very special piece of evidence which enables the public to know the true source of the averments made from the witness stand."[52] The disclosure of the legal name enables others to check and challenge

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48. Joan Steinman, "Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?" (1985) 37:1 Hastings Law Journal 1 at p. 18 [Steinman, "Public Trial"], which provides an extensive review of US law in the mid 1980s and proposes an analytical framework to assist courts in deciding whether or not to grant a pseudonym. Her observations resonate with the case law as it has developed in Canada.

49. *Ibid.*

50. Although the courts still adhere to this principle of openness, it should be noted that administrative tribunals are not always bound by the same principles. For example, the Privacy Commissioner of Canada, as a matter of policy generally does not publish the names of parties, although there is the power to do so at least with respect to the information practices of an organization. See *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, <http://laws.justice.gc.ca/en/P-8.6/209512.html>, s. 20(2) (PIPEDA) and general commentary on the Commissioner's findings. The grounds for this are to encourage compliance through a mediated settlement. This point is not pursued in this paper; however, it would be an area of enquiry that would be worth pursuing in relation to the use of a name in administrative proceedings.

51. *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, <http://scc.lexum.umontreal.ca/en/1994/1994rcs3-835/1994rcs3-835.html> [*Dagenais* cited to S.C.R.], where at issue was an accused's right to a fair trial, which might be compromised by freedom of the press. Here the Supreme Court of Canada decides against using an analysis based on a clash model of competing rights, preferring instead an analysis that takes into account both the salutary and deleterious effects of a publication ban. In enumerating salutary and deleterious factors, the Court references the privacy interests of the accused, victims, witnesses and their respective families. See also *R. v. O.N.E., infra* note 65, where the Court restates the test in *Dagenais* in instances where the administration of justice "competes" with *Charter* principles such as freedom of the press and a right to a fair trial.

52. *Canadian Newspaper Co. Ltd. v. Isaac* (Ont Div Ct 1988), 63 O.R. (2d) 698 at para. 8. See also the decision of the Supreme Court in *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175, <http://www.canlii.org/ca/cas/scc/1982/1982scc10003.html> [*MacIntyre* cited to S.C.R.], which is often cited as expressing the importance of an open court and the rationale for displacing this presumption, and in particular the following statement by Dickson J (as he then was) at pp. 186-187, "In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent."

evidence given by the person and discourages perjury. In the civil and criminal context, the ability to fully interrogate a witness may be compromised if the legal identity is unknown.

A compelling interest, therefore, is required to displace the presumption of naming the person before the court by his or her legal name. Before considering the interests that are considered to be sufficiently compelling to permit the use of a pseudonym, it is important to note that even when the use of a pseudonym is permitted, the legal name is not shielded from the court's eyes. The court ensures that it at least holds a key to link the two names. This key, like the sword of Damocles, hovers over the head of the person behind the pseudonym, who knows that disclosure is an unsealed exhibit away.[53] The procedure that courts use to maintain the link between legal name and pseudonym underscores the gravity of this link. In one case a court describes the process as follows:

> Having decided that I would allow the witness to testify under a pseudonym, I had the witness sworn under the name "A-9" (his undercover identity). He then adopted as true the unsworn representations he had made in support of the "pseudonym application." I then followed the English practice of having the witness write his real name on a piece of paper which I had marked as an exhibit. That was shown to defence counsel on the undertaking that they would not disclose it to the accused, nor to anyone else who would disclose it to the accused. The exhibit was then sealed.[54]

In this court's words, this procedure has the effect of ensuring that "the witness realizes that he or she is not testifying as a completely anonymous entity, and that assists in underscoring for the witness the gravity of testifying."[55]

The legal principles that apply to allow the use of a pseudonym have been developed at common law and, in some instances, fortified or altered by

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53. Whether a court would or should tolerate not knowing the identity of a person who seeks to use a pseudonym is an interesting question. Steinman has suggested that a court might tolerate such anonymity; however, this is a brief discussion and not a well-developed proposition. See Steinman, "Public Trial," *supra* note 48, at pp. 42-43. Interestingly, the jury does not always know the fact that a pseudonym is being used in the court. In circumstances where the court considers that it might be prejudicial to an accused it will require that the pseudonym used not appear to be a pseudonym. *Supra* note 47.

54. *R. v. Moosemay*, 2001 ABPC 156, <http://www.albertacourts.ab.ca/jdb/1998-2003/pc/Criminal/2001/2001abpc0156.pdf> at para. 15 [*Moosemay* cited to Alberta Courts website].

55. *Ibid.* at footnote 10. See also footnote 4 where in connection with an application to use a pseudonym, the court notes: "This type of application gives rise to a unique evidentiary problem: how does the Court receive the evidence in support of the application? Two methods are possible: (1) The Court can hear the unsworn representations of the person who wishes to give his or her evidence under a pseudonym with the witness confirming those representations under oath if the application is granted. If that confirmation is not forthcoming, then the order granting the application can be rescinded. (2) The witness can be sworn under a pseudonym in a voir dire held for the purpose of determining whether he or she may be sworn under a pseudonym in the trial proper. Though I chose the first method in this case, upon reflection, the second method might be preferable because it allows the Court to base its decision on sworn evidence which is ostensibly more reliable."

statute.[56] The applicable legal principles are not always clearly decipherable from the cases and at times their application appears inconsistent or overlapping. Nevertheless, these principles can be seen as falling into four broad categories of interests sufficient to displace the strong presumption in favour of the use of the legal name: (1) ensuring that claims are advanced or crimes prosecuted; (2) furthering the administration of justice; (3) protecting the innocent; and, (4) protecting privacy interests.

The courts (and legislature) have an interest in ensuring that legal claims are advanced and that crimes are prosecuted, an interest which may be thwarted if people are unwilling to have their legal identity revealed. For example, the policy rationale behind the fairly common practice in Great Britain of allowing victims of blackmail to use a pseudonym has little to do with compassion or sympathy with the victim. Rather, it follows from a practical or utilitarian calculation that without this protection witnesses will not come forward, and that it is necessary for achieving the public interest and the interest of justice in convicting blackmailers.[57]

Thus when a court considers whether to allow the use of a pseudonym it takes into account reasons that might discourage or dissuade a person from advancing a claim, prosecuting a crime or providing key testimony in either a criminal or civil proceeding. In considering this issue a court is also making judgments as to which *types* of reasons it will recognize or allow as being sufficiently compelling to permit the use of a pseudonym, and which ones it will not.

The potential for physical harm if a person's identity becomes known is *often* accepted as a compelling reason for shielding legal identity.[58] In addition, the potential that a person might suffer serious and adverse consequences short

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56. In the criminal law context, the common law provisions are supplemented by legislation. With respect to children and youth, specific provisions apply that generally prohibit the publication of identifying information, including the name of an offender, victim or witness, and are expressly declared to be in the interests of protecting the privacy of young people. See *Youth Criminal Justice Act*, S.C. 2002 c. C-1, <http://laws.justice.gc.ca/en/Y-1.5/216604.html>, ss. 110-111. The *Criminal Code*, R.S.C. 1985 c. C-46, <http://laws.justice.gc.ca/en/C-46/180704.html> [*Criminal Code*], contains a number of provisions that prevent the publication of the identity of a witness or complainant, particularly regarding victims of sexual offences and offences relating children. See s. 486 particularly subsections (1.1), (3). The *Criminal Code* provisions contain similar considerations to those of the common law with respect to the types of circumstances that might or will constitute grounds to permit the use of a pseudonym; these include circumstances where harm or fear may be at issue, for example, organized crime and extortion. In the case of children and complainants in connection with sexual offences there is a mandatory right to have the publication of identity banned (see subsection (4)). In *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, <http://scc.lexum.umontreal.ca/en/1988/1988rcs2-122/1988rcs2-122.html>, similar provisions with respect to sexual assault were found to be justified under s. 1 of the *Charter,* notwithstanding that they infringed freedom of the press guarantees. In reaching this conclusion the Supreme Court noted at p. 130 that the provisions in the *Criminal Code* were necessary to address the problem of the underreporting of these offences, due in part to "the trauma of widespread publication resulting in embarrassment and humiliation." See also *R. v. Seaboyer*, [1991] 2 S.C.R. 577, <http://scc.lexum.umontreal.ca/en/1991/1991rcs2-577/1991rcs2-577.html>. In the civil law context, the common law is also similarly supplemented by legislation. See, for example, *Courts of Justice Act*, R.S.O. 1990, c. C.43, <http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90c43_e.htm>, s. 135.

57. *Moosemay*, *supra* note 54, at para. 5. Note also similar provisions in the *Criminal Code*, *ibid.*, with respect to extortion.

58. *Mousseau*, *supra* note 47.

of physical harm (for example, in HIV/AIDS cases, discrimination) is *sometimes* accepted by the courts as a compelling reason.[59]

Potential consequences such as humiliation, embarrassment or shame are looked upon far less favourably by courts, and even with a certain suspicion. This is evident in the case of *Monsieur X c. Société canadienne de la Croix-Rouge*.[60] The court refused to permit a hemophiliac infected with HIV to use a pseudonym on the ground that to do so would "perpetuate a retrograde attitude towards" the disease.[61]

In cases where reasons having to do with humiliation, embarrassment or shame are in play, a court will often articulate the need for additional reasons, although there is no bright line here to indicate what additional reasons will be sufficiently compelling to tip the scales in favour of allowing pseudonym use. A trilogy of Ontario cases, each based on similar facts, illustrate the competing perspectives under consideration. These cases address requests to use a pseudonym in claims concerning adverse outcomes in penis enlargement surgery. In two of the three cases the court granted the plaintiffs permission to use a pseudonym.[62] In the third case, permission to use the pseudonym was denied.[63] In all cases there was deference to the general principle of an open court as well as concern that permitting pseudonym use on the grounds of embarrassment alone would open the floodgates for "anonymity orders." However, the granting of the order took into account privacy interests as balanced against the public interest in disclosure, whereas in denying the order the court insisted that more than embarrassment was necessary before such an order would issue.

In the past, rape and sexual assault victims fell within the ambiguous zone of having to demonstrate more than shame, embarrassment or humiliation and were not, as a matter of course, permitted to use a pseudonym. Today, victims of rape and sexual assault have the right to use a pseudonym; however, this development came about not through court decisions but through legislation, and against the backdrop of public concerns about under-prosecution of these crimes.[64]

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59. *A.(J.) v. Canada Life Assurance Co.* (Ont HCJ 1989), 66 O.R. (2d) 736, allowing the use of a pseudonym for persons who, during the course of blood tests for life insurance, had their blood tested for the AIDS virus (without specific authorization). The results were positive and insurance was denied and the results of the test were forwarded to the family physician (without consent) and the family physicians communicated the results to the plaintiffs.

60. *Monsieur X c. Société canadienne de la Croix-Rouge* (Qc CA), [1992] A.Q. No. 2051 [*Monsieur X*].

61. Translation and context taken from Nathalie Des Rosiers & Louise Langevin, *Representing Victims of Sexual and Spousal Abuse* (Toronto: Irwin Law, 2002) at p. 275 [Des Rosiers & Langevin, *Representing Victims*]. The authors ask, "[A]re not taboos perpetuated by the parties' anonymity?" And conclude that, "We are of the opinion that fear of taboos is sufficient grounds for ordering that the parties' identities be protected, whether it concerns AIDS victims or sexual abuse. The plaintiffs should not have to pay the price for changing society's attitudes."

62. *T. (S.) v. Stubbs* (Ont Gen Div 1998), 38 O.R. (3d) 788, concerning the same case at a preliminary stage where the court grants an interim order to use a pseudonym for the purposes of a motion seeking permission to use a pseudonym. See also *P.Q. v. Bederman* (Ont Gen Div 1998), [1998] O.J. No. 4009.

63. *B. (A.) v. Stubbs* (Ont Gen Div 1999), 44 O.R. (3d) 391.

64. See *Seaboyer, supra* note 56.

A second set of interests relevant to permitting the use of a pseudonym relate to serious risks to the proper administration of justice,[65] which refer to a court's interest in maintaining the integrity of its processes, including the administration of justice. Precisely what comprises the proper administration of justice has not been fully developed; however, courts have interpreted it to include protecting the identity of law enforcement personnel who work under cover, those who have assisted law enforcement, and those in witness protection programs.[66] Shielding identity by means of pseudonym may thus be permitted if a court finds this shielding necessary to further the administration of justice.

A third set of interests for permitting pseudonym use concern the protection of the innocent.[67] The rationale here is rooted directly and non-instrumentally in concern for the person whose identity is at issue. Its scope is quite narrow: typically it is applied in the case of children and youth, and as such has been reinforced in legislation.[68] However, it can extend more broadly to persons facing unproven allegations and to persons who have become unwillingly embroiled in legal proceedings.[69]

A final set of interests that may have some traction with the courts in deciding whether to permit pseudonym use concerns privacy. Through a number of cases, the courts have shown a reluctance to allow privacy interests as

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65. *R. v. O.N.E*, 2001 SCC 77, <http://scc.lexum.umontreal.ca/en/2001/2001scc77/2001scc77.html>, [2001] 3. S.C.R. 478; and *R. v. Mentuck*, 2001 SCC 76, <http://www.lexum.umontreal.ca/csc-scc/en/pub/2001/vol3/html/2001scr3_0442.html>, [2001] 3 S.C.R. 442 [*Mentuck* cited to LexUM/S.C.R.] where the Supreme Court restates the test in *Dagenais*, *supra* note 51, when interests in the administration of justice compete with *Charter* principles, in particular, the right to a fair trial and freedom of the press. In this case undercover police officers sought to conceal their identity; therefore, the administration of justice was in competition with both *Charter* principles.

66. *Mentuck, ibid*. at para. 35. It should be noted that the Supreme Court was not all together comfortable in its decision and noted that the term "administration of justice" should not be interpreted "so widely as to keep secret a vast amount of enforcement information the disclosure of which would be compatible with the public interest."

67. *MacIntyre*, *supra* note 52, which recognizes protection of the innocent as a compelling reason.

68. *Youth and Criminal Justice Act*, *supra* note 56.

69. See *T.H. v. C.D.G* (Man QB 1997), 7 W.W.R. 318, 120 Man. R. (2d) 11, a case involving the allegation of sexual abuse of children by the clergy. The alleged perpetrator and the institution he was associated with sought and were granted permission to use a pseudonym. In *J. Doe v. TBH* (Ont Gen Div 1996), 45 C.P.C. (3d) 1, a case based on sexual assault of a child by a counsellor, the court, while granting the plaintiff permission to litigate under a pseudonym, expressed some reservations with respect to permitting the same to the charitable institution wherein the abuse was alleged to have occurred. This court noted that protection from embarrassment of current staff and the institution was insufficient; however, the court appears to have been persuaded that the teenagers in the institution, who were there because they needed protection, were a category of innocents that should be protected. The court granted the institution permission to use a pseudonym, but only throughout the pre-trial process, which would be revisited once and if the matter went to trial. See also *T. v. T.* (Ont SCJ (Fam Div) 2003), 63 O.R. (3d) 188, <http://www.canlii.org/on/cas/onsc/2003/2003onsc12557.html>, where the court refused to permit the use of a pseudonym in family law proceedings and rejected an argument with respect to the children of a current marriage being innocent for the purposes of the test enunciated in *MacIntyre, supra* note 52. Also, in *Mousseau*, *supra* note 47, two executive directors of sexual assault centres who had received calls and correspondence from a person accused of sexual assault were provided with pseudonyms even though they were not directly involved in the case (they were called as witnesses)and there was no clear threat of harm against them.

sufficiently compelling to permit pseudonym use.[70] However, there is recent indication of movement in the direction of giving privacy interests greater weight.[71] The decision of the Federal Court of Canada in *BMG Canada Inc. v. John Doe* (*BMG*) is a recent case in point.[72] This case concerned a motion to require the disclosure of the identity of persons alleged to be engaged in downloading music files via internet peer-to-peer (P2P) file sharing programs. The Federal Court had stated:

> [t]o further minimize the invasion of privacy of the ISP account holders, the order would have provided that only the internet pseudonyms be added as defendants in the statement of claim. An annex (subject to a confidentiality order) would have been added to the statement of claim relating each pseudonym to the name and address of an ISP account holder.[73]

This was supported by the decision of the Federal Court of Appeal and is at least suggestive that courts might recognize privacy interests as an independent ground for permitting pseudonym use.[74]

To the extent courts are prepared to take privacy interests into account in deciding whether to compel the use of the legal name in legal proceedings, it is relevant that the same pseudonym is sometimes used in a number of different and diverse contexts. [75] When this is so, disclosure of a legal name in one context will *de facto* reveal it in all other contexts, even though there is no legal reason to compel disclosure in these other contexts. The Federal Court's decision in *BMG* may be a practical and fair way of addressing this issue. It sufficiently limits disclosure for purposes relevant to the matter before the court

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70. In the case of *Re Regina v. Unnamed Person* (Ont CA 1985), 22 C.C.C. (3d) 284, 20 C.R.R. 188—a case that is often cited to establish that something more than embarrassment must be demonstrated—the court was of the opinion that it had no jurisdiction to create "a discretionary right of privacy." This has been picked up in other cases as establishing that privacy *simpliciter* is insufficient. More recently, however, in another unnamed person case, *In the matter of an application by an unnamed person for an Order banning the publication of his name*, 2005 NLTD 126, <http://www.canlii.org/nl/cas/nlsctd/2005/2005nlsctd126.html>, (2005) 249 Nfld. & P.E.I.R. 233 [*Unnamed Person*], the court agreed to a publication ban concerning the accused's name on the grounds of damage to his reputation (and that of his family) in the community and potential loss of livelihood (which were similar to the consequences claimed in the former case). It is interesting to note, and perhaps not insignificant, that the former case concerned a young woman accused of infanticide whereas the latter case concerned a doctor accused of sexual assault.

71. *Unnamed Person*, *ibid*. See also *Dagenais*, *supra* note 51, where privacy is clearly expressed as a factor to be weighed in the balance when granting a publication ban.

72. *BMG Canada Inc. v. John Doe*, 2004 FC 488, <http://decisions.fct-cf.gc.ca/en/2004/2004fc488/2004fc488.html>, [2004] 3 F.C.R. 241 [*BMG (FC)* cited to F.C.R.], affirmed in result but, in some instances, on different grounds 2005 FCA 193, <http://decisions.fca-caf.gc.ca/en/2005/2005fca193/2005fca193.html>, [2005] 4 F.C.R. 81 (CA) [*BMG (FCA)* cited to F.C.R.].

73. *BMG (FC)* , *ibid*. at para. 45 (emphasis added).

74. *BMG (FCA)*, *supra* note 72, at para. 45: "In any event, if a disclosure order is granted, specific directions should be given as to the type of information disclosed and the manner in which it can be used. In addition, it must be said that where there exists evidence of copyright infringement, privacy concerns may be met if the court orders that the user only be identified by initials, or makes a confidentiality order."

75. This issue was identified by the Electronic Frontier Foundation and the American Civil Liberties Union of Washington in documents filed in the case of *2TheMart.com v. Doe*, 140 F. Supp. 2d 1088, which concerned disclosure of the identity of a non-party to an action. The subpoena was quashed and the court imposed a high standard for disclosure in such cases. See *Reply Memorandum in Support of Motion to Quash*, Electronic Frontier Foundation, <http://www.eff.org/legal/cases/2TheMart_case/20010330_eff_aclu_reply_memo_quash.html>, s. 3 [EFF, *Reply Memorandum*].

while avoiding disclosure in contexts that are not warranted. Moreover, it prevents the potential to inappropriately leverage the threat of general disclosure as a means to force a settlement in a given case.

It is noteworthy that the *BMG* case, which is suggestive of possible change as concerns the reasons and interests relevant to permitting the use of a pseudonym in legal proceedings, concerns the internet. As courts adjust to the issues and challenges posed by the internet, and in particular to heightened concerns about privacy, they will also have to contend with their own practices as these practices are transformed in an electronic communicative environment.

Recent work by the Canadian Judicial Council reviewing the publication of decisions on the internet may have some relevance to how the courts will handle the issue of pseudonyms in legal proceedings in the future. In a recent discussion paper,[76] the Council noted that courts across the country were using different strategies to address the problem of access to personal information through access to judgments. For example, some jurisdictions had stopped publishing family law decisions on the internet.[77]

The Council followed up with a recommended protocol on the use of personal information in judgments.[78] The protocol seeks to maintain and encourage an open system of justice, including the publication of decisions, unless there is an express publication ban in place. It recommends omitting certain personal information in reasons for judgment to accommodate privacy interests. The protocol recognizes that where there is a formal order to shield identity, removal of a name is not always sufficient to mask identity. Consequently, the Council recommends the omission of other types of information, such as personal identifiers and acquaintance and location information. The protocol addresses discretionary privacy rights of those who, although not protected by a publication ban, should nonetheless be protected by having their identity shielded. These discretionary rights generally would be restricted to cases where there "may be harm to minor children or innocent third parties, or where the ends of justice may be subverted by disclosure or the information might be used for an improper purpose."[79]

3.2. Revealing the Identity Behind the Pseudonym

A second main area in which the law considers the pseudonym is that concerning disclosure of the legal name of a person who has engaged in allegedly actionable conduct. Here the question is whether, and under what circumstances, a court will compel the disclosure of the legal name of someone

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76. Canadian Judicial Council, *Discussion Paper: Open Courts, Electronic Access to Court Records, and Privacy* (Ottawa: Canadian Judicial Council, May 2003), <http://www.cjc-ccm.gc.ca/cmslib/general/OpenCourts-2-EN.pdf>.

77. See also, Barbara McIsaac, Rick Shields & Kris Klein, *The Law of Privacy in Canada* (Toronto: Carswell, 2000) at s. 2.4.7.4 (Court Records).

78. Canadian Judicial Council, *Use of Personal Information in Judgments and Recommended Protocol* (Ottawa: Canadian Judicial Council, March 2005), <http://www.cjc-ccm.gc.ca/cmslib/general/PIJ_Protocol_E.pdf>.

79. *Ibid* at para 31. These discretionary rights reflect the interests identified in the case law.

who has performed legally contentious acts under a pseudonym. Our review of the case law indicates that there are generally two key parts to a court's analysis of this question in civil proceedings.

The first concerns the legitimacy of the claim against the alleged wrongdoer.[80] Applicants must establish that they have a *bona fide* claim, which is "that they really do intend to bring an action … based upon the information they obtain, and that there is no other improper purpose for seeking the identity of these persons."[81]

The second part of a court's analysis concerns the factors in favour of, and mitigating against, disclosure.[82] The main factor in favour of disclosure once a *bona fide* claim has been established is the public interest in allowing claims to be pursued. The factors that might mitigate against disclosure of the legal name, given that non-disclosure of the name will usually prevent the applicant from pursuing the claim, are not clearly delineated and are in some measure contentious or unsettled. However, they can be roughly categorized as relating to privacy, to competing public interest considerations, and to the nature of the relationship between the user of the pseudonym and the party having knowledge of the legal name.

In *BMG*, the factors accepted as militating against the disclosure of the legal name centered on privacy interests. Both the Federal Court and the Federal Court of Appeal made express reference to the tension that exists between what they termed "the privacy interests" of a person behind the pseudonym and the opposing interests of those pursuing a legal claim for an alleged wrong committed under a pseudonym.[83] Both courts denied the application to reveal the legal name. Factors that were pertinent to this decision were that the data upon which the ISP would rely for determining the legal name were not recent, not reliable and might identify innocent account holders. Von Finckenstein J concluded that, "the privacy concerns outweigh the public interest concerns in favour of disclosure."[84]

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80. In *BMG, supra* note 72, the main issue before the Court was whether to compel disclosure of the legal names of twenty-nine persons using pseudonyms (*e.g.* "Geekboy") who were allegedly uploading and downloading music files. Disclosure was sought so that legal proceedings could be commenced against them. The wrong alleged was an infringement of copyright; however, any number of alleged wrongs could evoke a similar application in circumstances where the alleged defendant is knowable to a third party but concealed to the person seeking to advance the claim against him or her. For example, defamation by email (*Irwin Toy v. Doe* (Ont SCJ 2000), 12 C.P.C. (5th) 103); wrongful transmission of confidential information by email (*Loblaw Companies Ltd. v. Aliant Telecom Inc.*, 2003 NBQB 215, <http://www.canlii.com/nb/cas/nbqb/2003/2003nbqb215.html>, [2003] N.B.R. (2d) (Supp.) No. 32); or patent infringement (*Glaxo Welcome PLC v. M.N.R.* (FCA 1998), <http://www.canlii.org/ca/cas/fca/1998/1998fca10171.html>, [1998] 4 F.C.R 439, 62 D.L.R. (4th) 433).

81. *BMG (FCA), supra* note 72, at para. 34. Note that the Federal Court of Appeal disagreed with von Finckenstein J's articulation of this aspect of the test. Von Finckenstein J had established a higher threshold of a *prima facie* case, which the Court of Appeal found was not supported by the authorities and would make it all but impossible for the applicant to succeed in the application given the preliminary stages of proceedings.

82. *BMG (FCA), ibid.*, at para. 31, affirming, in general content, the statement of the test by the Federal Court judge. Note that other factors are also considered in this test, for example the status of the person who has knowledge of the identity (are they more than a mere bystander?) and the ability to get the information from elsewhere.

83. *BMG (FCA), supra* note 72, at para. 1.

84. *BMG (FC), supra* note 72, at para. 42.

One of the noteworthy things about this case is the consideration of privacy interests as an independent ground for not compelling the revelation of the legal name. In considering the privacy interests at issue, both courts underscored the importance of protecting privacy, both as concerns individual autonomy and public order. Several interesting observations in connection with privacy and the use of a pseudonym on the internet were made, including that this use implies an understanding that one's legal name will be concealed in some measure.[85] These considerations led both courts to remark that they would have allowed the continuing use of the pseudonyms in legal proceedings even had they ordered disclosure.

In the *BMG* case both courts were clear that, in principle, the disclosure of the legal name could be compelled and that privacy interests weighed against the public interest in disclosure. Are there other public interest considerations that might weigh against disclosure? In the United States, free speech has been a prominent ground that has been weighed against disclosure, with the right to speak anonymously protected under constitutionally guaranteed freedom of speech.[86]

In a joint memorandum,[87] which concerned an appeal of a subpoena ordering disclosure of the identity of a person who had posted pseudonymously on a bulletin board, the Electronic Frontier Foundation and the American Civil Liberties Union of Washington argued that there must be a compelling interest in the production of a name when "disclosure threatens to impair fundamental rights."[88] The brief argues that a more stringent test for disclosure than would otherwise be required should be applied when disclosure would engage fundamental rights. This test would take into account the adverse consequences of ordering disclosure, such as a general chill on speech that would reduce overall participation in public message boards.[89] This approach calls for an analysis that reconciles one *public* interest (in disclosure) with another *public* interest (in free speech).

In the Canadian context, such an approach weighing public interest against public interest was taken in *Dagenais*[90] and *Mentuck*[91] in connection with the reconciliation of the right to a fair trial and freedom of speech and the press (in the case of *Dagenais*), and the reconciliation of the right to a fair trial and freedom of speech with the proper administration of justice (in the case of

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85. Citing with approval statements made in *Irwin Toy v. Doe*, *supra* note 80. In addition the courts noted that some ISPs expressly agree to maintain privacy and/or conceal identity and under internet protocol and etiquette there is some expectation of privacy (which is good public policy). The courts also noted that the need to protect privacy has been recognized in the enactment of PIPEDA, *supra* note 50, which generally requires a court order (or legislative provision) to permit disclosure of personal information.

86. EFF, *Reply Memorandum*, *supra* note 75.

87. *Ibid. Memorandum in Support of Motion of J. Doe to Quash Subpoena Issued to Silicon Investor/Infospace, Inc.*, Electronic Frontier Foundation, <http://www.eff.org/legal/cases/2TheMart_case/20010226_quash_memorandum.html>.

88. EFF, *Reply Memorandum, ibid.* at s. 9, para. 2.

89. *Ibid.* at s. 10. This is suggested as analogous to protecting the journalist's source for the purpose of discovering facts and information that would not be forthcoming if confidentiality were not guaranteed.

90. *Dagenais*, *supra* note 51.

91. *Mentuck*, *supra* note 52.

Mentuck). A different and more stringent analysis is required when the public interest in disclosure is measured against other public interests than when it is measured against the private interests of the parties.[92] In Part 3.4 below, which looks at prohibitions on the use of a pseudonym, we discuss factors that militate against such prohibitions. Some of these factors might also count as weighing against the public interest in disclosure.

Finally, a further consideration in the *BMG* case was the nature of the relationship between the ISP and persons using pseudonyms. The Federal Court noted that this relationship was contractual, which included an expectation of privacy and confidentiality, and was governed by privacy legislation that required the ISP not to disclose personal information. Consideration of this relationship did not prove decisive in the Federal Court's reasoning in *BMG*, since it would have ordered disclosure, notwithstanding these considerations, if not for its concerns about the reliability of the evidence linking the pseudonym to the identity. However, in other cases the nature of the relationship could be decisive in considering whether disclosure will be ordered. For example, several relationships have at their core the maintenance of trust and confidence, such as priest and penitent, journalist and source, lawyer and client, and doctor and patient. In such cases it could be argued that compelling disclosure would undermine the trust and confidentiality on which these relationships are built. Generally, ordering an action that is contrary to the strong expectation that confidentiality will be maintained in these relationships is not done lightly, and only upon a demonstration of a countervailing, compelling public interest for doing so.[93]

3.3. Maintaining a Link Between the Pseudonym and the Legal Name

A third area of law touching on the pseudonym concerns the maintenance of a link between the pseudonym and the legal name. This includes legislation or policy that requires measures to be taken to enable access to the legal identity of persons engaged in certain transactions or activities (*e.g.*, internet traffic, money laundering, telecommunications), which measures have the effect either of *requiring* or of *providing incentives for* the maintenance of a link between the pseudonym and the legal name.

Recent proposed policy and legislative initiatives to enable "lawful" access[94] and to provide greater control (and some would argue extended rights)

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92. See also *Smith v. Jones*, [1999] 1 S.C.R. 455, <http://scc.lexum.umontreal.ca/en/1999/1999rcs1-455/1999rcs1-455.html>, 169 D.L.R. (4th) 385, where the Supreme Court required an overriding public interest to displace the disclosure of information collected under a duty of confidentiality.

93. *Ibid.*, where the majority allowed disclosure of information between lawyer and client because of a compelling public safety reason.

94. "Lawful access" is a term that is understood to mean access to information by law enforcement and national security personnel. These initiatives have a recent history in the wake of 9/11 when, in 2001, Canada joined an international effort to address so called "cybercrimes" and became a signatory to the Council of Europe, *Convention on Cybercrime*, 23 November 2001, E.T.S. No. 185, <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>. In 2002 the Government of Canada issued a consultation document on lawful access, which among other things contained suggested approaches to

over online copyright protection[95] would have the effect of requiring that access to the legal name be ensured or maintained. An important focus of attention for these initiatives is ISPs and other entities that mediate or enable access to online services and the internet.

In 2005, Bill C-74[96] (lawful access) and Bill C-60[97] (copyright protection) had been introduced to address some of these issues; however, the bills died when an election was called at the end of November 2005. It is anticipated that the Conservative government, elected in 2006, will introduce similar legislation. Bill C-74 contained requirements for intercept capability, providing the key to encrypted material if the entity has it, and providing subscriber information if requested. This information would be accessible, under certain conditions, for law enforcement purposes, without the requirement to seek a judicial authorization. Since this information *must* be available for lawful access purposes, it would also be more readily available, technically at least, for other purposes, such as pursuing civil claims. Bill C-74 did not contain a requirement to retain information on the web surfing activity of subscribers, a measure that had been contemplated.[98]

Bill C-60 included provisions requiring an ISP (or digital memory provider or search engine) to forward a notice of an alleged copyright violation to an alleged copyright violator. An ISP, having been provided with notice, would have been required to retain records to allow the identity of the alleged violator to be determined.

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data preservation and production of data and data traffic as well as the production of subscriber information. Department of Justice, Industry Canada & Solicitor General, *Lawful Access: Consultation Document* (Ottawa: Government of Canada, 2002), <http://canada.justice.gc.ca/en/cons/la_al/law_access.pdf>. The Consultation documents were met with mixed reviews and significant concerns were raised in relation to the vagueness of the underlying agenda, lack of evidence to support the proposals, unsubstantiated assumptions, increased and unnecessary business costs, and over-intrusive surveillance. Nevis Consulting Group Inc., *Summary of Submissions to the Lawful Access Consultation* (Ottawa: Department of Justice, 2003), <http://canada.justice.gc.ca/en/cons/la_al/summary/las_report_042803_e.pdf>. For a compilation of online materials and brief commentary on developments and submissions during this period see the web site of Jason Young, "Lexinformatica," <http://www.lexinformatica.org/cybercrime/#consultation>.

95. Proposals for copyright reform, like lawful access proposals, have come about as the result of studies and deliberations as well as to implement treaty obligations. See Library of Parliament, Legislative Summaries, Bill C-60, *An Act to Amend the Copyright Act,* 1st Sess., 38th Parl., 2005, <http://www.parl.gc.ca/38/1/parlbus/chambus/ house/bills/summaries/c60-e.pdf> [Bill C-60 Legislative Summary].

96. Bill C-74, *An Act regulating telecommunication facilities to facilitate the lawful interception of information transmitted by means of those facilities and respecting the provision of telecommunications subscriber information*, 1st Sess., 38th Parl., 2005, <http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-74/C-74_1/C-74_cover-E.html>.

97. Bill C-60, *An Act to Amend the Copyright Act,* 1st Sess., 38th Parl., 2005, <http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C-60_1/C-60_cover-E.html>.

98. Privacy advocates have criticized the bill on a number of grounds, including the failure to demonstrate a need for the measures proposed. See, for example, Jennifer Stoddart, Privacy Commissioner of Canada, Submission to the Minister of Justice and Attorney General of Canada, *Response to the Government of Canada's "Lawful Access" Consultations* (Ottawa: Privacy Commissioner of Canada, May 2005), <http://www.privcom.gc.ca/information/pub/sub_la_050505_e.asp>. See also, Michael Geist, "The Lawful Access Spin," blog posting (15 November 2005), <http://www.michaelgeist.ca/index.php?option=com_content&task=view&id=1009&Itemid=85>. See also, Canadian Internet and Public Policy Interest Clinic (CIPPIC), News Release, "New Police Powers Unnecessary, say Privacy Advocates" (18 November 2005), <http://www.cippic.ca/en/news/documents/News%20Release%20v1.pdf>.

Both of these initiatives, although not specifically targeting the pseudonym, would have had the *effect* of maintaining a link between the pseudonym and the legal name. Another policy area in which measures having this effect have been contemplated relates to controls on encryption. In 1998, the Canadian government disseminated a consultation document that floated the idea of requiring some means of decryption.[99] This could be accomplished directly, through the prohibition of encryption without an ability to recover the key (a so-called "back-door" through which government could decrypt all encrypted messages).[100] It could also be accomplished indirectly through the use of regulatory standards and licences, influence of industry norms or incentives, and standard setting bodies. In these cases it would become accepted or required practice that a duplicate key be produced and maintained.

In 1998 Canada's Cryptography Policy was announced.[101] The policy rejects the use of mandatory key recovery but notes that government will encourage industry to develop "responsible practices, such as key recovery…."[102] The policy also committed to providing a framework to ensure national safety and, as can be seen from the above discussion on proposed lawful access legislation, the means to facilitate access to encrypted materials by law enforcement and national security agencies was specifically provided for.

A less direct way of maintaining a link between the pseudonym and the legal name is the threat of third-party liability (*e.g.*, ISPs and other intermediaries). For example, a recent US Supreme Court decision found the providers of technology and services that facilitate the uploading and downloading of music files were liable for these actions.[103] Concerned that they might be found liable for materials posted on bulletin boards, chat rooms or

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99. Canada, Task Force on Electronic Commerce, *A Cryptography Framework for Electronic Commerce: Building Canada's Information Economy and Society* (Ottawa: Industry Canada, 1998), <http://e-com.ic.gc.ca/epic/internet/inecic-ceac.nsf/vwapj/Cryptographypolicy_En.pdf/$FILE/Cryptographypolicy_En.pdf>. This report follows the work of Canada's Information Highway Advisory Council and a Government of Canada White Paper, *Building the Information Society: Moving Canada Into the 21st Century* (Ottawa: Industry Canada, 1996).

100. The consultation paper was introduced in Canada after the United States had tried to introduce a system to circumvent encryption. The US had considered requiring that a chip containing a specific algorithm (the Skipjack) be used to encrypt voice and data with keys for decryption deposited with "escrow agents." This proposal was met with significant criticism and was not implemented. See A. Michael Froomkin, "The Metaphor is Key: Cryptography, The Clipper Chip and the Constitution" (1995) 143:3 University of Pennsylvania Law Review 709 [Froomkin, "Metaphor"]. See also Electronic Privacy Information Center (EPIC), "The Clipper Chip," <http://www.epic.org/crypto/clipper/> and Centre for Democracy and Technology (CDT), "US Encryption Policy" (1993), <http://www.cdt.org/crypto/admin/ clipperchip.shtml>.

101. See Minister Manley's speaking notes, Industry Canada, <http://e-com.ic.gc.ca/epic/internet/inecic-ceac.nsf/en/gv00119e.html>, which contain the Cryptography Policy ["Cryptography Policy"].

102. *Ibid.*, "Cryptography Policy," 3d point.

103. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 125 (2005), <http://www.supremecourtus.gov/opinions/04pdf/04-480.pdf>, 125 S.Ct. 2764. While this decision focused on the technology, it evidences a willingness to find third-party suppliers of a service or technology liable for the use of that technology (perhaps, particularly when it is difficult to discover the identities of persons who are engaged in the use of the technology).

discussion groups, or for other activities of subscribers, ISPs or other providers of access to or services on the internet may be more inclined to insist on and maintain a link to legal identity and potentially divulge the identity behind a pseudonym without first notifying persons to enable them to challenge the disclosure.[104]

3.4 Prohibiting the Use of a Pseudonym

The following discussion considers instances where pseudonymity is effectively prohibited due to legal requirements that speech or text be attributed in the legal name.

We emphasize that, with respect to such law, the prohibition against pseudonym use may be more or less indirect or implied: if one must attribute in one's legal name, it follows that one cannot attribute by means of a pseudonym, regardless of whether the use of a pseudonym is specifically prohibited as such.

The requirement of attribution can arise in a number of contexts. Two obvious US instances, both of which were successfully challenged on constitutional grounds, relate to legislation that sought to prevent fraud and to legislation that sought to promote transparency in political campaigns. The first concerned legislation that made it a crime for:

> any person … knowingly to transmit any data through a computer network … for the purpose of setting up, maintaining, operating, or exchanging data with an electronic mailbox, home page, or any other electronic information storage bank or point of access to electronic information if such data *uses any individual name … to falsely identify the person ….*[105]

In considering the constitutionality of the provision, the court found that such a content-based restriction was presumptively invalid as a restriction on freedom of speech. Consequently, it could be justified only if it promoted a compelling state interest and used the "least restrictive means to further the articulated interest."[106] A number of affidavits were filed with the court articulating a range of activities that could be threatened if the capacity to speak pseudonymously were withdrawn.[107] Concerns included the suppression of free speech and fear

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104. Andrew Bernstein & Tina Piper, "Web-based Providers: Anonymity and the Legal Process" (2000–2001) 1:8 Internet and E-Commerce Law 57, <http://www.torys.com/publications/pdf/AR2000-6T.pdf>. The authors also address the related issue of notice to the "anonymous" subscriber prior to disclosure of subscriber's identity. As noted above, in terms of legislative proposals to address alleged copyright infringements, the Canadian approach has been to provide notice to the alleged infringer, which would, among other things, provide an opportunity to challenge disclosure. In addition, cases like *BMG*, *supra* note 72, where contractual provisions and privacy law in general were taken into account, support the position that disclosure of identity should not be provided as a matter of course.

105. *Act No. 1029*, Ga. Laws 1996, p. 1505, codified at O.C.G.A. Sect. 16-9-93.1(a), <http://www.legis.state.ga.us/cgi-bin/gl_codes_detail.pl?code=16-9-93.1> (emphasis added).

106. *American Civil Liberties Union of Georgia et al v. Zell Miller et al*, 977 F. Supp. 1228 (ND Ga 1997) at p. 1231, citing *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), <http://supreme.justia.com/us/492/115/case.html>, at p. 126.

107. Electronic Frontier Foundation Affidavits filed in a case challenging the constitutionality of Georgia "net police" law, <http://www.eff.org/legal/cases/EFGA_v_GA/>.

of discrimination and harassment if it were known that a person using a pseudonym was HIV positive or gay or lesbian and in the military.[108]

The second instance where a prohibition of the pseudonym was at issue (indirectly) concerned elections and political campaigns. The US Supreme Court in *McIntyre v. Ohio Elections Commission*[109] considered the constitutionality of a requirement to put one's name on campaign literature. McIntyre had created and distributed pamphlets that opposed a proposed tax levy but had not signed her name to them; instead the views expressed were represented as those of "Concerned Parents and Taxpayers." McIntyre was fined under the statute because she had acted contrary to its prohibition. In finding the provisions contrary to the US Constitution, and in keeping with previous authorities, the US Supreme Court stated:

> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority …. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse…. Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech. The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented. One would be hard pressed to think of a better example of the pitfalls of Ohio's blunderbuss approach than the facts of the case before us.[110]

Froomkin discusses *McIntyre* in several articles, providing commentary on this matter and on the more general topic of anonymity and pseudonymity.[111] He affirms the right and necessity of anonymous speech, and he notes, as did the US Supreme Court, that the famous Federalist Papers were written pseudonymously under the name of "Publius."[112]

In the election context, Froomkin distinguishes two lines of analysis: one that affirms free speech and disallows constraints on anonymous speech, and

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108. *Ibid.*

109. *McIntyre v. Ohio Elections Commission*, 514 US 334 (1995), <http://www.law.cornell.edu/supct/html/93-986.ZO.html>, 115 S.Ct. 1511.

110. *Ibid.* at pp. 356-357.

111. A. Michael Froomkin, "Legal Issues in Anonymity and Pseudonymity" (1999) 15:2 The Information Society 113; see also Froomkin, "Metaphor," *supra* note 100.

112. The pseudonym "Publius" was used by Alexander Hamilton, James Madison and John Jay to write pieces in support of ratifying the US Constitution; these pieces have since become known as the Federalist Papers. Publius was the first name of a noted republican Roman Senator, Valerius Publicola. Presumably, Hamilton—the first to use the pseudonym—wished to associate the argument he wanted to advance with republican characteristics of the historical person Publius.

another that permits some restrictions on anonymous speech. In the latter category, Froomkin sees the restrictions as preventing the "amplification" of political speech by those who can afford to influence the political process, and he specifically mentions limits on campaign contributions and anonymous advertising in this regard. The policy rationale for requiring attribution in these latter cases is to effect a specific concept of a fair election process.[113] Although Foomkin's focus is "anonymous" political speech, it should be noted that this could include not just speech that has not been attributed at all but also speech that has been attributed to a pseudonym.[114]

Although Canadian courts have not addressed the specific issue of anonymous political speech, they have addressed the issue of the constitutionality of provisions restricting speech in an election context.[115] The most recent of these cases, *Harper v. Canada (Attorney General)*,[116] concerned the constitutionality of a number of provisions of the *Canada Elections Act*[117] relating to constraints on election spending and advertising, including provisions requiring attribution. The Supreme Court of Canada found that even though the limits infringed freedom of speech protected by section 2 of the *Charter*, the limits were justified as reasonable limits under section 1 of the *Charter* and therefore constitutional. The primary rationale for the Court's decision was that the measures adopted were sufficiently tailored to meet the legitimate goal of promoting electoral fairness through the adoption of an "egalitarian model of elections," which model is "premised on the notion that individuals should have an equal opportunity to participate in the electoral process."[118] Equal opportunity is provided by a level playing field that restricts those with greater resources from having a disproportionate influence.[119] The sections in the *Canada Elections Act* relating to the requirement for attribution were considered to be necessary (and sufficiently limited) to effect the legitimate objects of the statute. In reaching its conclusion, the Court noted with approval the limits that were placed on the Act's ambit. Specifically, the Court found that the definition of "election advertising" in the Act:

> *[d]oes not* apply to many forms of communication such as editorials, debates, speeches, interviews, columns, letters, commentary, the news and the Internet which constitute highly effective means of conveying information. Thus, as the trial judge concluded … the limits allow for "modest, national, informational campaigns and reasonable electoral district informational campaigns."[120]

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113. This point was addressed by the US Supreme Court in *McIntyre*, *supra* note 109, at pp. 21-23.
114. The use of the pseudonym "Publius" is often given as an example of "anonymous" speech.
115. For a discussion of the three relevant Supreme Court of Canada decisions, see Andrew Geddis, "Liberté, Egalité, Argent: Third Party Election Spending and the *Charter*" (2004) 42:2 Alberta Law Review 429.
116. 2004 SCC 33, <http://scc.lexum.umontreal.ca/en/2004/2004scc33/2004scc33.html>, [2004] 1 S.C.R. 827 [*Harper* cited to LexUM/S.C.R.]. See also, James R. Robertson, "Electoral Rights: *Charter of Rights and Freedoms*," (2002) Library of Parliament Background Paper, <http://www.parl.gc.ca/information/library/PRBpubs/905-e.htm>.
117. *Canada Elections Act*, S.C. 2000, c. C-9, <http://laws.justice.gc.ca/en/E-2.01/187712.html>.
118. *Harper*, *supra* note 116, at para. 62.
119. *Ibid.*
120. *Ibid.* at para. 115 (emphasis added).

There remains some ambiguity as to what will count as advertising. For example, in 1997 Elections Canada issued a warning to an Ottawa man on the basis that his website, "vote green," did not make the appropriate attribution required by the *Canada Elections Act*.[121]

3.5. Promoting or Facilitating the Use of a Pseudonym

The previous discussion revealed that in a number of areas steps are being taken that, in effect, curtail the use of pseudonyms by persons who might seek to erase or mask the link between their legal name and their pseudonym. In other contexts, the law, rather than limiting or curtailing pseudonym use, facilitates or promotes it.

In the context of HIV/AIDS, it has been accepted that some persons will not seek to ascertain their HIV status through testing if they are required to disclose their name or identity. Consequently, in some jurisdictions measures have been instituted to provide the option of anonymous testing and reporting; by contrast, all Canadian jurisdictions provide the option of non-nominal testing.[122] The distinction between these two options of anonymous and non-nominal testing is that in the former case the person seeking the test is identified by a code name alone and is the sole person who can link his or her identity to the code through which all transactions relating to the test occur; in the latter case a code name is also used for testing and some reporting purposes; however, the link between identity and the code name is known by a limited number of persons providing access to testing services. The overriding interest in providing avenues to ascertain HIV status has been accepted as sufficiently compelling to warrant the allowance of being tested and receiving test results without having to reveal one's legal identity.[123]

The code names used in HIV testing uniquely identify the person being tested, and stand in for the individual who is being tested in the place where the legal name would otherwise appear. They could fulfill this function just as well whether they are symbols, numbers or fictitious names. They stand in for the individual's legal name and function, in effect, as pseudonyms.[124]

If we capture such identifiers under the definition of "pseudonym," the field of pseudonym use, and the law as it pertains to the pseudonym, is vast indeed. Pseudonyms (in this broad and inclusive sense) are assigned to persons for the purpose of uniquely identifying them in a wide variety of instances and can be quite varied: user IDs, email addresses, personal health numbers, social insurance numbers, and customer numbers.[125]

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121. Electronic Frontier Canada, Press Release, "The Latest Internet Censor: Elections Canada" (22 May 1997), <http://www.efc.ca/pages/pr/efc-pr.22may97.html>.
122. Public Health Agency of Canada, *HIV/AIDS EPI Updates* (May 2005),<http://www.phac-aspc.gc.ca/publicat/epiu-aepi /epi-05/pdf/epi_05_e.pdf>.
123. *Ibid.* at pp. 12–14.
124. We recognize that it is questionable whether these identifiers are properly called "pseudonyms." In the final part of the paper, we discuss issues of definition concerning the pseudonym.
125. See discussion in Part 2.4 concerning the use of the name as unique identifier. For an interesting discussion on the different ontological perceptions of animals resulting from the use of a proper name or an ID number to identify laboratory animals, see Mary T. Phillips, "Proper Names and the Social Construction of Biography: The Negative Case of Laboratory Animals" (1994) 17:2 Qualitative Sociology 119.

The Canadian Institute of Health Information (CIHI) assigns numbers to patients, prescribers and pharmacists for the purpose of collecting information from a number of sources, on an ongoing basis, without knowing the actual identity of persons. It refers to these numbers as "pseudonyms":[126]

> "Pseudonymized data" means data from which identifying numbers (*e.g.* personal health number or provider number) have been removed and a manufactured number assigned to create a "fictitious identity or identifier," or pseudonym. Creation of pseudonymous data means that the data are de-identified, but altered in a consistent manner over time, to permit the determination that several records relate to the same individual, without the identity of that individual being known to CIHI.[127]

In such protocols a profile of individuals is established; however, the organization developing the profile and tracking it over time does not know the actual identity of each individual (although the link to this identity is possible at the local level where the information is being "pseudonymized" and disclosed).

Such protocols are also used in other research contexts. For example, the Canadian Institutes of Health Research (CIHR), in guidance relating to protecting privacy of health information, distinguishes levels of identifiability of information collected or used for research purposes from the most to the least identifiable.[128]

For institutions such as CIHI and CIHR, individual records will be uniquely identified. However, the mark used to identify the records may or may not be linkable back to the name or identity of the person to whom the information in the record pertains. The measures that are taken in these contexts relate to allowing the use of personal information while at the same time taking steps to mask or erase the identity of individuals so as to provide privacy protection and greater security of records. Thus the use of such marks (pseudonyms broadly understood) is promoted in the interests of furthering a specific purpose (*e.g.*, statistics on drug utilization or health research).

How do these sorts of protocols relating to pseudonym use comport with privacy legislation? Typically unique identifiers (whether one calls these pseudonyms or not) such as user IDs, social insurance numbers, and the like, are characterized as personal information that warrants the protection of privacy

126. Canadian Institute of Health Information (CIHI), *Privacy Impact Assessment: National Prescription Drug Utilization Information System* (Ottawa: Canadian Institute of Health Information, 2003-2004), <http://secure.cihi.ca/cihiweb/en/downloads/privacy_PIANPDUIS_e.pdf>.

127. *Ibid.* at p. 3 n. 5.

128. Canadian Institutes of Health Research, *Best Practices for Protecting Privacy in Health Research* (Ottawa: Public Works and Government Services Canada, 2005), <http://www.cihr-irsc.gc.ca/e/documents/et_pbp_nov05_sept2005_e.pdf> at p. 33 [CIHR, *Best Practices*]. The guidance addresses the assignment of codes to conceal "direct identifiers" and also recognizes that some data elements alone or in combination with other elements may link back to an individual identity.

laws.[129] It remains a question whether identifiers assigned in research and other contexts, where legal identity is at the same time erased or masked, will be characterized as personal information for the purposes of privacy law. It is noteworthy that privacy law may promote the use of such pseudonyms as a means of avoiding the requirements otherwise imposed on personal information, notwithstanding that the use of such pseudonyms readily enables the linkage of information between and among databases.[130]

Privacy legislation concerns the protection of personal information. It typically defines personal information as information that is "about" an "identifiable individual."[131] This definition implies that the individual to whom the information pertains is known or knowable. To the extent that information is detached from a known or knowable individual and attached to an assigned pseudonym that cannot be traced to an individual, the question arises whether this information is protected by privacy legislation at all. A secondary and related question is whether the link between the information and the individual must be severed completely, with nobody holding a key, code, or data elements that would enable the re-linking of the information to a known individual, for it to be sufficiently anonymized to warrant no protection under privacy laws.

Most privacy legislation does not expressly exclude anonymous or de-identified information; however, some recent legislation does address this issue. For example, the Saskatchewan health-sector legislation specifically excludes de-identified personal health information, which is defined to mean "personal health information from which any information that may reasonably be expected to identify an individual has been removed."[132] Alberta's health-sector legislation defines non-identifying information to mean "that the identity of the individual who is the subject of the information cannot be readily ascertained from the information."[133] Under this statute non-identifying information can be collected, used and disclosed for any purpose[134] and is not subject to other requirements

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129. Although PIPEDA, *supra* note 50, does not expressly declare these as personal information, advice from the Office of the Privacy Commissioner of Canada recognizes personal ID numbers to be personal information, see Privacy Commissioner of Canada, *A Guide for Business Organizations* (Ottawa: Office of the Privacy Commissioner of Canada, 2004), <http://www.privcom.gc.ca/information/guide_e.pdf>, definition of personal information. Other privacy legislation more explicitly includes these as personal information. For example, Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F.25, s.1(n)iv), <http://www.qp.gov.ab.ca/documents/Acts/F25.cfm?frm_isbn=0779742850>, defines personal information to include an identifying number. See also, Privacy Commissioner of Canada, *Fact Sheet: Social Insurance Number* (Ottawa: Office of the Privacy Commissioner of Canada, 2004), <http://www.privcom.gc.ca/fs-fi/02_05_d_02_e.asp>; Privacy Commissioner of Canada, *Fact Sheet: Best Practices for the Use of the Social Insurance Number* (Ottawa: Office of the Privacy Commissioner of Canada, 2004), <http://www.privcom.gc.ca/fs-fi/02_05_d_21_e.asp>.

130. CIHR, *Best Practices, supra* note 128. The use of a pseudonym, particularly online, is often suggested as an option to protect privacy. See, for example, Privacy Commissioner of Canada, *Fact Sheet: Protecting Your Privacy on the Internet* (Ottawa: Privacy Commissioner of Canada, 2004), <http://www.privcom.gc.ca/fs-fi/02_05_d_13_e.asp>.

131. PIPEDA, *supra* note 50, is typical in this regard.

132. Note that this also includes when de-identified personal health information is used in combination with other data, *Health Information Protection Act*, S.S. 1999, c. H-0.021, <http://www.qp.gov.sk.ca/documents/english/Statutes/Statutes/H0-021.pdf>, ss.2(d), 3.

133. *Health Information Act*, R.S.A. 2000, c.H-5, <http://www.qp.gov.ab.ca/documents/Acts/H05.cfm?frm_isbn=0779719352>, s.1(1)(r).

134. *Ibid.* ss. 18, 25, 31.

of the Act, for example, disclosing the purpose and authority for its collection.[135] If identifying information is to be used under this Act for research purposes, then special provisions apply, including a requirement of assessment by a research ethics committee.[136] PIPEDA (and other privacy legislation) implies exclusion; this is further supported by the fact that PIPEDA equates the anonymization of information with its destruction.[137]

These provisions indirectly support or promote the anonymization or pseudonymization of personal information. Whether this means complete or limited anonymization is unclear and there is very little case law directly on point.[138]

3.6. The Pseudonym and the Author

A quite different but important place in which the law recognizes the pseudonym concerns the rights of the author. A major area of law of relevance here is copyright law. The *Copyright Act*[139] has as its general purpose balancing "the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator."[140]

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135. *Ibid.* ss. 22(3)(a), 22(3)(b).

136. *Ibid.* ss. 48–56.

137. PIPEDA, *supra* note 50, sched. 1, s. 5, art. 5.3, which provides: "Personal information that is no longer required to fulfill the identified purposes should be destroyed, erased, *or made anonymous*. Organizations shall develop guidelines and implement procedures to govern the destruction of personal information" (emphasis added).

138. Typically (but not always) when pseudonyms are used the legal identity of the person to whom they pertain is unknown, and perhaps even unknowable, to those who relate to the pseudonym in whatever context and for whatever purposes the pseudonym is used. The pseudonym renders its user or bearer anonymous—in the sense of being unknown in legal identity—with respect to some persons, but not to others. We will use the term "limited anonymity" to refer to anonymity when it exists in relation to some persons, but not others. We will use the term "complete anonymity" when it exists in relation not just to some others, but to all others. In the UK, the case *Source Informatics* suggests that limited anonymity will suffice, see *Re Source Informatics Ltd.*, [1999] E.W.J. No 6880 (CA), rev'g *Source Informatics Ltd. v. Department of Health*, [1999] E.W.J. No. 2765 (QB), <http://www.bailii.org/ew/cases/EWHC/Admin/1999/510.html>. This case concerned the sale of prescription data from which identifying information (*e.g.*, name) about patients had been removed. On appeal, the Court of Appeal determined that there were no legal impediments to the sale of this data. However, a guidance issued by the UK Data Commissioner (subsequent to the case) suggests that only complete anonymity will suffice to remove information from the ambit of the UK Act. UK Information Commissioner, *Data Protection Act 1998: Legal Guidance* (London: Information Commissioner, 2002), <http://ico-cms.amzeco.uk/DocumentUploads/data%20act%20201998%20guidance.pdf>, where the Commissioner states, "The Commissioner considers anonymisation of personal data difficult to achieve because the data controller may retain the original data set from which the personal identifiers have been stripped to create the 'anonymized' data. The fact that the data controller is in possession of this data set which, if linked to the data which have been stripped of all personal identifiers, will enable a living individual to be identified, means that all the data, including the data stripped of personal identifiers, remain personal data in the hands of the data controller and cannot be said to have been anonymised. The fact that the data controller may have no intention of linking these two data sets is immaterial."

139. R.S.C. 1985, c. C-42, <http://laws.justice.gc.ca/en/C-42/text.html> [*Copyright Act*].

140. *CCH Canada Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, <http://scc.lexum.umontreal.ca/en/2004/2004scc13/2004scc13.html>, [2004] 1 S.C.R. 339 at para. 23 [*CCH* cited to LexUM/S.C.R.].

Vesting certain exclusive rights—for example, the right to publish--in the author or the author's assignee, enables the author's reward.[141]

Canadian copyright law is influenced by two distinct traditions, English and French, which developed in the wake of social changes occasioned by the printing press, an emerging publishing industry and the capacity for economic gain from the sale of works.[142] Both traditions emphasize individuality and the "notion of authorship as creative individual genius" and recognize the author as the "creator" of a work.[143]

English copyright law is traced to 1710 with the *Statute of Anne*.[144] While the expressed goal of the statute was to encourage the writing of books, some suggest that it may have been a means to regulate expression and communication facilitated by the new printing medium[145] and to hold persons accountable for published works.[146] In the nineteenth century, authors became able to make a living from writing, which freed them from the fetters of patrons[147] and required protection of the economic value in name and reputation.[148] Accordingly, in the English tradition, copyright is formulated as a property right.

French copyright law had its inception in the wake of the French Revolution. Its central premise is that the work created by an author is intimately attached to the personality of its author—the work is the "oeuvre, the fruits of a writer's thought."[149] The French tradition provided control over the work from this perspective and a strong concept of moral rights developed, which attached to the personality of the author and, as such, are inalienable, perpetual and indefeasible.[150] These rights are separate and apart from the economic value of the work.

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141. Copyright protects the expression of ideas and not the ideas themselves. An author is entitled to copyright in literary (and other creative) works that meet a threshold test for originality which is one that: "[o]riginates from an author and is not copied from another work. That alone, however, is not sufficient to find that something is original. In addition, an original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. While creative works will by definition be 'original' and covered by copyright, creativity is not required to make a work 'original'." *Ibid.* at para. 24.

142. Harry Hillman Chartrand, "Copyright C.P.U.: Creators, Proprietors and Users" (2000) 30: 3 Journal of Arts Management, Law & Society 209, <http://www.culturaleconomics.atfreeweb.com/cpu.htm>.

143. Rowland Lorimer, "Intellectual Property, Moral Rights, and Trading Regimes: A Publishing Perspective" (1996) 21:2 Canadian Journal of Communication 267, <http://info.wlu.ca/~wwwpress/jrls/cjc/BackIssues/21.2/lorimer.html>. Note that David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000), ch. 1, s. A [Vaver, *Copyright Law*], rejects the idea of tracing the origins of copyright law to time immemorial as implausible.

144. *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned* 1710 (UK), 8 Ann., c. 19, <http://www.yale.edu/lawweb/avalon/eurodocs/anne_1710.htm>. See also Mike Holderness, "Moral Rights and Authors Rights: The Key to the Information Age" 1998:1 Journal of Information Law & Technology, <http://elj.warwick.ac.uk/jilt/infosoc/98_1hold/>, s. 1 [Holderness, "Moral Rights"].

145. *Ibid.*

146. Vaver, "Copyright Law," *supra* note 143, s. 3.

147. *Ibid.*

148. *Ibid.*

149. Holderness, "Moral Rights," *supra* note 144.

150. Jonathan Herman, "Moral Rights and Canadian Copyright Reform: The Impact on Motion Picture Creators" (1990) 20 Revue de droit de l'Université de Sherbrooke 407 at p. 412.

Although Canadian copyright law has been influenced by each of these traditions, the strong concept of moral rights has not been incorporated into Canadian law. Specifically, Canadian law allows moral rights to be waived, which weakens the concept of inalienability, and moral rights subsist only for the duration of copyright, which undermines the notion of a perpetual right. In addition, although moral rights are generally considered distinct from the economic interest associated with copyright, this distinction is challenged with respect to the rules relating to attribution and the economic value associated with the name of the author. Vaver notes:

> The moral rights movement started gaining its impetus in the nineteenth century at a time when authors were becoming independent professionals free of the yoke of royal, ecclesiastical, and seigneurial patronage. Their ability to earn a living depended upon obtaining a reputation within their potential market. This reputation could accrue only if their name was associated with their works; the more an author's works became popular and his or her reputation was enhanced, the more marketable became his or her future works and the more income the author was able to earn. […]
>
> By the turn of the century both the common law and civil law recognized that traders were entitled to protect their goodwill against misrepresentation; no-one could adopt for his or her business or wares a name or mark deceptively similar to an existing trader…. The same underlying purposes that passing off actions, however imperfectly, promoted and reinforced were present when authors sought to exercise their moral rights.[151]

In Canada, the main rights relating to the use of a pseudonym concern the right of attribution and the right of integrity, both of which are moral rights.[152] Reference to attribution is found in section 14(1) of the *Copyright Act,* which provides that an author has "the right, where reasonable in the circumstances, to be *associated with the work as its author by name or under a pseudonym and the right to remain anonymous.*"[153] It is of course the author as such, in his or her legal name, who holds this right and other rights contained in the Act. This suggests that if an author who has chosen to conceal identity through non-attribution or the use of a pseudonym wishes to pursue an action based on an infringement of a protected right, identity would have to be revealed. It is interesting to note that the *Berne Convention*[154] provides a further

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151. David Vaver, "Authors' Moral Rights—Reform Proposals in Canada: Charter or Barter of Rights for Creators?" 25:4 Osgoode Hall Law Journal 749 at p. 754 [Vaver, "Authors' Moral Rights"].

152. *Copyright Act, supra* note 139, ss. 14.1(2), 14.1(3), which provide that moral rights do not automatically pass to the assignee of copyright. If the moral right is waived in favour of the owner or licensee of the copyright then "it may be invoked by any person authorized by the owner or licensee to use the work, unless there is an indication to the contrary in the waiver," s. 14.1(4). Moral rights subsist for the same term as copyright in the work (s. 14.2 (1)) and are transferred on the death of the author (s. 14.2(2)).

153. *Ibid.* (emphasis added).

154. *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, as last revised in Paris 24 July 1971, and amended 28 September 1979, 828 U.N.T.S. 221, <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html>, 25 U.S.T. 1341 [*Berne Convention*]. Note that s. 91 of the *Copyright Act*, *supra* note 139, provides that such measures as necessary will be taken to secure Canada's adherence to the Convention.

option to enforce rights when an author is unknown (anonymous or pseudonymous); in this event a publisher named on the work is "deemed to represent the author, and in this capacity he shall be entitled to protect and enforce the author's rights,"[155] which ceases once the author's identity becomes known.

Essentially, "the right to remain anonymous" means the right not to attribute one's work, period. The right to use a pseudonym means the right to attribute it in some name other than one's legal name, in which respect (but not in others) it amounts to the same thing as the "right to remain anonymous." In either case, it is limited anonymity that is here contemplated because the author who holds this right, as a rightholder, is someone who exists in a legal name, which must moreover be used if the author wishes to register the work.[156]

Vaver notes that the right to remain anonymous and the right to attribute using a pseudonym is consistent with the theory that attribution rights are grounded in economic protections accorded by the law of passing-off, which requires that consumers not be deceived as to the source of a product.[157] In terms of no attribution (anonymous), there is no deception as it is clear that the author wishes identity to remain concealed. In terms of attribution under a pseudonym, Vaver calls this a "little lie" according to the law of passing-off:

> […] the practice protects an author's privacy and autonomy, and is an age-old and harmless device well-known to the public. It is also consistent with the law of passing off: a trade mark rarely reveals the identity of its owner, but this does not affect the mark owner's right to sue for passing off or trade mark infringement.[158]

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155. *Berne Convention*, *ibid.* art. 15(3). Moreover, when an author's identity is unknown, the *Copyright Act*, *supra* note 139, provides a different length of protection than if the identity is known, measuring the term from when the work was first published or made rather than on the basis of the life time of the author. If the author is known, then protection is accorded for the lifetime of the author plus 50 years. If not, then protection is accorded for the earlier of publication plus 50 years or the making of the work plus 75 years. Note that moral rights subsist for the same length of time as copyright. The Act allows that the term of copyright can revert to the known author's copyright term if the identity of an author becomes "commonly" known (s. 6.1). This suggests that the attribution or lack of attribution to a pseudonym is not synonymous with not knowing the identity of the author; however, it does suggest that the identity of the author must be known fairly widely for this provision to apply. The *Berne Convention* (art. 15 (1)), <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html>, takes a similar approach and vests even greater significance in the pseudonym when the identity behind the pseudonym is known by providing that it is a sufficient proof of authorship (absent evidence to the contrary) that the author's name appear on the work in the "usual manner," which applies "even if this name is a pseudonym, where the pseudonym adopted by the author leaves no doubt as to his identity."

156. Advice provided by the Canadian Intellectual Property Office clearly contemplates knowledge of the legal name of the author in connection with registering the work. See Canadian Intellectual Property Office, *A Guide to Copyright* (Ottawa: Industry Canada, 2002), <http://strategis.ic.gc.ca/sc_mrksv/cipo/cp/cpguide-e.pdf> at p. 12. The Guide states: "The name and a complete address of the owner of the copyright: some authors prefer to use pen names, rather than their real names, on their published works. You may include your pen name on your application for registration, but you must also give your full legal name. This is necessary because, without your legal name, it would be difficult to determine the full duration of the copyright, i.e., your lifetime plus 50 years." Note that copyright does not depend on registration for it to take effect.

157. *Supra* note 151 at p. 755.

158. *Ibid.*

Non-attribution or the use of a pseudonym does not mean that a work is unprotected. When a work is published anonymously, the courts have found that the work cannot be claimed by another and have provided compensation to the author whose work was inaccurately represented as that of another.[159]

In addition, as noted by Vaver, the pseudonym may have sufficient currency in the marketplace to warrant a successful passing-off action, based on the fact that the "goodwill in the pseudonym is vested in the first author."[160] However, here it is important to distinguish between passing-off the work itself and passing-off the pseudonym. In the former case, it is the work itself that is protected; in the latter, it is property or value that is associated with the pseudonym that is protected. In both cases, it is the rightsholder, in his or her name, that must take action against infringements.

On Vaver's analysis, it is the name (or the pseudonym) through currency in the marketplace that has an economic value. This view is supported by Jolliffe who, while acknowledging that passing-off was historically connected to falsely representing the source of the product (for example, by affixing a mark similar to the one that the person with the good reputation would affix to his or her own products), states that it is not necessary to know the source by name.[161] Key to success in a passing-off action was establishing the existence of reputation in a trade name or mark that "indicates to the relevant public that the wares, services or business … originate from or are associated with the plaintiff."[162]

Jolliffe notes a number of cases where persons who write or perform under a pseudonym were entitled to property in the pseudonym on the grounds that it was part of their stock-in-trade.[163] For example, in *Landa v. Greenberg,*[164] an author's pen-name was found to be part of the plaintiff's stock-in-trade and could not be used by another to deceive. In *Hines v. Winnick,*[165] where the name under which the plaintiff performed on the radio was sufficiently identified with him to constitute his stock-in-trade, entailing the right to prevent another from performing in the same show using the same pseudonym. In the case *Fawcett v. Modern Fiction Ltd. and Turvey,*[166] the court found that a plaintiff had a right to the exclusive use of the pseudonym under which he had written.

The fairly recent tort of appropriation of personality has also been suggested as a potential legal avenue to protect commercial interests in one's

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159. *Ateliers Tango argentin Inc. v. Festival d'Espagne et d'Amérique latine Inc.* (Qc Sup Ct), [1997] R.J.Q. 3030.

160. Vaver, "Authors' Moral Rights," *supra* note 151, at p. 755. Note that in Canada, trade-mark law does not generally permit a name to be registered as a trade-mark. Section 12(1)(a) of the *Trade-marks Act*, R.S.C. 1985 c. T-13, <http://laws.justice.gc.ca/en/T-13/text.html>, provides that a word that is "merely" the name or surname of a person who is living or dead within the last 30 years is not registrable as a trade-mark.

161. Kelly Gill & R. Scott Jolliffe, *Fox on Canadian Law of Trade-Marks and Unfair Competition*, looseleaf (Toronto: Carswell, 2002) [*Fox on Trade-Marks*] ch. 4 at p. 32 makes the point that it is not necessary to know the source by name; it is just necessary to identify the indicia (trade-name, symbol) connected to goods or services as coming from one source.

162. *Ibid.*

163. *Ibid.* ch. 4 at p. 37. See also, Vaver, "Authors' Moral Rights," *supra* note 151, at p. 755.

164. (1908), 24 T.L.R. 441 (Ch.D).

165. (1947), 64 R.P.C. 113 (H.C.J. Ch.D).

166. (1949), 66 R.P.C. 230 (H.C.J. Ch.D).

name or likeness, particularly if that name has reached celebrity status due to its reputation in the market.[167] This is quite similar to the tort of passing-off and also depends on a reputation in the marketplace.[168] To the extent that an artist's personality is vested in or expressed through a pseudonym, then it would seem reasonable in principle to consider extending this tort to protect commercial interests in one's pseudonym.

Copyright protection of characters, which includes protection of fictional characters created by an author, could have some relevance here. Notwithstanding the fictitiousness of the character, it is nonetheless recognized as having a "life" of its own in some measure, and as such cannot be used by other than its creator.[169]

Finally, David G. Post makes an interesting link between pseudonymous speech and the corporation.[170] He develops an argument that suggests that the legal recognition provided the corporation as a fictional "person" might have application to the legal rights (and obligations) concerning the pseudonym used in online communication. He discusses the intellectual and reputational capital that might build up in a particular pseudonym over time (or through repetitive use) and advances the policy option of allowing the "e-person" similar legal attributes to those currently accorded corporations.

A second moral right contained in the *Copyright Act* that has an impact on pseudonym use and non-attribution is the right to the integrity of the work.[171] This right is infringed if the *work* is changed, or used in association with a "product, service, cause, or institution," "… to the prejudice of the honour or the reputation of the author."[172] This raises an interesting question concerning to *whom* honour and reputation attach. Can these attach only to the author in his or her legal name or can they also attach to the pseudonym as such?

The preceding discussion on the name and pseudonym saw the author in his or her legal name exercise the rights protected. To the extent that the pseudonym was given independent protection, it was in relation to the integrity of the brand itself, preventing others from trading on the goodwill established in the brand (name or pseudonym), and providing the "owner" of the

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167. *Gould Estate v. Stoddart Publishing Co.* (Ont Gen Div 1996), 30 O.R. (3d) 520, aff'd on different grounds (Ont CA 1998), 39 O.R. (3d) 545, <http://www.canlii.org/on/cas/onca/1998/ 1998onca10300.html>. See also St. Michael Hylton & Peter Goldson, "The New Tort of Appropriation of Personality: Protecting Bob Marley's Face" (1996) 55:1 Cambridge Law Journal 56.

168. *Ibid.*

169. The case of *Anne of Green Gables Licensing Authority Inc. v. Avonlea Traditions Inc.*, (Ont SCJ 2000) 4 C.P.R. (4th) 289 at para. 100, aff'd (Ont CA 2000), 6 C.P.R. (4th) 57, 130 O.A.C. 369, <http://www.canlii.org/on/cas/onca/2000/2000onca181.html>, finds a copyright interest as "entitling the owner to assert his or her exclusive proprietary rights to commercially exploit an original work, or characters and situations in the work." In some instances it may plausibly be argued that the "author" has created a fictitious character in the pseudonym; see for example, the discussion in part 3 on Kierkegaard's deployment of pseudonyms.

170. David G. Post, "Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace" (1996) University of Chicago Legal Forum 139, <http://www.temple.edu/lawschool/dpost/pseudonym.html>.

171. *Copyright Act*, *supra* note 139, s. 14.1(1).

172. *Ibid.* s. 28.2(1).

pseudonym, in his or her legal name, the actionable right in connection with wrongful uses of a pseudonym.

While the moral right to integrity relates to changes or usages of the *work*, the right is infringed only if such change or usage prejudices the honour and reputation of the author. To the extent that the identity of the author is not common knowledge, or even a closely guarded secret, can an author who has pseudonymously attributed the work be said to suffer loss of honour and reputation? Do the grounds for relief have to relate to prejudice to the author in his or her legal name? How could a claim succeed if, notwithstanding a finding of prejudice attaching to the reputation and honour of the pseudonym, the author in his or her legal name remained untouched and unaffected? There is no clear answer to these questions. In the section of the *Copyright Act* that *deems* prejudice to have occurred in specified circumstances, no qualification is made on the grounds of attribution, whether by name, pseudonym, or no attribution at all.[173] This suggests, albeit inclusively, that prejudice can occur notwithstanding the form of attribution.

The cases we examine below do not address this point directly. However, they do demonstrate some difficulty in coming to terms with what is encapsulated in the "personality-invested" moral right of integrity and how this may indirectly relate to the identity of the author. The differing approaches taken in the cases may also reflect the influence of the different traditions that inform Canadian law.

Consistent with the French tradition, in *Théberge v. Galerie d'Art du Petit Champlain inc.*,[174] the majority notes that moral rights "treat the artist's oeuvre as an extension of his or her personality, possessing a dignity which is deserving of protection."[175] This appears to infuse the work itself with dignity that flows from, and is linked to, the personality of the artist. This is supported by the Supreme Court's further observation that the decision in *Snow v. Eaton Centre Ltd*[176] allowed the artist to take action against another "for perpetrating … an attack on the artistic integrity of the descending flock" (a sculpture).[177] This analysis shifts the locus of the discussion away from the personal attributes of the author (honour, dignity and reputation) by virtually abstracting these qualities and affixing them to the work itself, albeit with a gossamer thread linking back to the author's personality. In making this shift, the "who" of the author (in name or pseudonym) becomes less relevant.

Consistent with the English tradition, a separate line of analysis considers the integrity right more functionally as related to protecting an artist's economic interests. In *Théberge,* for example, it was stated that, although the

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173. *Ibid.* s. 28.2(2) deems prejudice to have occurred in the case of a painting, sculpture or engraving as "a result of any distortion, mutilation or other modifications of the work."

174. 2002 SCC 34, <http://scc.lexum.umontreal.ca/en/2002/2002scc34/2002scc34.html>, [2002] 2 S.C.R. 336 [*Théberge* cited to LexUM/S.C.R.]

175. *Ibid.* at para. 15.

176. (Ont HCJ 1982), 70 C.P.R. (2d) 105.

177. *Théberge*, *supra* note 174, at para. 18.

author's economic interests are protected primarily through copyright, "[t]his is not to say that moral rights do not have an economic dimension (*e.g.*, there may be an economic aspect to being able to control the personality-invested 'moral' rights of integrity and attribution)."[178] In *Prise de Parole Inc. v. Guérin, Éditeur Ltée*,[179] the Federal Court of Appeal, in denying a moral rights infringement, did take into account the fact that the author's career continued to do well. However, although this finding considers the author's economic interests, it is not clear whether the fact that there was no adverse impact was decisive in finding that the alleged infringement did not prejudice the author's reputation.

On an economic analysis, the "brand" in the market place, whether this is a name or pseudonym, may suffer damage to "its" reputation in some circumstances. The author of the work, in name or as the person behind the pseudonym, has an economic interest in controlling the integrity of work, whether this is associated with *his* or *her* name or pseudonym.

The preceding discussion illustrates some vexing issues concerning the relationship in law between the name and the pseudonym, particularly how honour and reputation relate to a name, identity and authorship. Although it may be unreasonable to conclude that a pseudonym can have a personality that is separate and apart from the name of the person who writes under it, it also seems counterintuitive to conclude that the integrity of a work cannot be at issue when there is no direct impact on the honour and reputation of the author in his or her legal name. On one view, honour and reputation can relate only to an author in his or her legal name to the extent that he or she is known in this name as the author of the work in question. A quite different view is that honour and reputation can also relate to an identity or personality subsisting in a pseudonym, or even in an anonymous text. Along the lines of the French tradition, this would be on the basis of the expression of the author's personality in the work itself. Following the English tradition, this would be on the basis of injury to the brand name, which could be name or pseudonym or other uniquely identifying mark.

3.7. Summary Comments

The six main areas in law discussed above, and the legal considerations pertinent to them, overlap. However, they are sufficiently distinct that important distinctions would be collapsed if they were to be run together. Different background assumptions about pseudonymity operate not just across these areas but also across the range of instances within each.

For example, we have seen that in some cases the pseudonym is essentially a mark standing in the place of the legal name. Whatever personality it may have is essentially that of the person once removed in disguise behind the name. In others, the pseudonym virtually has a personality of its own, as it were,

178. *Ibid.* at para. 59.
179. (FCTD 1995), 66 C.P.R. (3d) 257 at p. 266, aff'd (FCA 1996), 73 C.P.R. (3d) 557.

which may or may not coincide with the pre-existing personality of the person using it. In some cases the reason for pseudonym use is primarily to conceal the legal identity, typically in order to avoid harm or detriment to the person in his or her name were certain acts or words to be attributed to him or her. In others the pseudonym is used not to conceal legal name and identity as such but for some other purpose, such as to express or explore aspects of personality. In some cases the pseudonym is badge of shame, in others a badge of honour, or at least nothing to be ashamed of.

Such distinctions pertaining to pseudonym use may be more or less relevant to specific issues in law and public policy. At this time, the law of the pseudonym is so undeveloped and untested, the overall technological and social context bearing on notions such as "privacy" and "anonymity" so fluid, contested, and fraught with anxiety, and the phenomenon of pseudonym use proliferating so unpredictably, that it would be foolish to make bold predictions, much less prescriptions.

No doubt as the use of pseudonyms proliferates in computerized and online contexts—and indeed as the phenomenon of pseudonymity itself changes and the term takes on different meanings—new and perhaps quite different sorts of issues will arise than those we have briefly canvassed. However, at least in the first instance consideration of these issues will map onto the law of the pseudonym as it has evolved to date and to the principles and assumptions at work in the areas we have distinguished.

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4. NAMES, NORMS, PSEUDONYMS AND NOMENCLATURE

THE PRECEDING ANALYSIS FOCUSED on the law pertaining to the pseudonym, with emphasis on the link between the pseudonym and the legal name and identity. That link is the law's essential interest in the pseudonym. However, viewing the pseudonym from this perspective gives us a rather limited, truncated, and one might almost say "false" picture of the pseudonym. Pseudonym use is much more complicated than masking the legal name or identity. Not every pseudonym, so to speak, is a "Jane Doe."

The varieties of pseudonym use that we have seen in the areas of law we have canvassed are by no means exhaustive of pseudonym use in society today. As we have noted, computerization has facilitated a tremendous growth in the practice of assigning pseudonyms—often identification numbers—to persons, for purposes including research or surveillance, to track their behaviour indirectly, using the pseudonym as indicator. However, unique identifiers and the like do not get identified by the law pertaining to pseudonyms as such. Indeed, one could quarrel with the use of the term "pseudonym" to describe this sort of unique identifier, notwithstanding that, increasingly, the term is being used in this way.

The issue here is one of definition or nomenclature. What is a pseudonym? What are its defining characteristics? The answers to these questions are obviously important in examining pseudonym use. For example,

to study pseudonyms empirically—to explore the reasons people use them, what functions or purposes they serve, and so on—we must have some definition in mind in order to be able to pick out the pseudonym in a line-up of alternative names. Is this or that name (or number) a pseudonym? What kind? What are its distinctive features?

The problem is that the term "pseudonym," increasingly, is used in a variety of different ways, encompassing a tremendous variety of meanings that in important respects are quite heterogeneous. If we want to study this phenomenon in its *de facto* manifestations, we have to accept the fact of diverse uses of the term and find a way to manage its multiplicity of meanings or usages.[180]

Questions of definition and nomenclature may be even more important when it comes to normative analysis. Here it may be necessary not only to know what counts as a pseudonym but also what matters, normatively speaking, as concerns its use. Should someone be allowed to use a pseudonym in this or that context? Should the identity behind the pseudonym be compelled in this or that circumstance? To answer these sorts of questions we must have at least some preliminary understanding of what a pseudonym is to begin with. And if there are different varieties or kinds of pseudonym, we need to distinguish the variables that, normatively speaking, matter.

Michael Aceto, whose anthropological analysis of naming practices we discussed earlier, offers a nomenclature of what he calls "alternative" names that is in some measure helpful for conceptualizing the pseudonym. For Aceto, the pseudonym is a kind of *alternative name*. An alternative name presupposes some other name in relation to which it is alternative. Aceto calls the latter the "official" name. We call it the "legal" name.

The legal name is the name by which someone is recognized as citizen and as subject of or to the law, or under the dominion of law, whatever other names he or she may have.[181] For example, it is the name a court will use to call the person, qua legal subject, who enters its jurisdiction to answer to a charge,

180. See, for example, Roger Clarke, "Famous Nyms" (Version of 29 November 2000, with modifications on 21 October and 17 December 2001, and 11 July and 31 August 2004), <http://www.anu.edu.au/people/Roger.Clarke/DV/FamousNyms.html>, who, noting that the term "nym" probably has its origins in anonymity and pseudonymity, writes: "How mainstream the concept is is evidenced by the wide range of terms that are available to choose from. They include aka (short for 'also-known-as'), alias, avatar, handle, nickname, nick, nom de guerre, nom de plume, moniker, persona, personality, profile, pseudonym, pseudo-identifier, sobriquet, and stage-name. I coined the term 'digital persona' in 1994 to refer to 'a model of an individual's public personality, based on data, maintained by transactions, and intended for use as a proxy for the individual.' At about the same time, the term "e-pers" (an abbreviation of electronic persona) was suggested. These terms almost all have particular usages and connotations, and they evidence somewhat different meanings. The term 'nym' appears to be gaining currency, and has the advantage of carrying no semantic baggage with it." Clarke, who writes extensively on the topic of anonymity and pseudonymity, was making the point that the "nym" has a much richer meaning than simply a means of disguise to engage in criminal activities.

181. Although a person has only *one* legal name, the content of that name can change; marriage and adoption are examples of this as well as witness protection programs and self-directed name changes. When the content of the legal name changes, the antecedent legal name can sometimes become almost as though it never was, for example, as in witness protection and adoption. In other cases the antecedent legal name is known more or less openly as part of the person's past (an historical antecedent to the "now" legal name), as in name changes associated with marriage. This "other" name (which once was, but no longer is, the legal name) arguably stands in a unique relationship to the legal name. Would it properly be classified as an alternative name, even though it is one of the many names that are linked to the person?

advance a claim, give testimony, or bear witness, and even if a court allows this person to be called by some other name for the purpose of its legal proceedings.

The pseudonym then, is an alternative name, and an alternative name is one that is in kind (but not necessarily in content) other than, or different from, the legal name.[182] But precisely what kind of alternative name is it? In addition to the pseudonym, Aceto distinguishes three kinds of alternative names: ethnic name, nickname and alias.

We have already discussed the ethnic name (which Aceto relates to a "signum" or "by-name") in the context of the Spanish and Creole dual naming system Aceto describes. It remains to discuss the nickname and the alias, comparing and contrasting them with the pseudonym.[183]

Aceto contrasts the pseudonym with the nickname as follows. A pseudonym is typically self-selected and "emphasizes aspects of identity that the recipient of the name wishes to make known publicly, perhaps at the expense of more private aspects of his or her identity."[184] A nickname, by contrast, is typically given by others (family, friends) and accents "things (events, characteristics, social hierarchies, etc.) that members of the community want to emphasize to their fellows, even if the recipients of the nicknames prefer to be reminded of or to index other aspects of their lives."[185] Whereas the nickname tends to be given (both the nickname itself and the identity characteristics associated with it), the pseudonym is typically self-selected and the identity characteristics that will be associated with it are new ones that the person wishes to take on through the pseudonym. Thus "pseudonyms are common among individuals who assume a new, more public identity (*e.g.*, in politics and religious contexts, and especially in entertainment)."[186] Aceto illustrates this aspect of the pseudonym with the example of "Sojourner Truth," a name "selected by the recipient herself to represent her new role as a seeker of black and women's equality in the 19th century USA."[187]

For Aceto, the alias is like the pseudonym as concerns the assumption of a new identity, but with the difference that the individual seeks to "deny any historical connection to the previous name and its corresponding identity."[188] In this sense, it is a "false name." The pseudonym, by contrast, is usually assumed "with little or no effort to deny the individual's original name, even if the original name is rarely referred to."[189]

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182. Even if the legal name should coincide exactly with one of these names (for example, if the law simply recognizes the name given to someone at birth according to a formula prescribed not according to law but to a religious or cultural tradition), they are nonetheless formally distinct as pertaining, on the one hand, to the person's abstract legal identity, and on the other to his or her identity in or for a family, cultural or religious tradition.

183. Aceto, "Ethnic Personal Names," *supra* note 40, at p. 587.

184. *Ibid.* at p. 583.

185. *Ibid.*

186. *Ibid.* at p. 584, where Aceto gives examples of political (Sojourner Truth, Malcom X), religious (Mother Theresa), social or entertainment (Kirk Douglas) purposes.

187. *Ibid.*

188. *Ibid.*

189. *Ibid.* at p. 583.

The adequacy of Aceto's nomenclature is questionable in view of how the term "pseudonym" is commonly used today, both in law and more generally. This becomes apparent when applying his description to a pseudonym well known in legal proceedings, namely, "Jane Doe." "Jane Doe" lacks features that, in Aceto's nomenclature, are typical of the pseudonym. Indeed, it appears to have more in common with the nickname and the alias. Like the nickname, and unlike Aceto's typical pseudonym, it is not self-selected. Unlike Aceto's typical pseudonym, the concealment of legal identity is the essential purpose behind the name "Jane Doe." In this respect, it is more like what Aceto calls an alias. If "Jane Doe" is a pseudonym, it is not, in Aceto's nomenclature, typical. Indeed, it is debatable whether it would count as a pseudonym at all.

Moreover, Aceto's explication of the pseudonym does not cover some of the usages that we have found. Of particular note is the absence of the literary pseudonym—a literary device whereby an author attributes a work he or she has created to a fictitious name. And his nomenclature does not take into account things like unique identifiers used for the purpose of tracking persons.

It is of course debatable whether this or that alleged pseudonym is properly called one. Indeed, it is debatable whether the tracking pseudonym is a name at all. However, to prescribe correct and proper usages—disallowing some usages and allowing others by definitional fiat as it were—would be to unduly prejudice the examination of the phenomenon. For our purposes, it is enough to note the fact that usage today of the term "pseudonym" encompasses a wide variety of overlapping meanings, with features that belong to each of Aceto's alternative names.

Aceto's nomenclature is a useful way to open up the variety and complexity of naming practices, whatever name one calls them, and to single out features of relevance for conceptualizing and mapping the phenomenon of pseudonymity (which we are allowing to be as broad as Aceto's generic term "alternative name" in order to capture contemporary usage of the term). For our purposes, there would be little to be gained by arguing fine philosophical points about nomenclature. However, we believe there is much to be gained by backing up to certain variables—more or less implicit as features in Aceto's nomenclature of alternative names. Attention to these variables as they can be discerned in varieties of the pseudonym in use today—whether these rightfully be called pseudonyms or not—enables important distinctions to be made. We elaborate these variables below, with examples and discussion.

4.1. Assumed (Chosen)/Assigned (Given)

In some instances, a pseudonym is chosen or assumed; in others, it is given or assigned. For Aceto, the pseudonym is typically chosen, and distinguished in this regard from the nickname, which by contrast tends to be assigned, given or even imposed. To the extent that voluntariness, considered by itself, matters, this difference matters. However, whether the pseudonym is assumed or assigned tends to correlate with whether the pseudonym serves the purposes of the one thus named or of someone else. This difference also matters.

Literary authors, members of an online community or discussion or interest group, writers of fan fiction or blogs, and participants in chat rooms or bulletin boards may choose or assume a pseudonym for very different purposes. These purposes may be quite different, but nonetheless significantly similar if, whatever the purpose, the purpose is *that of the person assuming the name.* Likewise, a pseudonym may be assigned for a variety of quite different purposes—by community members, organizations, researchers, religious orders, and friends or associates. These purposes are significantly similar to the extent that they serve whoever or whatever is assigning the pseudonym (for example, as an identifier, or a tracking number). In this event, the purpose is *that of someone other than the one assigned the name*.

To be sure, a pseudonym may be assigned for the purpose of the person to whom it is assigned. Or, although primarily for someone else's purpose, it may also be more or less compatible with the purposes of the person to whom it is assigned. However, the purposes for which it is assigned may be at odds with those of the person to whom it is assigned.

Moreover, it may not be entirely clear, or may be debatable, whose purposes are being served primarily. In many cases a pseudonym, whether assigned to or selected by the person, serves mixed purposes. In a sense, the name "Jane Doe" in legal proceedings is freely assumed (whether she chooses *this* particular name or not) for her purposes. However, it also serves the purpose of the court, and this consideration is prominent for the court in permitting its use. Anonymous testing for HIV is likewise mixed. The assigned code name or number serves the purpose of those who wish to have the test without becoming known to have had it; however, it also serves the purpose of the public health system in preventing the spread of the disease.

A pseudonym originally assigned for someone else's purposes may also be taken up or assumed by the person for his or her own purposes, and take on a different significance in consequence. For example, when the person known to us as "Ka-Tzetnik 135633" was assigned this name in a Nazi concentration camp, this was clearly for someone else's purposes. When he assumed or adopted this as his name in writing about his experiences, it was for his own purposes.[190] The two purposes are quite distinct, notwithstanding that the content of the name is the same in each.

In some measure, the difference with respect to purposes maps onto Kant's classic distinction between respecting persons as ends in themselves (*i.e.*, as having their own purposes) and treating persons as means to an end or as

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190. Jeremy D. Popkin, "Ka-Tzetnik 135633: The Survivor as Pseudonym" (2002) 33:2 New Literary History 343 [Popkin, "Ka-Tzetnik 135633"], explains that the pseudonym was constructed by combining the slang word "Ka-Tzetnik," which was used in the death camps for the term prisoner, with the number that was tattooed on his arm in the camp. Popkin describes how Ka-Tzetnik 135633 insisted on maintaining his (non)-identity in the post-Holocaust world and on this premise wrote a number of works about the Holocaust and the post-Holocaust period. Popkin notes that while most authors write under a pseudonym to conceal something about their identity, Ka-Tzetnik 135633 "forces readers to confront what he presents as the one and only significant aspect of who he is." Ka-Tzetnik 135633 claimed that as pseudonym he was able to faithfully relate (and be among) the truth about the horrors that the victims of the Holocaust experienced; they speak through him. Popkin's article provides a very powerful example of the nexus between the pseudonym and the work itself—in this case, the two are inseparably intertwined.

objects. For example, in some cases, pseudonyms function essentially, if not exclusively, as identifiers for system purposes. When names are assigned for the purpose of monitoring or tracking, those assigned names (or numbers), may be considered as objects from the standpoint of te organization or institution and its purposes. A system of identification along these lines may be formally identical in its logic to one designed for tracking cattle or keeping track of laboratory animals.[191]

Computerization has facilitated the development of such identification and tracking systems for a variety of purposes, including administration, efficiency, accountability, research, surveillance, and marketing. Often, these systems have mixed purposes. Such systems may be more or less problematic depending on the extent to which the purpose for the assigned identifiers are compatible with the ends of the persons to whom they are assigned. As noted, whether such identifiers should be called "pseudonyms" would be a debatable point, but the fact is that not infrequently they are called that.[192]

4.2. Concealment Essential/Inessential

In some cases, the use of a pseudonym functions essentially to conceal the legal name and identity. This is so in the case of "Jane Doe" in legal proceedings, or when someone uses a pseudonym (Aceto would call this an "alias") to commit a crime or wrong to avoid being detected. In *BMG* the Federal Court noted that the use of the pseudonym for the purposes of privacy protection has concealment as an essential purpose.[193] A privacy purpose is also claimed when the legal identity is concealed, for essential reasons, through anonymization or pseudonymization to enable research, statistical and other information use.

In other cases, the pseudonym may *de facto* mask someone's legal identity, but not for essential reasons. The purpose of the mask may be to concentrate and draw attention to the characteristics expressed in and through it rather than to hide the legal name of the person. The person using the pseudonym may even be indifferent to whether the legal identity is known. In this case, legal identity is not hidden behind the pseudonym but rather stands beside or alongside it, as it were. This would be the case in the use of ethnic names in the community Aceto describes, of literary pseudonym in some instances, of many online pseudonyms adopted not for purposes of concealment but for context-specific interaction using an identity shaped to that context, and in the case of an email "address" that has no intent to conceal the legal name but has been selected for institutional form, practicality, or fun.

The use of a pseudonym that does not require the concealment of legal identity (notwithstanding that it may have the effect of concealment) is much less problematic than uses for which this concealment is essential, whether the purpose being served is of dubious lawfulness or not. In the latter case, the key

191. *Supra* note 125 and accompanying text.
192. *Ibid.*
193. *BMG (FC)*, *supra* note 72.

issue is to whom the concealment is essential. In some cases, a judiciously circumscribed regime of limited anonymity—permitting disclosure to some but not to others on principled grounds—may be able to accommodate the legitimate rights and interests of all concerned. However, if concealment from the law is considered essential, whether for specific purposes or as a matter of right or principle—limited anonymity would not be a solution at all (at least not if the law had access to the key) for the person using the pseudonym. And complete anonymity is of course not much of a solution from the standpoint of the law's interest in the legal name.

4.3. Complete Anonymity/Limited Anonymity

A decisive question from the standpoint of the law and public policy is whether the pseudonym—and the acts or works reported or performed in the name of the pseudonym—are linked or linkable to the legal identity, and if so, by whom and on what terms and conditions? This question will generally arise when concealment is an essential element of the purpose for pseudonym use, and here it is largely irrelevant whether the name has been assigned or assumed.

In the law enforcement context, this is a current and contested issue. The policy inertia appears to be toward less opportunity for complete anonymity. More permissive grounds to link the pseudonym with the legal name, particularly in the online context, and imposed requirements to require data collection and record keeping to enable this link, would allow limited anonymity at best.[194] In a regime of limited anonymity, the policy question reduces to the terms and conditions for compelling disclosure. Moreover, beyond the purposes that the courts might have for compelling disclosure, a regime of limited anonymity facilitates surveillance and tracking for a variety of purposes.

Someone's ability to perform acts or produce works under the cover of a pseudonym, where the law is not able to establish a link to the legal person who is under the dominion of the law, is obviously of concern to the law. The legally unlinked or unlinkable pseudonym gives licence to unscrupulous persons to commit crimes with impunity, even if it also facilitates benign purposes as well. To the extent pseudonymity enables people to avoid being subject to the law, and moreover facilitates illegal behaviour, it is inimical to law. However, the same conditions of pseudonymity that enable lawfully dubious purposes also enable other purposes that are not so, and that may even be of fundamental importance not just to the person using the pseudonym but also to society.

Typically, the issue of anonymity and pseudonymity is considered on the assumption that it is the person behind or using the pseudonym who seeks to conceal his or her legal name. Less attention is given to contexts where an alternative name has been assigned and the link to the legal name (or to what was once the legal name) has been erased or significantly restricted to serve the purposes of someone other than the person concerned. The adoption context

194. *Supra* note 94 and accompanying text.

is an obvious example. Since a sealed record is maintained, this would be a situation of limited anonymity because the potential to re-establish the link generally endures. Another example would be the use of "personal information" that has been anonymized or pseudonymized for research and other purposes. Here it is often assumed that, provided the legal name and features that might otherwise identify a person have been delinked, the person loses whatever rights he or she may have had with respect to this information and that without knowledge or consent it can be used for a myriad of purposes beyond the purpose for which it was collected. This assumption has recently been contested in the British Courts.[195] In confidential relationships, where confidantes judiciously release confidential information under a pseudonym about a confider to whom a duty of confidentiality is owed in order to shield the confider's name, the ultimate purpose for doing so may or may not be that of the confider.

4.4. Mirroring/Transformative

We will refer to qualities, events, actions, works or products associated with, or attributed to, a name as "identity characteristics." These characteristics may be ones that pre-exist the pseudonym use, and simply mirror those of the pre-existing personality, or they may be ones that come into existence in and through the pseudonym, in virtue of and not incidental to it.

The pseudonym "Jane Doe" referenced in legal proceedings is of the first type. The events concerning "Jane Doe" attach to the pseudonym, but ultimately to the person, whose legal name is known to the courts but not publicly. The pseudonym, in intention at least, is nothing more than an identifier by means of which to refer to someone's qualities without revealing his or her legal identity. It is important, therefore, that the characteristics linked to the pseudonym really do pertain to the legal person (*e.g.*, that the facts are accurate). In order to conceal the legal identity while transferring facts from the legal person to the pseudonym, it may be necessary to alter not just the name but also certain facts that could indirectly reveal the name.

The code name used in certain research is an interesting example in this regard. The researcher's purpose requires that the facts pertaining to the person be accurate. Necessarily, there will be selectivity as to which facts about the person are transferred to the code name, this selectivity guided by the researcher's purpose. Out of concern to conceal the identity for which the pseudonym is a marker, it may even be necessary not just to omit but also to scramble or alter certain facts. Although the immediate purpose of the masking is to prevent others from associating the characteristics with the legal person, the ultimate and essential purpose is that of the research, masking being a means to the end of data collection under conditions where it would otherwise be impossible due to privacy and confidentiality laws, research ethics constraints, or unwillingness of participants to volunteer. To the extent the

195. See *supra* note 138.

pseudonym functions as a means of getting something of value to the researcher from or pertaining to the persons concerned, and particularly where this extraction occurs without knowledge or consent, or perhaps even in spite of protest, this use of pseudonyms is problematic. However, increasingly such use is being permitted or enabled by the law.

Some literary pseudonyms act essentially in the same way as "Jane Doe" in legal proceedings in that characteristics associated with them are indirectly attributable to the personality behind the name. An example would be "Publius," whose characteristics (*i.e.*, the works produced in his name) could have been attached to the persons behind the pseudonym, but for concern that such attachment would weaken the perlocutionary force of their arguments. The situation is similar when female literary authors concealed their sex through the use of male or ambiguous pseudonyms in order to publish when, but for the pseudonym, what was written was an expression of the pre-existing personality.

The situation is markedly different when "Jane Doe," the "same" person previously assigned this name in a legal proceeding, writes a book recounting her experience as a "Jane Doe."[196] Presumably, the characteristics that "Jane Doe the author" ascribes to "Jane Doe the witness," and indeed other characteristics before and after this event, pre-existed the writing of the book. However, it also seems likely that, in assuming or choosing this name as a pseudonym under which to author this book, a new personality is emerging: for example, the woman we know from legal proceedings as "Jane Doe" was not an author (or so we surmise) before she wrote the book.

In any event, in some instances of pseudonym use the characteristics that come into existence with (and are associated with) the pseudonym are expressions not of the pre-existing personality as such, but of a personality that comes into being through the pseudonym, or at least of a personality transformation occasioned by the pseudonym. The characteristics associated with Sojourner Truth, for example, do not pre-exist her name but rather belong to a new personality created in, or at least marked by, it. The same could be said of names like Malcolm X, Muhammad Ali, Pope Benedict XVI, and perhaps Jane Doe the author. Here the assumption of the pseudonym is virtually identical to a name change. In cases where the pseudonym is assigned, this may be an erasure of the pre-existing personality, a new and restricted identity being effectively decreed in the assignment of the name.

In other contexts, the transformative aspect of pseudonym use is more on a par with Aceto's description of the ethnic name. Here the alternative name coexists with the legal name but serves such purposes as individuation from the dominant culture, the maintenance of ethnic, linguistic or other identities, the accommodation of the dominant power structure, and the adoption of a context-specific identity. In the community that Aceto describes, this dual-naming system begins at birth and continues over time. However, there are instances that do not involve this life-long existence in two names but

196. Jane Doe, *The Story of Jane Doe: A Book About Rape* (Toronto: Random House, 2004).

nonetheless incorporate essential elements of its structure. Examples of this type of transformative use of the pseudonym may be found in on- and off-line communities that come together for context-specific purposes.

In most of the cases described above, disassociation from the legal name is not essential. It may be suppressed or downplayed, but it is not hidden, as it is when someone adopts an alias for the purpose of deceiving people into believing that the alias is his or her legal name. In this latter case, the identity characteristics do not associate with the person behind the name at all. We have a truly false name.

The paradigm case of the false name is someone who gives him or herself out or is given out to be someone other than who he or she is. Here there is an intention to deceive. It is not simply the legal identity that is concealed but, additionally, the fact that a pseudonym is being used at all. Gary Marx argues categorically that this use of a pseudonym is morally wrong because it is deceptive.[197] Others might add that whether the deception is wrong may itself depend on the purpose for its use. Some such argument would be required to justify the court's complicity in this type of deception when, permitting a pseudonym to be used to conceal identity, it also conceals the fact that the witness is using a pseudonym from the jury. The reason for this concealment is that the jury's knowledge that a witness was appearing under a pseudonym could lead it to make inferences prejudicial to the accused's right to a fair trial.[198]

Falsity (or deception) in connection with pseudonymity is relevant only to the extent that something like a fact of the matter is held out as being so, but in fact is not. For example, the jury believes that the person known to them as "Mark Johnson" is Mark Johnson in legal identity when in fact "Mark Johnson," unbeknownst to them, is a pseudonym. Likewise, in cases where the fact that a pseudonym is being used is known, falsity (or deception) can occur when acts attributed to the person under the name of the pseudonym are not accurately attributed. "'Geekboy' downloaded 17 files" is false if, in fact, Geekboy did not download seventeen files, but only sixteen, or none at all. In other cases, however, the pseudonym is not given out as being a legal person at all; the characteristics of the pseudonym do not coincide, and are not claimed to coincide, with that of a legal person behind the pseudonym. If attributed to the person using the pseudonym, they would indeed be false. But it would be a mistake or confusion to thus attribute them.

A striking example here is Søren Kierkegaard, who wrote under several pseudonyms. The characteristics associated with these pseudonyms or produced in their name are not those of the author but rather those of "fictional characters" that Kierkegaard created to express and explore certain questions

197. Gary T. Marx, "What's in a Name? Some Reflections on the Sociology of Anonymity" 15:2 The Information Society 99, <http://web.mit.edu/gtmarx/www/anon.html> at p.108.

198. *Supra* note 47 and commentary at note 53. Concern about the possibility of such inferences underscores the fact that the pseudonym is commonly, and we believe somewhat undeservedly, tainted with suspicion in the popular imagination. See also *supra* note 158 and accompanying text concerning the use of a pseudonym by the author, which Vaver refers to as a "little lie."

and issues from alternative points of view. Moreover, Kierkegaard, as is generally the case in the literary pseudonym, does not disguise the fact of pseudonym use, and barely disguised the fact of his identity behind the pseudonyms. One can tell from the pseudonyms—Johannes De Dilentio, Anti-Climacus, Vigilius Haufniensis, etc.—that they are not "real" names.[199]

Indeed, Kierkegaard's pseudonyms are more like fictional characters than they are masks behind which he is expressing his own personality. The pseudonym's characteristics should no more be ascribed to the author behind the character than a narrator's characteristics should be attributed to the novelist. The narrator who instructs the reader to call him Ishmael is not, and does not necessarily, have the characteristics of, Herman Melville, and it would be a mistake or confusion to attribute them to him. Likewise, it would be wrong to ascribe Juliet's characteristics, including her remarks about the name, to Shakespeare. If in the case of Sojourner Truth we could speak about a new identity being expressed in or through the pseudonym, here we have not a new identity but a different one. Here the pseudonym is not so much a transformation of the author's personality as the expression of a different personality.

There is no issue of falseness in the case of such pseudonym use because there is no claim to truth, or at least not in the sense that the law cares about. Kierkegaard's pseudonyms go out of the way to signal to the reader their fictitiousness. Such signalling occurs to the point of comedy in the pseudo-play staged within Shakespeare's play, *A Midsummer Night's Dream,* when certain of the characters, absurdly worried that their audience might mistakenly believe that the character portraying a lion is in fact one and become frightened, devise a prologue to warn the audience that the "lion" that they will see and hear roaring is not a real lion and that therefore they should not be afraid.[200]

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199. The Kierkegaard scholar, Roger Poole confesses how in an earlier work he had published on Kierkegaard scholarship he had failed to take note of the specificity of the pseudonyms and their fictionality. He writes: "I began to see the importance of keeping the views of the pseudonyms rigorously apart. Pseudonymity gave Kierkegaard entire freedom to investigate a 'point of view', a world-view, a philosophical theory, while maintaining a complete independence. He himself was not responsible for the views expressed: this was a view—and would the esteemed reader please make up his mind about the matter? There was going to be no help from the author, indeed he would do what he could (with the aid of what Bakhtin would, a century later, call 'polyphony') to confuse the reader as much as possible by the use of clashing 'voices', tones, inflections, acoustic effects, sibilances and ordinary racy Danish from the street, so that no final view could ever be established. Kierkegaard took extreme care that his pseudonymous texts should remain perpetually open, perpetually incapable of 'closure'. Like Henry James in The Turn of the Screw, every mystery is left undecided and (deliberately) undecidable. But then, I realised that almost the entirety of the secondary literature was composed of readings which systematically ignored that fact. All the pseudonyms, all the identities, all the voices and inflections, all the subtleties and ironies, were lumped together in a kind of conceptual food-processor and the switch turned on. What emerged, a mixture made up of conflicting opinions from quite discrete authors, was called 'Kierkegaard': 'Kierkegaard says', 'Kierkegaard writes' and so on. This mixture is most unappetising, and what is worse, it has no nutritional value whatsoever." Roger Poole, "Kierkegaard's New Philosophical Importance" (Seminar given to the Faculty of Divinity, University of Cambridge, 14 May 2003), <http://www.divinity.cam.ac.uk/Kierkegaard/Seminar.html>. Kierkegaard's own account of his use of pseudonyms is found in his work, Søren Kierkegaard, *The Point of View of My Work as an Author*, trans. Walter Lowrie (London: Oxford University Press, 1939).

200. William Shakespeare, "A Midsummer Night's Dream," c. 1600, John Dover Wilson (text established by), *The Complete Works of William Shakespeare* (London: Cambridge University Press, 1982), <http://www.tech.mit.edu/Shakespeare/midsummer/index.html>, Act 5 at p. 180.

Nonetheless, even in cases where pseudonyms are clearly fictitious, and views expressed are not those of the author, the pseudonym may attract the law's attention to the legal person using the pseudonym if these views are actionable for one reason or another.

4.5. Benign/Malign Purposes

Pseudonyms, whether assigned or assumed, may be used for a variety of reasons or purposes. These purposes may be more or less benign. It is here, in this evaluation, that normativity is most prominent.

People who believe that their legal name will not be associated with the words or acts of their pseudonym may be emboldened to perform acts under the name of the pseudonym that they would otherwise be inhibited from performing. To allow or facilitate this may be judged good or bad depending on the purpose being served.

The figure of one like the Unabomber, who uses anonymity for purposes thought to be malign, is prominent in discussions concerning the morality of pseudonyms, and for good reason. We also have figures like Ka-Tzetnik 135633, for whom a pseudonym was assigned for malign and clearly immoral purposes.[201] However, the use of the pseudonym may enable and facilitate benign as well as malign purposes. For example, it may promote richer participation in political debate (here we have the hero "Publius") or facilitate the elaboration of perspectives (here we have Johannes DiSilentio) and experimentation with vicarious identities in the context of self-discovery and exploration.

The evaluation of a given purpose may be at issue in some cases. For example, persons sometimes assume (or are assigned) pseudonyms because acts or characteristics that would otherwise pertain to them in their legal name are thought to be objectionable or shameful. The pseudonym protects them from adverse consequences that may rebound to them. A person assuming a pseudonym when "cruising" may do so not (obviously) to conceal his gayness from those with whom he relates in this name but for the purpose of ensuring that his gayness will remain concealed in the life he leads under his legal name. Some would object to this use of a pseudonym on the grounds that the norms being evaded are suspect and that by evading them he is indirectly giving support to or perpetuating them. In fact, the Quebec Court of Appeal reasoned along these lines in refusing to allow pseudonym use for hemophiliacs worried that knowledge of their HIV status would stigmatize them.[202]

Distinguishing wrongful and acceptable acts or purposes may be more or less problematic. In any event, the very conditions that enable the one may also enable the other. Whether the conditions for invisibility should be permitted

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201. Popkin, "Ka-Tzetnik 135633," *supra* note 190, explains how the erasure of name, the imposition of a number, and an impending death, obliterated a sense of self, individuality and identity. *Supra* note 190.

202. *Monsieur X*, *supra* note 60. However, see also the comments of Des Rosiers & Langevin, *Representing Victims*, *supra* note 61.

or facilitated, and what limitations there should be on the ability to trace a pseudonym back to the legal person, should there be cause to do so, will involve a rather complex estimation of the potential benefits and detriments taken together.

4.6. Summary Comments

Pseudonyms are not all of a piece, and the considerations relevant to one use may be quite different for another. An important purpose of pseudonym use, whether concealment is essential or inessential, and whether the name and purpose is assigned or assumed, is to mark out different identities for use in different contexts. Different names give expression to the multiplicity of identities that we have, whether we wish to have them or not, and enable us to navigate different relationships and contexts.

We believe that distinguishing and combining the different variables or considerations we have described facilitates richer and finer distinctions among different varieties of pseudonym use than would Aceto's fixed nomenclature. These distinctions, in turn, enable greater precision and comprehensiveness for the purpose of empirical and normative analysis of pseudonym use. It may be that, depending on one's definition, only a few of the figures we have considered would properly be called pseudonyms, the others being in effect "pseudo pseudonyms." However, depending on our purpose, the class names we give to these figures do not matter and, to paraphrase Romeo's Juliet, any other name would do. What matters is the variables and how they combine: whether the fact of pseudonym use is imposed on or assumed by the person to whom the pseudonym pertains, and related to this whether the purposes are those of the person to whom the pseudonym pertains or someone else's; whether concealment is essential or not; whether the anonymity afforded by the pseudonym is complete or limited; whether the characteristics attached to the pseudonym attach also to the person behind the pseudonym; and whether the purposes facilitated by the pseudonym are benign or malign.

What the law cares about, primarily, is whether the characteristics mirrored or produced under a pseudonym come under its dominion, and whether it is possible, for the law's purposes at least, to link the pseudonym to the legal person or subject who can be called to or by the law.

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5. CONCLUSION

IN OUR INVESTIGATION, we have found that the term "pseudonym," as used today, and increasingly so, can take on a wide variety of meanings and encompass several quite distinct varieties or species of pseudonyms. In use, it crosses over into several other species of alternative names—the ethnic name, the nickname, the alias—to the point that it almost rises to the genus "alternative name": virtually any kind of alternative name may be called a "pseudonym." Indeed, numbers, which are not names at all, in the ordinary

sense of the term at least, are sometimes referred to as pseudonyms.

Faced with this expansion of meaning, and its attendant collapse of distinctions, one might protest against this or that usage of the term, disallowing it according to some purportedly authoritative definition or other that rules it out. Perhaps Jane Doe, known to the courts as a "pseudonym," is not a pseudonym at all but a nickname. Perhaps one should insist on this and other such distinctions on the view that, in answer to Juliet's apparently rhetorical question, there *is* something in a name. Certainly a nickname called by some other name, for example, "pseudonym," might not taste as bitter.

The issues of definition and nomenclature here are important, but beyond the scope of this paper. Rather than trying to resolve these issues, and err on the side of inclusiveness, we have elected to back up behind the definitions and the names of various alternative names to features or properties of relevance, by whatever name one calls the instance of use.

It is perhaps trite to say that the consideration of norms and policy options in connection with alternative names (or, pseudonyms, depending on one's definition and nomenclature) should occur in as full an understanding as possible of what is going on in usage and in practice and of relevant distinctions. The values and principles relevant to normative analysis will be different for different instances of the pseudonym, or apply differently. Along these lines, it would be possible to list something like different pros and cons for different instances of pseudonym use, distinguishing for example, whether the name is imposed or assigned. Our hope is that the analysis in this paper, incomplete and sketchy as it is, will facilitate and inspire such analysis.

Here in conclusion we wish to make a few comments and observations of a more general and even fundamental nature, returning to and picking up the line of questioning with which we began this paper. What does it matter who is speaking?

We believe that this question may harbour an important and problematic assumption about what it is to be a "who." Presumably, to answer the question "who is speaking?" in, with, or by means of a pseudonym would not do for Foster. The presumption is that, whoever the person who is speaking, the pseudonym is not his or her "real" name. And Foster's "who" question is after something like a "real" name. In relation to this "real" name, the pseudonym would be fictitious, unreal, untrue and perhaps even false. In any event, it would not be a proper answer to the question "who is speaking?" such as a court might demand it, or as Foster in his capacity as an expert in attribution might help a court to find it. In response to the answer demanded or sought, it would be at best an alternative name, and at worse a false one. But alternative or false in relation to what, or which "who"? The answer: in relation to a "who" that, in contrast, would not be alternative or false—in relation to something like the "real" name or the "true" name. What kind of "who" could this be? Given the logic of the concepts here in play, it is tempting to suppose, as we believe Foster does, that it would be what Aceto calls the "official" name or what we have called the "legal" name. However, if the pseudonym is an alternative and perhaps even false name, this does not mean that the legal name has justifiable

claim to being, by contrast, "real" or "true."

Consider the case earlier referenced of Akaka Sataa (but by what name shall we call him?), to whom government workers executing government policy assigned the number (should we even say name?) "E7-37," and some 50 years later assigned (presumably) another name, this time a surname.[203] If we took either of these new assigned names as our reference point, "Akaka Sataa," would be an alternative name, of the sort that Aceto calls an ethnic name. But this is so only relative to a privileging of the "official" or the "legal" name. Were we to privilege the name "Akaka Sataa," and one might suppose that Akaka Sataa at least would prefer to do so, such government-assigned names would be "alternative" names, along the lines of what Aceto calls the "nickname."

Our point here is not so much to challenge the privileging of the legal name as to disclose the fact of this privileging. For if with Foster we can ask who is speaking, and demand that in effect this question be answered with something like a legal or official name, we are surely privileging this kind of name and whatever institutions prescribe it. Behind the question "who is speaking," there is an assumption about what will count as a proper answer to this question. And behind this question there is another, less obvious but no less important question: who is it (and what kind of who) who asks "who is speaking?" and in asking demands an answer in conformity with a privileged perspective on the name?

It would not do to answer this latter question by providing a name such as "Donald W. Foster," or the name of this or that judge before whom a witness is called to account. It would not be in his or her own name that the question "who is speaking?" might be posed. Ultimately, it could be posed in no one's name but rather in the *name of the law*, as the law (and not Donald W. Foster or this or that judge in his or her person) would require it to be answered, understandably privileging the legal name.

This is not to say that this privileging is not or cannot be justified, although to be sure its justification would involve us in very complicated issues concerning the foundation and legitimacy of law in view of something like justice as a higher or anterior ground or principle. The privileging of the legal name is virtually constitutive of law, given in the nature of law. At the very least, it is not inessential or arbitrary. We do not take issue with this privileging as such. The issue we wish to bring to light arises only to the extent that the legal or the official name, in being privileged and as a master term in relation to which other names are designated as "alternative" names, is promoted to the status of something like the "real" or the "true" name.[204]

Insofar as we come under the dominion or the jurisdiction of the law, our identities are fixed as subjects of and to that law. If the law poses the question "who is speaking," and an answer is demanded, the proper answer will

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203. Brown, "In Old Names," *supra* note 37.

204. See *supra* note 45 and accompanying text, which refers to the inclination to assume an equivalency between the real name and the legal name, as serendipitously demonstrated by the advice to authors by the Canadian Copyright Board at *supra* note 156.

be the provision of the legal name, and not some other. If one is indeed subject to the law, to answer as required is merely to acknowledge that one is thus subject. However, if one is subject to the law this is not to say that this is all that one is, or who one is. For the question "who is speaking?" is not reducible to the law's question in the name of the law. It is *also* a profoundly philosophical (some would say religious) question, the answer to which is not exhausted in our legal name and legal identity. If one is subject to the law, one is *not only* or *totally* subject in this way.

Along these lines, whatever answer may be given to the question "who is speaking?" the important thing is that *someone* is speaking. Some *one*, in whatever name he or she may be called (and by whom) or call him or herself, is speaking. And this some *one* is not reducible to the subject as named, located, or fixed in or by law.

Whatever risks and dangers pseudonymity may pose today, we believe that these dangers are far less grave than the one to which Foster alludes when he speaks ominously about a time when "our literary and critical discourse disappears into the abyss of anonymous Internet chat." The sense of "anonymity" invoked here is worthy of comment. If by "anonymous internet chat" Foster means that literally we would not know who is speaking, perhaps because the speech is unattributed, or attributed in the name of a pseudonym, the impact on literary and critical discourse might very well be grave indeed. However, the phrase could also be taken to include the possibility that the speech in question, while being perfectly well and properly attributed in an official or legal sense, was anonymous, and that no *one* was speaking, in a quite different sense. And in this sense perhaps there would be no one who could listen in any event. That seems to us a far graver danger, and one that, in some measure, the use of a pseudonym may be in resistance to and safeguard us against.[205]

205. Kierkegaard describes this as follows: "Anonymity in our age has a far more pregnant significance than is perhaps realized; it has an almost epigrammatic significance. Not only do people write anonymously, but they write anonymously over their signature, yes, even speak anonymously …. Nowdays it is possible actually to speak with people, and what they say is admittedly very sensible, and yet the conversation leaves the impression that one has been speaking with an anonymity." Søren Kierkegaard, *The Present Age*, trans. Alexander Dru (New York: Harper Torchback, 1962) at p. 103.