

THE ANONYMITY TOOL

SAUL LEVMORE†

TABLE OF CONTENTS

INTRODUCTION	2192
I. EXPLAINING CONVENTIONS GOVERNING ANONYMITY	2192
A. <i>Chilling and Reliability</i>	2192
1. Anonymity to Encourage Communication	2192
2. Identifiability to Encourage Reliability	2193
3. The Tradeoff Between Reliability and Communication	2194
B. <i>The Limited Role of Consent</i>	2195
C. <i>Intermediation</i>	2199
1. Filtration As an Alternative to Anonymity	2199
2. Evaluations	2200
3. Intermediation and Consent	2203
4. Pseudonyms	2206
a. <i>Publishers As Intermediaries</i>	2206
b. <i>Signalling</i>	2207
c. <i>Signalling and Intermediation</i>	2210
II. LEGAL AND SOCIAL NORMS	2215
A. <i>Law's Reluctance Regarding Intermediation</i>	2215
B. <i>Voting Rules, Anonymity, and Intermediation</i>	2219
C. <i>Legal Intermediation</i>	2226
1. Judges and Secrets	2226
2. Judicial Evaluation of Anonymous Information	2228
3. Criminal Law and Intermediation	2230
a. <i>Investigation Versus Adjudication</i>	2230
b. <i>Government As Intermediary</i>	2231
D. <i>Blending Law and Norms</i>	2233
1. Legal Regulation of "Normal" Intermediaries	2233
2. Intermediation in the Shadow of the Law	2234
CONCLUSION	2235

† Brokaw Professor and Albert Clark Tate, Jr. Professor, University of Virginia School of Law. I am indebted to Clay Gillette, Wendy Gordon, Pam Karlan, Cara Maggioni, Richard McAdams, participants at the *University of Pennsylvania Law Review* Symposium on Law, Economics, & Norms, and colleagues too numerous to mention.

INTRODUCTION

Anonymous communications may be exalted or discouraged by both legal and social norms. Most democracies sanctify the secret ballot, most law schools encourage anonymity as to the identity of students in both the grading of examinations and the evaluation of courses, most charities and ethicists welcome and even idealize anonymous philanthropy, and few readers object to pen-named novels. In contrast, voting by elected representatives (and by American judges) is public, juror votes are normally discoverable after a verdict is in, and anonymous telephone calls as well as unsigned, critical interpersonal notes are strongly discouraged by social norms.

Such lists and comparisons suggest a number of lines of inquiry. One puzzle is suggested by the title of this Article. If anonymity encourages some communications, so that it can be a useful tool, then why do many social conventions discourage anonymity? It is, for example, mysterious that so many businesses solicit anonymous criticism through suggestion boxes and customer evaluation forms but that so few people think that anonymous notes, containing constructive criticisms with comparable probability, are welcome by friends and neighbors. There is also the obvious positive puzzle of why and when anonymity is acceptable. I will suggest that social norms go beyond formal legal rules in anticipating alternative methods of communication through intermediaries with certain characteristics. These alternatives may be desirable because they are more reliable than anonymous communications and yet unlikely to be easily chilled. Legal rules governing anonymity, as we will see, are less amenable to case-by-case application and are, therefore, less compromising than social norms.

I. EXPLAINING CONVENTIONS GOVERNING ANONYMITY

A. *Chilling and Reliability*

1. Anonymity to Encourage Communication

Anonymity implicates two countervailing forces. If parties with valuable information can choose between making anonymous and nonanonymous communications, it is likely that they will convey more (or simply more accurate) information than they would in a world where anonymous communications are effectively barred by social conventions or enforceable legal rules. Anonymity allows

communication without retribution. This straightforward intuition is reflected in the business practice of asking customers for information but indicating that a respondent can remain unidentified. The business, or potential recipient, recognizes that more information will be forthcoming if communicators can choose whether to be anonymous or not. Some respondents may think that their communications will be rewarded, but others may fear unwanted requests for additional information or even confrontations with the subjects of their criticisms. This intuition about the gain associated with anonymity is also found in the practice of offering rewards for the return of missing items with "no questions asked."

The institution of the secret ballot and the convention of unsigned student evaluations of teachers may serve as additional examples of anonymity designed to encourage communication. One is compelled by legal rules and the other by common practice, or social norms, but in both cases identification might chill responses because communicators might fear retaliation or confrontation. Note that these practices are explained (*ex post*) rather than predicted; if anonymity were barred or abhorred in these settings, it would be easy to say that identifiability discouraged corruption or improper motives. Anonymity may encourage honest communication, but (even in the same settings) it may also stimulate dishonest, corrupt, or simply socially undesirable decisionmaking or communications. I return to these matters, and to all these examples, below. For the present, I consider only simpler cases where it appears to be unambiguously desirable, both privately and socially, to encourage communication.

2. Identifiability to Encourage Reliability

Anonymity may encourage communication, but nonanonymity, or identifiability, will often raise the value of a communication to its recipient. Identification can be a useful signal, and it may promote accountability; but it may also be sufficient simply to say that the information contained in the identification of the source of a communication is itself of value to the recipient. In some contexts, the value (to the recipient) of identification has more to do with marketing or other forms of adaptation than with intrinsic value or reliability. Thus, a firm may seek information about the preferences, income, or residence of retail customers, but this information is most often relevant when making decisions regarding future business locations, advertising strategies, sales of mailing lists, and

the like. It is the fact (and volume) of sales that provides feedback as to quality, price, and past marketing decisions, and these sales rarely lose much value if they are unidentifiable. In other settings, however, identification is critical to the value of a communication. Generally speaking, the value of identification (of the source of information) is greater the more costly it is for the recipient independently to evaluate the accuracy of the communication. Thus, the value of communications about the commission of a crime or about another country's military secrets often increase enormously with identification of the source of the communication.¹

3. The Tradeoff Between Reliability and Communication

Anonymity may induce communicative activity, but, for a given communication, anonymity is also likely to reduce its value to the recipient. This tradeoff suggests why norms favoring, discouraging, or making optional the use of anonymity might develop. Consider the case where *G*, a guest in host *H*'s home or a patron of *H*'s business, observes another guest or customer, *P*, pilfer an item belonging to *H*. Especially where *G* is a social guest, *G* may feel some moral obligation to confront *P* or inform *H*.² On the other hand, *G* may choose to remain uncomfortably silent. A purely self-interested *G* may even choose to blackmail *P* or extort from *H*; a somewhat better behaved or more risk-averse *G* may choose to intervene, if only because *H*, after discovering the theft, may be suspicious of *G* (and other guests or patrons who were present around the time of the now-discovered theft).³ There are of course costs associated with confronting *P* or informing *H*. If *P* has some innocent explanation ("*H* had given me permission to take that item, and I slipped it in my pocket because I had no other way to

¹ Conversely, communications such as "wash me" (found on one's car), "this locker really smells," and "the enclosed tape recording will show you that your dog barks all day while you are away" lose nothing in the way of reliability when delivered anonymously.

² I raise but do not dwell on the different social norms in the guest and business settings. It is more likely that the social host will not want the information known to the guest, but it is also more likely that the social guest will feel an obligation to report. Superficially this is something of a paradox, but the solution is probably that some social hosts want the information more than business hosts (and can do more with it), but the guest's problem is to know which kind of social host is present.

³ *G*'s selfish motive is unlikely to be the prevention of theft by *P* from *G* because *G* can always refuse to admit *P* to *G*'s home or business. In this example, I assume that the host will be somewhat less suspicious of the guest who informs, although there are settings where it is the other way around.

carry it home"), *P* may take great offense at *G*'s inquiry. And where *P* is a wrongdoer, there are of course costs borne by *G* whether or not *G* succeeds in causing *P* to right the wrong. Informing *H* may be ideal, because *H* may be grateful and may cause *P* to return what has been taken. But there is the danger that *H* will resent *G*, accuse *G*, or announce *G*'s accusation of *P* in a way that harms *G*.

Our host, *H*, may welcome a social norm against anonymity if *H* attaches substantial value to identification and if *H* thinks that guests such as *G* will not choose inaction when offered a stark choice between full disclosure and no disclosure. But a different host could either place less value on (source) identification or fear a more substantial chilling effect from an anti-anonymity norm. Relying only on the preceding analysis, I think we would expect no strong social norm against anonymity. Alternatively, we might expect some variety as to this norm across communities or in somewhat different circumstances. I must return therefore to the task of "explaining" the nearly universal anti-anonymity norm governing this kind of situation.⁴

B. *The Limited Role of Consent*

The relevance of the host's preferences in the previous example suggests that anonymity may follow hypothetical consent by the recipient. Indeed, consent (whether implied or explicit) can easily explain the acceptability of anonymous communications that are entirely positive in substance. Valentine's Day cards are often anonymous, as are some notes and apples received by teachers. The positive nature of these communications (that is, so long as they do not go so far as to raise the fear of unwanted behavior) allows us to imply consent. Most of us prefer flattery in some volume. The social convention can be seen as providing an outlet for or even a limit on such positive feelings, and the convention reassures both sender and recipient. In the case of Valentine's Day, the social

⁴ I argue below that even if *G*, the potential informer, cares for (or interacts repeatedly with) *H*, the recipient, so that *G* tries to internalize *H*'s sentiments about the value of information, it is difficult for *G* to assess the relative increase in *H*'s disutility from anonymity where close friends or relatives are concerned as compared to *H*'s disutility from receiving no information at all from this group. Thus, if I learn that *A* detests my best friend, *B*, I am not sure whether *B* wants that information, and I am fairly sure that if I guess wrong, in either direction, I am likely to wound *B* seriously. The bond between us produces some information about preferences, but it also raises the costs of error.

norm may even serve the purpose of encouraging these communications in a way that increases private and social utility.⁵

Consent may also have something to do with occasions for applause or, less pleasantly, for hisses and jeers. A performer implicitly "consents" to applause, though it be anonymous, but it is interesting that arising out of this convention are such things as vocal exclamations ("Bravo!") and standing ovations, which might be seen as attempts by some communicators to escape anonymity and even to earn individual credit. Hissing and catcalling are thought to be rude, perhaps because most performers would not consent to such critical anonymous feedback; but inasmuch as there are ballparks and even classrooms where this sort of communication is accepted, the consent idea is perhaps too malleable to do much good. There is even the possibility that jeering aloud at a sporting event is more acceptable than is hissing at a lecture because the hisser need not alter his or her facial expression and may therefore escape identification.⁶

⁵ More overt affection might be unwanted by both parties.

Charitable giving provides another example of activity that might both be stimulated by the option of anonymity and regarded as consensual even when, or especially when, anonymous. The substance of the message is positive, except for the fact that an individual recipient might prefer not to know the identity of his or her benefactor. See generally R. MOSES MAIMONIDES, *THE LAWS OF HEBREWS RELATING TO THE POOR AND THE STRANGER* (James W. Peppercorne trans., Pelham Richardson 1840) (exalting most of all gifts or loans that generate self-sufficiency and ranking as second those gifts that are anonymous); THE KORAN, *The Cow* 2:271, at 363 (N.J. Dawood trans., Penguin Books 1974) ("To be charitable in public is good, but to give alms to the poor in private is better and will atone for some of your sins. Allah has knowledge of all your actions."). The very existence of charitable organizations might be explained as facilitating dual anonymity, at least between donor and recipient. There are, however, also tax and monitoring explanations equal to the task.

Note that a donor and charity might consent to the former's anonymous gift, but other charities may not because they would gain from information about who donates how much and to which causes. In *ex ante* terms, this seems like an insignificant problem for the consent notion.

Finally, one advantage of anonymous contributions is that the donor may wish to avoid pursuit by this or other charities. But this is not a path worth pursuing in developing a general theory because individual donors will usually be able to convince the recipient to keep some information private.

⁶ An anthropologist might go further and note that disapproval can also be expressed by stomping feet and by such noises as "boo," which are more difficult to discern than applause (which is more visible) or than the open-mouthed cheer of "yay" or "hooray," with analogies in other languages. It may also be noteworthy that a member of an audience who cheers or jeers is often identifiable to those sitting nearby even if not so to the performer. Norms about anonymity may thus tie into the availability of "intermediaries" as discussed below in part II.C.

It is plainly the case that, where the recipient explicitly consents to receive anonymous communications, there is little objection to anonymity even if it attaches to critical communications.⁷ If a professor or a restaurant distributes evaluation forms to students or patrons, indicating that anonymous feedback is expected (by putting in no space for the communicator's name or by labeling such a space as "optional"), the recipient can hardly object to the anonymous quality of stinging but apparently honest responses, even if this sort of criticism might not have been expressed by identifiable communicators. Explicit consent rarely extends to third parties who are likely to be implicated in evaluations. Consent might, however, be implied when these third parties are aware of the invitation to communicate and, perhaps, where they also stand to gain from these anonymous communications. For example, employees at a restaurant might be thought to consent to anonymous comments about their performance on suggestion cards left at the table by the proprietor. Customers certainly seem as likely to complain about their server as about the proprietor's menu selections. Similarly, the etiquette of course evaluation forms is the same whether a university requires that they be distributed to students or a professor chooses to ask for evaluations.⁸

A variety of subtle consent arguments may illuminate these conventions and the relationship between consent and identifiability. It is possible that in most employer-employee-informer settings, identifiability is of little value to the employee because identifying a transient customer is unlikely to add much in the way of reliability; when the cost of confrontation is taken into account, the employee may prefer that communications be solicited in anonymous fashion. This may be so because the employee expects that anonymity will bring about a greater increase in positive feedback than in negative feedback (from customers who can use voice without unpleasant confrontation). A waitress at a pancake house learns little from the name of a critical patron. She might better

⁷ The same is true where the information is sensitive, rather than critical, but easy enough to avoid. Thus, anonymity may be strategic, and even strategically relinquished, by one who places personal ads in a newspaper. Responders, in turn, are free to do the same, and both parties can be seen as consenting.

⁸ These examples, and others to follow, also suggest that there is more to the social convention than the idea that anonymity is generally treated with contempt (even though the tradeoff between communication and reliability would sometimes favor anonymity) because in the long run openness is an important check on accuracy.

defend herself to her employer if there are clues as to which customer complained or when the offending coffee was poured, but the content and date of the evaluation form is far more likely to provide that information than is the name of the communicator. It is possible that when there are no evaluation forms, customers are more likely to speak up and to seek out the manager. Either way, the employer can be seen as offering customers multiple feedback options, with the employee actually preferring that customers choose the anonymous method. Employers might like a system in which patrons were told "If you are pleased, let us know by mail (and we can choose how to use or withhold this information from our employees who pleased you), but if you are disgruntled come to the back office and let us know." Meanwhile, the employee might like it best if adoring customers were invited to speak up and disgruntled ones asked to use the mails. Social norms often exhibit a kind of symmetry, and my intuition is that such symmetry operates here. But my narrow point is simply that there is at least a story to be told in which many employees consent to anonymous evaluations running from their customers to their employers.⁹

In other settings, third-party interests are sufficiently valued that we do not pause to contemplate the likelihood of universal consent. We welcome anonymous tips in order to prevent horrible crimes because we value third parties' safety sufficiently to care not at all about the question of whether the subject, which is to say the criminal, consented to anonymous communications. We might prefer identifiability for reasons of reliability, and we might prefer as second best the informer's use of a reliable intermediary who could vouch for the character of the informer while preserving anonymity, but there is no legal or social norm against unintermediated anonymity. In emergencies we take whatever information we can get. Indeed, to the extent that informers are treated as "snitches" within some subcultures, anonymity may there be preferred to identifiability because an anonymous snitch seeks no personal gain, while the identifiable snitch, or rat, is doubly

⁹ Anonymity may also be preferred if it encourages local, rather than more notorious, communication. A faculty member may welcome anonymous criticism from students, although identifiable communications may be yet preferred if there is a perception that an alternative available to the student or colleague is a trip to the dean's office. Even more trivially, we may prefer that passers-by write "wash me" on our dirty cars rather than express their disgust with notes to our colleagues or neighbors. The graffiti is anonymous, but so is the owner of the car to most passers-by.

despised for siding with the authorities against a peer and for profiting in implicit or explicit ways.

Falling between these extremes, just where a predictive tool might be useful, third-party interests are not easily assessed and consent does not therefore seem terribly helpful in explaining tolerances for anonymity. We might say that identification is required of donors to a political campaign but not to most charities because the recipient consents to anonymity in both cases while third-party interests (in fighting corruption, for example) are much greater in politics. But such cases almost inevitably concern legal norms rather than social norms, if such a distinction can be granted, and I defer discussion of legal rules to Part II. For the present, I suggest simply that we should expect a good deal of variety where third-party interests are concerned, and that one way to describe this variety in required identifiability is with the absence of a kind of consent.¹⁰ But I think it a mistake to put too much weight on consent. Consent may help explain many of the settings where anonymity is acceptable—because acceptability follows universal consent almost as a matter of definition—but the challenge is to distinguish among cases where either the recipient, subject, or another affected party does not consent to anonymous communications. Consent is neither a sufficient nor a necessary condition for anonymity, and it does not seem helpful in hard cases or in areas where variety is found.

C. *Intermediation*

1. Filtration As an Alternative to Anonymity

A central theme of this Article is that anonymity is a less acceptable social practice where the informer can use an intermediary to avoid confrontation with the recipient and to convey information about the reliability of the source. This sort of intermediary can be thought of as filtering out the precise identity

¹⁰ By variety, I mean that different legal systems will have different rules, and that even a single legal system may have different strategies for fairly similar problems. See generally Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235, 237-38 (1986) (positing that there will be variety among legal systems when legal rules "are not compelled by behavioral effects"); Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43, 45 (1987) (discussing the variety of ways different legal systems deal with the problem of good-faith purchasers of stolen goods).

of the original communicator but, at least ideally, preserving the value normally attached to identifying that communicator (reliability). The informer who chooses to use an intermediary will normally be identifiable to the intermediary¹¹ but not to the recipient; the intermediary can (as a matter of social norms) normally choose whether to transmit the substance of the communication—without identifying its precise source—to the intended recipient. This theme has normative, positive, and specific predictive components, all arising out of the idea that anonymity is a more useful tool where there is no substitute that both preserves most of the advantages of anonymity, which is to say, encourages communications that would be chilled by the requirement of identifiability, and offers the recipient most of the gain normally associated with identification.

In some cases, the intermediary encourages communications and ultimately serves as a useful filter, even though the availability of the intermediary encourages some additional, unreliable communications. Investigative journalists who use informers, like broadcasters who welcome communications about unsolved crimes, illustrate this sort of intermediation. These intermediaries can be seen as entrepreneurs who bear the costs of sifting through an increased volume of communications in order to profit from consumers who enjoy either gaining information about the results of various communications or observing the intermediation itself.

2. Evaluations

I have already referred to the familiar practice of students evaluating their teachers. The communications are commonly invited in an anonymous format, even though the fear of retribution—where there is also single-“blind,” or anonymous, grading¹²—is fairly low. In some universities there is even a requirement that anonymous student evaluations be solicited and that these be

¹¹ We will see instances where there is value to “anonymous intermediation,” but for the present it is useful to think of the most straightforward filtering process. See *infra* note 21.

¹² There is also something of a practice of students anonymously submitting questions for a review session with their instructor. Here there is no need for reliability, and a serious desire to increase communication. The social norm rises to the occasion. It is interesting that sometimes such notes from students will begin with “My study group is confused about . . .” The intermediation theme seems to have permeated social instincts here.

factored in to the evaluation of faculty members. At the same time, when committees focus on a faculty candidate for promotion or tenure, it is common to supplement the information received from these anonymous course evaluations with nonanonymous interviews of students who have recently taken courses with the teacher who is a candidate for promotion. These student interviewees are identified to the interviewer¹⁵ but not to the candidate, even if the candidate reads the committee's report as part of, or following, the evaluation process. Somewhat similarly, evaluative letters that are solicited from faculty reviewers at other universities are normally anonymous in the sense that the candidate either has no access to these letters or reads them after the identities of these referees have been obliterated. In contrast, the committee that solicits these reviews, the university administrators who review promotion decisions, and perhaps the faculty that votes on promotion can all identify the communicator. These are straightforward examples of what I will call intermediation, or filtration. Intermediation is often a preferred alternative to anonymity. The information

¹⁵ While impersonal interviews would be possible, there seems to be no reason for such acoustical separation. Put differently, anonymity may provide "information" in some settings, such as where there is the fear that identification will bias the listener. In this context, anonymity cleanses the signal of previous associations. This is presumably part of the argument for anonymous grading if not for anonymity in general, or at least in the "public sphere." Compare Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 640 (1990) (noting that anonymous public discourse allows speakers to "divorce their speech from the social contextualization which knowledge of their identities would necessarily create in the minds of their audience") with Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 94 (1991) (discussing John Stuart Mills's objection to the use of the secret ballot) and Hendrik D. Gideonse, *Letter to the Editor*, THE NEW REPUBLIC (n.d.) (on file with author) (chastising an unnamed faculty member at Harvard for submitting an anonymous opinion, said to be based on Harvard experience, because "[f]or [an] opinion to be attended to, it is crucial to know the source").

It is interesting that anonymous submissions or auditions are regularly sought in architectural competitions, wine tastings, and orchestral hiring, but not in university hiring nor in many other settings. There is, of course, often anonymous refereeing of manuscripts for scholarly journals and university presses. The editor is an intermediary who knows the identities of those who are involved, evaluates their reliability, and has the power to withhold some information. There are studies of how accurate reviewers are at guessing the identities of the authors of these manuscripts. See, e.g., Rebecca M. Blank, *The Effects of Double-Blind Versus Single-Blind Reviewing: Experimental Evidence from the American Economic Review*, 81 AMER. ECON. REV. 1041, 1051 (1991) (finding that 45.6% of authors of blind papers in experiments could be identified).

provided by these evaluators is more valuable when identities are known,¹⁴ but most of the reliability gain, if it can be called that, can be captured simply by identifying each communicator to the intermediary.¹⁵

These examples do not on their own make the case for my central thesis, but it may be useful to set much of it out at this point. One claim or observation is that anonymity is an accepted social practice not when it is complete but rather when there is anonymity as to some recipients or subjects but identifiability to a responsible intermediary. This sort of intermediation is found acceptable where it encourages communication without an excessive sacrifice of reliability. A more complicated claim is that complete, or unfiltered, anonymity is most foul where the communicator could have operated through an intermediary. The contrapositive claim is that where intermediation is unavailable anonymity is more tolerable. The examples involving student and peer reviews support the first assertion.

¹⁴ The gain may come from knowing the student, from knowing the student's grade in the course given by the faculty member in question, from the presence of a bond between the interviewer and interviewee, or from the ability of the interviewer to discern the mood or attitude of the interviewee towards the candidate or other matters. All these possibilities have counterparts in other settings where the source of a communication is identified.

¹⁵ It is of course possible that the student-interviewee and faculty member who is being evaluated have a special relationship, negative or positive, such that the filtering process destroys the constructive (rather than evaluative) value of the communication. My point is not that filtering is either a perfect substitute (with collateral benefits) or a dominant strategy, but rather that it is plausible that on average its positive affect on communicative activity greatly exceeds the losses it generates in terms of reduced reliability. In turn, my claim is that this conclusion may lead to a distaste for anonymity, at least where intermediation is possible.

Note, finally, that in the case of students' evaluations there may be no net loss in reliability from intermediation (with the anonymity of the interviewee preserved insofar as the subject is concerned) because a subject who was informed of the identities of interviewees might be expected to issue warnings or vetoes with regard to interviewees known to have negative sentiments but to say nothing when the potential interviewees had positive bonds. Nevertheless, it is apparently common for tenure candidates to have the opportunity to veto proposed outside faculty reviewers. Perhaps the asymmetry is mitigated by the professional and ethical practice of disclosing one's relationship with the candidate at the outset of a review letter. Still, I have never seen an outside review letter in which the author reveals that he or she had previously communicated to the candidate enthusiasm for the latter's work (so that the candidate may discourage the use of some reviewers without discouraging the use of those known to be positively inclined).

3. Intermediation and Consent

I have suggested that intermediation plays an important role in preserving much of the reliability that anonymity sacrifices. Even where reliability is lost through anonymity, consent may open the way for its acceptability. In some settings, consent may be revealed through intermediation, and intermediation may encourage rather than discourage anonymous communications.

Consider the consent that is often implied where the return of lost or stolen property is concerned. Someone who finds or who himself stole something belonging to another can normally return the property anonymously. Put more academically, we might disapprove of the theft or of the failure to return what has been found, but we so prefer the return of the item (*sans* confession) to its retention that we cannot say that there is a social norm against returning the item anonymously (simply because of the stronger social preference for a world with no theft or with return combined with confession).¹⁶

Where the owner seeks to encourage return by promising a reward, complete anonymity becomes difficult if not impossible. The owner may promise "no questions asked," but the "communicator," or finder, or thief-turned-finder, runs a substantial risk in claiming the reward. An obvious solution for nearly all the involved parties, assuming the owner honestly prefers an increased probability of return to an increased chance of apprehension, is for the finder to use a reliable intermediary who is beyond suspicion and who can effect the exchange of missing property for reward.¹⁷ We might take the familiar "no questions asked" expression to mean that an honest intermediary who is approached by a finder should not on principle decline to serve as intermediary, inasmuch as the owner consents to favoring the value of a return more than that of discouraging theft, searching for the thief, or administering a lecture on integrity. There is in this way a modest role played by

¹⁶ The owner surely consents to the anonymous return. We could imagine a world or a norm that strongly discouraged making or accepting an anonymous return in order to encourage a return with confession. It is thus conceivable that third-party interests against theft could vitiate consent. We can either assert that our own social experiences suggest nearly universal consent (as a kind of second- or third-best solution) or repeat the idea that consent is an ad hoc, ex post explanation.

¹⁷ I frame this solution in terms of the finder's choosing intermediation because an owner who named an intermediary in order to encourage returns would often frighten away a finder who feared that this intermediary would prove to be an agent of the owner and would not preserve the finder's anonymity.

intermediaries in facilitating anonymity (and therefore some activity or communication) where the recipient consents.

It is tempting to expand on this link between intermediation and consent with the suggestion that intermediation may also serve to assess consent. Intermediation might not only facilitate consensual transactions but also (earlier in conceptual time) establish the existence or absence of consent. Imagine, for example, that *A* hesitates to present an acquaintance, *B*, with evidence that *B*'s child has a gambling or substance-abuse problem. *A* might turn to *B*'s friend, *C*, if only to assess whether *B* is the sort of person who wishes to receive this information. *C* may be a close enough friend of *B* that, if *C* chooses to relay the information to *B* without revealing its source, it is unlikely that *B* will suspect that *C* is a spineless informer simply pretending to be an intermediary. And *C* may instead decide that *B* would prefer not to receive this communication from any quarter, or *C* may choose to encourage *A* to communicate directly with *B*.¹⁸ In this sort of case *A* may be encouraged by social norms to avoid anonymity not—or not simply—in order to encourage direct communication with the recipient but rather to encourage intermediation by a party with better information about the recipient's preferences. Put differently, we have seen that anonymity may be discouraged because the communicator can at a low cost provide the recipient with better reliability (and little loss in the volume of communication) by using an intermediary, and now we see that another gain from intermediation might be the intermediary's ability to assess the recipient's preferences. It is possible that an intermediary would advise the informer to proceed anonymously, and my sense is that this sort of anonymous communication would not be regarded as cowardly or as socially inappropriate—at least as compared to one sent without the advice of an intermediary who knew the recipient well.

One problem with this view of intermediation as a means of assessing consent is that knowing someone well does not mean that one can predict his or her preferences with respect to receiving information about sensitive topics. Such situations do not often

¹⁸ *C* may also decide to ask *B* whether *B* would like information that has come to *C*'s attention regarding *B*'s family. The problem with this sort of hypothetical question, of course, is that the question produces anxiety. *B* can hardly turn down the offer and continue life as before. A more general point is that gossip may serve a useful social and private function, but many people would (if they could choose) prefer not to be the subject of any gossip.

arise and do not much resemble other observed behavior. If so, intermediation may preserve reliability, but it does not make headway on the consent front. Another problem is that intermediation can make things worse, which is to say the recipient may have objected to intermediation itself because the information is now in the hands of one additional party and this may serve further to humiliate the recipient. If the informer chooses an intermediary that is sufficiently distant from the recipient or subject so as to avoid the risk of humiliation, then this intermediary is also unlikely to have any special perspective on the likelihood of consent.

One way to focus on the consent aspect of intermediation is to remove the reliability gain by considering an example where complete anonymity does not sacrifice reliability. If *A* has stumbled across a photograph of *B*'s child engaging in a crime, *A*'s use of an intermediary, *C*, is unlikely to improve reliability because the picture is worth a thousand words. On the other hand, *C* may know enough about *B* and *B*'s parenting experiences to have some insight into the question of whether *B* (or even the child) would want the picture sent. *B* may wonder about the sender's motives, but a well-written note from the sender will do as much to alleviate these anxieties as a guarded report from *C*. And any comparative advantage enjoyed by *C* in assessing *B*'s reaction to receiving such information, anonymous or otherwise, is likely to be offset by the added anxiety experienced by *B* in learning that both (unnamed) *A*, and now *C*, know of *B*'s problem. In some situations *C* (and *A*) may have the additional option of confronting not *B* but perhaps *B*'s child, threatening disclosure to the parent (or to another suitable party) unless the wrongdoer takes a variety of rehabilitative steps. I think this is the best case for intermediation, but again I think it rare that a chosen intermediary will have enough insight into *B*'s family to improve things much. I am inclined to conclude that intermediation is only useful where it avoids the stark tradeoff between chilling and reliability—and that it does little for consent. But perhaps the more academic thing to say is that the matter is sufficiently murky that we should be unsurprised (or even pleased) that no strong social norm has evolved to govern this sort of situation. People who find themselves in *A* and *C*'s circumstances report serious doubts as to how to proceed. Only the most optimistic observer would say that all ends well when these people continue to pass the buck by consulting other "intermediaries," thereby increasing the probability

that social gossip will in the long run deter misbehavior and generate social harmony.¹⁹

4. Pseudonyms

a. *Publishers As Intermediaries*

Consider next the use of pseudonyms by authors of fiction and nonfiction. Pseudonymously written work often goes beyond anonymity either because the fact that a communicator seeks to remain unidentified can itself provide information to the recipient or because the pseudonym affirmatively misleads the recipient. A reader might, for example, gain insight from the fact that an author's pen name entailed a gender switch, or more accurately a paper gender switch. But in many cases a pseudonym promotes a kind of neutrality or avoids identification not by one's readers but rather by one's employer or family.²⁰ Most readers will not feel wounded by this kind of anonymity, although there is something of a troubling asymmetry in the fact that the writer might be more likely to choose to remain anonymous if the work offends or fails to gain acclaim.

The general acceptability of pseudonyms, even where an author attempts to mislead readers, supports the intermediation theme because the pseudonymous strategy is pursued under the publisher's watchful eye. The publisher vouches in a sense for the harmless or even noble intentions of the author.²¹ The pseudonymously

¹⁹ Indeed, because gossip is used to regulate information within a relatively small sphere of intimate social relationships, appropriate behavior on the part of *B* and *C* may well vary according to the norms followed by *B* and *C*'s peers. On the role of gossip in society, see generally Maryann Ayim, *Knowledge Through the Grapevine: Gossip as Inquiry*, in GOOD GOSSIP 85 (Robert F. Goodman & Aaron Ben-Ze'ev eds., 1994) (describing gossip as an effective method of communication); Nicholas Emler, *Gossip, Reputation, and Social Adaptation*, in GOOD GOSSIP, *supra*, at 117 (describing gossip as integral to patterns of human social structure).

²⁰ The social acceptability of this practice derives either from the sense that communication is encouraged while the author's acquaintances cannot be hurt much by what they do not know or from a devaluation of the sentiments of disapproving and deceived observers.

²¹ The intermediation theme suggests that we might always like publishers to be identified. But inasmuch as First Amendment and other concerns might prevent strong-form regulation of all publishers, it is noteworthy that identification is required where the government has some excuse for regulation. See, e.g., 39 U.S.C. § 3685 (1994) (requiring identification of publishers who enjoy preferential postal rates for periodicals); see also *Lewis Publishing Co. v. Morgan*, 229 U.S. 288, 312 (1913) (upholding a statute requiring disclosure in return for postal discounts and expressing

written *Federalist Papers* are perhaps the best example of this idea.²² Reporters who use unnamed sources, or who themselves write under bylines, reflect the same social norm. Reporters' sources are taken up in Part II.D below, in the context of a discussion of the legal regulation of social norms. I embark on something of a detour now, by inquiring further into pseudonyms and intermediation by publishers. The central strand of this Article can be rejoined in Part II, which turns to legal norms governing anonymity.

b. *Signalling*

I have already come close to suggesting that the examples presented thus far reflect a robust social norm such that communicators whose anonymity and information are filtered through responsible intermediaries are regularly tolerated. Pseudonymous publications, however, might be interesting or different because false claims of authorship can affirmatively mislead a reader. If an author's anonymity and perspective are made explicit, as in "written by 'X,' a detective in the L.A.P.D.," there is little more to say inasmuch as the publisher presumably warrants that the author is indeed as advertised. Anonymity may protect the author (or simply intrigue the reader) while filtration preserves much of the reliability that is normally associated with identification. If there is intentional misidentification, as where 'X' has never seen the inside of a police station, acceptability depends on what is intended and accomplished by this fib. There are easy cases where misrepresentation is simply offensive or even legally actionable, and the complicity of an intermediary makes the matter worse rather than better.

The use of pen names to misidentify authors is especially common with respect to gender, and especially controversial with respect to race and ethnicity, because the author's "true" perspective may be misidentified. In these circumstances it seems that readers (once informed) are likely to object more strenuously to an author who pretends to be an "insider" than they are to an author whose pen name or other suggestions mislead them into thinking the author is an "outsider." A Senator or a diplomat or a presidential advisor might, with little objection, attach a pen name to a mystery novel involving political or military intrigue.²³ Similarly,

the public's right to know the origin of information).

²² See *infra* notes 37-39 and accompanying text.

²³ See ADRIAN ROOM, A DICTIONARY OF PSEUDONYMS AND THEIR ORIGINS, WITH

a lawyer or judge involved in a case might be the unidentified author of a book about that case.²⁴ When the book proves successful and the author's identity is revealed, the public reaction appears to be positive or neutral. The potential for objectionable strategic behavior, which is to say the likelihood that the author would have remained anonymous had the book been a commercial disaster or had it proved to be offensive to a substantial subset of readers, seems offset by the likelihood that the author may have chosen a pen name in order to compete on an equal playing field with less well-positioned authors. This form of pseudonymity or misidentification may, after all, invite honest criticism and sacrifice sales to buyers who would purchase the book only because of the celebrity status of the author. It is therefore arguable that the insider who pretends to be an outsider offends no social norm because any strategic gain to the author is more than offset by the perceived losses, or even the possibility of noble aims on the author's part.

In contrast, the outsider who misleads readers by pretending to be an insider can easily benefit from the charade and normally offers the reader no corresponding gain. At best, the reader might gain self-knowledge, but it is unlikely that the reader would hypothetically have consented to this style of education. My sense is that greater offense is taken when the misrepresentation is of "insider" status. Thus, an author who pretends to be a member of an ethnic or racial group when writing about that group is likely to give offense.²⁵ The same may be true of one who pretends to be from an earlier era, although this misrepresentation may be less offensive in that it does not usurp another's place.²⁶ The author's

STORIES OF NAME CHANGES 199 (1989) (explaining that John Le Carré is a pseudonym for David John Moore Cornwell, who wished to conceal his identity as a British Foreign Officer when writing spy novels); see also ANONYMOUS, PRIMARY COLORS (1996) (comprising a thinly veiled "novel" about President Clinton's campaigning and advisors written by apparent insider(s)).

²⁴ Thus, John D. Voelker wrote *Anatomy of a Murder* based on a case in which he served as defense counsel. The case took place in 1952; the author was appointed to the Michigan Supreme Court in 1957; and the book was published under the pseudonym Robert Traver in 1958. See *John D. Voelker Is Dead at 87; Author of 'Anatomy of a Murder'*, N.Y. TIMES, Mar. 20, 1991, at B9.

²⁵ See, e.g., FORREST CARTER, THE EDUCATION OF LITTLE TREE (1976) (describing the author's childhood in the Tennessee mountains where he was reared as a Native American by Cherokee grandparents with no connections to the Cherokee Nation). On the subsequent controversy surrounding the book, see Dan T. Carter, *The Transformation of a Klansman*, N.Y. TIMES, Oct. 4, 1991, at A31 (revealing Forrest Carter to be a former Klan member); Felicia R. Lee, *Best Seller Is a Fake, Professor Asserts*, N.Y. TIMES, Oct. 4, 1991, at A11 (same).

²⁶ See David Streitfeld, *Spoof, Hoax or Freudian Slip?*, WASH. POST, Apr. 6, 1989, at

defense is that a reader's biases are exposed by the deception, but inasmuch as that is true of many successful deceptions it seems fair to conclude that the cost of deception, in terms of reducing the value of the signal of (all) authorship, is perceived to exceed the gain from testing the value of these signals with false signals. We would not, for example, think much of a doctor or university student who obtained that position with falsified credentials and then later explained that the deception was socially beneficial in that it provided a test of whether the credentials normally required for the position were sensible ones. Similarly, if an author self-identifies as a member of a racial, religious, or ethnic group, and then inspires a reader who genuinely thought that only a real insider could have provided such a moving tale, the reader may understandably be wounded by a subsequent revelation that the author only pretended to be an insider of the kind described. The author might argue that purer anonymity, which would have left the reader to wonder whether the author was an insider or not, would not have tested the reader's preconceptions. But the reader's response is that signals can be valuable, and that it is the reader's and not the author's place to decide how much to devalue these messages in order to test their validity.²⁷

A highly optimistic, but plausible, view of the acceptability of misleading pseudonyms is that the existing combination of legal and social norms is sufficiently rich to provide an optimal degree of signalling and testing. The pretender stands to gain in these settings so long as no one discovers that the pretender is no licensed doctor or Native American and so forth.²⁸ Even a pretender who is unmasked may emerge better off than before. There will therefore be a certain amount of misleading signals in order to sell books, make a point, or enjoy prestige and celebrity status, as the case may be. Legal rules will discourage some pretending, with the sanctions varying according to the expected harm. One who

B5 (reporting that a Yale history professor had written an unidentified work that appeared to be by a contemporary of Freud's and appeared to buttress positions that had been advanced by the true author).

²⁷ Of course, we are more sympathetic to undercover police work and other forms of misleading pseudonymity the more we think that there is a great social gain from deception and the more we devalue the preferences or costs to the group that is infiltrated. We would be offended, I think, by the idea of the police infiltrating a religious hierarchy in order to check for unlikely violations of law.

Note that businesses do occasionally choose to employ experts who will test their security systems by pretending to be insiders.

²⁸ See *supra* note 25 and accompanying text.

pretends to be a licensed surgeon may go to prison, a self-styled valedictorian and master of unknown languages may be required to disgorge scholarship money to a duped university,²⁹ while one who deceives readers and critics as to his membership in a racial or ethnic group is likely to suffer no legal sanction at all. The relevant intermediaries may suffer as well: a hospital may be sued or may lose reputational value for its failure to detect an unlicensed surgeon in its operating theater, a university may be ridiculed for giving superior grades to a pretender, and a publisher that plays along with an author's manipulative deception might suffer economically.³⁰ In some of these cases, as where a university wins in court but is ridiculed for its relationship with a con-artist-student, the "successful" complainant itself suffers some reputational loss—and this may provide socially useful feedback as to the preconceived value of signals. More generally, because deception threatens the value of future signals, most deception is penalized by legal remedies or social norms or both—although there survives some incentive to undertake deception that promises private gain and, perhaps, some socially useful function as well.

c. *Signalling and Intermediation*

Perhaps the most subtle incentive in these matters is the ex post judgment of the intermediary. A good example is found in the practice of "cross-penning" by female authors using male-sounding pen names. Cross-penning runs in both directions and has numerous distinct historical contexts and causes, but at least one

²⁹ See, e.g., Erin Hallissy, *Expelled Yale Called Victim of Snobbery*, S.F. CHRON., Apr. 13, 1995, at A8 (reporting on a student charged with larceny for falsifying admissions documents); Richard Hoffer, *The Great Impostor*, SPORTS ILLUSTRATED, Jan. 15, 1996, at 76 (reporting on a 30-year-old University of Texas student who faked his identity in order to play Division I college football); *Trickster Who Fooled Princeton University Receives 9-Month Sentence*, Associated Press, Oct. 24, 1992, available in Westlaw, 1992 WL 5322556 (reporting on a student who pled guilty to forging admissions documents and swindling Princeton out of \$22,000 in scholarship money). Students of contract law have thought about this problem in the context of Roddy-Eden v. Berle, 108 N.Y.S.2d 597, 599 (Sup. Ct. Spec. Div. 1951), where the court refused to enforce a ghost-writer's contract when the celebrity-principal decided not to publish the book.

³⁰ It is a bit difficult to imagine a publisher being harmed; I can barely imagine a class action by misled purchasers of a book. *But see* Freedman v. Arista Records, Inc., 137 F.R.D. 225, 229 (E.D. Pa. 1991) (involving a class action attempt by purchasers of Milli Vanilli albums who claimed to suffer from misrepresentation of the identity of the singers).

strand involves the use of male-seeming pen names in order to overcome preconceptions about the role of women.³¹ At a superficial level the deception is harmless and very different from that discussed in the preceding section because in most cases the author does not (dishonestly) claim or intend to write from a male perspective. But of course the very reason for cross-penning may be that some readers discriminate against female authors because these readers regard all topics as infused with questions of gender (albeit in a pre-modern way). My guess is that the social norm takes account of this by generating a slight preference for anonymity rather than misidentification. Initials (as in P.D. James) are preferred to affirmative deception, and the continued presence of male authors who use their initials provides the necessary camouflage.

The intermediary's *ex post* judgment comes into play as preferences change. When we look back on an era in which women cross-penned because there was an insufficient market for books ostensibly authored by women, we tend to blame the market, which is to say readers of that time period. We may even glorify the intermediaries, such as publishers and agents, who helped authors break or at least evade this cultural barrier. In any event, given our disapproval of the preferences that generated deception by some authors and intermediaries, we may even credit successful deceptions with changing those preferences expressed in the market. We may not glorify all deceptions regarding gender, race, religion, and ethnicity, but we count the deceivers as among the victims.³²

³¹ One of many well-known examples of cross-penning is Amandine Dudevant's writing as George Sand. There are also many examples of ambiguous-penning, discussed presently in the text, including the Brontë sisters' writing as Currer, Ellis, and Acton Bell. See ROOM, *supra* note 23, at 89 (quoting Charlotte Brontë's expression of her fear "that authoresses are liable to be looked on with prejudice" (citation omitted)). For some additional discussion of the reasons for cross-penning, see Joyce C. Oates, *Success and the Pseudonymous Writer: Turning Over a New Self*, N.Y. TIMES BOOK REV., Dec. 6, 1987, at 12; *infra* note 36.

³² Compare CARTER, *supra* note 25, with JOHN H. GRIFFIN, BLACK LIKE ME (1961) (describing racial prejudice from the point of view of a white journalist, undercover as a black man, hoping to gain a perspective on racial prejudice). See also Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1801-02 (1989) (contending that one's status as a member of a racial minority should not be considered an academic credential) and subsequent criticisms, including Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864 (1990), Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872 (1990), and Leslie G. Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878 (1990).

However, hindsight is often not so kind to the nonconformist instincts of the deceivers. In such cases I would expect the intermediary to suffer serious reputational loss, and an optimistic view is, once again, that this threat leaves the system as a whole in something of a decent equilibrium. Publishers have some incentive to deceive in order to exploit the (sometimes wrongheaded or offensive) preferences of readers, but if publishers mispredict future preferences, they will suffer some loss much as other misrepresentations are penalized.³³ I can barely imagine a world in which scandals eventually caused publishers and authors to submit their planned deceptions to a "committee on human experimentation" because in some sense these deceptions or experiments resemble other "research" that has come to be constrained by outside reviews.

If the preceding example can be said to represent a case where the intermediary serves as something of a filter, with a modest incentive to predict future social preferences correctly, then a somewhat different analysis is required for the conceptually troubling (if morally trivial) case where the intermediary actually corrects a deception or misunderstood signal. One useful and closely related example concerns the habit of many consumers who prefer one gender or the other for given services.³⁴ Thus, there are men who strongly prefer detective novels that are written by men, and women who prefer such novels that are written by women. No doubt there are cross-reading preferences as well. It is easy to imagine that, on average, men and women have different tastes in character development and plot, and that authors have comparative advantages, often based on their own gender, in satisfying those tastes. Over time, and setting aside for an instant the presence of deceptive claims of authorship, some men may learn that they generally prefer novels written by men. If as many women as men

It is also interesting to note that the plaintiff in *Plessy v. Ferguson*, 163 U.S. 537 (1896), Homer Plessy, was apparently selected as name-plaintiff because of his status as a light-skinned black man. "Because phenotypically Plessy appeared to be white, barring him from the railway car reserved for whites severely impaired or deprived him of the reputation of being regarded as white." Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1747 (1993) (footnote omitted).

³³ I do not mean to rule out principled publishers suffering the same fate. A publisher may attempt to defeat readers' preferences because the publisher thinks them wrong, even though the publisher does not expect to gain from its deception.

³⁴ My example continues the focus on the identities of the readers and authors, but the point is quite general for other services and for other stereotypes or characteristics. I do not, however, mean to imply that all such examples are equally acceptable or repugnant.

read detective novels, if women are as likely to prefer novels written by women as men are likely to prefer those written by men, and if there is no shortage of authors of either gender, then there will be little gain from deception as to an author's sexual identity. Cross-penning may be fun, but publishers (and authors) will have little economic incentive to practice this deception because they profit from matching authors with readers who will like their books. There may be an occasional author who is better at writing in the other voice, in a manner of speaking, and in these cases author and publisher will have an incentive to deceive readers—but most readers will not be wronged by this signal because the intermediary (and indeed the communicator) has every incentive to dupe the reader only insofar as the reader would wish to be duped.

There are, to be sure, weaknesses in this argument about harmless or even efficient cross-penning. Some readers may value honesty for its own sake. Others may have a stronger than average preference and sensibility for authorship of one gender or the other; the publisher may satisfy the market average, but this reader may lose because an honest signal as to authorship is especially valuable to this reader. But these problems seem small compared to the general point that if we grant some modest assumptions, intermediaries and authors will engage in a level of deception that is close to what many of their readers would like. There may be some overexperimentation, at least from the readers' perspective, but the market ought to work about as well as it works in most settings.³⁵

Even when we relax some assumptions, so that there is gain to authors from cross-penning, intermediaries may discourage harmful deception. If, for example, the buyers of romance novels strongly prefer female authors (as they seem to), male authors will have an incentive to cross-pen. Again, so long as there are plenty of female authors turning out this product, publishers have little incentive to deceive readers unless their judgment of the actual manuscript is that it will please the intended audience. I suspect that most readers would not, *ex post*, feel wounded by this deception. The name that appears on the book jacket is thus a socially and economically constructed signal. "Mary Kingsley" and "Patricia Grosvenor" are no more deceptive in the romance genre, whether

³⁵ I may go to Macy's because I have come to like their product selection and displays, and then they may "deceive" me by experimenting with different images. But on the whole their incentives and mine are fairly well aligned.

they are really male or female authors, than are Marilyn Monroe, Mountain Dew, and Hulk Hogan in others.³⁶ Entrepreneurs have every incentive to exploit preferences with these marketing tools, but inasmuch as they also have incentives to put products in packages that match consumer expectations, the deception problem is fairly small.

One nice thing about the role of publisher as intermediary is that there is little danger of a false intermediary. When one guest sees another steal from their host, there is the danger that the informer will be regarded (by the host or a chosen intermediary) as a suspect. Indeed, the act of communicating may draw attention to this guest and raise the likelihood that others will think of this person as the wrongdoer masquerading as a quasi-rescuer. Put differently, an argument for the anonymity tool in this guest-host-pilferer setting is that intermediation may do little good. If the social norm tolerated anonymous communications of this sort between guest and host, then I would be able to assert that we had support for the claim that anonymity is more acceptable when more effective intermediation is unavailable. I have already alluded to the conclusion that the social norm against anonymity may be overbroad (assuming that it extends, as I think it might, to this situation); anonymity would be a useful tool, and in harmony with other features of our legal and social system, in this guest-host setting. In contrast, a publisher that distributes novels is obviously not fronting for itself and is therefore a suitable intermediary with little risk of casting itself as a suspect. Similarly, the newspapers that published the *Federalist* and *Antifederalist* essays, under names like Publius and Brutus, were obviously not fronting for themselves.³⁷ Pub-

³⁶ Another example is the use of serial-authorship, where one author takes over from another and signals the continuity of style. There is some deception because readers might have been preferred to be told that the present author is, for example, writing in the wake of an earlier casebook author or, more popularly, in the style of Carolyn Keene, but the publisher has a fairly good incentive to match readers with styles. See Patricia L. Brown, *A Ghostwriter and Her Sleuth: 63 Years of Smarts and Gumption*, N.Y. TIMES, May 9, 1993, §4, at 7 (explaining that Mildred Benson was the original author of the Nancy Drew series under the pen name Carolyn Keene); Susan Chira, *Harriet Adams Dies; Nancy Drew Author Wrote 200 Novels*, N.Y. TIMES, Mar. 29, 1982, at A1 (discussing how Edward Stratemeyer and later his daughter, Harriet Stratemeyer Adams, took over the authorship of the Nancy Drew series and contributed to the Bobbsey Twins series).

³⁷ The authorship of *The Federalist Papers* seems to have been a well-kept secret at the time of their publication, and it does appear likely that the editor of the *New York Independent Journal*, where the essays appeared, must have known the authors' identities. See JOHN C. MILLER, ALEXANDER HAMILTON: PORTRAIT IN PARADOX 189

lishers can thus generally serve as effective intermediaries and, where there is such filtration, the gains from the remaining anonymity often outweigh the costs. In the case of *The Federalist Papers*, for instance, one source of gain was the separation of serious discourse from interpersonal feelings.³⁸ Moreover, the true authors were hardly outsiders pretending to be insiders. In the case of the social guest with a message for the host, anonymity is either unacceptable or is acceptable only because intermediation is ineffective. My claim must be that the Federalist cause would have been damaged if those essays, with authors unidentified, had been mailed directly to citizens.³⁹

II. LEGAL AND SOCIAL NORMS

A. *Law's Reluctance Regarding Intermediation*

I have operated at a fairly conceptual level thus far in suggesting (1) that intermediation is sufficiently useful in improving the tradeoff between chilling and reliability of communications and that a social norm against direct anonymity may be explained as a means of encouraging intermediation;⁴⁰ (2) that this social norm, like most rules, may be somewhat overbroad; (3) that pseudonymity is more complex when it misleads but that intermediation is a robust tool in understanding the acceptability of pseudonymous publications; and (4) that, while consent is a means of understanding some acceptable anonymity and some intermediation, it is often not easy to know when and whose consent ought to be implied. I have also

(Greenwood Press 1979) (1959) (discussing the secrecy surrounding the authorship of *The Federalist Papers*).

³⁸ Excellent sources are cited in Kreimer, *supra* note 13, at 83 n.229. Such sensitivities might explain the common practice of pseudonymity in that era, for "[b]etween 1789 and 1809 no fewer than six presidents, fifteen cabinet members, twenty senators, and thirty-four congressmen published political writings either unsigned or under pen names." Note, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084, 1085 (1961).

³⁹ If this is unlikely, then I think it is only because we are more concerned with free communication than with reliability where political speech is concerned. See *infra* notes 50-54 and accompanying text (comparing the Supreme Court's view of anonymous political speech to other speech).

⁴⁰ Given the nature of this symposium, I do not address the question of how such norms might evolve or whether there is even a case to be made for a sociobiological argument. My own intuition is to think of social practices as developing because of some function, and then as surviving if this practice is not destructive. This perspective is reflected in such things as legends of the origins of cuffs on trousers, buttons on sleeves, or shaking hands when making an acquaintance.

sought to employ fairly representative and mundane examples of unidentifiable communications and of "successful" intermediation. I have not, however, said much about law. Indeed, it is fairly obvious that in the situations I have discussed where anonymity is abhorred, it is, nevertheless, with only rare exception, perfectly legal. The social norms at issue seem to have no more relationship with legal rules than do the social norms concerning the use of butter knives and napkin rings. There are, however, a fair number of legal rules about anonymity. It is thus one of those rich topics where legal norms are intertwined with social norms. Much as social norms regarding property rights are of greater interest to lawyers than those dealing with table etiquette, norms regarding anonymity will also parallel (and diverge from) the law in interesting ways.

My claim in this Part is that legal rules reflect the same concerns about the tradeoff between reliability and chilling effects as do social norms but that law devalues or often simply cannot accommodate intermediation.⁴¹ We might think of intermediation as one of many mechanisms that thrive in informal contexts, but that are not easily formalized.

Consider, for example, voting by jurors in criminal and civil trials. There is again a tradeoff between communication (in terms of honest revelation rather than quantity) and reliability such that it is not obvious whether the votes cast by individual jurors should be discoverable through the polling of jurors or another procedure.

⁴¹ When mass intermediation is logistically impossible, its absence is not particularly interesting. Thus, anonymous (and critical), or "poison pen," letters are not illegal in the United States—although they may be actionable where the threat or other matter contained would be legally objectionable if made nonanonymously. *See, e.g., C.R. Bard, Inc. v. Wordtronics Corp.*, 561 A.2d 694, 696 (N.J. Sup. Ct. Law Div. 1989) (noting that poison pen letters maligned a company's reputation). Other legal systems, however, have proposed criminalizing such behavior, although I have not found a rule where anonymity, as opposed to something like "causing needless anxiety," was specified as an element of the crime. *See, e.g., THE LAW COMMISSION, CRIMINAL LAW: REPORT ON POISON-PEN LETTERS*, Law. Com. No. 147 (1985) (British law proposal). Even if legal systems can be described as choosing between allowing and prohibiting anonymous letters, in binary fashion, it is not as if one could easily provide for intermediation. The volume of anonymous communications, and the circumstances surrounding each of these, are too great and diverse for the state to provide some censor or other intermediary. Nor could a serious law require that an anonymous sender clear the missive with a "suitable intermediary" to be determined by the sender and then subject to challenge after the fact. In sum, anonymity need not be allowed, but formal intermediation is nearly impossible; therefore, the contrast between legal and social norms may simply follow from pragmatic considerations.

Anonymity may encourage conscientious voting on the part of a juror who is freed of peer pressure or even outside influence from defendants, prosecutors, or litigants. This may even be the case under a unanimity rule because a nonunanimous vote will then be impossible to trace, but it is of course more so with a supermajority voting rule.

The problem with anonymity, however, is that it may facilitate corruption. If, for example, there are one or two holdouts on a jury that requires unanimity, or if there is an acquittal by a jury operating under a supermajority rule, anonymity will complicate post-verdict inquiries. A prosecutor who looks for evidence of jury tampering is assisted by identifiable jury voting, and a juror who accepts a bribe is empowered by anonymity. In short, anonymity effects a trade between accountability and honest communication.

Jury voting in American criminal law is normally identifiable—although in its deliberations the jury might employ secret ballots.⁴² Other systems, including American court-martial procedures, opt for anonymity.⁴³ The conventional wisdom is that this practice protects junior officers from (formally impermissible) retaliation by their superiors, but of course this very argument might be used for

⁴² Most states allow for polling of juries, but not polling of grand juries, which have a tradition of secrecy. See GEORGE EDWARDS, *THE GRAND JURY* 70 (1973); George E. Dazzo, Note, *Opening the Door to the Grand Jury: Abandoning Secrecy for Secrecy's Sake*, 3 D.C. L. REV. 139, 139-40 (1995). As for petit juries, only Oregon limits polling to secret written polls. See *State v. Lehnherr*, 569 P.2d 54, 56-57 (Or. Ct. App. 1977) (finding that the Oregon legislature intended to protect the secrecy and integrity of jury deliberations). Anonymous juries, with identities undisclosed, are occasionally used where an unusual fear of retribution is present. See Ephraim Margolin & Gerald F. Uelman, *The Anonymous Jury*, 9 CRIM. JUST. 14, 14 (1994).

⁴³ On military law, see Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103, 127 (1992) (stating that the *Code of Military Justice* requires supermajority votes for conviction (and unanimity for capital punishment) and employs secret written ballots, counted by the junior member of the panel).

Another example involves the use of the secret ballot in electing member countries to the Security Council. See Anthony Goodman, *Five Countries Elected to U.N. Security Council*, Reuters Ltd., Nov. 8, 1995, available in LEXIS, News Library, Curnws File. The United Nations has also adopted numerous resolutions advocating secret ballot elections in its member countries and elsewhere. See, e.g., *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, [1991] 45 U.N.Y.B. 588, U.N. Doc. A/RES/46/137 [hereinafter U.N. Voting Resolution] (paying homage to the principle that different electoral systems are necessary to suit the needs of different societies but declaring that "the International Covenant on Civil and Political Rights provides that every citizen shall have the right to . . . vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot").

anonymous jury voting more generally. In any event, this variety of practices regarding juror anonymity is unsurprising given the plausible advantages of both anonymity and identifiability.

The reader who has come this far might well wonder whether there is not a role for intermediation in this context. Following the analysis developed in Part I, the advantages of anonymity and identifiability might both be enjoyed in a scheme that called for jurors to record their individual votes with the presiding judge, who would then report only the aggregate result. If a prosecutor or other interested party made a plausible claim of tampering or other corruption, the judge could supervise or unseal and selectively reveal otherwise unidentifiable votes. The example is far from perfect for my purposes because, among other things, it is not as if there is a social counterpart to (the formal law of) jury voting, where pure anonymity is discouraged in order to channel information through an intermediary. Nevertheless, the idea of using an intermediary to improve the terms of the tradeoff between two aims or goods is easy to see in this example.

My positive claim with regard to this and similar examples is, I think, uncontroversial. Making sense of the world it describes will prove more difficult. The positive claim is simply that, although there is room for intermediation in order to gain some of the advantages of anonymity (honest disclosure) without sacrificing too much in the way of reliability (or corruption), the law is much less inclined to encourage or legitimate intermediation than is informal social practice. The law appears to choose between anonymity and identifiability—although there is some flexibility among encouraging, mandating, or permitting one or another of these—with little room for intermediation as a compromise or superior means of combining the best of both. Social norms may well contemplate and even encourage intermediation (between an anonymous communicator and an eager recipient), as explored in Part I, but legal rules seem more binary in nature.

The binary nature of most laws may have something to do with the difficulty in tailoring legal arrangements to individual cases. Social practice does not force guests or authors to communicate through intermediaries, and it does not force these communicators to abide by a single convention; each informer is free to decide whether circumstances call for identifiability or not—and if not, intermediation may be attractive. In contrast, anonymity and intermediation will not mean much for a member of a jury unless fellow jurors do the same. Legal rules may simply be disinclined to

force some jurors into a method of communication. The difference between law and social norms with respect to intermediation may therefore reflect a difference in the range of these two sources of influence on behavior.

B. *Voting Rules, Anonymity, and Intermediation*

I have drawn on the example of jury voting because it involves formal legal rules, variety among these rules regarding anonymity, and an obvious intermediary in the person of the presiding judge—although, as we have seen, our legal system does not use this intermediary as it might to encourage honest revelation. The example suggests that we turn to voting rules more generally in order to facilitate a more direct comparison between legal rules and social norms. Social norms do not govern juries or jury-like decisionmaking (or perhaps are simply not observed in this context), it might be said, while voting schemes under law might seem more fairly comparable to those found in business, collegial, fraternal, or other “informal” settings.

There is nothing startling about the use and disuse of the anonymity tool in formal political life, but there is something puzzling about the comparison between formal voting and informal voting, by which I mean everything other than the legal norms governing political decisionmaking. The binary character of the law with respect to anonymity is plain in the political arena. Anonymity is exalted and demanded in public elections. The secret ballot has in a short time⁴⁴ come close to becoming a universal human “right”; democracies such as ours insist that it ought to be the legal norm in all societies.⁴⁵ Anonymity is thus required rather than

⁴⁴ See L.E. FRIEDMAN, *THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM* at ix (1968) (teaching that the secret ballot was adopted in Massachusetts in 1888 and in the remaining states during the next fifteen years); see also GEOFFREY BRENNAN & LOREN LOMASKY, *DEMOCRACY AND DECISION: THE PURE THEORY OF ELECTORAL PREFERENCE* 217-21 (1993).

⁴⁵ See *DEMOCRACY AT THE POLLS: A COMPARATIVE STUDY OF COMPETITIVE NATIONAL ELECTIONS* 218 (David Butler et al. eds., 1981); see also U.N. Voting Resolution, *supra* note 43, at 588 (affirming the importance of secret votes).

It is interesting that where voting is normally open, it concerns policy or budgetary rather than personnel decisions. See, e.g., VALENTINE HERMAN & FRANÇOISE MENDEL, *PARLIAMENTS OF THE WORLD: A REFERENCE COMPENDIUM* 400-11 (1976) (noting that there is secret voting for the election of many a parliament's president and for the seating or unseating of a member); Mogens H. Hansen, *The Athenian Ecclesia and the Swiss Landsgemeinde*, in *THE ATHENIAN ECCLESIA: A COLLECTION OF ARTICLES* 207, 207-26 (1983). There have also been proposals to use secret ballots

simply accepted in (the legal rules governing) general elections.⁴⁶ In contrast, when voting takes place in representative or deliberative bodies, it is open. The conventional wisdom is that the secret ballot protects voters against threats and reprisals from government officials, employers, and the like, while "open government" allows voters to monitor their representatives.⁴⁷ Expanded into the framework offered in this Article, the conventional wisdom is that the usual tradeoff between chilling information and reliability, sketched in Part II.A, is here entirely skewed in favor of anonymity—although the aim must be uncorrupted revelation rather than more information⁴⁸—because, so long as each eligible citizen is identified only so far as necessary to guarantee that each will cast but one vote, there is no further gain to be enjoyed in terms of "reliability."⁴⁹ It does not matter which citizen voted for which

in the United Nations. For example, a number of member nations cited "economic pressure" in pushing for secret ballot on a vote to extend indefinitely the Nuclear Non-Proliferation Treaty. See Evelyn Leopold, *Open or Secret Vote? Debate Stymies Nuke Conference*, Reuters World Service, Apr. 25, 1995, available in LEXIS, News Library, Curnws File.

⁴⁶ I should not make too much of the mandatory character of anonymity inasmuch as social conventions cannot quite match this kind of requirement. On the other hand, law could make anonymity more optional than it does. It errs on the side of concern for coercion, as by barring a voter from bringing another adult into a voting booth, so that the concern about coercion (or identifiability) might require the casting of an anonymous ballot. That formal legal rules do not go so far where primaries, party registration, or the very fact of voting is concerned suggests that reliability and other values are not beyond consideration. See David Lubecky, Comment, *Setting Voter Qualifications for State Primary Elections: Reassertion of the Right of State Political Parties to Self-Determination*, 55 U. CIN. L. REV. 799, 824 (1987).

⁴⁷ The case for signed judicial opinions may be the same. On the other hand, arguments for an independent judiciary cut in favor of permitting anonymity. In most civil law traditions, judicial opinions are issued anonymously and without dissents. The variety may have more to do with the taste for strong precedents (and judges who will feel bound by their earlier work) than with balancing communication (or honest revelation) and reliability. On judicial opinions, see Ruth B. Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 146 (1990). On the tension between secrecy and disclosure and the application to secret and open voting, see Kreimer, *supra* note 13, at 94.

⁴⁸ The evidence seems to be that the secret ballot decreased voter turnout, so it cannot be said to increase communication in unambiguous fashion. See BRENNAN & LOMASKY, *supra* note 44, at 221.

⁴⁹ And if the system seeks to improve representation by requiring that citizens vote, identification is easily limited in a way that polices this requirement but protects the substance of the vote. The only "problem" is that someone who is required to vote in a democracy (like Australia's) with mandatory voting can simply appear at the voting place but cast a blank ballot. Given that the point of the mandatory rule is to combat a collective action problem, there is thought to be no need to require that the voter choose among the available candidates. Few voters will go to vote and then cast

candidate so long as each voted once and the aggregate count is reliable.

There is nothing necessarily wrong with this wisdom, emphasizing as it does the familiar goods of honest communication and—especially in representative assemblies—reliability, but the uniformity found in these laws is perhaps surprising. There is, for example, more variety in the law governing anonymous political speech. The Supreme Court has recently struck down an Ohio statute prohibiting the distribution of anonymous campaign literature,⁵⁰ but it is perhaps just as interesting that most state legislatures have thought rules requiring some disclosure and accountability were worthwhile and that many foreign democracies prohibit anonymous political campaigning as well.⁵¹ There are of course reasonable arguments for and against anonymity;⁵² the point is that we should expect some variety (and that the relative uniformity of the secret ballot is therefore surprising) and should take note of the law's disinclination to compromise by requiring that campaign literature be identifiable or intermediated.⁵³

Secret balloting may be linked to fears of reprisals, but the law does, of course, permit contributions to political campaigns and endorsements of candidates, although it might fear reprisals against those who failed to contribute to or to endorse the right candidate.

a blank ballot. Put differently, the blank ballots that are cast in such a mandatory system are thought to send a clearer message of protest than do nonvoters in a system where voting is not required. Citizens who stay home may be lazy (or rational) rather than communicative. It would, however, be possible to employ an intermediary in order to accomplish the desired end of extracting an expression of preference from all eligible citizens. Pious citizens could observe the voting process and prevent the casting of blank ballots. Logistical problems aside, there is here another modest example of the idea that legal norms do not much reflect the option of intermediation.

⁵⁰ See *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511 (1995). The case did not address those statutes that attempt to regulate only anonymous publication of derogatory charges against political candidates. See Steven R. Daniels, *Recent Development*, 72 N.C. L. REV. 1618, 1618 (1994) (addressing a case upholding a statute prohibiting the anonymous publication of derogatory charges); see also *Talley v. California*, 362 U.S. 60, 64-66 (1960) (voiding a state statute prohibiting all anonymous pamphlets).

⁵¹ See *McIntyre*, 115 S. Ct. at 1535-36 (citing statutes in Australia, Canada, and England); see also Erika King, Comment, *Anonymous Campaign Literature and the First Amendment*, 21 N.C. CENT. L.J. 144, 145-50 (1995) (noting that 48 states had statutes in 1995 requiring the campaign literature to disclose either the author or sponsor's identity).

⁵² The competing arguments concern deterrence of speech on the one hand and an ability to better evaluate arguments on the other. See Note, *supra* note 38, at 1084.

⁵³ That is, anonymous literature is either permitted or barred.

Moreover, these donors are required to be identifiable, rather than anonymous, although there are laws against excessively (or perhaps notoriously) favoring those who contributed to one's campaign.⁵⁴ There is therefore something interesting, perhaps even inconsistent, about the orthogonal arguments for secrecy and openness. It should not be surprising to find a system that made political contributions anonymous by channeling them to candidates through intermediaries or to find a legal regime that used open ballots but then criminalized reprisals.

That there is, moreover, some loss associated with secret balloting is plain from an examination of the more arresting puzzle of why the secret ballot is so uniformly exalted in the law governing general elections but is only occasionally used in private settings. Even if we exclude cases where semi-open balloting is accompanied by confidentiality norms, so that candidates (for office in a club or class, or for promotion) should not be pained to discover who voted against them, open ballots are fairly common in social settings ("Which movie shall we rent?"), in faculty meetings, and in organizations more generally.⁵⁵ *Robert's Rules of Order*, for example, provides for open voting as the default rule and requires not a mere request but a majority vote to switch to secret ballots.⁵⁶ In the most informal settings, secret ballots would be something of an insult, implying fear of reprisals among friends, but in faculty meetings, for example, the tradeoff between honest communication and a kind of reliability, or responsibility, is quite evident. Actual "social" practices are quite mixed. It is common for a faculty member accustomed to open voting to deride secret ballots, especially in votes on promotion, as cowardly and dangerously hospitable to inappropriate motives, while faculty accustomed to closed voting abhor open voting as an example of overdelegation to

⁵⁴ See *Buckley v. Valeo*, 424 U.S. 1, 64-82 (1976) (upholding a requirement that private individuals report contributions to campaigns). Legal rules requiring parade organizers to register also reflect the absence of the intermediation compromise.

⁵⁵ There may be something of a move toward secret ballots (with purely procedural "intermediaries") in corporate shareholder voting, but this seems to have more to do with removing insiders' advantages in assessing ongoing votes and then bargaining with or pressuring voters (including those who have already submitted proxies but who can now trump them with later-dated ones). See Carol Goforth, *Proxy Reform As a Means of Increasing Shareholder Participation in Corporate Governance: Too Little But Not Too Late*, 43 AM. U. L. REV. 379, 460-63 (1994).

⁵⁶ See HENRY M. ROBERT, *ROBERT'S RULES OF ORDER NEWLY REVISED* 346-48 (1981). Again, the default seems to switch where interpersonal relations are more likely at stake, as in elections of officers or new members. See *id.* at 347.

committees and unsuitable empowerment of deans and regard it as adding to the difficulty of maintaining standards of excellence. The puzzle is that similar arguments do not throw doubt on secret ballots in general elections. Thus, the phenomenon of African-American candidates for political office faring better in polls on the eve of an election, and even in exit polls, than they do in the actual elections, where the anonymity of the voting booth is available, might be thought wisely remedied by open voting.⁵⁷ If there is an argument for suppressing some deeply held preferences in an election, then identifiability may be a useful tool, much as anonymity is a useful tool in allowing the expression of deeply held but publicly unpopular preferences. And if there is no such argument, perhaps because voting is thought to be synonymous with preference revelation, then why are sentiments so different in some faculty meetings and similar settings?⁵⁸

The theme offered in this Article about intermediation, and its important if unstated role in the design of social norms but not in the structure of legal rules, would be vivid if intermediation were common in faculty voting or similar decisionmaking.⁵⁹ Members might record their votes with an intermediary, such as a faculty ombudsman, whose opinion of these colleagues might encourage responsibility on their part. If such intermediation were used to improve the terms of the tradeoff between communication and "reliability," then it would be striking that the law chose secret ballots in general elections and open ballots in representative assemblies, with nothing in between, while social conventions developed intermediation where virtually the same tradeoff was at

⁵⁷ See Les Payne, *The Lies White Voters Tell to Pollsters*, NEWSDAY (N.Y.), Nov. 12, 1989, at 11, available in Westlaw, Allnewsplus Database. But see Thomas B. Rosenstiel, *Inaccurate Poll Results Laid to Bad Polling*, L.A. TIMES, Nov. 9, 1989, at A1, A28 (commenting on elections in New York and Virginia "where polls put black candidates much further ahead than they actually were" and noting that since the majority of "undecided" voters were whites contemplating cross-racial voting, the polled voters were not necessarily lying). For other examples and for discussion of the implications of this occurrence, see Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 734 (1991) (discussing the motivations of anonymous voters and the likelihood that anonymity would generate legislation disadvantaging racial minorities).

⁵⁸ One can barely imagine a wedding at which the minister suggests, "Let anyone who knows a reason why this couple should not be wed surreptitiously pass me an anonymous note."

⁵⁹ I focus on faculty voting because it is familiar to many readers, and I apologize to those who think that social norms that develop in a nonprofit or insular setting are likely to be unrepresentative.

issue. The actual evidence is, of course, much less striking than it might have been. The variety found with respect to open and secret balloting in informal settings is helpful, as is the practice of open voting accompanied by confidentiality with regard to persons outside the decisionmaking group. An optimist might say that the group is the intermediary. There is also something of a practice of registering dissenting views with the dean or chair before a faculty meeting, and this too might be seen as intermediation of the kind introduced in Part I. Finally, there are some interesting anecdotes, or perhaps outliers, that suggest the utility and acceptability of intermediation where social norms govern. One example captures the flavor of these developments. A law faculty which prides itself on collegiality, and virtually always votes openly,⁶⁰ engaged in a search for a new dean. After two outside candidates were interviewed, and several insiders considered, the search committee divided up the resident faculty in random fashion and set about to interview every faculty member with the understanding that preferences (not to mention intensities) could be made confidential between the interviewee and committee member. The method is likely to promote anonymous or even confidential⁶¹ communications as compared to open voting at a meeting where the understanding is that there is to be no discussion with outsiders or with the candidates themselves. The presence of a single intermediary makes it easier to trace any breaches of confidentiality. This sort of intermediation seems to invite rather than taint anonymity because there is some check on reliability and motives. It offers a compromise between communication and reliability precisely where the group is likely to have the greatest anxieties about hurt feelings and retribution, whether conscious or otherwise, after a new dean is elected. The emergence of this polling method may illustrate the tolerance in social practice, as opposed to law, for anonymity where reliability can be preserved.

⁶⁰ It is interesting that the same faculty opted for secret ballots, in the interest of "honest preference" revelation, when there was a call for a resolution regarding divestment from South Africa-related investments in the early 1980s. It is interesting that anonymity emerged where the vote concerned something less rather than more professional.

⁶¹ "Confidentiality" is taken to mean that the substance of a communication is not to be transmitted by the recipient, while "anonymity" means that the informer's non-identifiability is to be preserved while the substance of the communication may be broadcast further.

In sum, voting law and practices offer interesting clues about law, social norms, and intermediation. My suggestion has been that law chooses between anonymity and identifiability, depending on lawmakers' assessment of the tradeoff between revelation and reliability, with little appetite for intermediation as a means of improving the terms of this tradeoff. In contrast, social norms wield the anonymity tool in a way that is sensitive to the value of the companion tool of intermediation. This story has the ring of truth where voting rules are concerned, but it is hardly a neat account. There are at least two reasons for the untidiness. First, if we have correctly identified the tradeoff between anonymity and identifiability, there is something surprising about the uniformity of the secret ballot in general elections. As discussed earlier, this is especially puzzling given the variety found in private voting contexts, even where intermediation is out of the picture.

The second complicating factor is that it is impossible to make much of the lack of intermediation in general elections because practical problems can on their own explain (not the uniformity of secret balloting but) the absence of intermediation. In most general elections there is no feasible intermediary to encourage responsible voting. The intermediary needs to be reliable with confidences and sufficiently authoritative or respectable to bring out the best rather than the worst in voters. The more awesome the figure, the less it is necessary for the communicator to be known to the intermediary or to expect repeat interaction, but a remote figure creates logistical problems where thousands or millions of voters are concerned. For many voters, a local pastor might advance the goal of honest communication salted with some notion of responsibility or reliability. But many pastors will have their own agendas, and their very presence would be counter to our notions of separating church and state. We might pine for the grade school classroom, where voting for class monitor called for closed eyes with heads face down on the desks, and where hands were raised under the teacher's (and one or two cheaters') watchful eyes, but as a practical matter our general elections must either be open or closed, with no such intermediation. There may be something of a surprise in the uniformity we find, but given a stark choice between open and closed voting it is surely not irrational for any given set of lawmakers (or voters) to choose the secret ballot for its general elections, but then open, identifiable voting in its representative bodies.

C. *Legal Intermediation*

1. Judges and Secrets

The quixotic search for an intermediary in general elections, along with the suggestion in Part II.A that judges could intermediate in jury voting, draws attention to those few areas where judges *are* called on to intermediate—in the sense of preserving some degree of anonymity in order to encourage communication while preserving reliability. The best and most familiar examples may be the role of the judiciary in preserving national secrets or other sensitive information in such things as lawsuits involving government decisions, including requests under the Freedom of Information Act (FOIA).⁶² When a judge is entrusted with a requested document in order to ascertain whether it falls under one of the Act's exemptions,⁶³ the judge's role is one of intermediation. If the law had been unwilling to use judges in this manner, it is quite likely that it would have given citizens less power to extract information because fears of important breaches would have loomed larger. Intermediation thus encourages communication. It may also encourage reliability because government officials are more likely to respond to requests for information with complete and unfalsified documents if they know that judges will monitor their compliance.

Similarly, there is room in our legal system for anonymous litigation where disclosure threatens serious harm.⁶⁴ To the

⁶² The Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1994) (guaranteeing access to government records unless specific exemptions apply). Pursuant to § 552(a)(3), government records not covered by specific exemptions must be made available upon receiving a request made in accordance with the regulations. See AMERICAN CIVIL LIBERTIES UNION FOUNDATION, LITIGATION UNDER THE FEDERAL FREEDOM OF INFORMATION ACT AND PRIVACY ACT, topic 4 (Allan Adler ed., 19th ed. 1995).

⁶³ Sections 552(b)(1)-(9) of the statute provide for specific exemptions (including national security, internal agency documents, specific statutory prohibitions, and other personnel and business-related confidential records) where an agency may in its discretion decline to provide information to the requestor. After exhausting an administrative appeal, the requestor may appeal the denial of information to the district court. In deciding whether the denial was justified, the court may rely upon the agency's record and affidavits, or may in its discretion conduct an *in camera* review of the requested documents. See § 552(a)(4)(B) (stating that district courts "shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld"); cf. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242-43 (1978) (holding that the NLRB could withhold releasing witness statements because they would interfere with upcoming enforcement proceedings).

⁶⁴ See *Doe v. Stegall*, 653 F.2d 180, 181 (5th Cir. 1981) (entitling plaintiffs to

extent that the plaintiff's true identity is known only to the court, or even to all parties but not to the public, there exists another example of (nonbinary treatment and) intermediation in legal rules.⁶⁵

These relatively unusual examples illustrate (by counterexample) the law's general reluctance regarding intermediation.⁶⁶ Judges could be (but are overwhelmingly not) used where social norms hint that intermediation is valuable. If an employee approaches an employer, or even a union representative, with a complaint about a fellow employee, we expect the authority figure—who in many ways has the power of a judge—often to counsel silence or to explain why the complaint is better not pursued. The legal system could in similar fashion allow complaints to be filed privately, with judges advising or insisting that some of these complaints be made public while others be dropped quietly. In the absence of such intermediation, complainants seek advice from lawyers, but agency costs may lead to much more openness and litigation than judge-based intermediating systems would generate.

It is noteworthy that even where we do use judges as intermediaries, as in the FOIA example above, we often instruct our judges to be general or rigid and not as sensitive to the facts of

proceed anonymously in "challenging the constitutionality of prayer and Bible reading exercises in Mississippi public schools"). *But cf.* FED. R. CIV. P. 10(a) (requiring that the caption of a filing contain parties' names). *See generally* Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*, 37 HASTINGS L.J. 1, 3 (1985) (proposing "a detailed analytical approach for courts to use in determining when pseudonymity should be permitted in civil actions").

⁶⁵ Note that parties may be ordered (under threat of criminal sanctions) not to reveal information outside of court. *See, e.g.*, *University of Pa. v. EEOC*, 493 U.S. 182 (1990) (dealing with reviews of an employee's work). The discussion here approaches the fine line between secrecy in law and the narrower question of anonymous communications. *See* Benjamin S. DuVal, Jr., *The Occasions of Secrecy*, 47 U. PITT. L. REV. 579, 579 (1986) (arguing "that there are a number of good reasons for restricting the acquisition and dissemination of knowledge and that government does restrict the dissemination of information in a variety of ways in a great number of situations"); Kreimer, *supra* note 13, at 25-71 (discussing the potential for the disclosure of information to serve as a sanction).

⁶⁶ This binary character of the law leads to its share of litigation and fine lines. Thus, a statute aimed at prohibiting the wearing of masks by terrorizing groups was upheld in *State v. Miller*, 398 S.E.2d 547, 553 (Ga. 1990). The statute provided an exception for "legitimate" mask wearing, as on holidays or for job safety or as part of theatrical costumes or medical treatment. *See id.* at 549. A similar statute, however, was struck down in *Ghafari v. Municipal Court*, 150 Cal. Rptr. 813, 819 (Ct. App. 1978). A less "legal" resolution of the problem would bar masks that had not been approved (for the given person wearing it) by a suitable intermediary.

the particular case as a private intermediary would be. Thus, it might be sensible for a judge to weigh not only a government agency's need for secrecy but also the gain to a citizen from obtaining the information requested. Organized crime is said, for example, to make requests for information under the FOIA, but judges are supposed to decide upon these requests by evaluating only the scope of the legislative exemptions and not the likely uses to which the requested information will be put.⁶⁷ Put in the framework advanced in this Article, our law again chooses between the extremes of anonymity and identifiability. Here, the requester can remain anonymous (if only by using an attorney), although it is easy to imagine a system where that would not be the case. More generally, although we are in the habit of describing legislation as prospective and broadly aimed, and our judiciary as retrospectively working on a case-by-case basis, these examples remind us (as if we needed more reminding) that our judges are asked to do their share of general lawmaking with little attention to the justice, costs, and benefits of the particular case.

2. Judicial Evaluation of Anonymous Information

One obvious source of examples of acceptable anonymity with greater particularized attention to facts is in the triggering of criminal investigations. Unsolicited information, or tips, can be used (and indeed are even encouraged with rewards) to obtain search warrants, to conduct tax audits, and so forth.⁶⁸ It is tempting to think of these as examples of intermediation of the kind I have associated with social practice much more than with legal rules because it is often the case that the informant is known to the

⁶⁷ *Panel Probes Lawyers' Roles in Organized Crime*, NAT'L L.J., Sept. 24, 1984, at 33 (noting the use of FOIA requests to thwart enforcement proceedings against organized crime). Nevertheless, "[t]he law makes it clear that persons seeking information no longer have to state a reason." Freedom of Information Act Compilation and Analysis, House Comm. on Government Operations, 90th Cong., 2d Sess. 7 (1968); see also *Pollard v. FBI*, 705 F.2d 1151, 1155 (9th Cir. 1983) (citing the FOIA statutory exemptions allowing the FBI to refuse to disclose); *Baez v. United States Dept. of Justice*, 647 F.2d 1328, 1330 (D.C. Cir. 1980) (same).

⁶⁸ See *Illinois v. Gates*, 462 U.S. 213, 243-46 (1983) (allowing the use of an anonymous letter, accompanied by corroborating circumstances, to satisfy the "totality of circumstances" test for probable cause). Anonymous tips can also trigger the investigations more generally, but since my focus here is on law's receptivity to anonymity, I concentrate on legal rules (rather than the practices of law enforcement officials).

judge or other government official but not to the subject of the information or investigation. On the other hand, our legal rules permit the judge or other official to proceed on the basis of purely anonymous information; in other settings it is the fact that the informer is revealed to the intermediary that makes the residual anonymity acceptable. A search warrant, for example, may be obtained on the basis of a purely anonymous tip that suggests some reliability because of its context or because of information transmitted along with reports of the subject's wrongdoing. Identifiable communicators will normally appear more reliable than anonymous informers do to the investigators or to the magistrate deciding whether to issue a warrant. As such, the legal official's role involves a kind of intermediation, but it is fair to say that the law again chooses between anonymity or not—and here it allows anonymity—but it allows a legal official to assess the loss in reliability. Nevertheless, because informants' identities are sometimes made known to judges but then put under seal, there is here at least a solid example of intermediation under law as a means of improving the terms of the tradeoff between communication and reliability.⁶⁹

Some legal systems place limitations on the use of anonymous communications in police investigations.⁷⁰ Those systems might even more clearly be seen as choosing between anonymity and identifiability, with no room for intermediation as a means of gaining the best of both worlds.

⁶⁹ MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.4 (1975) provides that the identity of an undisclosed informant be revealed to the other party unless the judge determines that "there is substantial corroboration of the informant's existence and reliability" and the issue whether there existed reasonable cause to act based on an informant's tip "can be fairly determined without such disclosure." The judge may require the prosecution to disclose the informant's identity to the court for purposes of making this determination. The information, if deemed to be confidential, must be kept under seal and transmitted to the appellate court in the event of appeal.

⁷⁰ See, e.g., Richard S. Frase, *Comparative Criminal Justice As a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 578 n.184 (1990) (noting the French supreme judicial court's holding "that an anonymous telephone call does *not* provide sufficient basis . . . to invoke the 'flagrant offense' doctrine," which would allow police to search the scene of the offense and domiciles of all the individuals who appear to have participated in the offense without a warrant).

3. Criminal Law and Intermediation

a. *Investigation Versus Adjudication*

The inclination of some legal systems to balance communication and reliability in a way that leads to the rejection of anonymous tips as a means of triggering some kinds of government investigations suggests that it might be useful to think about our own system's similar preferences in criminal trials. This is not the place to examine the law arising out of the Confrontation Clause, but generally speaking our legal system is much less tolerant of anonymity at trial than in investigation.⁷¹ A criminal defendant can better prepare a defense if the accuser, victim, and witnesses are identified than if some of these players are not. A concern for avoiding mistaken criminal convictions also leads to an emphasis on reliability rather than marginal communications. Cross-examining a witness or accuser is thus taken to be an important step toward reliability, so that anonymity is normally barred.

This line between investigation and trial, defining as it does where anonymity is tolerated, is more arbitrary than it first seems. And much as there are principled legal systems that demand identifiability as a precursor to invasive searches, so too there are respectable legal systems that permit anonymous accusers all the way through to conviction.⁷² The possibility of anonymity will

⁷¹ The right to confront witnesses dates back at least to the Roman era where the right was noted at the sedition trial of the Apostle Paul, although it is commonly thought that the abuses of the infamous Star Chamber of sixteenth-century England (and the trial of Sir Walter Raleigh) provoked its wide acceptance into Anglo-American law. See Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 482 (1994) (finding that, while "[c]onventional wisdom marks Raleigh's rejected demand [to meet the witness against him face to face] as the starting point in the history of the Sixth Amendment's Confrontation Clause, . . . the right of confrontation . . . reaches back far beyond Raleigh's trial"); see also *Jencks v. United States*, 353 U.S. 657, 668 (1957) (requiring a prosecutor to provide witness statements to the defense); Alfredo Garcia, *The Sixth Amendment in Modern American Jurisprudence*, in CONTRIBUTIONS IN LEGAL STUDIES 73-74 (1992) (discussing the origins of the Confrontation Clause).

⁷² But the variety is dwindling. See *EC: European Court Law Report—Conviction on Basis of Anonymous Witnesses' Evidence Against Convention*, Times-Reuters Textline, Nov. 22, 1989. The Czech Republic's criminal law recently ended reliance on anonymous witnesses. See *Czech Republic: Interior Minister Condemns Court's Decision on Anonymous Witnesses*, BBC Summary of World Broadcasts, Oct. 17, 1994, available in LEXIS, News Library, Textnws File.

On the other hand, the Australian Supreme Court recently upheld a conviction based on anonymous testimony, stating "the protection of undercover

surely bring forth some reporting of crime and some witnesses that would otherwise be chilled. Plainly, this tolerance of anonymity must be accompanied by greater use of intermediation. Judges or even nonadversarial prosecutors might be used to question witnesses or simply to assess the prejudice suffered by the defendant who is unable to confront his or her accuser. In this case, it is our legal system that makes less room for intermediation, and chooses most bluntly between pure anonymity and identifiability. When the choice is put this way, the preference for identifiability is easy to defend.

b. *Government As Intermediary*

The value of confrontation and the true role of intermediation in a legal system is, however, made much more complicated by the role legislated for the government in serving as accuser and victim, and by the role government often plays as intermediary. A defendant who pollutes a river may be convicted under a criminal statute, even though there is no private accuser and no immediately identifiable victim. A landlord may be convicted of discriminatory practices and a drug dealer may be convicted of selling a controlled substance on the basis of behavior toward government agents who "test" the defendant on behalf of real citizens. These undercover agents begin pseudonymously, but even once they are identified we might best think of them as intermediaries. They operate where private accusers might be chilled and they are less easily intimidated by threats of reprisals. Meanwhile, their deployment sacrifices something in the way of reliability if only because there is always the question of entrapment, or simply a kind of incremental activity-level question. Our system's disinclination to use intermediation in order to permit anonymous accusers at trial might thus be described as camouflaging its willingness to use intermediation in the definition and development of criminal offenses. Defendants as a group might well prefer a system that sacrificed some of their ability to confront identifiable accusers in return for something of a ban on pseudonymous "testing" by the government.⁷³

police officers should be recognized as a basis for the grant of public interest immunity." David Saunders, *Australia: Court Upholds Appeal on Secrecy of Police Undercover Identities*, Reuter Textline, July 28, 1994, available in LEXIS, News Library, Ttxtnews File.

⁷³ I call it pseudonymous because the undercover agent attempts to mislead as to his or her true identity even if there is no explicit use of a false name.

Once we think of criminal law in terms of tradeoffs between communication (or simply the reporting of crimes) and reliability, various compromises, including several kinds of intermediation, catch our interest. Variety among legal systems is easy to understand, and doctrinal distinctions within any one system seem somewhat arbitrary. The matter is further complicated by the availability of other tools with which to encourage communication. Thus, rewards can be offered to encourage communication—but then these rewards often cast doubt on the reliability of the information. The optimal combination of anonymity, intermediation, and rewards is surely difficult to ascertain.⁷⁴ My suggestion here can only be that anonymity is a potentially useful tool, best understood as an alternative to the following: less communication that is on average more reliable; more communication that is on average even less reliable—because it is financially rewarded; and somewhat less communication that is, however, somewhat more reliable—because it is filtered through a reliable intermediary.

It is also the case that government often serves as an unofficial intermediary. Neighbors might call the police or other local officials in order to avoid direct confrontations regarding such things as noise, property usage, parenting behavior, and even aesthetics. Such examples blur the line between legal and social norms. In turn, my claim that social norms are more flexible than legal institutions in allowing for the advantages of intermediation is weakened by the idea that there is no firm line between the two sources of rules. On the other hand, it is arguable that social practices lead to intermediation as a matter of course, and that it is simply the case that actors will turn to available intermediaries who will sometimes be found in what is, after all, the large public sector.

⁷⁴ It is difficult to ascertain in the rules governing finders because rewards generate moral hazard problems. Here the problem is with accuracy, or the moral hazard of wrongful conviction or acquittal, rather than with the moral hazard of generating additional crimes.

D. *Blending Law and Norms*

1. Legal Regulation of "Normal" Intermediaries

Immunities and privileges available under legal rules for family members, clergy, doctors, and lawyers say more about first-party advice than third-party communication. Thus, a willingness on the legal system's part to protect communications between an individual and a priest has more to do with leaving space for religious rituals and obligations, and perhaps with facilitating self-help, than it does with protecting intermediaries who may be used to transmit information to third parties.⁷⁵ Nevertheless, these very counselors may be turned into filters. They often serve a community that includes both a communicator, who wishes to be anonymous, and the subject or ultimate recipient of that communication. The legal rules that support or even encourage confidential communications to certain persons are in this way likely to promote the sort of intermediation discussed in this Article. Of course, to the extent that the best-placed intermediaries are outside this group, the law might be said to discourage or to regulate intermediation because in the rare cases where legal processes become relevant, the intermediary who was approached with the expectation of confidentiality may be legally unable to abide by that expectation or social norm.

Perhaps the best example of this sort of intermediation that arises without much regard to legal rules, but is then regulated by law, is found in journalism. Reporters often agree to protect their sources, editors may require more than one source in order to improve the reliability of unattributed information, and informers often seek out reporters not only because their views or complaints will be transmitted effectively but also because they will be broadcast without attribution. The strong social norm against sending critical, anonymous notes exists alongside an equally strong norm glorifying journalists and their anonymous sources who criticize and even threaten subjects. Legal rules promote this sort of intermediation in several related ways. Most notably, journalists will normally be protected by a constitutional privilege from defamation suits brought under a strict liability rule; they are more strongly pro-

⁷⁵ See generally *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450 (1985) (discussing the history and implications of privileges for attorney-client, medical, counseling, familial, and institutional relationships).

tected (because plaintiff must show "actual malice") where they can claim that the information was about a public matter and a public or official figure.⁷⁶ And as for their specific roles as intermediaries, "shield laws" often protect journalists from revealing their sources.⁷⁷

Although journalism offers another nice example of intermediation as a means of improving the terms of the tradeoff between encouraging information and preserving reliability, it is also an example of the way that the choice of intermediaries may be a function of legal rules. But this interaction between legal rules and social norms means that there is no clear line between these rules and norms. Fortunately, little that I have said suffers from the deconstruction which may follow from this observation. Formal law seems relatively disinclined to assign intermediating tasks to its officials. Where there is a good deal of regulation in the background, so that formal law is hard to separate from social norms because each develops in light of the other, it becomes impossible to say whether one "sector" is more inclined than the other to anticipate or encourage intermediation.

2. Intermediation in the Shadow of the Law

Interdependence between private practices and legal rules also develops when private parties are threatened by legal regulation. Norms that arise in this manner may go beyond where legal rules could have gone in constitutional or other terms. This sort of evolution is common where communications are concerned. Thus, the film industry may agree on a rating system, and television and music producers may converge on norms regarding nudity and obscenity, because of the uncertainty and threat value of legal regulation. There is a different kind of intermediation in many of these developments, as when an industry establishes standards and a board of review, but the point of an "independent" reviewer may be to gain reliability without much suppression of communication.

Similar developments surround anonymous communications. Many universities have rules requiring an official to approve all posted signs. These rules hint at the preference for intermediation

⁷⁶ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

⁷⁷ See Leslye deRoos Rood & Ann K. Grossman, *The Case for a Federal Journalist's Testimonial Shield Statute*, 18 HASTINGS CONST. L.Q. 779, 796-97 (1991) (noting the variety of protections for sources offered by different state shield statutes).

over complete (and sometimes “irresponsible”) anonymity, but they may also prevent involvement in litigation over hate speech and the like. Internet access services may censor or terminate the accounts of customers who send offensive materials, or they may intermeditate on the receiving end of such materials received in mass electronic mailings from outside sources. These services may simply respond to market preferences or they may be designed to preempt legal regulation (which may or may not be constitutionally feasible).⁷⁸ Similarly, it is possible that the development of “caller identification” technology was influenced by the social norm against—and the threat of legal regulation to control—anonymous telephone calls. Remarkably, the case-by-case flexibility of the social norm is preserved by the availability of “per call blocking;” customers can see the number from which an incoming call has been made, but the caller can also block the recipient from gaining this information. In turn, the recipient will know that information about the source of an incoming call has been blocked. This offers a kind of consent option, analogous to receiving a letter which says “do not open unless you consent to receive an anonymous letter.”⁷⁹ It is especially difficult to unpackage such evolving marketplace norms from the regulatory and litigation environments in which they develop.

CONCLUSION

Most of us participate rather frequently in institutional arrangements that involve anonymous communications. But most of us have few experiences with sending or receiving critical, anonymous communications to or from coworkers, neighbors, students, and so

⁷⁸ Anonymous letters and phone calls are not per se legally objectionable (in most places), but there is the sense that communication over the Internet can reach many more people at much lower cost and thus advantages the sender at the expense of many recipients. Moreover, senders can gain anonymity by using “re-mailers” that forward electronic mail with no trace of the author’s identity. These re-mailers do no filtering and are therefore not intermediaries as that term has been used in this Article. See generally I. Trotter Hardy, *The Proper Legal Regime for “Cyberspace”*, 55 U. PITT. L. REV. 993 (1994) (discussing various cyberspace issues and the proper methods of regulation).

⁷⁹ The consent is not entirely flawed by the “offer” itself because customers are also offered the option of simply rejecting all anonymous calls. See *USA: New Jersey Bell to Introduce Additional Capabilities*, PR Newswire, June 23, 1993, available in LEXIS, News Library, Finns File (reporting New Jersey Bell’s decision to offer “Per Call Blocking” and “Anonymous Call Rejection”). Determined callers can of course defeat the innovation by using public telephones.

forth. Social practice discourages these communications, and I have suggested that it does so in part because communication through intermediaries generally dominates direct, anonymous communication. I have also suggested that legal rules incline toward a different and more limited role for intermediation.

My intuition is that there is something unsettling about the binary reaction of law toward anonymity. The secret ballot is glorified, but in many states voters in primaries must openly state their party affiliations and identifiable signatories are required to put a new candidate on the ballot.⁸⁰ We pride ourselves on allowing defendants to confront their accusers but we invade privacies on the basis of anonymous tips and regularly use our government as an impersonal accuser. In these and other areas we may be missing something by not thinking through our own social practices.

⁸⁰ The majority of states have closed primary systems, which require voters to sacrifice some degree of anonymity by registering their party affiliation prior to a primary election. There is, however, the possibility that a party will permit "independents" to vote in its primary. See *Republican Party v. Tashjian*, 770 F.2d 265, 267, 286 (2d Cir. 1985) (ruling that the Republican party has a right to permit independents to participate in its primary and enjoining the enforcement of Connecticut's closed primary statute), *aff'd* 479 U.S. 1049 (1986). Statutes calling for closed primaries are usually justified as an effort to prevent "party raiding," the practice of voting for an opposing party's weaker candidate to increase the chances of one's own candidate to win the general election. Some states employ either an open (where voters choose a party slate at the polls) or blanket (where voters may vote for either party for each office) primary system. See Lubecky, *supra* note 46, at 800.