

Pseudonymous Litigation

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INTRODUCTION

In March of 2003, Jane Doe, a sixteen-year-old student at Springfield High School, slept with Jason Smith.¹ Subsequent events would show this to be a serious mistake. By sleeping with Smith, she was unwittingly casting herself for the leading role in an amateur pornographic film. After videotaping their sexual encounter, Smith allegedly circulated his footage to fellow students at Doe and Smith's school.² One of these students allegedly posted the media file on the Internet, and it seems to have been widely viewed by Doe and Smith's peers.³ Doe sued Smith for violating the federal Wiretap Act,⁴ and asserted state law tort causes of action for intentional infliction of emotional distress, invasion of privacy, eavesdropping, and battery.⁵

The case of *Doe v Smith*⁶ eventually came before a panel of the Seventh Circuit, where Frank Easterbrook was the presiding judge. The trial court dismissed Doe's claims based on a faulty reading of the Wiretap Act.⁷ Writing for the court, Judge Easterbrook cogently explained how the trial court had erred. The portion of the opinion dealing with the Wiretap Act is a model opinion. It parses the statutory language in a methodical and completely convincing way.⁸ Most judges

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¹ *Doe v Smith*, 412 F Supp 2d 944, 945 (CD Ill 2006); *Doe v Smith*, 2005 WL 6082529, *1 (CD Ill).

² *Doe v Smith*, 412 F Supp 2d at 945.

³ See id at 946. The facts were in some ways reminiscent of a plot line in the 1999 comedic film *American Pie*, though Smith's behavior was more obnoxious than that of the movie protagonist's.

⁴ Omnibus Crime Control and Safe Streets Act of 1968, Title III, Pub L No 90-351, 82 Stat 211, codified as amended at 18 USC § 2510 et seq.

⁵ See *Doe v Smith*, 2005 WL 6082529 at *1.

⁶ 429 F3d 706 (7th Cir 2005).

⁷ See id at 709–10 (reversing the trial court's dismissal of the case because the videotape might have had an audio track, which would be consistent with allegations of a Wiretap Act violation requiring "oral communication").

⁸ See id at 708–09.

would not have written as elegant an opinion, but they would have undoubtedly reached roughly the same result. Had the court's opinion stopped there, the salacious facts and the clarity of the court's reasoning would have been the only remarkable aspects of the opinion. But, acting *sua sponte*, the court proceeded to say something very interesting about litigant pseudonymity.

It is that portion of the opinion that is my focus here, as I use *Doe v Smith* to develop a theory of pseudonymous litigation and identify what is at stake in a case caption. My thesis is that pseudonymous complaining about another's conduct has become increasingly available in the Information Age, and that the prospect of pseudonymity in formal litigation therefore can be used as a device to sort grievances between informal and formal dispute resolution mechanisms. When deciding whether to grant pseudonymity to a party, the courts essentially ought to decide where a grievance is best addressed. Making such judgments will not be straightforward at an early stage in the litigation, so there may be a strong basis for ultimately resolving the question of pseudonymity at the conclusion of litigation, rather than at its onset. There even may be a good case for granting pseudonymity only to the victorious party in some litigation.

I.

The facts alleged in the *Doe v Smith* complaint immediately make the typical reader sympathetic to the plaintiff. Courts, understandably, have taken a hard line against the distribution of videos depicting sexual intercourse without the consent of both parties, and in one widely cited case, a California court even granted an injunction to prevent the dissemination of a videotape of Bret Michaels and Pamela Anderson that was recorded, but not disseminated, with Anderson's consent.⁹ The law generally permits an adult to disseminate images of herself engaged in sex acts if she so chooses, while recognizing that these exhibitionist preferences are highly unusual. To many people, the non-consensual recording and dissemination of a film of someone having sex with her lover is among the most deeply embarrassing privacy harms imaginable.

The Seventh Circuit's opinion suggests that the court's judges might not fully share these popular intuitions. As the court understood the facts of the case, Smith's identification as the kind of guy who would surreptitiously record himself having sex with his then-girlfriend and

⁹ *Michaels v Internet Entertainment Group, Inc.*, 5 F Supp 2d 823, 842 (CD Cal 1998) (holding that an injunction was warranted because the plaintiffs faced irreparable injury that would be aggravated by the video's worldwide distribution via the Internet).

then share the videotape with his friends would be more damaging to his reputation than anything that Doe would have to endure as a result of the dissemination of a sex video she did not realize had been recorded. Here is what Judge Easterbrook said on behalf of the court:

Plaintiff was a minor when the recording occurred but is an adult today. She has denied Smith the shelter of anonymity—yet it is Smith, *and not the plaintiff*, who faces disgrace if the complaint’s allegations can be substantiated. And if the complaint’s allegations are false, then anonymity provides a shield behind which defamatory charges may be launched without shame or liability.¹⁰

The court noted that everyone at Doe’s high school who had seen the recording already knew Doe’s identity, but it allowed the possibility that pseudonymous status might be appropriate if using her real name in the case would “allow strangers to identify the person in the recording and thus add to her humiliation.”¹¹ The court then remanded to the district court for close consideration of this question, and noted that if Doe was unable to convince the court of her right to litigate pseudonymously, she ought to have the option of dismissing her suit voluntarily.¹² After having the plaintiff brief the issue, the district court observed that she would have to bear a “difficult burden in demonstrating that she should be allowed to proceed as Jane Doe.”¹³ The trial court then ordered the parties to take discovery on the question of how many people had already identified Doe in the video and how many people would be able to identify her if she proceeded under her own name.¹⁴ The excerpted language is surprisingly oblivious to the ways in which gender affects the privacy calculus. A generation of feminist scholarship has suggested that the harms women suffer from having their naked bodies exposed to the world is more grave than the harms suffered by men,¹⁵ and the double standard faced by “studs” and “sluts” is widely understood. Quite a few people would take issue with the court’s suggestion that Doe was not the party most disgraced by what transpired between her and Smith.

Two additional, and less obvious, difficulties arise at this point. First, the Seventh Circuit’s concern about the damage to Smith’s reputation was misplaced, though the appellate court could not have

¹⁰ *Doe v Smith*, 429 F3d at 710 (emphasis added).

¹¹ *Id.*

¹² *Id.*

¹³ *Doe v Smith*, 412 F Supp 2d 944, 947 (CD Ill 2006).

¹⁴ *See id.*

¹⁵ *See, for example, Catharine A. MacKinnon, Pornography, Civil Rights, and Speech*, 20 Harv CR-CL L Rev 1, 27–38 (1985) (describing pornography as inflicting harm upon the autonomy, credibility, and public image of women because “[s]ubordinate but equal is not equal”).

known that at the time. In his answer to the plaintiff's complaint, which was filed after the remand, Smith conceded that he both videotaped their encounter and disseminated its contents without Doe's knowledge or consent.¹⁶ Smith offered various arguments about why his actions had not violated the law,¹⁷ but essentially conceded the material facts alleged in the complaint. In hindsight, the court's apparent equation of Smith's dignitary interests with Doe's rings hollow.

Second, along with its opinion in the case, the Seventh Circuit made the parties' briefs publicly available online. In one of Doe's pleadings, her lawyers disclosed her real name in order to comply with Seventh Circuit Rule 26.1,¹⁸ which governs the recusal of judges in cases where they know any of the litigants. This pleading was posted in unredacted form on the Internet. Anyone with access to Westlaw and a basic understanding of legal process can learn Doe's name in a few minutes today. Fortunately, typing the plaintiff's name into Google reveals nothing about her involvement in the case, though we can learn that she, or at least someone with the same (unusual) name, was married recently in her hometown. While it would be tempting to hold that Doe's lawyers' mistake moots the question of pseudonymity, the Supreme Court's practice has been much more forgiving on precisely that issue. In *Florida Star v B.J.F.*,¹⁹ the Court said the following about a pseudonymous rape victim's real name:

In filing this lawsuit, appellee used her full name in the caption of the case. On appeal, the Florida District Court of Appeal *sua sponte* revised the caption, stating that it would refer to the appellee by her initials, "in order to preserve [her] privacy interests." Respecting those interests, we, too, refer to the appellee by her initials.²⁰

Returning to the crux of the case, the idea that the defendant ought to be entitled to pseudonymity if the plaintiff proceeds pseudonymously was previously proposed in the American context by Adam Milani, writing in the *Wayne Law Review* in 1995.²¹ Milani argued that whenever a pseudonymous plaintiff alleges that a defendant

¹⁶ See Complaint, *Doe v Smith*, No 04-3173, ¶¶ 7-13 (CD Ill filed Aug 6, 2004) (available on Westlaw at 2004 WL 3958388); Answer, *Doe v Smith*, No 04-3173, *1-2 (CD Ill filed Feb 22, 2006) (available on Westlaw at 2006 WL 809303) ("Smith Answer").

¹⁷ See, for example, *Smith Answer* at *3-4.

¹⁸ See Seventh Cir R 26.1(b), online at <http://www.ca7.uscourts.gov/Rules/rules.pdf> (visited Feb 12, 2010) (requiring any litigant using a pseudonym to file a disclosure statement revealing her real name).

¹⁹ 491 US 524 (1989).

²⁰ *Id.* at 527 n 2 (citations omitted).

²¹ Adam A. Milani, *Doe v. Roe: An Argument for Defendant Anonymity When a Pseudonymous Plaintiff Alleges a Stigmatizing Intentional Tort*, 41 *Wayne L Rev* 1659, 1712 (1995).

has engaged in intentional torts of a stigmatizing nature, the defendant ought to be able to proceed pseudonymously as a matter of right.²² He justified this symmetrical rule using similar reasoning to the Seventh Circuit's, though he displayed far less nuance:

If the alleged act is so stigmatizing that a plaintiff/victim's privacy interest requires the use of a pseudonym, is not being accused of *committing* that act even more stigmatizing to the alleged perpetrator? The answer to this question is clearly yes, and out of concern for those accused of stigmatizing, intentional acts, some courts have allowed them to use pseudonyms or closed the proceedings to the public.²³

Wrong. Reported opinions show how the social stigma associated with having one's intimacies revealed might be far greater than those associated with revealing another's intimacies.²⁴ For this reason, in a decision that preceded the publication of Milani's article by a year, the Connecticut Superior Court, in *Doe v Diocese Corp.*,²⁵ held that "the fact that pseudonym status has been given to one party does not mean that the other party is entitled to identical treatment."²⁶ In that case, the court went to great lengths to distinguish the privacy harm suffered by a plaintiff alleging that he was sexually abused by the defendant's clergy from the reputational harm that the defendant would suffer as a result of the plaintiff's allegations.²⁷

A hypothetical will further underscore the asymmetry. Suppose a Peeping Tom intentionally trespasses on Roe's property only to discover Roe engaging in extremely embarrassing but lawful conduct—consuming his own human waste, for example. The Peeping Tom has committed a serious legal wrong, one that is associated with its own stigma. But surely if both Roe and the Peeping Tom are exposed, it is Roe who will endure greater shame. In these circumstances, Tom has no greater interest in pseudonymity than any other garden-variety trespasser. By contrast, there is a substantial interest in granting Roe either pseudonymity or a protective order as to what Tom saw. Without it, Roe certainly will be deterred from pursuing a remedy for Tom's wrong.

²² See *id.* at 1664–65.

²³ *Id.* at 1698.

²⁴ See, for example, *Bonome v Kaysen*, 2004 WL 1194731, *2–6 (Mass Super Ct).

²⁵ 647 A2d 1067 (Conn Super Ct 1994).

²⁶ *Id.* at 1073 (adding that instead, a court should weigh each party's interest in anonymity separately "against the public interest in open access to the courts").

²⁷ *Id.* at 1073–75 (reasoning that granting the defendants' request for anonymity would create a slippery slope and be contrary to the public's interest in learning of allegations against a large and well-known public institution).

Of course, undermining the claim that a typical defendant suffers more stigmatization from a privacy suit than does a typical plaintiff is not equivalent to showing that defendants should be precluded from litigating a case pseudonymously. Judge Easterbrook is certainly right that the wrongfully accused privacy defendant will suffer reputational damage when the lawsuit is publicized,²⁸ and even vindication at trial on the merits will not fully repair the defendant's social standing. But that is true of nearly any complaint filed by a lawyer subject to Rule 11 sanctions. Defendants will *always* prefer pseudonymity when a moral sanction or injury to business reputation accompanies an accusation that the defendant violated the law.

Plaintiffs also typically prefer to litigate pseudonymously whenever they can. By filing suit, even to enforce an uncontroversial statutory, tort, contract, or property right, a plaintiff signals her litigiousness to the world. There are some contexts in which a firm wants to develop a reputation for litigiousness: a patent holder may want a reputation for aggressive litigation tactics so as to encourage potential infringers to agree to license the patent on favorable terms, or an organization like the Scientologists may want to be known for suing anyone who threatens its brand so as to chill others from speaking critically about the organization. But setting aside these sorts of cases, firms that litigate frequently and aggressively will plausibly incur more reputational harms than benefits. The same will be true for individuals—even those who have successfully sued for employment discrimination or violations of landlord-tenant laws may find it difficult to obtain a job or an apartment in the future.²⁹ Let us refer to these harms and benefits as “litigiousness signaling effects.”

In general, litigiousness signaling effects are not a strong basis for granting pseudonymity to parties. Though a party might prefer that his litigiousness be kept secret, that party's potential transaction partners will have good reasons for wanting to evaluate the litigiousness of a party before entering into a relationship with him. If information about who has litigated and who has not is opaque, then firms may rely on old boys' networks to identify transaction partners, they may take in-house certain tasks that would be done more efficiently through an outside vendor, or they may invest heavily in corporate espionage to try to evaluate the litigation history of potential partners.³⁰

²⁸ See *Doe v Smith*, 429 F3d at 710.

²⁹ Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 Nw U L Rev 1667, 1679–82 (2008) (describing how landlords, employers, and other decision-makers increasingly use public information about past litigation when evaluating counterparties).

³⁰ Consider id (“[A] substantial market has developed for tenant screening services.”).

Each of these alternatives to exploring PACER and Westlaw likely results in efficiency losses.

But what if a lawsuit signals some other attribute or characteristic of the plaintiff? For example, when a plaintiff brings suit for trade secret misappropriation, its stock price typically drops substantially as soon as its pleadings become public.³¹ Bringing the lawsuit informs the public that (a) the plaintiff has lost control over a valuable piece of intellectual property that may have been contributing to its bottom line previously, and (b) the plaintiff might have problems with security and management more generally. Concerns about dynamics (a) and (b) in turn prevent many plaintiffs who would have legitimate misappropriation claims from bringing suit.³² As a result, misappropriation suits are typically brought only in those cases where the harm from the loss of a secret is sufficiently great to overcome the expected harm resulting from the filing of the lawsuit. Sophisticated firms understand that litigating misappropriation claims is costly and, *ex ante*, this may cause them to decide to seek a patent on an invention that could have been protected through trade secret law.³³ Although we know that the Constitution requires that trade secret protection not be unduly attractive compared to patent protection,³⁴ we do not know whether society would be better off if some of its trade secrets were protected as patents instead.³⁵ At the very least, however, the law does try to accommodate the interests behind trade secrecy protection by permitting any party to a lawsuit to obtain a protective order with respect to the contents of its trade secret.³⁶

The problem in a trade secrets case is very much like the problem in privacy litigation. The secret at issue is known by the defendant, and perhaps has been disclosed by the defendant, but not everyone in the world who would benefit from the secret is aware of its content. The act of litigating a privacy or trade secret case publicly would necessarily

³¹ Chris Carr and Larry Gorman, *The Revictimization of Companies by the Stock Market Who Report Trade Secret Theft under the Economic Espionage Act*, 57 *Bus L* 25, 48–49 (2001) (adding that these drops “impl[y] an expected abnormal decline in firm value of approximately \$520 million per firm” during the period immediately following the public disclosure of the trade secret theft).

³² See *id.* at 29.

³³ See David D. Friedman, William M. Landes, and Richard A. Posner, *Some Economics of Trade Secret Law*, 5 *J Econ Persp* 61, 62–64 (1991).

³⁴ See *Kewanee Oil Co v Bicron Corp*, 416 US 470, 479–92 (1974) (inquiring into whether a state trade secret law “clashes[d] with the objectives of the federal patent laws”).

³⁵ See Friedman, Landes, and Posner, 5 *J Econ Persp* at 69–70 (cited in note 33).

³⁶ See, for example, FRCP 26(C)(1)(g) (providing parties with the ability to move for a protective order for “a trade secret or other confidential research” during the discovery process); Cal Civ Code § 3426.5 (West) (providing for the preservation of trade secrets in a judicial proceeding “by reasonable means”).

compound the harm that the plaintiff is alleging. There is an important potential difference, however. In the trade secret context, third parties knowing the identity of the litigants is usually far less threatening than knowing the contents of the secret itself. If one knows that Dow Chemical is the plaintiff in a misappropriation suit, this hardly helps a third party that would like to reverse engineer Dow's secret. Disclosure of the secret in a public document, however, would render the trade secret entirely valueless, even if the identities of the litigants are not revealed. Having said that, the social benefits of pseudonymity in trade secret litigation typically would be so small that they do not warrant the practice under US law.³⁷ In the privacy context, by contrast, knowing the contents of the secret usually is not embarrassing to the plaintiff so long as her identity is kept private. The world will not be terribly interested in learning that there is a sex tape of someone circulating among high school students. If the defendant remains pseudonymous and the videotape remains private, the litigation itself is not likely to compound the harm.

As a general matter, placing complainants' factual allegations under seal creates more significant problems for third parties that would like to comply with their legal duties. Equal treatment before the law is a bedrock principle, so the fact that a plaintiff was Dow as opposed to DuPont should not make it more difficult for lawyers in related industries to advise their clients. But removing certain facts—like the contents of the trade secret and the defendant's descriptions of how it might have been reverse engineered—from the public view makes it harder for lawyers to help their clients understand what conduct is impermissible. When courts deny requests by litigants to proceed pseudonymously, they usually invoke the harm to the public's ability to monitor the activity of the courts.³⁸ It is hard to take this concern seriously: in the typical case involving obscure litigants, there is a plethora of facts far more relevant to the public than the litigants' names. Yet the trial court may elect to exclude material facts from its statement of the case (for example, what the Peeping Tom saw) without having to explain the omissions, the public typically will not have access to the fruits of the parties' civil discovery requests,³⁹ and the

³⁷ *Doe v A Corporation*, 709 F2d 1043, 1044 n 1 (5th Cir 1983), is a rare case where the disclosure of a defendant corporation's identity may have compromised that company's proprietary information. Perhaps if a firm's competitors do not realize that a trade secret exists, the revelation of such a "deep secret" could damage the firm.

³⁸ See, for example, *Doe v Frank*, 951 F2d 320, 323 (11th Cir 1992) (describing the test for whether a litigant should be allowed to proceed anonymously as whether the litigant's privacy interest outweighs the "customary and constitutionally embedded presumption of openness in judicial proceedings"), quoting *Doe v Stegall*, 653 F2d 180, 186 (5th Cir 1981).

³⁹ *Seattle Times Co v Rhinehart*, 467 US 20, 32–36 (1984).

appellate court may elect either to publish a cryptic summary of the facts and legal issues or leave its opinion unpublished altogether. Comparative practice is also instructive. German courts, for example, routinely let famous parties like Princess Caroline or Mitsubishi litigate under pseudonyms even where the facts of the opinion will make the identity of the pseudonymous litigant obvious to most readers.⁴⁰ European Union case law is much the same.⁴¹

Several lessons emerge from the foregoing analysis. First, involvement in litigation often signals something negative about the litigants, and pseudonymity might obscure this signal. Second, obscuring such signals may engender social welfare losses, though not primarily because of a loss to judicial transparency, which is what courts typically emphasize. Third, sealing the identities of the litigants and sealing some of the facts giving rise to the complaint are imperfect substitutes for each other, with pseudonymity typically presenting less serious challenges to third parties. Fourth, the nonavailability of pseudonymity may discourage some parties from bringing suits in the first place. It is that final lesson on which we focus in the next Part.

II.

Not all valid legal claims should be litigated. Litigation is expensive, destructive of social capital, psychologically taxing for the litigants and third parties involved, and extraordinarily slow. While litigation can produce positive externalities by resolving existing ambiguity in the law, encouraging people to conform with the law's requirements lest they be sued, or providing expressive benefits to members of society, these benefits are rarely captured by the litigants themselves. In all but the most serious cases against deep-pocketed defendants, advising a client to turn to one of litigation's alternatives or to turn the other cheek is often the wisest guidance a lawyer can provide.⁴²

⁴⁰ Email from Karl-Nikolaus Peifer, Professor of Law, University of Cologne, to Lior Jacob Strahilevitz (Nov 12, 2009) (on file with author). Consider John Schwartz, *Two German Killers Demanding Anonymity Sue Wikipedia's Parent*, NY Times A13 (Nov 13, 2009) (reporting that two released killers have used a German law that allows "suppression of a criminal's name in news accounts once he has paid his debt to society" to pressure the German-language Wikipedia site to remove their names).

⁴¹ See Joel M. Schumm, *No Names, Please: The Virtual Victimization of Children, Crime Victims, the Mentally Ill, and Others in Appellate Court Opinions*, 42 Ga L Rev 471, 519 (2008) (noting the "commonplace" nature of anonymous judgments in Europe).

⁴² See, for example, Anthony Ciolli, *Lowering the Stakes: Toward a Model of Effective Copyright Dispute Resolution*, 110 W Va L Rev 999, 1013-14 (2008) (observing that for "low stakes" copyright disputes the average cost of mediation is only \$50,000, while a full trial typically costs five times that amount). Consider Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 Duke L J 889, 909 (2009)

What are these alternatives? Increasingly, the spread of Internet-based evaluation and gripe sites (“feedback sites”) gives anyone aggrieved by another party’s misbehavior a megaphone for sharing the story with others. HollaBack was launched to allow targets of street harassment to identify and call out their harassers—this resource may have provided Doe with the best subject matter fit for her grievance.⁴³ eBay’s feedback system is the most famous, and has succeeded in convincing transacting parties to evaluate buyers or sellers more than half the time.⁴⁴ Tripadvisor.com is filled with positive and negative reviews of hotels, restaurants, and tour companies. Amazon.com provides a plethora of forums for consumers to laud or complain about electronics, books, and music. Roadragers.com provides the same sort of service to aggrieved motorists, and apartmentratings.net enables tenants to sing the praises or damage the reputations of their landlords. Epinions.com allows users to leave positive or negative feedback about virtually anything. Notably, *virtually all of these forums permit the anonymous or pseudonymous posting of complaints*. Though signed reviews may well have greater credibility with readers, the norm on many sites is for the reviewer, especially the critical reviewer, to hide behind a pseudonym after posting commentary.

The quality of the information posted by anonymous reviewers can be extraordinarily low at times, as the AutoAdmit controversy has made clear.⁴⁵ Having said that, there is evidence suggesting that anonymous reviews subject to some quality control often elicit helpful and reasonably accurate feedback and can promote beneficial ex ante incentives.⁴⁶ As a case study, we might focus on a topic near and dear to many readers’ hearts: anonymous student evaluations of professor

(describing widely shared views that the burdensome costs of litigation drive parties towards settlement in all but the most serious cases).

⁴³ See generally *HollaBack New York City*, online at <http://hollabacknyc.blogspot.com> (visited Feb 12, 2010).

⁴⁴ Paul Resnick and Richard Zeckhauser, *Trust among Strangers in Internet Transactions: Empirical Analysis of eBay’s Reputation System*, 11 *Advances Applied Microecon* 127, 141 (2002) (noting that buyers commented on sellers for 52.1 percent of items sold, and sellers on buyers for 60.6 percent of items sold).

⁴⁵ Danielle Keats Citron, *Cyber Civil Rights*, 89 *BU L Rev* 61, 72–81 (2009); Brian Leiter, *Cleaning Cyber-Cesspools: Google and Free Speech*, in Saul Levmore and Martha C. Nussbaum, eds, *The Offensive Internet: Speech, Privacy, and Reputation* *4 (Harvard forthcoming 2010) (describing AutoAdmit as a “cesspool of infantile morons, racists, and misogynistic freaks”); Mary Anne Franks, *Sexual Harassment 2.0* *5–8 (unpublished manuscript, Feb 2010), online at <http://ssrn.com/abstract=1492433> (visited Feb 12, 2010) (same).

⁴⁶ See Omri Ben-Shahar, *One-Way Contracts: Consumer Protection without Law* *29–32 (University of Chicago John M. Olin Law and Economics Working Paper No 484, Oct 2009), online at <http://ssrn.com/abstract=1484928> (visited Feb 12, 2010) (explaining that the potential for negative ratings in certain online fora can serve as a greater deterrent against breach of contract than common law remedies).

quality. There is an extraordinarily large literature examining the utility of student evaluations, including, by some counts, more than two thousand research studies. Although the findings of such a large number of studies obviously will not be uniform, the overwhelming consensus is that the data generated by anonymous student evaluations are: “(a) reliable and stable; (b) valid when compared with student learning and other indicators of effective teaching; (c) multidimensional in terms of what they assess; (d) useful in improving teaching; and (e) only minimally affected by various course, teacher, or student characteristics that could bias results.”⁴⁷ A comparison of evaluation by current students, former students, teachers themselves, colleagues, and graduate students trained to evaluate effective teaching found that current and former students’ evaluations had the greatest external validity.⁴⁸ The advantages that students had over alternative sources of evaluation were straightforward—they had observed more hours of instruction, there were more students who could provide evaluations, and student evaluations could be obtained at the lowest costs.⁴⁹ In any event, professors who are disinclined to believe the consensus view in the relevant scholarly literature can take some comfort in the fact that, by and large, students and professors share similar views about the components of effective classroom instruction.⁵⁰ To be sure, even well-designed teaching evaluations are flawed, but, like democracy, they seem less flawed than all the conceivable alternatives.⁵¹

It should not surprise us that RateMyProfessors.com has been a hot topic for research among university professors—academics like to navel gaze as much as anyone else, and research studies of RateMyProfessors sometimes refer to the authors’ own ratings scores.⁵² Sever-

⁴⁷ John A. Centra, *Will Teachers Receive Higher Student Evaluations by Giving Higher Grades and Less Course Work?*, 44 *Rsrch Higher Educ* 495, 495–96 (2003).

⁴⁸ George S. Howard, Christine G. Conway, and Scott E. Maxwell, *Construct Validity of Measures of College Teaching Effectiveness*, 77 *J Educ Psych* 187, 195 (1985).

⁴⁹ *Id.*

⁵⁰ Kenneth A. Feldman, *Effective College Teaching from the Students’ and Faculty’s View: Matched or Mismatched Priorities?*, 28 *Rsrch Higher Educ* 291, 298–99, 319–21 (1988) (describing the tendency of students and teachers to value qualities like preparation, organization, and openness to student opinions similarly when describing what makes for good teaching). Consider Mareike Kunter and Jürgen Baumert, *Who Is the Expert? Construct and Criteria Validity of Student and Teacher Ratings of Instruction*, 9 *Learning Envir Rsrch* 231, 240–42 (2006) (finding that among secondary school students in Germany, correlations between student evaluations and teacher peer evaluations were very high for classroom management and teacher accessibility, but low for assessing the appropriate pacing of instruction).

⁵¹ See Theodore Coladarci and Irv Kornfield, *RateMyProfessors.com versus Formal In-Class Student Evaluations of Teaching*, 12 *Prac Assess, Rsrch & Eval* 1–2 (May 2007), online at <http://pareonline.net/genpare.asp?wh=0&abt=12> (visited May 5, 2010).

⁵² See, for example, Jesse M. Heines, *Comparing Free-Form Student Evaluations on RateMyProfessors.com with Those on a University-Based System* *5–6 table 1 (unpublished manu-

al of the published papers are quite hostile to RateMyProfessors. For example, a recent paper by researchers at Appalachian State University begins by emphasizing the shortcomings of student evaluations generally without considering any of their benefits⁵³ and then conducts a content analysis of RateMyProfessors evaluations by Appalachian State students.⁵⁴ It turns out that these students' comments adopt "an anti-intellectual tone" and mostly focus on how easy or hard the professors' classes are and how accessible the students find them—prompting the researchers to reach the sweeping conclusion that "student evaluations are not 'good' data."⁵⁵ More careful critical research points out that perceived teaching quality correlates strongly with perceived easiness and instructor attractiveness, and uses this correlation to attack the utility of RateMyProfessors scores.⁵⁶

It was only recently that researchers asked the really interesting question about RateMyProfessors feedback, which is whether scores on that website correlate with scores on in-class student evaluations of teaching performance. There are strong reasons to be skeptical about the quality of RateMyProfessors feedback—reviewers need not be students and there is some evidence that faculty have rated themselves and their colleagues on the website,⁵⁷ the website is likely to attract a skewed sample of the students who enrolled in a course,⁵⁸ and evaluations may be filled out after the first day of class or years after

script, 2006), online at <http://teaching.cs.uml.edu/~heines/academic/papers/2006ccsne/CCSCNE-2006-submission.pdf> (visited Feb 12, 2010) (comparing the scores of the author to those of recent recipients of Baylor University's award for distinguished teaching).

⁵³ Elizabeth Davison and Jammie Price, *How Do We Rate? An Evaluation of Online Student Evaluations*, 34 *Assess & Eval Higher Educ* 51, 52–53 (2009) (delineating shortfalls like a lack of safeguards to ensure external validity). Their tone becomes more balanced toward the end of the article. See *id.* at 62 (noting that websites like RateMyProfessors can be informative when they "rank the more serious academic factors" in order to focus students on the most relevant characteristics of effective teaching).

⁵⁴ *Id.* at 54.

⁵⁵ *Id.* at 51, 62. This conclusion is a statement against interest by the researchers, whose teaching evaluations on RateMyProfessors.com were good (in the case of Davison) and excellent (in the case of Price). See *Beth Davidson* [sic]—*Appalachian State University*, online at <http://www.ratemyprofessors.com/ShowRatings.jsp?tid=198337> (visited Feb 12, 2010) (reporting overall quality of 3.8 out of 5); *Jammie Price*—*Appalachian State University*, online at <http://www.ratemyprofessors.com/ShowRatings.jsp?tid=585057> (visited Feb 12, 2010) (reporting overall quality of 4.3 out of 5).

⁵⁶ See, for example, James Felton, et al, *Attractiveness, Easiness, and Other Issues: Student Evaluations of Professors on Ratemyprofessors.com*, 33 *Assess & Eval Higher Educ* 45, 54–60 (2008). Felton and coauthors evidently assume that ease and attractiveness influence the overall teaching quality score, but do not discuss the plausible hypothesis that student perceptions of instructor quality influence their views of the professors' attractiveness and the ease of the course.

⁵⁷ Davison and Price, 34 *Assess & Eval Higher Educ* at 52, 62 n 3 (cited in note 53).

⁵⁸ *Id.* at 52 (suggesting that students who either loved or hated an instructor are more likely to post because of the time it takes to register and log in).

the instructor handed in grades.⁵⁹ Using data from their home institution, the University of Maine, Theodore Coladarci and Irv Kornfield compared RateMyProfessors evaluations to the official evaluations collected by the university at the conclusion of each course. They found strong correlations ($r=0.68$) between the results of in-class surveys and RateMyProfessors surveys asking students to assess overall teaching quality.⁶⁰ The correlations between student answers to official evaluation queries about workload and RateMyProfessors questions about course easiness were weaker but still statistically significant ($r=0.44$).⁶¹ Like the study from Appalachian State, the Maine study looked at only one university's data, and the results should therefore be viewed with some caution. Having said that, if the Maine result is replicated elsewhere, then there is reason to be optimistic about the social value provided from many anonymous feedback sites. Feedback site data seem to correlate highly with anonymous in-class evaluation data, and the validity of such in-class evaluation data is well established after decades of rigorous study.⁶²

The best available evidence therefore seems to suggest that while anonymous forums like RateMyProfessors.com have their problems, the data they provide are useful to third parties thinking of enrolling in particular classes or purchasing particular services. But are the data available via these outlets as useful to third parties as the data that would be generated via litigation? And what of the other interests that litigation (and feedback sites, for that matter) might serve?

We can think of litigation as furthering five objectives. First, it permits opportunities for an aggrieved party to obtain some level of retribution. Second, it permits aggrieved parties to vent their displeasure with the defendant's conduct, which may prove cathartic for the plaintiff and reputationally damaging for the defendant. Third, litigation adjudicates; the possibility that a third party might publish a judgment on the merits supplements the information value potentially produced by the airing of a grievance. Fourth, litigation may resolve a dispute, conceivably permitting both parties to believe that justice has been done. Fifth, litigation creates a system of precedents that will prove useful to third parties who are trying to determine what the law requires of them.

Feedback sites are markedly inferior to litigation with respect to some of these objectives, and markedly superior with respect to oth-

⁵⁹ *Id.*

⁶⁰ Coladarci and Kornfield, 12 *Prac Assess, Rsrch & Eval* at 8 (cited in note 51).

⁶¹ *Id.* (finding statistically significant correlation, but noting that the data points for these factors show "considerable scatter").

⁶² See notes 47-51 and accompanying text.

ers. With respect to retribution, complaining in a public forum about a defendant's conduct is a lower-intensity alternative to litigation. It is far less costly for the complainer than hiring a lawyer to pursue a claim, but also less costly to the target of the complaint than being hauled into court—these savings could be passed on to complainers in the form of more generous settlement offers. From a venting perspective, there is reason to believe that using a grievance forum may be superior to the filing of a formal complaint in court. Psychological research suggests that articulating a grievance in written form is an essential ingredient of forgetting it, which in turn enables the aggrieved party to stop dwelling on a past harm.⁶³ Non-pro se litigation necessarily out-sources much of the process of crafting a complaint to a trained attorney, potentially depriving the aggrieved party of these benefits.

Kenworthy Bilz's fascinating research on "delegated revenge" adds an important dimension to the general comparison between resort to self-help and litigation and the sui generis nature of pseudonymity.⁶⁴ She argues that individuals may prefer that the state punish wrongdoers, rather than the individual punishing the wrongdoers through vigilantism or other forms of self-help, because the state's decision to punish restores the victim's social status more than self-help can.⁶⁵ Bilz identifies some contexts in which victims may prefer to exercise self-help vengeance rather than having the state impose criminal sanctions, such as in those societies where personal honor matters a great deal or where the victims do not view the state as legitimate.⁶⁶ While Bilz's analysis seems to explain persuasively some of what goes on in criminal law, it cannot provide a fully satisfactory explanation for individuals' willingness to delegate retribution to the state via pseudonymous civil litigation. In such cases, the victim chooses to mask her identity, thereby substantially curtailing the ability of third-party adjudication to enhance her social status.⁶⁷ Though a desire for restored social status might explain a minor component of the victim's

⁶³ See Strahilevitz, 102 Nw U L Rev at 1708 & n 197 (cited in note 29) (exploring research into the positive effect that "[w]ritten venting" has on consumer satisfaction, employee satisfaction, and general health).

⁶⁴ See Kenworthy Bilz, *The Puzzle of Delegated Revenge*, 87 BU L Rev 1059, 1111–12 (2007).

⁶⁵ Id at 1086–91 ("Social status is, by definition, *social*: I cannot get it unless others agree I should have it. Others punishing on my behalf is an indication they think I should.")

⁶⁶ Id at 1100–11.

⁶⁷ To the extent that a plaintiff in a pseudonymous lawsuit is known to intimates and acquaintances, but unknown to the general population, a victory in pseudonymous litigation may have some salutary effects on her social status within her immediate circle. See generally Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U Chi L Rev 919 (2005). Of course, evidence that the plaintiff has disclosed her involvement in pseudonymous litigation to her peers may be used to undermine her argument for pseudonymous status under a "have your cake and eat it too" rationale. Consider text accompanying note 11.

motivation, other motivations like a desire to punish or vent dominate in the class of cases that concerns us here.⁶⁸

Adjudication is a function where litigation is far superior to the use of Internet forums. To the extent that neutral third parties reach judgments concerning the weight of the evidence and the applicable legal standards, either at summary judgment or as part of a trial, the adjudicative benefits of litigation are significant. Indeed, litigation's ability to generate high-quality information that can be used by third parties as they decide with whom they should do business is an underappreciated benefit of the litigation process.⁶⁹ These significant positive externalities of course come at a high cost. Feedback sites rarely provide much, if anything, by way of adjudication. At most, interested third parties may comment upon the merits of an aggrieved complainant's allegations, or reach judgments of their own about whether a customer's allegations of vendor misconduct are credible and problematic.

In some cases, procedural rights built into the litigation process will enhance adjudicative objectives. Let us return to the example of the AutoAdmit controversy. There, women identified by name were being harassed by pseudonymous users of the Internet.⁷⁰ The AutoAdmit forums became populated overwhelmingly with speakers who were not interested in anything resembling rational debate.⁷¹ So the AutoAdmit plaintiffs could have tried to defend their reputations online in AutoAdmit, but this likely would have engendered more harassment, rather than truth prevailing in this particular marketplace of ideas. To fight back on neutral terrain (that is, in a less hostile forum), the AutoAdmit plaintiffs needed to use the judicial process to unmask their harassers. And once the harassers were unmasked, it became easier to get to the bottom of the disputes surrounding their conduct.

As best we can tell, the value of litigation as a dispute resolution device is rather limited. To be sure, modern litigation in the United States courts often requires or urges the courts to try alternative dis-

⁶⁸ There may be an additional significant distinction between the criminal prosecutions described by Bilz (where the state may pursue the victimizer even if the victim declines to press charges) and civil suits (where the victim's willingness to proceed in the forum is a prerequisite to the state's willingness to involve itself in the dispute). Because the state is acting only as the resolver of disputes, as opposed to acting as both the prosecutor and adjudicator, it is plausible that the social status restoration benefits of civil litigation are more attenuated, even where a plaintiff sues using her real name.

⁶⁹ See Strahilevitz, 102 *Nw U L Rev* at 1678–79 (cited in note 29) (describing the way that landlords in New York used court records to avoid litigious tenants because of the extremely high eviction costs imposed by city regulations).

⁷⁰ Citron, 89 *BU L Rev* at 71–75 (cited in note 45).

⁷¹ See, for example, *id.* at 73 (noting how one anonymous poster was told she deserved a “Congressional medal” when she posted a proposed attack email “as a warning to all those who would try to regulate the more antisocial posters—we have the power now”).

pute resolution mechanisms before a case can proceed to trial,⁷² but these reforms speak more to the failures of litigation itself than to its successes with respect to dispute resolution. By contrast, in forums where merchants typically respond to consumer complaints, the lodging of a complaint often does reopen channels of communication between the complainer and the target of a complaint. It is not unusual for the parties to an online dispute on eBay or TripAdvisor to reach some sort of compromise that results in the complainer removing his original posting after the vendor learns the complainant's identity and makes amends. A plurality of eBay disputes evidently fall into this category.⁷³ In some circumstances, feedback sites may facilitate monetary compensation for harms. Where a complaining party has the ability to edit or remove negative feedback, the target of the complaint may offer a refund or product replacement in exchange for an agreement to remove the negative feedback.⁷⁴ Under such an arrangement, the reputational damage to the target, rather than the harm to the complainer, will provide the upward limit of any possible compensation, but in many low-stakes disputes we can expect that this reputational damage to the target will exceed the amount at issue in the underlying dispute. To be sure, it is plausible that lawsuits are more likely to result in dispute resolution than complaints on eBay—most cases do settle, after all.⁷⁵ But litigation is assuredly not a cost effective means of resolving most disputes.

The development of case-law precedents is the most significant comparative advantage of litigation over the use of informal venues for complaints. Reviewing the content of informal complaints may help third parties determine what the norms of appropriate behavior are, but the value of this information disclosure is minor. Deciding issues of first impression in litigated cases, especially on appeal, produces enormous benefits to society, though the associated private benefits to the litigants themselves are often insignificant. Of course, most litigation does not raise such issues of first impression, and so it

⁷² See, for example, FRCP 16(a)(5) (including “facilitating settlement” as a reason for pretrial conferences).

⁷³ Lilian Edwards and Ashley Theunissen, *Creating Trust and Satisfaction Online: How Important Is ADR?: The eBay Experience*, 5 Web J Current Legal Issues (2007), online at <http://webjcli.ncl.ac.uk/2007/issue5/edwards5.html> (visited Feb 12, 2010).

⁷⁴ Consider *Feedback FAQ*, online at <http://www.amazon.com/gp/help/customer/display.html?nodeId=1161284&#respond> (visited Feb 23, 2010) (“If you want to respond to negative feedback, the best option is to work with the buyer to improve the situation that led to the negative feedback. Then, ask the buyer to remove the feedback.”).

⁷⁵ See Moss, 58 Duke L J at 909 (cited in note 42). Of course, settlement and resolution of a dispute are different things. See Owen M. Fiss, *Against Settlement*, 93 Yale L J 1073, 1085–86 (1984) (arguing that a judge’s “job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in” the law through proper adjudication).

is only a small subset of filed complaints that have the propensity to contribute much to the development of the law.

In short, an individual with a complaint about another individual or a corporate entity might turn to the courts or to more informal institutions for satisfaction. The primary benefits associated with litigation are its contribution to the development of case law (in cases that raise novel issues), its ability to adjudicate facts (in cases where material facts are in dispute and the parties' reputations matter to third parties), and its greater remedial flexibility (in cases where the complaining party has suffered a significant harm). These benefits, limited as they are to certain kinds of disputes, come at great cost to the parties. Where the law authorizes a cause of action but a dispute involves no legal issues of first impression, where factual disagreements or the parties' respective social or economic standing are low-stakes affairs, and where the plaintiff has not suffered a terribly significant harm, litigation is an extremely inefficient tool. Informal mechanisms for venting complaints may be more satisfying to the parties and just as helpful to third parties, and the transaction costs associated with these mechanisms are nearly zero.

Happily, individuals will already have some proper incentives to sort themselves effectively into formal or informal channels for addressing grievances. People who place a great deal of value on adjudication by a third party, or parties who expect to confront a similar legal ambiguity down the road and will benefit greatly from having a precedent "on the books," will tend to pursue litigation. And those who are likely to suffer disproportionately from the burdens of civil discovery, or whose primary aim is to express dissatisfaction with another party, will tend to take advantage of self-help mechanisms. But many of the considerations that judges ought to apply in sorting among litigants will be external considerations for the litigants themselves. For example, courts might deny pseudonymous status to wealthy but vexatious litigants who are trying to take advantage of their opponents' lack of resources to fight legal battles. More controversially, courts could try to act paternalistically. They might recognize that naïve litigants, especially those represented by inexperienced counsel, are likely to underestimate the psychological and opportunity costs associated with litigation, and use the nonavailability of pseudonyms as a strategy for nudging those litigants toward informal grievance procedures.

There is a final set of considerations that should guide our preferences as to whether an aggrieved party should litigate or gripe. Under certain circumstances, it will be difficult for the complainant to get satisfaction through resort to feedback sites. Although existing resources are very effective at tracking the reputations of individual buyers and sellers on eBay, and websites like Avvo or Angie's List

enable the reputations of lawyers, doctors, or sole proprietors to be monitored closely, some individuals will be difficult to monitor effectively. They may have common names that make them impervious to easy Googling; they may interact in social and economic milieus where others are unlikely to examine their reputations; or they may already be part of a reputational underclass. Alternatively, the reputation of the complaining party (or her pseudonym) may be so damaged that even her credible complaints are ignored—recall that the little boy who cried wolf was actually right the third time. Or the party with a valid grievance may be so poor at articulating her grievance or so ignorant about the proper avenues for airing it as to deprive the complaint of any influence. Finally, we can expect that the aggrieved party who challenges majoritarian norms will need formal adjudication by an insulated judiciary more than one who seeks to enforce well-established, widely adhered-to social norms.

In assessing the comparative advantages of litigation and feedback sites, we can develop a working hypothesis for when courts should try to steer some grievances away from formal adjudication. Complaints by parties who have suffered limited injuries, who raise non-novel legal issues, whose credibility and access to information networks is particularly strong, who can articulate their complaints eloquently, and whose claims involve relatively unimportant factual controversies, should be steered out of court. So too should complaints against parties whose reputations are well monitored by informal mechanisms for airing grievances. At first blush, this proposal is quite radical. I am indeed proposing that judges consciously turn away valid legal claims, not on the grounds that those claims are not authorized by statutes or the common law, but on the grounds that society is best off if those claims are addressed via self-help. Yet, it is perhaps only radical in the sense that it justifies what any rational theory of judging would predict—that judges do their best to force settlement in, or otherwise dispose of, those cases where they think they can add little value, and let cases that present interesting or important issues proceed to trial. In that sense, my proposal is pragmatic, not radical, albeit far more Posnerian than Easterbrookesque.⁷⁶ In the concluding Part, we apply these criteria to *Doe v Smith* to determine whether it was appropriate for Judge Easterbrook to hint that Doe had to choose between waiving pseudonymity and pursuing her grievance through informal channels.

⁷⁶ See Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 *Nw U L Rev* 1409, 1409–10 (2000) (identifying Judge Richard Posner’s role as “a leading pragmatist” and Judge Easterbrook’s role as “a leading textualist”).

Before we get there, however, let us flag a final wrinkle. Once a court has determined that a case is best resolved through informal processes for addressing grievances, the would-be defendant must be estopped from trying to bring the dispute back into the courts. If the plaintiff, who was denied a pseudonym by the court at the urging of the defendant, then complains pseudonymously on a feedback site, the target of the complaint ought to be prevented from responding with a defamation suit or any other legal process that might enable the defendant to unmask the pseudonymous complainer. The absence of such an estoppel rule could squander the judicial resources that the proposal in this Essay intends to preserve.

III.

Given the facts of *Doe v Smith*, it is obvious why Doe would have wanted to proceed pseudonymously. If her grievance represented a poor fit for formal litigation, however, it would be appropriate to direct her away from the courts, so that she could pursue her complaint pseudonymously in a less expensive forum. Would sorting her complaint to feedback sites have been appropriate?

While Doe could have lodged a pseudonymous complaint via an Internet forum, such an institution would not have served her well. The defendant, Jason Smith, had an exceptionally common name shared by multiple professional American athletes and a not entirely obscure Australian actor, so any complaints she posted about his conduct would have been difficult to tie to the particular man who injured her. (The same dynamic makes it somewhat curious that the court chose a case filed against someone named “Jason Smith” as the vehicle for advocating a symmetrical approach to pseudonymous litigation.) The nature of her complaint was such that posting it, even pseudonymously, could well result in her being identified by Internet-based commentators, given the hostility towards women that often pervades Internet forums.⁷⁷ Indeed, lodging such a complaint would practically invite the posting of a hyperlink to the unlawfully recorded sex video itself, substantially magnifying the reputational and dignitary harms against Doe. Thus, although Smith’s conduct flagrantly violated existing norms of chivalry, forums that facilitate anonymous and pseudonymous speech may imperfectly reflect majoritarian sentiment. Finally, note that Smith himself admitted that he had disseminated the footage of himself and Doe engaged in intercourse to

⁷⁷ See note 45 and accompanying text.

friends, thereby signaling exhibitionist tendencies and a lack of shame about becoming a lightning rod.

The nature of Doe's case suggests that litigation, by contrast, would have been an appropriate mechanism for addressing her grievance. The nonconsensual dissemination of a sex tape represents a significant injury—especially for someone who was a minor at the time. Moreover, Doe's case raised novel legal issues—witness the Seventh Circuit's publication of an opinion reversing the trial court's superficially plausible but ultimately erroneous analysis of her Wiretap Act claims.⁷⁸ Finally, there was nothing in the record to indicate that Doe was particularly eloquent or that she had an unusually powerful bully pulpit. She was, at the time of the injury, an ordinary American high school student who became romantically involved with the wrong guy. Requiring Doe to forego her lawsuit in order to pursue her complaint pseudonymously would have deprived her of meaningful relief and cost us a helpful clarification of precedent and statutory text.⁷⁹ Indeed, given the seriousness and the reprehensibility of the conduct that Jason Smith ultimately admitted to, the worst possible result for society would be for Doe's grievance to be aired neither in court nor online. Such a result would increase the odds that Smith would engage in the same sort of behavior with another unsuspecting sex partner in the future.

Some of the factors rendering Doe's claim a good fit for litigation and a poor fit for self-help could not be determined at the time her complaint was filed. This temporal problem seems more daunting than it is, however. There is no reason why the issue of pseudonymity needs to be resolved at the outset of the litigation. A court is free to keep the identity of a party or both parties under seal until a final judgment is entered and all appeals are exhausted.⁸⁰ It would be straightforward to unseal the parties' identities at that later date, via an amended opinion. At that point, a court can more reliably answer questions about whether the plaintiff raised novel legal issues, whether her injuries were serious enough to warrant judicial intervention, and whether alternatives to litigation might have ameliorated the controversy more efficiently.

Say, however, one is unconvinced that courts can make these sorts of judgments, even upon the conclusion of the case. There is another alternative rule that almost certainly is more appealing than the symmetrical one Judge Easterbrook suggested in *Doe v Smith*—let us call

⁷⁸ See note 8 and accompanying text.

⁷⁹ Consider Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U Kan L Rev 195, 253 (2004) (arguing that judges' decisions about whether to grant pseudonymity should be sensitive to the possibility that without the availability of pseudonymity to the plaintiff, issues of first impression will not be litigated).

⁸⁰ See FRCP 5.2(d).

it prevailing party pseudonymity (PPP). Under such a rule, only the litigant who ultimately loses is named.⁸¹ In the shadow of PPP, we might expect most aggrieved plaintiffs to sort themselves appropriately into the litigation or informal grievance paths. Depending on our views about the desirability of settlement and adjudication, we might grant or deny pseudonymity to litigants whose cases settle before dismissal, summary judgment, or trial. As soon as Jason Smith filed his answer, we learned a lot of information about the appropriateness of pseudonymity to which Judge Easterbrook's panel never had access. The PPP rule lets us resolve pseudonymity in every case with the benefit of hindsight. By penalizing the complainant who chose the wrong forum *ex post*, we encourage future complainants to pick the right forum *ex ante*. If this sorting rule works as it should, then it will help keep the strongest claims in court and the more tentative claims out of it, thereby ensuring that scarce judicial resources are devoted to the most significant harms and controversies.

PPP is not a PP (perfect proposal). Doe was the party with the strongest legal arguments in *Doe v Smith* on every issue but pseudonymity, and it is my impression, contrary to the court's, that her unmasking would do more reputational harm than Smith's unmasking would. Still, the preceding analysis cautions us that the party that prevails on the merits is not always the same as the party that has the greatest reputational interest at stake. So we should think of PPP as an *ex ante* shortcut for sorting, not an *ex post* rule for achieving justice as between the parties. Seen in that light, it seems to be a significant improvement on the Seventh Circuit's antipseudonymity rules—but an inferior option to resolving the question of pseudonymity—after all the issues in the litigation are resolved, on the basis of factors like the novelty of the issues presented, the access of the parties to bully pulpits, the parties' legal sophistication, the magnitude of their injuries, and the reputational stakes for all those involved.

⁸¹ For both technological and First Amendment reasons, it is far easier to keep information out of the public domain in the first instance than it is to erase information that has been publicized. Therefore, pseudonymity ought to be maintained until there is a final judgment, rather than appearing and disappearing as the litigation proceeds.