Pay Attention to That Green Curtain: Anonymity and the Courts

Babak A. Rastgoufard

Follow this and additional works at: http://scholarlycommons.law.case.edu/caselrev
Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.case.edu/caselrev/vol53/iss4/15
PAY ATTENTION TO THAT GREEN CURTAIN:

ANONYMITY AND THE COURTS

Openness is a hallmark of the American judicial system. The Supreme Court has repeatedly recognized that the historical practice of presumptively open trials and the structural value of public access to the courtroom give the public a right to attend trials and to know what goes on in their courts. This right is based upon the public’s First Amendment “right of access to information about the conduct of public affairs,” a criminal defendant’s Sixth Amendment right to a “public trial,” and the general “principle that justice cannot survive behind walls of silence[,] which] has long been reflected in the ‘Anglo-American distrust for secret trials.’”

There are, however, limits to the openness of courts, and a judge may, “in the interest of the fair administration of justice, impose reasonable limitations on access to a trial.” Examples of such limits include empanelling an anonymous jury and allowing parties to file suits anonymously. However, such measures are drastic and disfavored exceptions to the presumption of openness in judicial proceedings.

Although these measures are uncommon, they have made recent gains in prominence. Within the past twenty years there has been an unprecedented willingness to alter the historical openness of trials in order to uphold the privacy interests of jurors and par-

---

1 See generally Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-75 (1980) (discussing the presumption of openness inherent throughout the Anglo-American system of justice).
2 See id. at 573 n.9 (collecting cases).
3 Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 18 (1986) (Stevens, J., dissenting); see also Richmond Newspapers, 448 U.S. at 575-76 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)) ("'[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."").
4 Sheppard v. Maxwell, 384 U.S. 333, 349 (1966) (quoting In re Oliver, 333 U.S. 257, 268 (1948)). This distrust for secret trials has played a prominent role in recent events as pundits and critics express objections to plans to try alleged terrorists in secret military trials. See, e.g., William Safire, Seizing Dictatorial Power, N.Y. TIMES, Nov. 15, 2001, at A31 (deriding the President’s seizure of “dictatorial power to jail or execute aliens . . . [in] military kangaroo courts”).
5 Richmond Newspapers, 448 U.S. at 581 n.18.
ties. Anonymity and anonymous speech have taken on a life of their own. Compare, for instance, the plurality opinion in *Richmond Newspapers v. Virginia,* a 1980 case which held that the public has a right to attend criminal trials, with the Court's opinion in *McIntyre v. Ohio Elections Commission,* a landmark 1995 case that dealt with the distribution of anonymous campaign literature and established the Court's anonymous speech doctrine. In *Richmond Newspapers,* the Court stated that criminal trials have long been presumptively open and that this openness is "no quirk of history" but "an indispensable attribute of an Anglo-American trial." Fifteen years later the Court gave unprecedented protection for anonymity and declared: "Anonymity is a shield from the tyranny of the majority." In some regards, this protection for anonymity and anonymous speech should be welcomed. However, courts have seemed both too eager, and too reluctant, to welcome anonymity. The unprecedented attention given to anonymous speech has created a situation where the boundaries of anonymity in the courts are far from clear. For instance, some courts have read provisions for allowing anonymity into a rule or statute that otherwise appears clear on its face; while other courts have refused to broaden a rule or statute to allow for anonymity. Also, while various commentators have looked at the issues surrounding the use of anonymous juries or the practice of allowing a litigant to bring a claim anonymously, such commentators have generally focused on a single facet of anonymity, without looking at the broader issue of anonymity and the courts.

In light of these unclear boundaries, this Note attempts to provide an analytical framework for understanding anonymity in the courts and proposes a single test for determining when anonymity—specifically, when an anonymous jury should be empanelled and when a party should be allowed to bring a suit anonymously—should be allowed to coexist with the inherent openness of our court system. Part I of this Note discusses anonymous juries and the recent Ohio Supreme Court decision in *State v. Hill.*

---

6 448 U.S. 555 (1980).
8 See infra notes 103-21 and accompanying text.
9 *Richmond Newspapers,* 448 U.S. at 569 (emphasis added).
10 *McIntyre,* 514 U.S. at 380 (Scalia, J., joined by Rehnquist, C.J., dissenting).
11 Id. at 357.
which upheld a local rule that made juror anonymity standard practice rather than an exceptional device for sensitive cases. Part II of this Note discusses anonymous parties, and, in particular, anonymous plaintiffs in civil suits.

I. ANONYMOUS JURIES

The Constitution guarantees a criminal defendant the right to a public trial by an impartial jury. Nevertheless, various state and federal courts have empanelled an anonymous jury in situations where the jury is believed to need protection. The use of an anonymous jury conceals one of the most important facets of a criminal trial, the public role of the jury. Furthermore, the use of an anonymous jury can affect the impartiality of a jury. Thus, the use of an anonymous jury, which courts have held to be constitutionally permissible, creates a tension between the interests of the jury and the interests of both the defendant and the public.

14 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury.")
15 An anonymous jury, which can vary in degree of anonymity, is one "in which specific identifying information about the jurors - names, addresses, employer information, or other information - [is] not disclosed to or permitted to be revealed by the accused at trial." William D. Bremer, Annotation, Propriety of Using Anonymous Juries in State Criminal Cases, 60 A.L.R. 5TH 39, 45 (1998); see, e.g., United States v. Edmond, 52 F.3d 1080, 1089 (D.C. Cir. 1995) (upholding concealment of jurors' names and addresses); United States v. Ross, 33 F.3d 1507, 1519 (11th Cir. 1994) (upholding concealment of jurors' and spouses' names, addresses, and places of employment). Anonymity may continue post-verdict. See United States v. Brown, 250 F.3d 907, 918-22 (5th Cir. 2001) (concluding that without the continuation of anonymity, jurors might be vulnerable to abuse after the trial ends). As an additional protective measure, anonymous jurors often do not commute directly to and from the courthouse; instead they are transported by the United States marshals between the courthouse and an undisclosed central location. See, e.g., United States v. Paccione, 949 F.2d 1183, 1191 (2d Cir. 1991). Finally, the Los Angeles Superior Court has adopted an intermediate form of jury anonymity for criminal trials in which jurors' names and addresses are concealed, even after a verdict, but the names are available to the court and counsel. See People v. Goodwin, 69 Cal. Rptr. 2d 576, 579-80 (Cal. Ct. App. 1997) ("The names of the jurors were not recorded in the reporter's transcript, but the names were nonetheless available to the court and counsel. Since the jurors' names were known to the court and counsel, the jurors were not anonymous.").
16 See, e.g., Ross, 33 F.3d at 1507; see also 28 U.S.C. § 1863(b)(7) (2000) (allowing a federal district court to keep jurors' names confidential from the public "in any case where the interests of justice so require"); 18 U.S.C. § 3432 (requiring disclosure of names and addresses of prospective jurors in capital cases at least three days before trial, unless the "court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person").
17 The extent to which a jury's role should be made public is fueling the current controversy regarding whether the PBS program Frontline should be allowed to film the trial and jury deliberations of a capital murder case in Houston, Texas. See generally, e.g., Kris Axtman, Cameras in the Jury Room Fuel Capital Debate, CHRISTIAN SCI. MONITOR, Jan. 21, 2003, at 2 (discussing whether cameras would serve the public interest by educating the public as to how a jury decides a death-penalty case and by allowing the public to decide if the system is working). 18 See, e.g., United States v. Scarfo, 850 F.2d 1015, 1021 (3d Cir. 1988) (stating that the merits of anonymous juries can be worthy enough to override any concern regarding impairment on the defendant's constitutional rights). See generally Edmond, 730 F. Supp. at 1144-51
When an anonymous jury is empanelled, the public is deprived of information that historically has been within its purview. Thus, an anonymous jury is at odds with the public’s First Amendment right to know about events that transpire in the courtroom and with the defendant’s constitutional right to an open trial. Moreover, the use of an anonymous jury suggests a need to protect the jury from the defendant, and thus subverts the defendant’s constitutional right to a presumption of innocence. This presumption of openness in judicial proceedings is a strong presumption predicated on the text of the Constitution, upon the history of our judicial system, and the structure of our government. Thus, the empanelment of an anonymous jury is by all means a “drastic measure.”

A. The Constitutionally Embedded Presumption of Openness in Judicial Proceedings

Although the Supreme Court has not directly addressed the use of anonymous juries, it has dealt with the inherent openness of trials, and the conflict between an open trial and a desire to protect jury privacy. For instance, in Press-Enterprise Co. v. Superior Court (Press-Enterprise I), a newspaper successfully challenged a trial court ruling that closed all but three days of a six-week voir dire proceeding. The Court held that the presumption of openness entitles the media to be present during voir dire and that this “presumption of openness may be overcome only by an overriding

*discussing how a court must balance the interests of the criminal justice system with that of the defendant’s when deciding to empanel an anonymous jury."

19 See generally Abraham Abramovsky & Jonathan I. Edelstein, Anonymous Juries: In Exigent Circumstances Only, 13 ST. JOHN’S J. LEGAL COMMENT. 457, 465-84 (1999) (“[T]he case against juror anonymity is compelling and implicates the highest values and traditions of the American justice system.”).

20 See Craig v. Harney, 331 U.S. 367, 374 (1947) (stating that a trial is a “public event,” and what “transpires in the courtroom is public property”).

21 See Coffin v. United States, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”). See generally Abramovsky & Edelstein, supra note 19, at 468-72.

22 U.S. CONST. amends. I, VI.

23 Richmond Newspapers v. Virginia, 448 U.S. 555, 564 (1980) (“[T]hroughout its evolution, the trial has been open to all who cared to observe.”).

24 See Maryland v. Balt. Radio Show, Inc., 338 U.S. 912, 920 (1950) (Frankfurter, J., respecting denial of certiorari) (“One of the demands of a democratic society is that the public should know what goes on in the courts . . . [so] that the public may judge whether our system of criminal justice is fair and right.”); Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002) (“Democracies die behind closed doors.”).

25 United States v. Ross, 33 F.3d 1507, 1519 (11th Cir. 1994).


27 Id. at 503.
interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.\textsuperscript{28} While the Court indicated that a concern for jury privacy may, in some circumstances, warrant keeping portions of the \textit{voir dire} proceeding out of the public domain,\textsuperscript{29} it held that a blanket closure, which failed to consider less restrictive alternatives, was constitutionally impermissible.\textsuperscript{30}

Although the holding in \textit{Press-Enterprise I} was based on First Amendment principles, later that year, in \textit{Waller v. Georgia},\textsuperscript{31} the Court recognized that a closed trial also conflicts with the right of the defendant:

\begin{quote}
[T]here can be little doubt that the \textit{explicit} Sixth Amendment right of the accused is no less protective of a public trial than the \textit{implicit} First Amendment right of the press and public. The central aim of a criminal proceeding must be to try the accused fairly, and "[o]ur cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant."\textsuperscript{32}
\end{quote}

As a default, a fair trial is an open trial; however, in some situations, the defendant’s principal right to a fair trial may warrant closure: "[T]he Court has made clear that the right to an open trial may give way in certain cases to other rights or interests, such as the defendant’s right to a fair trial."\textsuperscript{33} Therefore, under certain circumstances a trial court has been allowed to close portions of a trial to the public by empanelling an anonymous jury – a procedure designed to take into account the fact that the public’s rights are

\textsuperscript{28} \textit{Id.} at 510.
\textsuperscript{29} \textit{Id.} at 512. This view was not shared by all the justices. \textit{See id.} at 513-15 (Blackmun, J., concurring) ("I write separately to emphasize my understanding that the Court does not decide, nor does this case require it to address, the asserted ‘right to privacy of the prospective jurors’ . . . . I am concerned that recognition of a juror’s ‘privacy right’ would unnecessarily complicate the lives of trial judges . . . ."). \textit{But see Sinclair v. United States}, 279 U.S. 749, 765 (1929) (discussing a juror’s expectation of basic privacy necessary to exercise calm and informed judgment). \textit{See generally} Michael R. Glover, \textit{Comment, The Right to Privacy of Prospective Jurors During Voir Dire}, 70 CAL. L. REV. 708 (1982) (discussing the conflicting interests between the parties’ right to an impartial jury and the prospective jurors’ right to privacy).

\textsuperscript{30} \textit{Press-Enterprise Co. v. Superior Court} (\textit{Press-Enterprise I}), 464 U.S. 501, 511 (1984). For instance, the Court suggested that the trial judge could have released a transcript of the \textit{voir dire}, sealing only "[t]hose parts of the transcript reasonably entitled to privacy." \textit{Id.} at 513; \textit{see also} \textit{State ex rel. Beacon Journal Publ’g Co. v. Bond}, 781 N.E.2d 180, 188 (Ohio 2002) (holding juror questionnaires to be part of the \textit{voir dire} process, and thus presumptively open to the public).

\textsuperscript{32} \textit{Id.} at 46 (emphasis added) (second alteration in original) (quoting \textit{Gannett Co. v. DePasquale}, 443 U.S. 368, 380 (1979)).
\textsuperscript{33} \textit{Id.} at 45; \textit{see also} \textit{Press-Enterprise I}, 464 U.S. at 508 ("No right ranks higher than the right of the accused to a fair trial.").
secondary to the defendant’s rights. For example, in Press-Enterprise Co. v. Superior Court (Press-Enterprise II), a case dealing with the release of a preliminary hearing transcript, the Court held that the hearing could be closed to the public if “specific findings are made demonstrating that, first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights.”

Given the defendant’s principal right to a fair trial, courts empanelling an anonymous jury will state that they are using the drastic measure while still preserving the defendant’s right to a fair trial. However, in practice an anonymous jury is empanelled primarily for the benefit of the jurors. Anonymous juries often have been empanelled against defendants’ wishes, and the use of anonymous juries often serves as grounds for appeal. As a result of such, the use of an anonymous jury has the unusual effect of making the jurors’ rights superior to those of both the defendant and the public. Therefore, the empanelling of an anonymous jury is properly viewed with skepticism.

B. The Use of Anonymous Juries

From a defendant’s point of view, the use of an anonymous jury undercuts the presumption of innocence and the right to ex-

---

34 In other words, although both the defendant and the public derive benefits from the Sixth Amendment guarantee to open trial, Gannett, 443 U.S. at 383; cf. Globe Newspaper v. Superior Ct., 457 U.S. 596, 604-05 (1982), the defendant’s right is primary. See generally Press-Enterprise I, 464 U.S. 501.
36 Id. at 14. In formulating this test the Court explicitly rejected the “reasonable likelihood” test, which was used by the California Supreme Court, in favor of the “substantial probability” test. Id.
37 See, e.g., United States v. Scarfo, 850 F.2d 1015, 1023 (3d Cir. 1988) (noting that jury anonymity “promotes impartial decision making”).
38 For instance, in United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), an early anonymous jury case that involved, inter alia, the conviction of eleven defendants in a narcotics conspiracy case, the Second Circuit upheld the use of an anonymous jury, finding that “[j]ury anonymity and sequestration comport with [the trial court’s] obligation to protect the jury, to assure its privacy, and to avoid all possible mental blocks against impartiality.” Id. at 141.
39 See, e.g., United States v. DeLuca, 137 F.3d 24 (1st Cir. 1998); Scarfo, 850 F.2d at 1023 (noting defendant’s dissatisfaction with the use of an anonymous jury).
40 United States v. Ross, 33 F.3d 1507, 1522 (11th Cir. 1994); see also Work v. State, 2 Ohio St. 296, 303 (1853) (explaining that the institution of trial by jury “demands our jealous scrutiny when innovations are attempted to be made upon it”).
41 See Ross, 33 F.3d at 1519 (“An anonymous jury raises the specter that the defendant is a dangerous person from whom the jurors must be protected, thereby implicating the defendant’s constitutional right to a presumption of innocence.”). See generally Commonwealth v. Angiulo, 615 N.E.2d 155, 170-72 (Mass. 1993) (reversing conviction by anonymous jury when
exercise peremptory challenges—concerns that also affect the integrity of the judicial process. Nevertheless, this exceptional procedure has been held permissible when a trial court (1) concludes "that there is strong reason to believe the jury needs protection," and (2) takes "reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected."

Several factors have justified the conclusion that a jury needs protection:

(1) the defendants' involvement in organized crime; (2) the defendants' participation in a group with the capacity to harm jurors; (3) the defendants' past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendants will suffer a lengthy incarceration and substantial monetary penalties; and, (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.

Once a court determines that a jury needs protection, the court must minimize the prejudicial effects of an anonymous jury on the defendant's rights by allowing the parties to conduct an adequate voir dire, and by instructing the jury that their need for anonymity is not attributable to the defendant's guilt or character:

Where jury anonymity is warranted, we have found the defendant's fundamental right to an unbiased jury is adequately protected by the court's conduct of "a voir dire designed to uncover bias as to issues in the cases and as to the defendant himself." In addition, we have found the danger that the jury

---

42 See Scarfo, 850 F.2d at 1021-26. The use of an anonymous jury limits the amount of information obtained in voir dire and this might prevent a defendant from uncovering a hidden bias of a juror. See Abramovsky & Edelstein, supra note 19, at 476-79 (stating that "juror anonymity prevents a defendant from learning whether '[a] juror might turn out to be related to a party or a witness (yet not disclose this on voir dire) or to live in a neighborhood whose residents have demographic characteristics predictive of their likely response to the issues in the case'").

43 United States v. Paccone, 949 F.2d 1183, 1192 (2d Cir. 1991). Generally, an anonymous jury is not permitted in capital cases. See 18 U.S.C. § 3432 (2000) (requiring disclosure of names and addresses of prospective jurors in capital cases at least three days before trial, unless "the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person.").

44 United States v. Salvatore, 110 F.3d 1131, 1143 (5th Cir. 1997); see also United States v. Koubriti, No. 01-CR-80778, 2003 WL 1456233, at *3-6 (E.D. Mich. Mar. 14, 2003) (discussing the use of an anonymous jury in September 11-related terrorist trial that, inter alia, has generated a great deal of media attention).
might infer that the need for additional security was attributable to the character of the defendant was minimized where the court took care to give the jurors a plausible and nonprejudicial reason for not disclosing their identities or for taking other security measures.45

Thus, courts have held, "when genuinely needed and when property used, anonymous juries do not infringe a defendant's constitutional rights."46 Nevertheless, despite the fact that courts have traditionally circumscribed the use of anonymous juries, their use is on the rise.47

1. Making the Unusual Routine: State v. Hill

On September 15, 1997, Harry Sisco was standing outside his home in Lancaster, Ohio when he was killed in a drive-by shooting. Ten days later, Clifton Hill, Mr. Sisco's stepson, was indicted for the murder.48

In a practice unique to Fairfield County, Hill, like all criminal defendants in the Fairfield County Common Pleas Court, was tried in front of an anonymous jury.49 Hill appealed his conviction, claiming inter alia, that the "trial court erred when it empanelled an anonymous jury in the absence of any evidence or findings that an anonymous jury was necessary in this case." Hill alleged that his right to a presumption of innocence and to a trial by a fair and impartial jury had been violated.50

The Court of Appeals reversed the conviction, concluding that the trial court's use of an anonymous jury, in the absence of "any particularized need" for one, "necessitates a new trial."51 This decision, however, was reversed, 6-1, by the Ohio Supreme Court in State v. Hill.52 In reversing, the Ohio Supreme Court upheld a lo-

---

45 Paccione, 949 F.2d at 1192 (citations omitted). The court suggested "protection against pressures from media" as a plausible reason for anonymity. Id. (citing United States v. Thomas, 757 F.2d 1359, 1364-65 (2d Cir.), cert. denied, 474 U.S. 819 (1985)). But see Scarfo, 850 F.2d at 1023-28 (upholding trial judge's instructions to the jury, which was hearing a criminal case against an alleged "boss" of an organized crime family, that they would remain anonymous in order to prevent any apprehensions about their safety or the safety of their families).
46 Ross, 33 F.3d at 1519 (emphasis added).
50 Id. at 579.
51 Id. at 583.
52 749 N.E.2d 274.
cal rule that made juror anonymity standard practice rather than an exceptional device for sensitive cases.\textsuperscript{53}

The local rule at issue, which has been in effect since May 1996, provides that the names and addresses of all jurors will remain anonymous, absent a showing of good cause.\textsuperscript{54} The rule states that it was implemented in order to “maintain secrecy of the grand jury proceedings and the privacy of petit jurors, to alleviate the concern of the jurors for fear of intimidation and/or harassment, to encourage jurors’ willingness to participate as jurors, and to fulfill the Court’s promise of confidentiality.”\textsuperscript{55}

However, this rule \textit{fundamentally} changes the nature of an anonymous jury from an extraordinary procedure designed to ensure juror safety, to a routine procedure designed to protect juror privacy to an unprecedented degree. The unanimous three-judge appellate court recognized this fact: “The anonymous jury system [in Fairfield County] is a significant alteration to the way jury trials have been conducted in this state.”\textsuperscript{56} The court postulated that the “carte blanche anonymous jury” system may be the result of a laudable concern – the trial court’s “concern for accommodating jurors who may be hesitant or timid about jury service” – but that the anonymous jury system “nonetheless flies in the face of history, precedent, custom and the federal cases.”\textsuperscript{57}

The Ohio Supreme Court based its reversal on Hill’s “failure to raise the anonymity issue at trial.”\textsuperscript{58} This allowed the court to avoid, at least for now, the larger issue of the validity of a “carte blanche anonymous jury” rule.\textsuperscript{59} Justice Paul E. Pfeifer dissented and argued that the carte blanche rule should be abandoned because anonymous juries “affect ‘the entire conduct of the trial from beginning to end’ and ‘the framework within which the trial proceeds.’”\textsuperscript{60}

\textsuperscript{53} \textit{Id.} at 283 (stating that a “thorough review of the record reveals no hints of any prejudice to appelle flowing from the use of an anonymous jury”).
\textsuperscript{54} \textit{Id.} at 278.
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Hill}, 737 N.E.2d at 582.
\textsuperscript{57} \textit{Id.} at 582-83.
\textsuperscript{58} \textit{Hill}, 749 N.E.2d at 281.
\textsuperscript{59} While the Ohio Supreme Court was able to avoid the issue, a similar issue is currently before the Wisconsin Supreme Court, which has been asked to decide whether anonymous juries can be empanelled as a matter of routine or standard trial court practice. \textit{See State v. Tucker}, No. 00-3354-CR, 2001 WL 1590738 (Wis. Ct. App. Dec 12, 2001), \textit{cert. granted}, 643 N.W.2d 97 (Wis. 2002).
\textsuperscript{60} \textit{Hill}, 749 N.E.2d at 289 (Pfeifer, J., dissenting). In arguing against the routine use of anonymous juries, Justice Pfeifer noted that there has been no tradition of anonymous juries in Ohio, and that changes or “innovations” to a bedrock institution, such as trial by jury, demand careful scrutiny. \textit{Id.} at 288.
2. The Case Against the Routine Use of Anonymous Juries

In order to justify the drastic measure of making anonymous juries a routine practice, the Fairfield County court gave conflicting reasons, not mentioned by either state court, for the rule. Fairfield County Judge Joseph Clark, the leading proponent of and driving force behind the local rule, told the Wall Street Journal that the rule was initiated by his haunting memories “of a distraught prospective juror who was forced to reveal during pretrial question that she had been raped by her stepfather.” Judge Clark, however, told the Cleveland Plain Dealer that the rule was “instituted without public discussion after some jurors said they were being followed to their cars during the trial of an anti-government zealot.”

Neither reason, however, justifies a blanket rule. The reason given to the Wall Street Journal is not convincing because an anonymous juror does not have any unique rights that would allow her, but not a non-anonymous juror, to abstain from answering questions during voir dire. Likewise, the reason given to the Plain Dealer is not convincing because potential jury-tampering problems in a single case against an anti-government “zealot” do not justify a blanket rule – especially when less drastic protective measures are available.

Commentators have offered other reasons for the routine use of anonymous juries. Professor Nancy King, a leading proponent of juror anonymity, has suggested four advantages to a blanket

---

61 Jerry Markon, Judges Pushing for More Privacy of Jurors’ Names, WALL ST. J., June 27, 2001, at B1: To protect the privacy of jurors in Fairfield County, Ohio, state court Judge Joseph Clark decided a few years ago to keep their names anonymous. He had been haunted by the memory of a distraught prospective juror who was forced to reveal during pretrial questioning that she had been raped by her stepfather. She said she had never told anyone, not even her husband. “I get tears in my eyes even now thinking about it,” says Judge Clark. ... Jurors, he adds "love" the idea.


63 See Press-Enterprise Co. v. Superior Court (Press-Enterprise I), 464 U.S. 501, 512 (1984) (Jurors “believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge in camera.”). Juror privacy issues are discussed at length in Brandborg v. Lucas, 891 F. Supp. 352, 357-60 (E.D. Tex. 1995), in which the court held that a potential juror is entitled to refuse to answer questions during voir dire. The court also describes how the in camera procedure should be implemented to allow “the public the maximum exposure to the proceedings without the disclosure of private matters which would interfere with the juror’s ability to serve.” Id. at 360.

64 See supra text accompanying notes 35-36 (noting that a hearing may be closed to the public); supra note 15 (discussing how jurors need not commute directly to and from the courthouse).
rule: (1) more reliable voir dire; (2) improved jury deliberations; (3) prevention of jury intimidation; and (4) greater jury participation.\(^65\)

These advantages, however, are illusory and fail to provide a compelling reason for altering the structural process within which a criminal trial proceeds. In fact, Professor King provides the bases for arguing against the routine use of anonymous jurors herself. She suggests that anonymity will enhance the voir dire process by allowing jurors to avoid public embarrassment, but she also acknowledges that anonymous juries are “feasible” only in urban areas.\(^66\) First, jurors already have the means to avoid public embarrassment via the in camera procedure described by the Court in \textit{Press-Enterprise} \(^1\)\(^67\) Second, this urban-areas-only limitation would mean that a defendant accused of theft in one part of the state would face a drastically different criminal trial process than would a similar defendant in another part of the state.

The other three advantages offered by Professor King are based on the notion that anonymity allays juror fears. History, however, has demonstrated that such fears are largely unfounded and thus are not in need of remedying. This too is something Professor King acknowledges: “[J]uror nightmares do not often come true” and fears of juror harassment “outstrip reality.”\(^68\) Moreover, there is nothing to suggest juror apprehension is a new problem that requires drastic new remedies.\(^69\) This is not to say that jurors may never have legitimate fears, based upon facts, that require a remedy; such fears would naturally demand a trial court’s attention and remedy.\(^70\) However, isolated and anecdotal incidents do not warrant a blanket rule, and do not rise to the level of \textit{Press-Enterprise II}’s “substantial probability” test\(^71\) necessary to over-

---


\(^66\) Id. at 125 & n.7 (“Anonymous juries may be impractical in small communities where a glimpse of a face or a few tidbits of employment information or life history would allow community members to zero in on a name.”).

\(^67\) See cases cited supra note 63; see also \textit{State ex rel. Beacon Journal Publ’g Co. v. Bond}, 781 N.E.2d 180, 189-90 (Ohio 2002) (“Consistent with \textit{Press-Enterprise I}, trial judges should inform prospective jurors of their right to request an in-camera hearing, on the record and with counsel present, regarding any written question during the voir dire process.”).

\(^68\) King, supra note 65, at 127; see also Abramovsky & Edelstein, supra note 19, at 466-68 (discussing the lack of necessity for juror anonymity in light of the few instances in which jurors have been injured, and the absence of a juror being killed, as a result of service on a jury).

\(^69\) King, supra note 65, at 127 n.20.

\(^70\) See \textit{United States v. Borelli}, 336 F.2d 376, 392 (2d Cir. 1964) (discussing threat felt by some jurors after seven jurors received unsigned letters telling them to find defendants guilty); \textit{Brandborg v. Lucas}, 891 F. Supp. 352, 356 (E.D. Tex. 1995) (“While the parties have attorneys to champion their rights, the court must protect the privacy rights of the prospective jurors.”).

\(^71\) See supra note 36 and accompanying text.
come the constitutionally embedded presumption of openness in judicial proceedings.

Finally, a frequent argument for the routine use of anonymous juries is that anonymity would no longer suggest guilt:

As long as jurors believe that withholding their names is an extraordinary practice, anonymity will suggest to them that the judge considers the defendant to be a particularly dangerous person who may retaliate if convicted . . . . Granting juror anonymity routinely, rather than upon proof of a real risk to juror safety, would remove the stigma of guilt that selective anonymity carries.72

This might be a benefit in a specific trial, but this argument overlooks the impact of anonymity on the overall judicial process — i.e., even though jury anonymity may not suggest that any one defendant is more guilty than another, it would suggest that defendants as a whole are, generally speaking, guilty of the crimes charged and that jurors need protection.73 This, of course, would violate a defendant's constitutional right to a presumption of innocence.74

C. Proposed Test for Anonymous Juries

Anonymous juries have their place. However, like any form of anonymity in the court, an anonymous jury should be empanelled only after careful consideration. When considering the use of an anonymous jury, a court should not empanel one unless: (1) the use of an anonymous jury has something to do with the content of the trial or litigation; or (2) the absence of an anonymous jury significantly burdens the trial process in some way. This test is consistent with the test currently used by a majority of courts, which looks to see whether there is a strong reason to believe the jury needs protection.75 Of course, once a determination to empanel an anonymous jury is made, a court must take precautions to minimize the prejudicial effects.

72 King, supra note 65, at 145-46.
73 See Abramovsky & Edelstein, supra note 19, at 472 (noting that routine anonymity would categorize all criminal defendants as menacing persons from whom jurors need to be protected).
74 See supra note 41 and accompanying text.
75 See supra text accompanying notes 43-44.
D. Applying the Proposed Test for Anonymous Juries

Under the proposed test the use of an anonymous jury would be proper, for example, in a trial involving a member of a known organized crime family or an organization known for violence; of course, the mere "invocation of the words 'organized crime,' 'mob,' or 'mafia,' [without] something more, does not warrant an anonymous jury." The use of an anonymous jury is proper where articulable facts show that the content of the trial or litigation is such that a reasonable juror may fear intimidation. Two Second Circuit cases, United States v. Real Property Known as 77 East 3rd Street and United States v. Barnes, illustrate such situations.

77 East 3rd Street was a civil forfeiture action against a building owned by the New York City Chapter of the Hells Angels Motorcycle Club, that allegedly was used to store and distribute narcotics. The court empanelled an anonymous jury after noting that the "history of violence perpetrated by members and associates of the Church of Angels demonstrates that they 'possess the means to harm the jurors.'" Specifically, the trial court noted: at the time of arrest numerous weapons, including rifles, handguns, and an uzi machine gun, were recovered; many members of the Hells Angels Club had been implicated in violence against, and intimidation of, witnesses in earlier criminal prosecutions; threats of violence and intimidation of witnesses occurred during the criminal prosecution of members who were arrested with the individual claimants in the case; jurors in some of the criminal prosecutions of Club members were followed to the cars; a Club member approached one juror's child to convey a threat; and, the presence of large numbers of Club members at Club trials intimidated other jurors.

77 East 3rd Street illustrates how articulable facts can demonstrate that a reasonable juror may feel intimidated, and how such intimation may significantly burden the trial process by affecting a juror's ability to deliberate and reach an impartial decision.

Barnes was a trial against Leroy "Nicky" Barnes, the notorious head of a Harlem narcotics network, and fourteen co-defendants. The seriousness of the alleged offenses, combined with the events that occurred before trial, warranted the use of an anonymous jury. For instance, the court was aware of a threat

---

78 604 F.2d 121 (2d Cir. 1979).
79 77 East 3rd Street, 849 F. Supp. at 879.
80 Id. at 878.
against a government witness who was in protective custody, which allegedly threatened, "If he does anything, he'll be dead."\(^8\) Also, "on the eve of trial" another potential witness was murdered at "the site of much of the trafficking in [the Barnes case]."\(^8\) Likewise, Barnes demonstrates, via articulable facts, how the content of a trial can be central to the use of an anonymous jury and how the trial process itself can be burdened by the absence of anonymity.

Finally, under the proposed test, the use of an anonymous jury would be proper in a trial against a defendant whose previous trial ended in a mistrial due to jury tampering. This specific type of a significant burden on the trial process was addressed by the Hawaii Supreme Court in State v. Samonte,\(^8\) where the Hawaii Supreme Court upheld the use of an anonymous jury in the defendant's third trial.\(^8\) The use of an anonymous jury was warranted in Samonte because the absence of an anonymous jury would have significantly burdened the trial process by increasing the likelihood of a mistrial. Likewise, if the jury has a legitimate fear of harassment by the media, then an anonymous jury should be empanelled, in order to minimize burdens on the trial process.\(^8\)

Anonymous juries should be used in situations like 77 East 3rd Street and Barnes, where the content of the trial is such that there is a strong reason to believe the jury needs protection; likewise, the use of an anonymous jury is appropriate in situations such as Samonte, where the trial process itself is threatened. However, in the vast majority of cases there is neither a substantial likelihood of harm to the jury or to the judicial process, nor any compelling rationale to overcome the constitutionally embedded presumption of openness in judicial proceedings.

II. PARTY ANONYMITY

Many, but not all, of the arguments against anonymity and the use of anonymous juries in criminal trials are applicable to civil
trials. However, as a result of the different interests at stake in civil trials, many of the arguments against anonymity carry less weight when applied to litigants in civil trials. In criminal trials anonymity must be balanced against the defendant's constitutionally protected interests, which often weigh against anonymity. By contrast, in civil trials anonymity should be considered alongside the plaintiff's potential privacy concerns and the protection given to anonymous speech — protection intended to act as "a shield from the tyranny of the majority." The protection given to anonymous speech, in conjunction with a plaintiff's privacy concerns, allows litigants in certain situations to bring suits anonymously and thus to keep their identities away from the public. Nevertheless, party anonymity remains an unsettled area of law, as there is a growing tension between the inherent openness of the courts and the increased protection for anonymous speech.

The Supreme Court has given tacit approval to the practice of bringing suits anonymously, and "it is clear that a practice has developed permitting individuals to sue under fictitious names where the issues involved are matters of a sensitive and highly personal nature." Nevertheless there is no formal recognition — either through the Federal Rules of Civil Procedure or through Supreme Court jurisprudence — of this practice. In fact, the Federal Rules actually suggest that the practice is disallowed and calls for formal recognition of the practice have gone unanswered; as a

---

86 See, e.g., Lego v. Twomey, 404 U.S. 477, 493 (1972) (Brennan, J., joined by Douglas & Marshall, J.J., dissenting) ("We permit proof by a preponderance of the evidence in civil litigation because 'we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. We do not take that view in criminal cases.'").


88 Typically party anonymity is achieved using a fictitious name, often "John Doe."


91 See FED. R. CIV. P. 10(a) ("Every pleading shall contain a caption setting forth . . . the [full] names of all the parties"). But see FED. R. CIV. P. 26(c) (authorizing court to make any protective "order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden"). However, a few courts have held that in order for a judge to make a ruling on a plaintiff's Rule 26(c) motion for anonymity, a plaintiff must first file a valid complaint that satisfies Rule 10(a). See, e.g., Roe v. New York, 49 F.R.D. 279 (S.D.N.Y. 1970) (holding that a complaint that does not identity any plaintiff in the title is ineffective to commence an action).

result, courts lack a consistent procedure for analyzing requests for party anonymity.93

The immediate consequence of the current situation is that "'there is no legal right in parties either to be allowed anonymity or to avoid it'"94 — despite the fact that the practice has been going on for at least forty years in federal courts. 95 This lack of consistent procedural and substantive law creates judicial inefficiency.96

Party anonymity is both rare97 and disfavored.98 As with jury anonymity, the starting points for this presumption against party anonymity are the First and Sixth Amendments. As discussed in Part I, the combined force of these amendments has established a clear public right of access to judicial proceedings that is in tension with any form of anonymity in the courts, including party anonymity.99 Nevertheless, the number of anonymous party lawsuits has skyrocketed: in 1963 there were only seven decisions throughout the federal district court system that involved a “John Doe” party bringing a civil suit; thirty years later the number had risen to nearly 200.100

The large increase in the number of anonymous party cases underscores the need for formal recognition of anonymous parties and for consistent procedures to analyze their propriety. This Section highlights the shortcomings of the current situation, and discusses how the proposed test for anonymity can be used to determine whether a party should be allowed to initiate a lawsuit anonymously.

93 Compare, e.g., M.M. v. Zavaras, 139 F.3d 798, 802 (10th Cir. 1998) (discussing plaintiff’s appeals from a trial court order denying her leave to proceed under an assumed name, and from trial court denying her leave to file an amended complaint under seal), with, e.g., James v. Jacobson, 6 F.3d 233, 235 (4th Cir. 1993) (discussing how plaintiffs commenced action by obtaining an ex parte protective order permitting them to use pseudonyms, before filing their complaint). See also Steinman, supra note 92, at 85 n.376.
94 Zavaras, 139 F.3d at 803 (quoting James v. Jacobson, 6 F.3d 233, 242 (4th Cir. 1993)).
96 See, e.g., Zavaras, 139 F.3d at 799-801 (discussing procedural history leading to the appeal).
97 See Femandeer v. Haun, 227 F.3d 1244, 1246 (10th Cir. 2000) (“Proceeding under a pseudonym in federal court, is by all accounts, ‘an unusual procedure.’”).
98 See, e.g., Doe v. Blue Cross & Blue Shield United, 112 F.3d 869, 872 (7th Cir. 1997) (“The use of fictitious names is disfavored . . . .”).
100 Rice, supra note 92, at 884 n.2.
A. Competing Interests

Courts will often defer to the constitutionally embedded presumption of openness and disallow litigants the ability to bring their suits anonymously. For instance, in *Femedeer v. Haun*, a case dealing with Utah’s sex offender registration and notification statute, the Tenth Circuit denied anonymity to the fictitiously named plaintiff due to the public’s “important interest in access to legal proceedings, particularly those attacking the constitutionality of popularly enacted legislation.” However, the Supreme Court has held that a citizen’s right to privacy protects her from certain state-compelled disclosures, and thus entitles her to anonymity. Notably, in *McIntyre v. Ohio Elections Commission*, the Court struck down an Ohio statute that prohibited the distribution of anonymous campaign literature. *McIntyre* involved a First Amendment challenge to a $100 fine for distributing unsigned leaflets that urged voters of Westerville, Ohio, to vote against an upcoming school tax levy. At the time, nearly every state, as well as the District of Columbia, had a statute that banned anonymous political literature. Nevertheless, the Court struck down the Ohio statute, creating the anonymous speech doctrine; as Justice Thomas noted, the number of states with laws similar to Ohio’s was unimportant: “[W]hat is important is whether the Framers in 1791 believed anonymous speech sufficiently valuable to deserve the protection of the Bill of Rights.”

*McIntyre* recognized that, in some situations, a right of anonymity is necessary in order “to protect unpopular individuals

\[101\] 227 F.3d 1244.
\[102\] Id. at 1246.
\[103\] See, e.g., *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87 (1982) (holding that the First Amendment prohibits a state from compelling disclosures by a minor political party, when such disclosures will subject those persons to threats, harassment or reprisals); *NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that Alabama may not compel disclosure of the names and addresses of rank and file NAACP members, when such disclosure would amount to a restraint on members’ right to associate by subjecting them to private community pressures).
\[105\] Id. at 357.
\[106\] Id. at 337-38. The handbills “purported to express the views of ‘CONCERNED PARENTS AND TAX PAYERS’”; nevertheless, Mrs. McIntyre essentially acted alone. Id. at 337. Ohio law required that all campaign literature conspicuously show “the name and residence or business address of the chairman, treasurer, or secretary of the organization . . . who issues, makes, or is responsible” for the literature. Id. at 338 n.3.
\[107\] See id. at 376 (Scalia, J., joined by Rehnquist, C.J., dissenting).
\[108\] Id. at 370 (Thomas, J., concurring).
This right to speak anonymously, including against the government, was given greater protection four years later in *Buckley v. American Constitutional Law Foundation, Inc.* In *ACLF* the Court affirmed a Tenth Circuit decision that had invalidated a Colorado statute prohibiting anonymous speech. The Colorado statute in *ACLF* was one that, *inter alia,* required ballot-initiative petition circulators to wear badges that stated their names. At issue was a process by which Colorado citizens were allowed to make laws. The Court held that requiring petition circulators to wear identification badges impermissibly discouraged participation in the political process, notwithstanding the fact that the Colorado ballot-initiative petition process is not a right guaranteed by the United States Constitution. Relying on *McIntyre,* the Court reaffirmed the right to speak anonymously: “[T]he restraint on speech in this case is more severe than was the restraint in *McIntyre* . . . . The injury to speech is heightened for the petition circulator because the badge requirement compels personal name identification at the precise moment when the circulator’s interest in anonymity is greatest.”

Finally, in the 2001-02 term, the Court expanded the anonymous speech doctrine in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton.* At the appellate level, the Sixth Circuit declined to extend *McIntyre* and upheld the constitutionally of an ordinance that required Jehovah’s Witnesses and other door-to-door canvassers, including those who may advocate a political cause, to register with the village prior to canvassing.

---

109 Id. at 357; see also Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton, 122 S. Ct. 2080, 2089-90 (2002) (holding that requiring a permit as a prior condition on the exercise of the right to speak is a “dramatic departure from our national heritage” and “imposes an objective [and unconstitutional] burden . . . .”); Talley v. California, 362 U.S. 60 (1960) (invalidating a city ordinance prohibiting all anonymous leafleting). But see Alan M. Dershowitz, *Why Fear National ID Cards?*, N.Y. Times, Oct. 13, 2001, at A23 (arguing that there is no right to anonymity, notwithstanding a right to privacy— “No such right [of anonymity] is hinted at in the Constitution. And though the Supreme Court has identified a right to privacy, privacy and anonymity are not the same.”).  
111 Id. at 197-200.  
112 Id. at 188.  
113 See COLO. CONST. art. V, § 1, cls. 1-2; COLO. REV. STAT. §§ 1-40-101 - 1-40-106 (2002). Although obvious, it should be noted that citizens can make laws through other means as well— such as using the courts to challenge the validity of a law or statute.  
114 ACLF, 525 U.S. at 191-92, 200.  
115 Id. at 199.  
117 And, as stated during oral arguments, even Halloween trick-or-treaters and perhaps the neighbor who asks to borrow a cup of sugar would be required to register first. See Watchtower
Although the Sixth Circuit acknowledged the Court's anonymous speech doctrine, it relied on a syllogism and held *McIntyre* inapplicable:

We agree that [the right established in *McIntyre*] arguably includes in that right the ability to speak to others anonymously. But we do not understand how [the Village's] ordinance inhibits this right. As we see it, individuals going door-to-door . . . are not anonymous by virtue of the fact that they reveal a portion of their identities – their physical identities – to the residents they canvass. In other words, the ordinance does not require canvassers going door-to-door to reveal their identities; instead, the very act of going door-to-door requires the canvassers to reveal a portion of their identities.19

The Village offered several reasons for the ordinance; specifically, prevention of fraud, protection of resident privacy, and prevention of crime. The Court, however, rejected the Village's stated interests120 and reversed the decision of the Sixth Circuit.121 In so doing, the Court once again upheld the right to engage in anonymous political speech and reiterated the constitutional importance of unrestricted public speech.

When applied to litigants who seek to redress wrongs – including those who seek to make or change laws through the courts – this right of anonymity, derived through *McIntyre*, *ACLF*, and *Village of Stratton*, conflicts with the right of the public to have full access to their courts.122 Nevertheless, the rationale used to protect anonymous speech in *ACLF* was the same rationale used by the Fifth Circuit to protect plaintiff anonymity in *Doe v. Stegall*.123

---


118 240 F.3d 553, 563, 567 (6th Cir. 2001).

119 Id. at 563. Inexplicably, the Sixth Circuit did not mention *ACLF*; this did not go unnoticed by the Court. *See Village of Stratton*, 122 S. Ct. at 2090 (“The Sixth Circuit’s reasoning is undetermined by our decision in *ACLF*. . . . The fact that circulators revealed their physical identities did not foreclose our consideration of the circulators’ interest in maintaining their anonymity.”).

120 *Village of Stratton*, 122 S. Ct. at 2089-91; see also id. at 2091-92 (Breyer, J., joined by Souter & Ginsburg, J.J., concurring) (writing separately to note that the “crime prevention’ justification for this ordinance is not a strong one”). As mentioned by the Court, id. at 2085, there was reason to believe that the ordinance was the result of the Village’s hostility towards Jehovah’s Witnesses. *See generally*, e.g., David G. Savage, *Justices Take Door-to-Door Preaching Case*, L.A. Times, Oct. 16, 2001, at A16 (briefly discussing an earlier version of the ordinance that had specifically targeted Jehovah’s Witnesses).

121 *Village of Stratton*, 122 S. Ct. at 2091.

122 See supra text accompanying notes 26-36.

123 653 F.2d 180 (5th Cir. Unit A Aug.1981).
In Stegall an anonymous parent brought a suit, on behalf of her minor children, challenging their middle school’s program of “religiously-oriented ceremonies broadcast each morning over the public address system.” The Fifth Circuit ruled that the plaintiffs should be allowed to sue anonymously in order to protect against “possible threatened harm and serious social ostracization based upon militant religious attitudes.” The court acknowledged that public access to court proceedings is “more than a customary procedural formality,” but found “precedent for departing from a procedural custom fraught with constitutional overtones to accommodate a plaintiff’s asserted need to proceed anonymously."

This tension in Stegall is representative of the need, on one hand, to protect anonymous speech, and the need, on the other hand, to preserve the openness of courts.

B. Current Tests

Without any provision of the Federal Rules of Civil Procedure or any Supreme Court holding as guidance, courts have adopted vastly different approaches when forced to determine whether a plaintiff should be allowed to initiate or maintain a lawsuit using a
fictitious name. This is an undesirable situation that has led to undesirable results — ranging from an indiscriminate ban on anonymity to a wholesale endorsement of anonymity. A review of anonymous party cases indicates that courts have based their decisions to grant or deny party anonymity using one (or more) of four distinct tests. These four tests can be characterized as: (1) a blanket prohibition; (2) a balancing test; (3) a content-based test; and (4) a factor-based test.

1. Blanket Prohibition

A small number of courts have held that a complaint filed by an anonymous party fails to commence a proper lawsuit and therefore must be dismissed — either upon motion or sua sponte. For instance, in Roe v. New York, a group of unnamed minors attempted to bring a Section 1983 claim against the state for its allegedly inadequate care and treatment of individuals within the state training school system. The court, however, dismissed the complaint, holding that “if a complaint does not identify any plaintiff in the title or otherwise, then its filing is ineffective to commence an action.” The decision rested solely upon a literal reading of Federal Rule of Civil Procedure 10(a), and not upon considerations of a litigant’s right of anonymity or the inherent open-

---

129 See supra note 93; Steinman, supra note 92, at 2 (lamenting that federal and state “courts have not yet refined an analysis for determining when litigants may sue or be sued pseudonymously”).

130 Steinman, supra note 92, at 2 (“The current ad hoc procedures for handing pseudonymity are unsatisfactory.”).

131 See, e.g., James v. Jacobson, 6 F.3d 233, 240 (4th Cir. 1993) (“[I]t seems obvious that the amended order [by the trial judge] simply reflected . . . [a] personal unwillingness to allow anonymity at trial . . . . [T]he record indicates that the [trial court] ruling here was based more on a judicially-adopted general rule than on a true exercise of case-specific discretion.”).

132 See, e.g., United States v. Microsoft Corp., 56 F.3d 1448, 1463-64 (D.C. Cir. 1995) (per curiam) (citations omitted):

We are similarly distressed by the district judge’s decision to allow the Doe Companies to proceed anonymously. We are not aware of any case in which a plaintiff was allowed to sue a defendant and still remain anonymous to that defendant . . . . Although it is within the discretion of the district court to grant [anonymity], the court has “a judicial duty to inquire into the circumstances of particular cases to determine whether the dispensation [of anonymity] is warranted” . . . . Nor are we aware of any case in which an amicus . . . has been permitted to remain anonymous . . . . The judge did not fulfill his duty to consider the impact of anonymity on the public interest in knowing the identities of the participants in this proceeding.


134 Id. at 280-81.

135 Id. at 281.

136 FED. R. CIV. P. 10(a); see supra note 91.
ness of courts. Such summary dismissals are rare; however, the decision in *Roe v. New York* is noteworthy because it underscores the lack of a procedural mechanism for commencing a suit anonymously.

2. **Balancing Test**

A far greater number of courts have based their decision to allow or deny party anonymity on a balancing test. Courts adopting a balancing test have attempted to balance the rights and interests of the plaintiff against the rights and interests of the public. For instance, in *Doe v. Stegall*, the court allowed the plaintiffs to maintain their anonymity while "advanc[ing] no hard and fast formula for ascertaining whether a party may sue anonymously," and stating that "[t]he decision requires a balancing of considerations calling for maintenance of a party's privacy against the customary and constitutionally-embedded presumption of openess in judicial proceedings.

Courts often invoke the balancing test, and a balancing test has been suggested by commentators, but, as discussed below, I believe that the proposed test for anonymity offers a better solution, without sacrificing the concerns addressed in the this test.

3. **Content-Based Test**

In *Doe v. Deschamps*, a pregnant woman challenged the constitutionality of Montana laws regulating abortions. The court allowed the woman to maintain her anonymity based on the fact that the suit involved the "intensely personal nature of pregnancy".

[I]t is clear that a practice has developed permitting individuals to sue under fictitious names where the issues involved are matters of a sensitive and highly personal nature. Characteristic of these are the birth control cases, the abortion cases, the welfare cases involving illegitimate children or children

---

137 *Roe*, 49 F.R.D. at 281; see also *Doe v. United States DOJ*, 93 F.R.D. 483, 484 (D. Colo. 1982) (holding that "action has not been commenced and it will not be commenced unless and until it is filed in full compliance with Rule 10(a)"); *Doe v. Rostker*, 89 F.R.D. 158 (N.D. Cal. 1981) (dismissing the case *sua sponte*).
138 See generally *Rice*, supra note 92, at 913-19 (discussing failure of current federal procedure to adequately address anonymous parties).
139 653 F.2d 180, 186 (5th Cir. Unit A Aug. 1981).
140 See, e.g., *Steinman*, supra note 92, at 36.
142 Id. at 653.
whose fathers have abandoned them, and at least one case involving homosexuality.\textsuperscript{143}

While this type of content-based test offers a clean simplicity, it is the least satisfying test; as Professor Steinman noted, "courts must not decide automatically the pseudonymity issue based on whether a case falls into a familiar fact pattern."\textsuperscript{144} Much like a blanket prohibition, content-based tests fail to consider fully a litigant's right of anonymity or the inherent openness of courts.\textsuperscript{145}

Nevertheless, courts have frequently based their decisions using a content-based test, despite occasional statements to the contrary. For instance, in the recent case of \textit{Roe v. Aware Woman Center for Choice, Inc.},\textsuperscript{146} the majority disingenuously stated that the "'ultimate test for permitting a plaintiff to proceed anonymously is whether the plaintiff has a substantial privacy right which outweighs the ... presumption of openness in judicial proceedings'."\textsuperscript{147} The majority was properly criticized by the dissent for "establish[ing] a \textit{per se} rule entitling \textit{any} plaintiff in \textit{any} case involving her abortion to proceed anonymously."\textsuperscript{148}

The use of a rigid content-based test establishes \textit{per se} rules of law that allow a litigant to automatically overcome the inherent openness of courts. As with carte-blanche anonymous juries,\textsuperscript{149} such \textit{per se} rules should not be used. \textit{Per se} rules fail to consider the constitutionally embedded presumption of openness in judicial proceedings, and they also fail to consider a litigant's right to anonymity. For instance, a \textit{per se} rule was used by the Fifth Circuit in \textit{Southern Methodist University Association of Women Law Stu-
Dents v. Wynne & Jaffe\textsuperscript{150} to deny anonymity to plaintiffs who attempted to sue two Dallas law firms. The plaintiffs, a women law students association and four female lawyers, alleged that the firms engaged in illegal sexual discrimination in the hiring of summer and regular associates.\textsuperscript{151} The court’s content-based test failed to consider fully the plaintiff’s interests — namely, the threat of retaliation\textsuperscript{152} — and led to a denial of anonymity: “Plaintiff have not cited, nor have we found, any prior decisions which recognized or even discuss the right of Title VII plaintiffs to proceed anonymously.”\textsuperscript{153}

Content-based tests appeared to be in disfavor, but the Eleventh Circuit’s recent use of one in Aware Women Center may signal its return.

4. Factor-Based Test

The fourth common test used by courts is the factor-based test. Under this test, a plaintiff can maintain her anonymity if one or more factors are met. In Doe v. Rostker,\textsuperscript{154} three unnamed plaintiffs alleged that the Selective Service registration procedures, with which they fully complied, violated their rights under the Privacy Act of 1974.\textsuperscript{155} The court refused to grant the plaintiffs anonymity, stating that: “[a] plaintiff should be permitted to proceed anonymously in cases where [1] a substantial privacy interest is involved,” for example, where matters are highly sensitive or there is a real danger of physical harm; or “[2] where the injury litigated against would occur as a result of the disclosure of the plaintiff’s identity.”\textsuperscript{156} The court denied anonymity since the plaintiffs’ only

\textsuperscript{150} 599 F.2d 707 (5th Cir. 1979).
\textsuperscript{151} Id. at 708-09.
\textsuperscript{152} See id. at 713 (“Plaintiffs argue that disclosure of A-D’s identities will leave them vulnerable to retaliation from their current employers, prospective future employers and an organized bar that does ‘not like lawyers who sue lawyers.’”).
\textsuperscript{153} Id. at 712. There are, of course, some content-based tests that are created by statute. Typical of such, are statutes designed to protect juveniles. Contra Candace Zierdt, The Little Engine That Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track, 33 U.S.F. L. Rev. 401, 420-21 (1999) (discussing recent state and federal reforms eliminating and/or reducing juvenile anonymity). An interesting twist on anonymity created by statute is seen in Gomez v. Buckeye Sugars, 60 F.R.D. 106 (N.D. Ohio 1973), where a group of migrant farm workers, proceeding in forma pauperis, were allowed to proceed anonymously. Since, pursuant to the Fair Labor Standards Act of 1938, the Secretary of Labor had authority to bring suits on behalf of unnamed persons to protect them from reprisal, the court granted anonymity and gave the plaintiffs “the same safeguards that [they would have had] had the Secretary of Labor brought the action. Id. at 107.
\textsuperscript{154} 89 F.R.D. 158 (N.D. Cal. 1981).
\textsuperscript{155} Id. at 159-60; see 5 U.S.C. § 552(a) (2000).
\textsuperscript{156} Rostker, 89 F.R.D. at 162; see also James v. Jacobson, 6 F.3d 233, 238 (4th Cir. 1993) (discussing how trial courts should consider judicially recognized factors when exercising discretion to grant or deny anonymity). Such factors include whether the justification asserted by
privacy interest at risk was disclosure of their names. The court reasoned that if plaintiffs were successful on the merits their only connection with the draft would be as victors in their lawsuit, and if plaintiffs were unsuccessful, then the issue would be moot.157

C. Proposed Test for Anonymous Parties

Although the use of a factor-based test is the best approach to anonymity, courts lack a consistent test and, as a result, ask inconsistent questions and look at various different factors when utilizing a factor-based test.158 The proposed test offers a simple and straightforward test that is consistent with the Court’s anonymous speech cases and the constitutionally embedded presumption of openness in judicial proceedings. Moreover, the proposed test allows party anonymity to be consistent with juror anonymity. When considering party anonymity, a court should grant anonymity only when (1) anonymity affects the content of the litigation; or (2) the lack of anonymity significantly burdens a litigant’s ability to file suit.

D. Applying the Proposed Test for Anonymous Parties

When applying the test in a civil context – as is often the case with party anonymity – a fair amount of deference should be given to the potential anonymous party, and to the reasons offered for anonymity. Such deference may make anonymity in civil proceedings more readily available, but such an outcome would be consistent with the Court’s anonymous speech doctrine and with the difference between the interests that are at stake in civil and criminal trials.

Although the First Amendment guarantees that both criminal and civil trials remain open to the public,159 the presumption of openness in judicial proceedings “operates only as a presumption and not as an absolute, unreviewable license to deny [closure].”160 Such flexibility is designed to recognize that a fair trial is more important than an open trial: “[T]he atmosphere essential to the preservation of a fair trial – the most fundamental of all freedoms

the requesting party “is to preserve privacy in a matter of sensitive and highly personal nature; [and] whether identification poses a risk of retaliatory physical or mental harm.” Id.

157 Rostker, 89 F.R.D. at 162.
158 See supra note 156 and accompanying text.
159 Cf. Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 580 n.17 (1980) (“Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.”).
160 James, 6 F.3d at 238.
must be maintained at all costs.\textsuperscript{161} Anonymity should be more readily available in civil trials, because, unlike a fair criminal trial, a fair civil trial is not constitutionally defined as a "public trial,"\textsuperscript{162} and because the anonymous speech doctrine stands for the proposition that an individual should not be impermissibly discouraged from exercising her rights — most importantly, the right to participate in the political process, which includes the use of the courts, and also the right to redress wrongs.\textsuperscript{163}

This is not to say that anonymity should be granted in all civil trials. Instead, the proposed rule should simply be applied against the backdrop of the anonymous speech doctrine and in recognition of the differences between civil and criminal trials.\textsuperscript{164}

Such deference is most appropriate in suits against the government because in such situations the political process values that are embodied in the anonymous speech doctrine are at their greatest: "The freedom to publish anonymously extends beyond the literary realm . . . . Writing for the Court, Justice Black noted that '[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.",\textsuperscript{165} Although the issue in \textit{McIntyre} (and \textit{ACLF}) was core political speech, the Court has consistently recognized a right of anonymity that extends beyond political speech. For instance, in \textit{Seattle Times Company v. Rhinehart},\textsuperscript{166} a case dealing with a protective order prohibiting newspapers from publishing information obtained during pretrial discovery, the Court explicitly rejected the notion that a protective order may restrict the inherent openness of a trial only if the order's proponent shows a compelling governmental interest.\textsuperscript{167} Instead of looking for a compelling governmental interest to sustain the protective order, the Court looked at the moving party's interest:

\begin{itemize}
  \item \textsuperscript{161} \textit{Estes v. Texas}, 381 U.S. 532, 540 (1965).
  \item \textsuperscript{162} U.S. CONST. amend VI.
  \item \textsuperscript{163} See \textit{Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton}, 122 S. Ct. 2080, 2090 (2002) (discussing how conditions on anonymous speech should not force patriotic citizens to choose silence over speech).
  \item \textsuperscript{164} See \textit{Estes}, 381 U.S. at 538-39 ("The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned. History had proven that secret tribunals were effective instruments of oppression."). Moreover, a fair civil trial is fundamentally different, in both form and procedure, from a fair criminal trial. \textit{Cf. supra} note 86.
  \item \textsuperscript{166} 467 U.S. 20 (1984).
  \item \textsuperscript{167} \textit{Id.} at 30-31.
\end{itemize}
The Supreme Court of Washington properly emphasized the importance of ensuring that potential litigants have unimpeded access to the courts: "As the trial court rightly observed, rather than expose themselves to unwanted publicity, individuals may well forgo the pursuit of their just claims. The judicial system will thus have made the utilization of its remedies so onerous that the people will be reluctant or unwilling to use it, resulting in frustration of a right as valuable as that of speech itself."\footnote{Id. at 36 n.22 (emphasis added) (quoting Rhinehart v. Seattle Times Co., 654 P.2d 673, 689 (Wash. 1982), aff'd, 467 U.S. 20 (1984); see also Village of Stratton, 122 S.Ct. at 2090.}

Anonymity is an appropriate means to avoid this chilling effect, since it can be used to prevent undue "annoyance, embarrassment, and even oppression."\footnote{Rhinehart v. Seattle Times Co., 467 U.S. 20, 37 (1984) (quoting Rhinehart v. Seattle Times Co., 654 P.2d 673, 690 (Wash. 1982); see also Roe v. Aware Woman Ctr. for Choice, 253 F.3d 678, 690 (11th Cir. 2001) (Hill, J., concurring in part, dissenting in part) (distinguishing the right to proceed anonymously in cases involving a suit against a private party from suits challenging governmental activity). Although the concern in Rhinehart was access to the courts, see Rhinehart, 467 U.S. at 37 n.24 ("Both the trial court and the Supreme Court of Washington also emphasized that the right of persons to resort to the courts for redress of grievances would have been 'chilled."); the Court has recognized a general right to be free from undue annoyance, embarrassment, and oppression: "The right to privacy in one's political associations and beliefs will yield only to a 'subordinating interest of the State [that is] compelling, and then only if there is a 'substantial relation between the information sought and [an] overriding and compelling state interest.") Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91-92 (1982) (alteration in original) (citations omitted); see also NAACP v. Alabama, 357 U.S. 449, 461 (1958) (discussing impermissible abridgment of personal rights through governmental action, regardless of whether oppression is intended).}

The need to prevent undue annoyance, embarrassment, and oppression is even greater today than when either Rhinehart or McIntyre were decided. Technological changes have made information much more readily available today, and, as a result, parties, whose names appear in cases and whose names are thus widely disseminated (unlike the names of jurors) are more likely to forgo the pursuit of just claims rather than expose themselves to unwanted publicity:

Court proceedings and the records thereof long have been open to the public. It is critical to recognize, however, that the information age has had a profound effect on the availability of the information they contain. Not long ago, the practical reality was that one could learn of the existence of a lawsuit involving a particular individual only by the most time-consuming searches of records located in courthouses all over the country. Unless one knew what to look for and almost exactly where to look for it, the "openness" of the in-
formation was more theoretical than real. But the computer has changed all that. It now is possible to determine whether a given individual is a party to a lawsuit in federal court anywhere in the country by the simplest of computer searches . . . . In consequence, the privacy that litigants once enjoyed as a practical matter has been diminished greatly already and will be eroded still further in the near future. These developments pose important issues as the courts seek to reconcile two legitimate and, to some extent, competing values: individual privacy and public access to the judicial system.170

The information age, in and of itself, is not sufficient to automatically overcome the constitutionally embedded presumption of openness in judicial proceedings; technology certainly makes us more aware of the competing values, but it does not create a whole new paradigm, as the openness of courts is still axiomatic.

However, the impact of these changes has not been properly realized by courts. For instance in Femedeer v. Haun,171 the Tenth Circuit denied anonymity to a convicted sex offender who was challenging Utah's sex offender registration and notification statute.172 In its denial of anonymity, the court incorrectly stated that the posting of the plaintiff's "identity and other personal information on the Internet is likely to be more extensive than is the exposure resulting from his name on the caption of this lawsuit."173 In reality, the plaintiff's exposure from having his name on the caption of the lawsuit was at least eleven times greater than the exposure from having his identity and other personal information posted on the Internet.174

Some may argue that changes in technology are irrelevant to whether a party should be granted anonymity; opponents of ano-

170 Doe v. New York, 201 F.R.D. 100, 101 (S.D.N.Y. 2001) (denying anonymity); see also Jennifer B. Lee, Dirty Laundry, Online for All to See, N.Y. TIMES, Sept. 5, 2002, at G1 (discussing the "practical obscurity" of court documents prior to the "e-government" movement and how Hamilton County, Ohio, has been facing unforeseen issues and complaints since it decided to put court documents online).
171 227 F.3d 1244 (10th Cir. 2000). Jon Femedeer is a pseudonym.
172 Id. at 1246-47.
173 Id. at 1246.
174 The results of a Google web search yielded forty-five unique results for "femedeer v haun," and four unique results, including two results involving a Utah court case, for a name randomly chosen from the Utah Sex Offender Registry (Timothy Arcaris). Search of Google web database, http://www.google.com/search?hl=en&q=femedeer+v+haun (last visited Feb. 1, 2003); search of Google web database, http://www.google.com/search?hl=en&q=%22 Timothy+Arcaris%22 (last visited Feb. 1, 2003); The Official State of Utah Sex Offender Registry, available at http://www.cr.ex.state.ut.us/asp-bin/sexoffendersearchform.asp (last visited Feb. 1, 2003). Since I was unable to determine the name of the plaintiff in Femedeer, I obtained a random name from Utah Sex Offender Registry by entering the zip code for Moab, 84532, and selecting the first name that appeared on the list.
nymity can point to the simple fact that “[t]he people have a right to know who is using their courts,”175 and to the notion that “[w]hat transpires in the courtroom is public property.”176 While this is true – the public has a First Amendment right to attend trials and a right to monitor the functions of government177 – there is a difference between preventing the public or press from attending a trial, and preventing the public from learning the true name of a litigant:

The equation linking the public’s right to attend trials and the public’s right to know the identity of the parties is not perfectly symmetrical. The public right to scrutinize governmental functioning is not so completely impaired by a grant of anonymity to a party as it is by closure of the trial itself. Party anonymity does not obstruct the public’s view of the issues joined or the court’s performance in resolving them. The assurance of fairness preserved by public presence at a trial is not lost when one party’s cause is pursued under a fictitious name. These crucial interests served by open trials are not inevitably compromised by allowing a party to proceed anonymously.178

There is an important distinction between anonymous parties and anonymous juries: when an anonymous jury is empanelled, the public and press are unable to scrutinize the judicial process. A consideration of the propriety of anonymous parties requires a focus on the very narrow issue of the public’s right to know the identity of the parties – as opposed to a focus on the broad issue of the public’s right to attend trials. Such a focus is especially appropriate when a party is suing the government, since opponents of party anonymity will often focus on a defendant’s right to be equally free from undue harassment or publicity179 – an argument that has

175 Doe v. Blue Cross & Blue Shield United, 112 F.3d 869, 872 (7th Cir. 1997).
178 Doe v. Stegall, 653 F.2d 180, 185 (5th Cir. Unit A Aug. 1981) (citations omitted); see also Richmond Newspapers, 448 U.S. at 596 (Brennan, J., joined by Marshall, J., concurring) (“It follows that the conduct of the trial is preeminently a matter of public interest.”) (emphasis added). But see Doe v. Provident Life and Accident Ins. Co., 176 F.R.D. 464, 467 (E.D. Pa. 1997) (“The public’s right to know the true identity of the parties is concomitant with the right of public access to judicial proceedings and records.”); Doe v. Conn. Bar Examining Comm., 818 A.2d 14, 33-34 (Conn. 2003) (“[T]he question of who is using the judicial system is ordinarily as much a part of [the inherent openness of judicial proceedings] as why it is being used.”)
179 See, e.g., Roe v. Aware Woman Ctr. for Choice, Inc., 253 F.3d 678, 690 (11th Cir. 2001), cert. denied, 534 U.S. 1071 (2001), (Hill, J., concurring in part, dissenting in part) (“[T]here is a very good reason for not allowing Roe to proceed anonymously. Roe has sued private parties who were engaged in lawful activity, accusing them of serious violations of
no weight when a party initiates a suit against the government in order to test validity of a law or statute. As the Fifth Circuit noted, there is "no injury to the Government's 'reputation'" in cases "challenging the constitutional, statutory or regulatory validity of government activity." ¹⁸⁰

Finally, although there has been an increase in the use of fictitious names, there is little reason to fear their widespread use, even in suits against the government. There are two reasons for this: (1) anonymity comes with some baggage; and (2) litigants, especially those challenging governmental action, often publicize their cause.

The attendant baggage that comes with anonymity is an important consideration when applying the proposed test, and when asking whether the need for anonymity is directly related to the content of the suit or the litigant's ability to bring a suit — specifically, the question is whether the request for anonymity is based on a party's need to avoid undue annoyance, embarrassment, or oppression, or if it is for less noble purposes.¹⁸¹ This distinction was recognized by the Fourth Circuit in *James v. Jacobson.*¹⁸² The case dealt with Mary and John James' suit to collect damages against their physician after he artificially inseminated Mrs. James with his own sperm, rather than that of Mr. James.¹⁸³ The Jameses sought anonymity in order to prevent harming their pre-adolescent children, at that point in time in their lives, with the revelation that

---

¹⁸⁰ S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707, 713 (5th Cir. 1979). *But see* Doe v. Frank, 951 F.2d 320, 324 (11th Cir. 1992) ("[B]ecause the plaintiffs were suing private individuals rather than a government agency, the court found more reason not to grant the plaintiffs' request for anonymity. *Wynne & Jaffe* does not stand, however, for the proposition that there is more reason to grant a plaintiff's request for anonymity if the plaintiff is suing the government."); Doe v. Stiegall, 653 F.2d 180, 189 (5th Cir. Unit A Aug. 1981) (Gee, J., dissenting) ("[O]ne who strikes the king should do so unmasked or not at all."). *See generally* Buckley v. Am. Constitutional Law Found., Inc. 525 U.S. 182 (1999) (holding that any restriction on political speech is subject to strict scrutiny); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) (holding that the decision of an author of a political leaflet to remain anonymous "is an aspect of the freedom of speech protected by the First Amendment.").

¹⁸¹ *See* McIntyre, 514 U.S. at 348 n.11 ("People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message.").

¹⁸² 6 F.3d 233 (4th Cir. 1993).

¹⁸³ Id. at 235.
their conception was by artificial insemination and that John James was not, as they had supposed, their biological father. The appellate court reversed the district court’s denial of anonymity, drawing a distinction between when anonymity is requested “merely to avoid the annoyance and criticism that may attend any litigation” and when anonymity is requested “to preserve privacy in a matter of sensitive and highly personal nature.”

Finally, widespread anonymity is unlikely to occur – especially in suits against the government – since litigants often publicize their causes. Organizations often use publicity to champion their causes and to generate good will. Notable examples include: the American Civil Liberties Union; the American Center for Law and Justice; and even the Jehovah’s Witnesses. Therefore, it is the rare party who seeks anonymity, and often only to avoid undue annoyance, embarrassment, and oppression.

CONCLUSION

Openness is one of the defining characteristics of American judicial proceedings; thus, as a general matter, anonymity directly conflicts with the constitutionally embedded presumption of openness in judicial proceedings and is disfavored. In criminal and civil trials, anonymity deprives the public of its rights to monitor the functions of government, to know what transpires in the courtroom, and to know who is using its courts. In criminal trials anonymity also deprives a defendant of the Sixth Amendment right to a public trial by an impartial jury and to a presumption of innocence.

Nevertheless, anonymity and individual privacy play important roles in our system of justice. Anonymity may be perceived as a threat to the constitutionally embedded presumption of openness in judicial proceedings, but, in some situations, the denial of anonymity poses a greater threat to effective justice than anonymity itself – a fact that the Supreme Court has consistently recog-

184 Id. at 241.
185 Id. at 238.
186 See ACLU, American Civil Liberties Union: In The Courts, at http://www.aclu.org/court/index.html (last visited Feb. 22, 2003) (discussing ACLU’s role and interest in the current Supreme Court term, and, via hyperlink, previous Supreme Court terms).
187 See JAY SEKULOW, THE AM. CTR. FOR LAW & JUSTICE, CASES INDEX, at http://www.aclj.org/cases_index.asp (last visited Feb. 22, 2003) (discussing the ACLU’s role in cases from the United States Supreme Court to local school boards).
nized. Despite its importance, anonymity is often misconstrued, and thus it is in need of proper understanding and formal recognition.

This Note's proposed test for anonymity is an attempt to balance the competing interests at stake whenever a court is asked to decide whether to empanel an anonymous jury or to allow a litigant to proceed anonymously. The proposed test represents a straightforward, flexible, and general approach to anonymity, and provides for consistency between the use of an anonymous jury and the use of party anonymity.

BABAK A. RASTGOUFARD†

† J.D. Candidate, 2003, Case Western Reserve School of Law. I would like to thank Professor Jonathan L. Entin for his invaluable assistance and knowledge.