

SUNLIGHT IS THE BEST DISINFECTANT—OR IS IT? ANONYMITY AS A MEANS TO ENHANCE IMPARTIALITY

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TABLE OF CONTENTS

INTRODUCTION	1064
I. THE PROMISE AND PERILS OF PERSONAL ACCOUNTABILITY.....	1067
A. Accountability as an Antidote to Agency (and Other) Problems.....	1067
B. Limitations and Drawbacks of Personal Accountability.....	1070
II. EXISTING USES OF ANONYMITY TO IMPROVE DECISION-MAKING	1074
III. DESIGNING ANONYMOUS DECISION PROCESSES:	
POLICY AND PRACTICALITIES	1079
A. An Absolute Right to Know the Identity of Decision-Makers?.....	1079
B. Drawbacks of Anonymity	1080
C. Types of Conflict-of-Interest.....	1081
D. Position of the Affected Entities	1081
E. Types of Decision-Makers	1083
F. Anonymity and Accountability Combined.....	1084
G. Anonymity and Secret Voting.....	1085
H. Scope of Anonymity	1086
I. The Time Dimension.....	1086
J. Social and Organizational Norms.....	1086
K. Summary	1087
CONCLUSION	1087

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INTRODUCTION

Whenever someone is entrusted with advancing other people's interests, enhancing the public good, or resolving conflicts between other people, there is a concern that instead of doing these things, he or she may advance his or her own interests. According to common wisdom, transparency and accountability are the best, if not perfect, cure to this problem. As Louis Brandeis famously claimed in his essay *What Publicity Can Do*, "sunlight is said to be the best disinfectant."¹ In that spirit, transparency and accountability have been hailed in recent decades as hallmarks of good governance.² We agree. However, this Essay argues that accountability and transparency also have their drawbacks and that, in the right circumstances, concealing the identity of the decision-maker may actually produce better outcomes.

In a nutshell, anonymity can insulate the decision-maker from external pressures and temptations, thereby facilitating an impartial and disinterested decision. This is especially true when the expected gainers and losers from a given decision are in a similar position in terms of their ability and motivation to harm, or reward, the decision-maker. Anonymity may also improve decision-making when the correct decision is expected to be unpopular. To be sure, anonymity does have its drawbacks. Among other things, not being exposed to public scrutiny may reduce the effort that the decision-maker puts into gathering and processing the relevant information.³ Consequently, the identity of the decision-maker should be kept confidential only if the expected societal benefit outweighs the expected cost. Specifically, as we explain below, there are identifiable situations where the risk of outside pressure on the decision-maker is a first-order concern. These are the situations in which either the quality of the outcome or of the procedure leading to it can be improved if the identity of the decision-maker is not made public.

The remedy advocated by this Essay is already used in specific circumstances—most notably in the context of juries. Courts sometimes empanel anonymous juries to protect the jurors from potential threats that might bias their decision-making.⁴ An example from the private sphere is the committee that

1. Louis D. Brandeis, *What Publicity Can Do*, in *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92, 92 (1914).

2. See, e.g., Mark Bovens, *Public Accountability*, in *THE OXFORD HANDBOOK OF PUBLIC MANAGEMENT* 182, 182 (Ewan Ferlie, Laurence E. Lynn, Jr. & Christopher Pollitt eds., 2007); Christopher Hood, *Accountability and Transparency: Siamese Twins, Matching Parts, Awkward Couple?*, 33 *WEST. EUR. POL.* 989, 989 (2010).

3. See generally Philip E. Tetlock, *Accountability and the Perseverance of First Impressions*, 46 *SOC. PSYCH. Q.* 285 (1983) (experimentally demonstrating that knowing they would have to justify their decisions helped subjects in overcoming the bias created by the order of presentation of the evidence); see also *infra* notes 90–93 and accompanying text.

4. See, e.g., *United States v. Barnes*, 604 F.2d 121, 140–41 (2d Cir. 1979) (upholding the decision of the trial judge, in a large heroin distribution case, to maintain the jurors' anonymity in order to reduce their fear that they or their families may be subjected to violence or death at the hands of the defendants or their friends—thereby facilitating free and impartial decision-making); *United States v. Ross*, 33 F.3d 1507, 1519–22 (11th Cir. 1994) (upholding the decision to empanel anonymous jury in a case involving major international drug organizations); see also *infra* notes 55–67 and accompanying text.

determines and periodically updates the makeup of the S&P 500 index—one of the most influential indices of stock performance of large companies listed on stock exchanges in the United States.⁵ The identities of the members of the Index Committee are kept secret.⁶ Another well-known application is academic peer review, where the identity of the referees is routinely concealed from the author.⁷ Still, anonymous decision procedures are unusual.

Contrary to first appearances, the choice between anonymous and transparent decision-making need not be categorical. Anonymity comes in various shapes and sizes. For example, a decision-maker might be anonymous to some people but not to others, and the identity of the decision-maker may be kept anonymous indefinitely or only for a certain period. It is also possible to provide the reasons for a decision without revealing the identity of the decision-maker. Such intermediate solutions are worth considering when designing anonymous decision processes.

Thus far, legal scholars have discussed anonymity primarily in other contexts, such as freedom of speech,⁸ including digital anonymity;⁹ encouraging the communication of information;¹⁰ the right to privacy;¹¹ and citizens' participation in the political process.¹² Notably, Jeffrey Skopek has adopted a more comprehensive perspective, but even he has not considered the use of anonymity as a means of promoting unbiased and prudent decision-making.¹³ With the exception of the

5. See, e.g., Scott Hirst & Kobi Kastiel, *Corporate Governance by Index Exclusion*, 99 B.U. L. REV. 1229, 1251, 1276 (2019) (referring to S&P 500 as one of the major stock indices).

6. Akane Otani, *David M. Blitzer: Stock Picker Behind the S&P 500*, WALL ST. J. (May 19, 2017, 5:30 AM), <https://www.wsj.com/articles/david-m-blitzer-stock-picker-behind-the-s-p-500-1495186202> [<https://perma.cc/VAX8-LQN5>].

7. See *infra* notes 82–83 and accompanying text.

8. See, e.g., Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537 (2007) (discussing the tension between the right to speak without revealing one's identity and the rights of the people who are harmed by anonymous speech).

9. See, e.g., Anne Wells Branscomb, *Anonymity, Autonomy and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639 (1995) (analyzing the challenges to the First Amendment created by the internet); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009) (analyzing the tension between freedom of speech and the assault on disadvantaged classes by anonymous online groups).

10. See, e.g., Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2191 (1996) (discussing social and legal norms regarding anonymity and the use of intermediaries in communication).

11. See, e.g., Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1 (1991) (analyzing the conflict between privacy and anonymity on the one hand, and the virtues of disclosure on the other hand).

12. See generally James A. Gardner, *Anonymity and Democratic Citizenship*, 19 WM. & MARY BILL RTS. J. 927 (2011) (discussing the pros and cons of exposing people's contributions to political candidates).

13. Jeffrey M. Skopek, *Anonymity, the Production of Goods, and Institutional Design*, 82 FORDHAM L. REV. 1751 (2014) (offering a rich taxonomy of rules relating to anonymity and analyzing the policy considerations behind them).

literature on the use of anonymous juries,¹⁴ little attention has been paid to the possibility of using anonymity as a means of enhancing impartiality.¹⁵

This Essay aims to fill this gap in the legal literature. It argues that keeping the identity of the decision-maker confidential may be advisable in many contexts where at present it is not yet used. For example, current rules of governmental procurements emphasize accountability: when a contract is awarded on the basis of competitive proposals, unsuccessful bidders are entitled to receive information about the evaluation of their offers, the overall ranking of all offers, a summary of the rationale of the award, and so forth.¹⁶ Without compromising the salutary effect of this accountability, keeping the identity of the administrators in charge of the decision confidential can improve the process by shielding them from corrupt offers by the bidders. To take another example, the choice between different vaccines against a virus that causes a pandemic, and the decision of who is vaccinated first, should be made on medical and scientific grounds. Keeping the identity of the decision-makers anonymous may protect them from external commercial and political pressures and temptations. Here too, the grounds of the decisions may be announced without revealing the identity of the decision-makers. Importantly, as these examples demonstrate, anonymity and accountability are not necessarily incompatible. Elements of anonymity and accountability may be interwoven in complex ways to produce best outcomes. Numerous other considerations and possibilities are discussed in detail below.

The Essay proceeds as follows. Part I outlines conflicts of interest when people make decisions on behalf of others, the prospects of accountability as a remedy for this problem, and its concomitant drawbacks. Part II then describes existing uses of anonymity to improve decision-making—especially as a means to enhance impartiality. Part III proposes tentative guidelines for the design of anonymous decision processes, in light of pertinent policy and practical considerations. A conclusion follows.

14. See, e.g., Eric Wertheim, *Anonymous Juries*, 54 *FORDHAM L. REV.* 981 (1986) (arguing that anonymous juries do not undermine the defendants' right to fair trial, nor the presumption of innocence); Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 *VAND. L. REV.* 123 (1996) (calling for the routine use of anonymous juries in criminal cases); Christopher Keleher, *The Repercussions of Anonymous Juries*, 44 *U.S.F. L. REV.* 531 (2010) (describing and criticizing the use of anonymous juries in federal and state courts); Leonardo Mangat, *A Jury of Your [Redacted]: The Rise and Implications of Anonymous Juries*, 103 *CORNELL L. REV.* 1621 (2018) (proposing ways to mitigate the difficulties created by jurors' anonymity).

15. On a higher level of abstraction, the issue of anonymizing decision-makers may be associated with the notion of *deliberate ignorance*—i.e., the personal or institutional choice not to seek or use information. Recently, deliberate ignorance has attracted much scholarly attention in various disciplines, but it lies outside the scope of the present discussion. For a collection of cross-disciplinary studies of deliberate ignorance, see *DELIBERATE IGNORANCE: CHOOSING NOT TO KNOW* (Ralph Hertwig & Christoph Engel eds., 2020). See also *infra* note 83.

16. 41 U.S.C.S. § 3704.

I. THE PROMISE AND PERILS OF PERSONAL ACCOUNTABILITY

This Part first describes how accountability can ameliorate the agency problem and have additional beneficial effects. It then points to the limitations and drawbacks of accountability.

A. Accountability as an Antidote to Agency (and Other) Problems

Rational choice theory, which underpins standard economic analysis, posits that people are rational maximizers of their self-interest.¹⁷ Behavioral studies question this premise and show that people care not only about themselves but also about others and about moral and social norms.¹⁸ At the same time, behavioral studies demonstrate that people suffer from (possibly unconscious) self-serving biases, due to which they tend to advance their own interests, even when they are supposed—and actually intend—to promote the interests of others or the common good.¹⁹ Either way, whenever people are entrusted with making decisions that affect the interests of other people, there is a real concern that they may prioritize their own interests over those they are expected to promote. This is the well-known *agency problem*, which has been studied extensively in the social sciences—first in the context of corporations²⁰ and gradually in other social, political, and legal contexts.²¹ The agency problem permeates individual and commercial relationships—e.g., between employees and employers, attorneys and their clients—as well as the public sphere where public officials are expected to serve the public

17. See FRANCIS Y. EDGEWORTH, *MATHEMATICAL PHYSICS: AN ESSAY ON THE APPLICATION OF MATHEMATICS TO THE MORAL SCIENCES* 16 (1881) (“The first principle of Economics is that every agent is actuated only by self-interest.”); DANIEL M. HAUSMAN, MICHAEL S. MCPHERSON & DEBRA SATZ, *ECONOMIC ANALYSIS, MORAL PHILOSOPHY, AND PUBLIC POLICY* 55–91 (3d ed. 2017) (discussing the notion of economic rationality and its relationship with morality); ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 12 (6th ed. 2012) (“Economists usually assume that each economic actor maximizes something: Consumers maximize utility (that is happiness or satisfaction), firms maximize profits”); Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 *PHIL. & PUB. AFFS.* 317 (1977) (criticizing the motivational assumptions of standard economic analysis).

18. See generally EYAL ZAMIR & DORON TEICHMAN, *BEHAVIORAL LAW AND ECONOMICS* 94–110 (2018) (surveying behavioral studies of people’s moral convictions, prosocial behavior, altruism, and cooperation).

19. Eyal Zamir, *Refounding Law and Economics: Behavioral Support for the Predictions of Standard Economic Analysis*, 16(2) *REV. L. & ECON.* 1, 1, 12–18 (2019) (describing “the behavioral studies that reveal how automatic and mostly unconscious processes lead well-intentioned people to make self-serving decisions”).

20. See, e.g., Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. FIN. ECON.* 305 (1976) (developing a theory of the firm based on the agency problem).

21. See, e.g., John Ferejohn, *Incumbent Performance and Electoral Control*, 50 *PUB. CHOICE* 5 (1986) (discussing the relationships between voters and officeholders); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 *J. LEGAL STUD.* 189 (1987) (analyzing the relationships between attorneys and their clients); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 *WIS. L. REV.* 679 (analyzing “Pay now, terms later” contracting through the lens of the agency problem).

good.²² In extreme instances, the agency problem leads to the corruption of public officials, which in turn undermines the public trust in government, impairs governmental operations, and lowers economic growth.²³

The conflict of interest inherent in agency relationships originates in the fact that the principal has limited information about the agent's behavior, cannot (perfectly) monitor it, and consequently cannot make the agent's remuneration contingent upon the latter's honest behavior.²⁴ A classic application is embezzlement: when unobserved by the principal, the agent pockets a valuable asset that belongs to the principal. However, very often, other people are involved apart from the agent and the principal. For example, in the case of a public official, the principal is the government or the public at large and the agent may inappropriately benefit someone in return for a bribe. In that case, the harm to the principal and the benefit to the agent are of different kinds, but the problem still stems from the fact that the principal can only imperfectly observe the agent's behavior.

This concern is somewhat mitigated when the decision process is adversarial—as in law courts—if both sides to the dispute can be expected to be equally competent and equally motivated to fight for their respective causes. Conversely, the risk of bias looms conspicuously large if there is no institutionalized adversary (for example, when there is no representative of the public interest in a given administrative procedure) or if there is a structural asymmetry between the disputants.²⁵

Accountability and transparency can mitigate the risk of biased and self-serving decision-making. Roughly, accountability denotes the duty to explain one's decisions or conduct (or the expectation of having to do so); transparency means the making of information about one's decisions and conduct visible to others.²⁶

22. This is a key tenet of public choice theory, which introduces the standard economic assumptions into the analysis of political and administrative processes. On public choice theory, see generally GORDON TULLOCK, ARTHUR SELDON & GORDON L. BRADY, *GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE* (2002).

23. See, e.g., SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* (1999) (analyzing corruption as an economic, cultural, and political problem, as well as ways of fighting it); Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681 (1995) (finding that corruption reduces investment and economic growth); Benjamin A. Olken, *Corruption and the Costs of Redistribution: Micro Evidence from Indonesia*, 90 J. PUB. ECON. 853 (2006) (studying the effect of corruption on a program for distribution of subsidized rice to poor households in Indonesia).

24. See, e.g., Gary J. Miller & Andrew B. Whitford, *The Principal's Moral Hazard: Constraints on the Use of Incentives in Hierarchy*, 17 J. PUB. ADMIN. RSCH. & THEORY 213, 217 (2007). For a book-length analysis, see JEAN-JACQUES LAFFONT & DAVID MARTIMORT, *THE THEORY OF INCENTIVES: THE PRINCIPAL-AGENT MODEL* (2002).

25. A corollary of this observation is, for example, the constitutional right of indigent defendants to an appointed counsel in criminal cases. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

26. See Hood, *supra* note 2, at 989. Accountability (or external accountability) should be distinguished from a sense of personal responsibility (that could be dubbed *internal accountability*), which may also affect one's decisions regardless of whether it is observable

Contrary to first appearances, the two are not inseparable twins, and some elements of accountability and of transparency are sometimes in tension with one another.²⁷ However, because our focus is ultimately on anonymity rather than on accountability or transparency, we will not elaborate on the intricate relationships between the two.

Many studies in economics, psychology, political science, and law have highlighted the role of transparency and accountability as antidotes to the abuse of power, the pursuit of ulterior motives, nepotism, corruption, and other forms of improper behavior.²⁸ As one commentator put it, “[p]ublic accountability is the hallmark of modern democratic governance. Democracy remains a paper procedure if those in power cannot be held accountable in public for their acts and omissions, for their decisions, their policies, and their expenditures.”²⁹

The expectation that one will have to justify one’s decisions to others also mitigates certain cognitive biases.³⁰ For example, it has been found that accountability for the decision-making procedure (so-called *process accountability*) attenuates possibly unconscious, self-serving biases in principal–agent

by others. On this distinction, see Welmer E. Molenmaker, Erik W. de Kwaadsteniet & Eric van Dijk, *The Impact of Personal Responsibility on the (Un)willingness to Punish Non-Cooperation and Reward Cooperation*, 134 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 2 (2016). In conformity with its common meaning, we use the term accountability to denote accountability to others.

27. See generally Hood, *supra* note 2 (highlighting the tensions between accountability and transparency and exploring several ways to analyze them); Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL’Y REV. 79 (2012) (arguing that online transparency may fail to promote accountability).

28. For a collection of cross-disciplinary studies of public accountability, see THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY, *supra* note 2. For an overview of the literature, see Bovens, *supra* note 2. See also Daniel Lederman, Norman V. Loayza & Rodrigo R. Soares, *Accountability and Corruption: Political Institutions Matter*, 17 ECON. & POL. 1 (2005) (examining the role of institutions that increase accountability, thereby reducing corruption across various countries); Catharina Lindstedt & Daniel Naurin, *Transparency Is Not Enough: Making Transparency Effective in Reducing Corruption*, 31 INT’L POL. SCI. REV. 301 (2010) (analyzing the factors that determine the efficacy of transparency in reducing corruption, across countries).

29. Bovens, *supra* note 2, at 182.

30. For general surveys of the effect of accountability on judgement and decision-making, see Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCH. BULL. 255 (1999) [hereinafter Lerner & Tetlock, *Accounting for Accountability*]; Jennifer S. Lerner & Philip E. Tetlock, *Bridging Individual, Interpersonal, and Institutional Approaches to Judgment and Decision Making: The Impact of Accountability on Cognitive Bias*, in EMERGING PERSPECTIVES ON JUDGMENT AND DECISION RESEARCH 431 (Sandra L. Schneider & James Shanteau eds., 2003); ZAMIR & TEICHMAN, *supra* note 18, at 132–34. For the claim that judges’ duty to give reasons for their decisions helps overcoming cognitive biases, see Christoph Engel, *The Psychological Case for Obliging Judges to Write Reasons*, in THE IMPACT OF COURT PROCEDURE ON JUDICIAL DECISION MAKING 71, 91–93 (Christoph Engel & Fritz Strack eds., 2007).

relationships.³¹ Synthesizing the results of previous studies, Jennifer Lerner and Philip Tetlock concluded that accountability is most likely to produce “self-critical and effortful thinking” when decision-makers expect “that they will be accountable to an audience (a) whose views are unknown, (b) who is interested in accuracy, (c) who is interested in process rather than specific outcomes, (d) who is reasonably well-informed, and (e) who has a legitimate reason for inquiring into the reasons behind . . . judgments.”³²

Relatedly, studies in psychology and economics have shown that people act pro-socially and altruistically to gain social approval.³³ People are therefore more likely to act pro-socially when their decisions and actions are observable and attributable to them.³⁴ For example, it has been experimentally demonstrated that people contribute more to public goods when their identity and contribution are known to others.³⁵ Likewise, people spend more of their own resources to punish unfair behavior when such punishment is observable.³⁶

B. Limitations and Drawbacks of Personal Accountability

The previous Section celebrated the benefits of accountability. But accountability is no panacea, and it has certain downsides, as well. This Section focuses on one common feature of accountability: the transparency of the identity of the decision-maker. It first characterizes the goals of decision-making procedures and then explains how public knowledge of the identity of the decision-maker may hinder the attainment of these goals.

One obvious goal of decision-making procedures is decision accuracy (or optimality). Thus, defendants should only be convicted if their guilt is proven beyond reasonable doubt (and otherwise acquitted), and drugs should be approved

31. Marko Pitesa & Stefan Thau, *Masters of the Universe: How Power and Accountability Influence Self-Serving Decisions Under Moral Hazard*, 98 J. APPLIED PSYCH. 550, 550 (2013) (showing that “holding agents accountable for their decision-making procedure reduces the level of self-serving decisions under moral hazard”).

32. Lerner & Tetlock, *Accounting for Accountability*, *supra* note 30, at 259.

33. See, e.g., Stefano Dellavigna, John A. List & Ulrike Malmendier, *Testing for Altruism and Social Pressure in Charitable Giving*, 127 Q.J. ECON. 1 (2012) (reporting the results of a field experiment that demonstrates that much of charitable giving is a product of social pressure); Peter H. Kriss, Roberto A. Weber & Erte Xiao, *Turning a Blind Eye, but Not the Other Cheek: On the Robustness of Costly Punishment*, 128 J. ECON. BEHAV. & ORG. 159 (2016) (experimentally demonstrating that the willingness to incur costs to punish norm violations by others decreases when the punisher can conceal his or her decision not to punish).

34. See, e.g., Jason Dana, Roberto A. Weber & Jason Xi Kuang, *Exploiting Moral Wiggle Room: Experiments Demonstrating an Illusory Preference for Fairness*, 33 ECON. THEORY 67 (2007) (experimentally demonstrating that reducing the transparency of one’s behavior increases unfair behavior); James Andreoni & B. Douglas Bernheim, *Social Image and the 50–50 Norm: A Theoretical and Experimental Analysis of Audience Effects*, 77 ECONOMETRICA 1607 (2009) (arguing that people often behave fairly because they want to be perceived as fair, rather than actually be fair).

35. James Andreoni & Ragan Petrie, *Public Goods Experiments Without Confidentiality: A Glimpse into Fund-Raising*, 88 J. PUB. ECON. 1605, 1606 (2004).

36. Jared Piazza & Jesse M. Bering, *The Effects of Perceived Anonymity on Altruistic Punishment*, 6 EVOLUTIONARY PSYCH. 487 (2008).

only if they are proven effective and meet the relevant safety standards. The outcome of the process—i.e., the final decision—may fall short of the accuracy standard for multiple reasons: applicable rules were disregarded; the decision was based on inapplicable rules; relevant facts were ignored; irrelevant facts were taken into account; information was not processed fully or properly; and necessary safeguards (like a more stringent standard of proof) were ignored.

Typically, we care not only about the accuracy of decisions, but also about the appropriateness of the process leading to them. *Procedural fairness* (or *procedural justice*) is important for principled and instrumental reasons. As a matter of principle, respect for the people who are affected by a decision may require, for example, letting them voice their concerns before the decision is made.³⁷ Instrumentally, appropriate procedures enhance decision accuracy. For example, hearing the affected people may draw attention to issues that the decision-maker may have been unaware of.³⁸ Moreover, perceptions of procedural justice directly affect the perceived legitimacy of the decision—which in turn enhances people's willingness to comply and indeed to abide by any normative expectation that originates in the law, even in completely different domains.³⁹

Both decision outcome and process are at risk if an interested party actively seeks to bias the decision-maker. This party may be the addressee of the decision—e.g., a defendant who threatens members of the jury with physical harm if he is found guilty, or a bidder in a public tender who offers a bribe if her offer is accepted. The biasing influence may also originate in a third party with an interest in the outcome—such as a business association that wishes to thwart an unfavorable judicial precedent or a racist organization seeking to prevent the awarding of governmental contracts to people of color.

The threat to procedural fairness and decision accuracy looms particularly large when policymakers are entrusted with regulating the activities of a given

37. See, e.g., DENIS J. GALLIGAN, *DUE PROCESS AND FAIR PROCEDURES: A STUDY OF ADMINISTRATIVE PROCEDURE* 351 (1996) (“The right to be heard . . . follows directly from the principle of respect . . . to hear a person is to show respect for him.”); TIMOTHY A. O. ENDICOTT, *ADMINISTRATIVE LAW* 125 (4th ed. 2018) (“The value of respect: to treat a person who is involved in certain ways in the outcome of a decision as someone who should be involved in the process.”).

38. GALLIGAN, *supra* note 37, at 349 (“The first virtue of the hearing principle is that it contributes to better decisions and actions, better that is, in the sense that the facts are decided accurately, the law applied properly, and any discretionary judgments reasonably made.”); ENDICOTT, *supra* note 37, at 125 (“The value of promoting good outcomes: to improve the capacity of the decision maker to act on all the relevant considerations.”).

39. Many studies of perceptions of procedural justice have focused on policing. See, e.g., Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 *LAW & SOC'Y. REV.* 513 (2003) (establishing the relationships between procedural justice, police legitimacy, compliance with the law, and cooperation with the police); Daniel S. Nagin & Cody W. Telep, *Procedural Justice and Legal Compliance*, 13 *ANN. REV. L. & SOC. SCI.* 5, 5 (2017) (reviewing the literature and concluding that “perception-based studies consistently show that citizen perceptions of procedurally just treatment are closely tied to perceptions of police legitimacy and that with only a few exceptions perceptions of legitimacy are strongly associated with legal compliance”).

industry or trade (or any other relatively small, organized group) to further the public interest. Typically, in such instances the public at large can hardly influence the regulator's decisions due to information costs and the *collective action problem*.⁴⁰ In contrast, the special-interest group (such as a trade association) can influence the regulator's decisions through lobbying and (explicit or implicit) threats and rewards. This widespread phenomenon is known as *regulatory capture*.⁴¹ In such cases, even public-spirited officials may promote the interests of organized groups due to automatic self-serving biases,⁴² including *motivated reasoning*.⁴³

Regardless of whether the decision-maker is a rational maximizer of his or her own interests or a public-spirited person who falls prey to self-serving biases, the danger of biased decision-making is greater when it is less obvious what the normatively correct decision should be. This is often the case when the relevant facts are not fully known or are open to alternative interpretations. It is also the case when the correct decision is unclear due to conflicting policy considerations. In such cases, it is easier to conceal one's ulterior motives from others and from oneself.

Accountability can mitigate the ills of biased decision-making—including in situations of regulatory capture—particularly if public officials expect their decisions to be reviewed by other governmental agencies or by the courts, scrutinized by the media, and the like. However, as long as there is a strong asymmetry between the large, unidentified public and the small, organized interest group, accountability may actually backfire. The implicit expectation of public or regulatory oversight may be less palpable than the imminent threat of interest group pressure.⁴⁴ Keeping the identity of the decision-maker confidential would make such pressure much more difficult to orchestrate.

More generally, as previously noted, human beings are social creatures who strive to gain social approval and avoid social disapproval. Consequently, they are prone to (consciously or unconsciously) making improper decisions to gain such

40. On the seminal, modern introduction of this insight, see MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 53–65 (1965).

41. For seminal contributions to the understanding of regulatory capture, see George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON & MGMT. SCI.* 3 (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 *LAW & ECON.* 211 (1976). For an overview of the early literature, see Andrew S. Carron, *The Political Economy of Financial Regulation*, in *THE POLITICAL ECONOMY OF DEREGULATION: INTEREST GROUPS IN THE REGULATORY PROCESS* 69 (Roger G. Noll & Bruce M. Owen eds., 1983). For a more recent review of the theoretical and empirical literature, see Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 *OXFORD REV. ECON. POL'Y* 203 (2006).

42. See Eyal Zamir & Raanan Sulitzeanu-Kenan, *Explaining Self-Interested Behavior of Public-Spirited Policy Makers*, 78 *PUB. ADMIN. REV.* 579, 584–87 (2018) (offering a behavioral explanation for the predictions of public choice theory).

43. Motivated reasoning is the (possibly unconscious) use of strategies that are likely to yield a desired conclusion. See generally Ziva Kunda, *The Case for Motivated Reasoning*, 108 *PSYCH. BULL.* 480 (1990).

44. Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward A Synthesis*, 6 *J.L. ECON. & ORG.* 167, 172–85 (1990) (constructing a model that integrates: (1) public officials' motivations; (2) the observability of public officials' decisions; and (3) the information, organization, and monitoring costs of special and general interest groups).

approval or avoid such disapproval. As Philip Tetlock has observed, “just as it is possible for decision-makers to recommend the right solution because they are accountable to a wise audience, it is equally possible for them to recommend the wrong solution because they are accountable to a shortsighted audience.”⁴⁵

Furthermore, while accountability helps alleviate some cognitive biases, it may exacerbate others.⁴⁶ Thus, it has been found that accountability heightens the *status quo bias* when overall desirable decisions are expected to harm identified or identifiable people.⁴⁷ As Tetlock and Boettger note, when the people who are expected to gain from a given governmental decision do not know how much better off they would be if the decision is made, accountable decision-makers are likely to serve the interests of the identifiable group of people who are about to lose from the decision (thus echoing the notion of regulatory capture).⁴⁸ Relatedly, inasmuch as decision-makers seek to avoid failures more than they strive to achieve success (a manifestation of the so-called *negativity bias*), transparency may lead to all sorts of distortions in the functioning of governmental agencies.⁴⁹ Accountability may also amplify the *escalation of commitment* and *confirmation bias*. Escalation of commitment (a.k.a. the *sunk costs effect*) denotes the tendency to persist in endeavors the more resources, time, or efforts one has already invested in them.⁵⁰ Confirmation bias refers to the inclination to seek and process information in ways that are in keeping with one’s beliefs and expectations.⁵¹ The more people are accountable to others, the less they are willing to admit that their initial decisions and beliefs were wrong.⁵²

Finally, accountability may induce decision-makers to make the decision that is easiest to justify, rather than the optimal one. For example, in one experiment subjects were asked to give financial assistance to several needy students with varying degrees of neediness. It was found that accountability to either the financing agency or to the prospective recipients of the aid reduced the efficacy of allocation

45. Philip E. Tetlock, *The Impact of Accountability on Judgment and Choice: Toward a Social Contingency Model*, in *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 331, 349 (Mark P. Zanna ed., 1992); see also ZAMIR & TEICHMAN, *supra* note 18, at 405–06 (“[E]ven if professional training, experience, the use of sophisticated decision aids, and checks-and-balances mechanisms reduce or even eliminate the impact of policymakers’ cognitive biases, they may still think it perfectly rational to adopt policies and take actions that reflect the heuristics and biases of their constituencies.”).

46. See *supra* note 30 and accompanying text.

47. See Philip E. Tetlock & Richard Boettger, *Accountability Amplifies the Status Quo Effect When Change Creates Victims*, 7 *J. BEHAV. DECISION MAKING* 1 (1994).

48. *Id.* at 20.

49. See generally Christopher Hood, *What Happens When Transparency Meets Blame-Avoidance?*, 9 *PUB. MGMT. REV.* 191 (2007) (explaining how blame-avoidance may nullify or even reverse the positive effects of transparency).

50. See generally ZAMIR & TEICHMAN, *supra* note 18, at 56–57; Hal R. Arkes & Catherine Bloomer, *The Psychology of Sunk Costs*, 35 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 124 (1985).

51. See generally ZAMIR & TEICHMAN, *supra* note 18, at 58–61; Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 *REV. GEN. PSYCH.* 175 (1998).

52. Lerner & Tetlock, *Accounting for Accountability*, *supra* note 30, at 257–58.

and increased waste of resources (e.g., due to equal allocation of resources to all applicants).⁵³ In extreme cases, holding public agencies accountable may result in obsession with rules, proceduralism, and rigidity.⁵⁴

In summary, accountability and transparency can improve decision-making—and in particular, mitigate the agency problem—in both the private and public spheres. However, personal accountability also has drawbacks and may sometimes even backfire.

II. EXISTING USES OF ANONYMITY TO IMPROVE DECISION-MAKING

One way to mitigate the agency problem and to improve procedural fairness and the quality of decisions, while avoiding the pitfalls of personal accountability, is to keep the identity of decision-makers confidential. Anonymity can sometimes facilitate wise (if unpopular) decisions; shield decision-makers from the fear of retaliation by those who are adversely affected by their decisions; and eliminate the expectation of being rewarded by those who stand to benefit. To add concreteness and provide background for the policy discussion in Part III, this Part briefly reviews existing uses of anonymity as a means of improving decision-making and enhancing impartiality in legal and organizational settings.

In recent decades, anonymity has been used to promote unbiased decision-making by juries in courts at both the federal and state level.⁵⁵ While the general rule is that jurors' identity is known to the litigants and the public at large, the courts sometimes empanel anonymous juries—primarily to protect the jurors from potential threats that might bias their decision-making. As summarized in *United States v. Ross*:

Sufficient reason for empaneling an anonymous jury has been found to exist upon a showing of some combination of several factors, including: (1) the defendant's involvement in organized crime, (2) the defendant's participation in a group with the capacity to harm jurors, (3) the defendant's past attempts to interfere with the judicial process, (4) the potential that, if convicted, the defendant 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 or harassment.⁵⁶

53. Sheldon Adelberg & C. Daniel Batson, *Accountability and Helping: When Needs Exceeds Resources*, 36 J. PERSONALITY & SOC. PSYCH. 343 (1978); see also Florian Baumann & Frank Fagan, *Publication Rules and Judicial Candor* (Working Paper, May 14, 2021, on file with authors) (arguing that unrestricted publication of the identity of judges may lead them to make less desirable, yet easier-to-explain, decisions).

54. Bovens, *supra* note 2, at 194–96.

55. See *supra* notes 4, 14.

56. *United States v. Ross*, 33 F.3d 1507, 1520 (11th Cir. 1994); accord *United States v. Edmond*, 52 F.3d 1080, 1091 (D.C. Cir. 1995); *United States v. Carson*, 455 F.3d 336, 356 n.18 (D.C. Cir. 2006); *United States v. Mathis*, 932 F.3d 242, 253 (4th Cir. 2019);

The decision to empanel an anonymous jury is considered a matter of trial administration and is at the judge's discretion. In general, neither federal nor state legislation regulates this discretion. One commendable exception to this is found in the Minnesota Rules of Criminal Procedure, which strive to strike a balance between protection of the jury and securing the rights of the accused (and the public at large).⁵⁷ Under the Minnesota rule, the court may, on any party's motion, restrict access to jurors' names, addresses, and other identifying information—but only if “a strong reason exists to believe that the jury needs protection from external threats to its members' safety or impartiality.”⁵⁸ The identifying information may be restricted “as long as necessary to protect the jurors,” and the court is instructed to “minimize any prejudice the restriction has on the parties.”⁵⁹ Procedurally, the court “must hold a hearing on the motion and make detailed findings of fact supporting its decision to restrict access to juror information”⁶⁰—and do so in writing.

The scope of jurors' anonymity varies in terms of the amount of information being withheld;⁶¹ the people from whom the jurors' information is concealed;⁶² the duration of the anonymity;⁶³ and in the amount of the anonymized information divulged post-trial, if any.⁶⁴

In the absence of specific legislation, some state courts are less receptive than others to anonymous juries. Those courts often rely on the wording of state statutes dealing with the selection of jurors and highlight the concerns that the very use of anonymity may bias the jury against the defendant, because it implies that the defendant is dangerous.⁶⁵ In response to this concern, it has been suggested that jury anonymity should be the rule, rather than the exception, thereby eliminating any

see also Keleher, *supra* note 14, at 537–43 (reviewing the criteria for empanelling anonymous juries in federal and state courts); Mangat, *supra* note 14, at 1628–36 (same).

57. Minn. R. Crim. P. § 26.02 subd. 2(2) (2020).

58. *Id.*

59. *Id.*

60. *Id.*

61. *See, e.g.,* United States v. Bowman, 302 F.3d 1228, 1236 (11th Cir. 2002) (withholding jurors' names, addresses, and places of employment); *Ross*, 33 F.3d at 1519 (withholding jurors' names, addresses, places of employment, and spouses' names and places of employment); *see also* Mangat, *supra* note 14, at 1625 (describing court decisions about the varying amounts of information revealed about jurors).

62. *See, e.g.,* United States v. Black, 483 F. Supp. 2d 618, 631 (N.D. Ill. 2007) (information being withheld from the public); *Ross*, 33 F.3d at 1519 (withholding information from both the public and the defendant); *State v. Sandoval*, 788 N.W.2d 172, 194–95 (Neb. 2010) (affirming the disclosure of juror information to the defendant's counsel, while ordering him not to disclose the information to anyone, including the defendant).

63. *See, e.g.,* United States v. Brown, 250 F.3d 907, 922 (5th Cir. 2001) (denying post-trial news request for juror information); United States v. Doherty, 675 F. Supp. 719, 725 (D. Mass 1987) (names of jurors revealed seven days after the verdict).

64. *See, e.g.,* *Brown*, 250 F. 3d at 918 (court withholding all juror information); United States v. Melendez, 743 F. Supp. 134, 138–39 (E.D.N.Y. 1990) (holding that only the jurors' surnames, counties of residence, and types of employment could be revealed to defendants).

65. *See* Keleher, *supra* note 14, at 543–46 (reviewing court decisions in Massachusetts, New Jersey, and New York).

negative inference from its use.⁶⁶ In fact, even when jurors are not strictly speaking anonymous, they are considerably less visible to the public than judges and are much less accountable for their decisions.⁶⁷

While anonymous juries have attracted considerable scholarly attention, the anonymity of the members of the S&P 500 Index Committee has not. The S&P 500 Index is one of the most influential indices of large companies publicly traded in the United States. It measures the performance of the large-cap segment of the market and is commonly considered a proxy of the U.S. equity market.⁶⁸ The S&P 500 serves as a benchmark for evaluating the performance of corporations and investment funds. Most importantly, passive index funds—a growing segment of the market in recent decades—often track the S&P 500 Index.⁶⁹

It has long been noticed that the very addition to, and, to a lesser extent, exclusion from, the S&P 500 list significantly affects the price of securities immediately after the change in index composition.⁷⁰ Two competing, though not mutually exclusive, explanations for this effect are the increased (decreased) demand for the added (excluded) firms by funds that track the S&P 500 Index⁷¹ and investors' interpretation of the addition or removal of firms as a signal about certain aspects of those companies' expected performances.⁷² Whatever the reason, the

66. King, *supra* note 14.

67. United States *ex rel.* McCann v. Adams, 126 F.2d 774, 775–76 (2d Cir. 1942) (stating that trial by jury is favored by the public because the “individual can forfeit his liberty . . . only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came”).

68. See S&P Dow Jones Indices, a Division of S&P Global, *S&P U.S. Indices Methodology* 3 (2020), <https://www.spglobal.com/spdji/en/documents/methodologies/methodology-sp-us-indices.pdf> [<https://perma.cc/R7LE-XL9M>].

69. On the various uses of the S&P 500 and comparable indices, see Adriana Z. Robertson, *Passive in Name Only: Delegated Management and Index Investing*, 36 YALE J. ON REG. 795, 801–08 (2019) [hereinafter *Index Investing*]. For a succinct description of index funds, see U.S. Securities Commission and Exchange Commission, *Investor Bulletin: Index Funds* (Aug. 6, 2018), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_indexfunds [<https://perma.cc/H5NX-62DU>].

70. See, e.g., Lawrence E. Harris & Eitan Gurel, *Price and Volume Effects Associated with Changes in the S&P 500 List: New Evidence for the Existence of Price Pressures*, 41 J. FIN. 815 (1986) (finding an increase of more than 3% in stock prices immediately after they are added to the index).

71. For pioneering contributions to this literature, see *id.*; Andrei Shleifer, *Do Demand Curves for Stocks Slope Down?*, 41 J. FIN. 579 (1986).

72. See, e.g., Diane K. Denis et al., *S&P 500 Index Additions and Earnings Expectations*, 58 J. FIN. 1821, 1821 (2003); Honghui Chen, Gregory Noronha & Vijay Singal, *The Price Response to S&P 500 Index Additions and Deletions: Evidence of Asymmetry and a New Explanation*, 59 J. FIN. 1901, 1916–27 (2004) (arguing that the permanent increase in the price of added firms stems from the increased awareness of investors to the existence of those firms). For a critical review of the competing theories, see Pyemo N. Afego, *Effects of Changes in Stock Index Compositions: A Literature Survey*, 52 INT'L REV. FIN. ANALYSIS 228 (2017).

decisions of the Index Committee have a major financial impact, especially in the short term.

Importantly, while the Index Committee follows predetermined criteria for the inclusion of firms in the list (criteria that the committee itself updates from time to time), it has significant discretion in this regard.⁷³ Based on a thorough empirical analysis, it has recently been estimated that the discretionary portion of the index represents about 5% of its total value.⁷⁴ It has therefore been argued that the S&P 500 Index Committee “effectively manages dozens of funds, representing trillions of dollars”⁷⁵—and yet, unlike investment advisers and investment funds, the Index Committee is not subject to statutory fiduciary duties or antifraud rules.⁷⁶ This alleged regulatory gap has been sharply criticized. Adriana Robertson has argued that “it is hard to come up with any economic or theoretical basis for justifying this differential treatment.”⁷⁷

But there is, perhaps, a good explanation for the success of the S&P 500 Index, despite the absence of regulation: the anonymity of its members. Over the years, the Index Committee has comprised six to ten employees of S&P Dow Jones Indices LLC, who convene periodically to discuss the composition of the index. One intriguing characteristic of the committee—noted by the media but overlooked by scholarly analysis—is the anonymity of its members.⁷⁸ Until 2019, only the identity of the committee’s Chair, David Blitzer, was publicly known, while the other members were anonymous.⁷⁹ Since Blitzer has stepped down (after serving more than thirty years on the committee—twenty-four of them as its Chair), not even the identity of the committee’s Chair is known. It stands to reason that this anonymity shields the committee members from external pressures and temptations, thereby facilitating impartial decision-making on an issue that bears great financial consequences for many people.⁸⁰

Similar considerations motivated the World Health Organization when it convened the Emergency Committee that guided the organization in fighting the

73. Adriana Z. Robertson, *The (Mis)Use of the S&P 500* 1 (Working Paper, Dec. 5, 2020), <https://ssrn.com/abstract=3205235> [<https://perma.cc/H9V6-S95L>] (empirically demonstrating that “far from being neutral or constant, the index represents substantial amounts of discretionary decision-making . . . [and its] composition changes substantially over time”). This feature characterizes other indices as well. *See Index Investing, supra* note 69, at 831–32, 843–45.

74. Robertson, *supra* note 73, at 8–21.

75. *Id.* at 24.

76. Under the Investment Company Act, an “investment adviser” of an investment company does not include “a person whose advice is furnished solely through uniform publications distributed to subscribers thereto.” 15 U.S.C. § 80a-2(a)(20)(i). Similarly, under the Investment Advisers Act, “the publisher of any bona fide . . . financial publication of general and regular circulation” is not considered an “investment adviser.” § 80b-2(a)(11)(D).

77. Robertson, *supra* note 73, at 25.

78. *See, e.g.,* Otani, *supra* note 6; Joel Weber & Eric Balchunas, *The Secretive Committee Behind the S&P 500* (Oct. 1, 2020), <https://www.bloomberg.com/news/articles/2020-10-01/the-secretive-committee-behind-the-s-p-500> [<https://perma.cc/4V6N-UUEB>] (an interview with former Chair of the committee, David Blitzer).

79. Weber & Balchunas, *supra* note 78.

80. Weber & Balchunas, *supra* note 78.

2009 influenza pandemic. To protect the members of the committee from commercial and political pressure, their identities were kept confidential until they completed their task.⁸¹

In the academic sphere, anonymity is used to enhance the impartiality of referees of manuscripts that are submitted for publication, research proposals that are submitted for funding, and the scholarly work of candidates for appointments and promotions.⁸² To enhance bias-free decisions, not only the identity of the referees but also that of the members of the relevant committees is sometimes kept secret.⁸³ Similarly, anonymity is the first principle of the inspection system of restaurants and hotels established by the Michelin Guide. According to Michelin's website, the inspectors are full-time Michelin employees who travel around the world and do their job in complete anonymity.⁸⁴

Another relevant sphere is peer assessment of academic work by students, especially in higher education, in a bid to advance their critical and analytical skills.⁸⁵ Various controlled studies have found that anonymity improves the quality of peer assessment. It reduces the peer pressure and fear of disapproval that students experience; enhances reliability; reduces overgrading; increases the number of critical comments; and is generally judged more positively by the students.⁸⁶

81. World Health Organization, *The International Response to the Influenza Pandemic: WHO Responds to the Critics* (2010), https://www.who.int/csr/disease/swineflu/notes/briefing_20100610/en/.

82. For critical assessments of this practice, see David Pontille & Didier Torny, *The Blind Shall See! The Question of Anonymity in Journal Peer Review*, 4 ADA: J. GENDER, NEW MEDIA & TECH. (2014), doi:10.7264/N3542KVW [<https://perma.cc/Y8FT-LP3Q>]; Juan Miguel Campanario, *Peer Review for Journals as It Stands Today—Part 1*, 19 SCI. COMMUN 181 (1998); Juan Miguel Campanario, *Peer Review for Journals as It Stands Today—Part 2*, 19 SCI. COMMUN 277 (1998) [hereinafter *Campario, Part 2*].

83. Another measure that is sometimes used to enhance the impartiality of academic assessments (and other decisions) is concealment of the identity of the person(s) whose work is assessed from the referee—the so-called *double blind* peer review. The present study focuses on the identifiability of the decision-maker, not those affected by the decision.

84. See Michelin Guide, *The Inspection System* (2021). <https://guide.michelin.com/sg/en/the-inspection-process-sg> [<https://perma.cc/Y3TN-RX2P>] (last visited Sept. 21, 2021).

85. See generally Nancy Falchikov, *Peer Feedback Marking: Developing Peer Assessment*, 32(2) INNOVATIONS IN EDUC. & TRAINING INT'L 175 (1995) (reviewing previous studies and proposing ways to improve peer assessments); Nancy Falchikov & Judy Golffinch, *Student Peer Assessment in Higher Education: A Meta-Analysis Comparing Peer and Teacher Marks*, 70 REV. EDUC. RES. 287 (2000) (a meta-analysis of forty-eight quantitative peer assessment studies).

86. See, e.g., Gunita Wadhwa, Henry Schultz & Bruce L. Mann, *Effects of Anonymity and Peer-Accountability During Online Peer Assessment*, in SELECTED STYLES IN WEB-BASED EDUCATIONAL RESEARCH 300 (Bruce L. Mann ed., 2006) (experimentally studying the effect of anonymity and peer-accountability on the quality of peer assessment); Ellen Vanderhoven et al., *What if Pupils Can Assess Their Peers Anonymously? A Quasi-Experimental Study*, 81 COMPUTS. & EDUC. 123, 123 (2015) (quasi-experimentally demonstrating that “pupils felt more positive towards peer assessment and experienced less

As these examples demonstrate, although the use of anonymity to foster disinterested and prudent decision-making is not very common, it is not unheard of. It is already used in some legal and nonlegal contexts.⁸⁷ To assess existing and potential uses of anonymity, the next Part considers its pros and cons.

III. DESIGNING ANONYMOUS DECISION PROCESSES: POLICY AND PRACTICALITIES

This Part discusses principled, policy, and pragmatic considerations that have a bearing on the adoption and design of anonymous decision processes. It takes into account the heterogeneity of decision-makers, organizational settings, attributes of the entities affected by the decisions, and cultural differences.

A. *An Absolute Right to Know the Identity of Decision-Makers?*

If people who are affected by a decision or the public at large have an absolute, freestanding right to know who makes a decision, then decision-makers' anonymity is ruled out as a matter of principle. However, in most instances there appears to be no such right—not even in the public sphere. Naturally, knowing the identity of the decision-maker may help those who wish to challenge a decision, benefit the public discourse, and help expose irregularities and corruption. But these and similar benefits are sometimes outweighed by the benefits of anonymity. Put differently, concealing the identity of a decision-maker is not necessarily disrespectful of the autonomy or dignity of the affected persons. Even in the highly sensitive context of criminal proceedings, most jurisdictions hold that in the right circumstances, anonymity of the jury neither violates the constitutional rights of the accused⁸⁸ nor the media's First Amendment rights.⁸⁹ Such a right is even less likely to exist in the private sphere, where the people or entities who are affected by a decision can usually choose whether to interact with anonymous decision-makers. Thus, for example, passive index funds can choose which index to track and are free

peer pressure and fear of disapproval when scores were given anonymously”); Annelies Raes, Ellen Vanderhoven & Tammy Schellens, *Increasing Anonymity in Peer Assessment by Using Classroom Response Technology Within Face-To-Face Higher Education*, 40 STUDS. HIGHER EDUC. 178 (2015) (reporting the positive results of anonymous peer assessment). For a general review of the literature, see Ernesto Panadero & Maryam Alqassab, *An Empirical Review of Anonymity Effects in Peer Assessment, Peer Feedback, Peer Review, Peer Evaluation and Peer Grading*, 44 ASSESSMENT & EVALUATION HIGHER EDUC. 1253 (2019).

87. Anonymity is also sometimes used in the contexts of consumer, employee, and student feedback on suppliers, superiors, and teachers. On such practices, see, for example, Levmore, *supra* note 10. However, these tools are aimed at facilitating impartial *feedback*, rather than impartial *decision-making*, so they lie outside of the scope of the present discussion.

88. See *supra* notes 56–67 and accompanying text. Even appellate courts that refused to affirm the empanelling of anonymous juries in particular cases did not rule that such empanelling is never allowed. See, e.g., *Commonwealth v. Angiulo*, 615 N.E.2d 155, 168–73 (Mass. App. Ct. 1993) (analyzing the exceptional cases in which jurors' anonymity is acceptable).

89. See, e.g., *Black*, 483 F. Supp. 2d 618, at 622–30. The court added that even if a First Amendment right existed, public access to the jurors' names would be denied to protect the defendants' right to a fair trial. *Id.* at 630–31.

to avoid an index that is determined and updated by a committee whose members are anonymous (such as the S&P 500).

In any event, the first question to be asked when considering the adoption of an anonymous decision process in any given context is whether such process would violate fundamental rights. Only if the answer to this question is negative can one proceed to examine other considerations.

B. Drawbacks of Anonymity

Just as transparency and accountability are no panacea for the agency problem, anonymity also has its own limitations and downsides. Basically, anonymity compromises the benefits of accountability. For example, in one experiment, mock jurors who knew that they would have to justify their decisions were compared with those who did not. It was found that the former were less influenced by the order of the presentation of the evidence and recalled the case material better than the latter.⁹⁰ Because anonymity eliminates (or at least reduces) the expectation that one will have to justify one's decision, it is likely to result in less vigilant information processing.

Anonymity may also have a disinhibiting effect in both individual- and group-behavior settings—which may result in increased aggressiveness.⁹¹ This is hardly surprising, as anonymity removes the fear of retaliation and disapproval. With regard to decision-making, one experimental study has found that anonymous juries imposed the harshest possible punishment significantly more often than non-anonymous ones.⁹² It has also been argued that behind the veil of anonymity, academic reviewers of manuscripts are more likely to write reports that are motivated by “malignant jealousy.”⁹³ These concerns appear to be less relevant in other contexts, such as the decisions of the S&P 500 Index Committee. Anyway, they should always be taken into account.

90. Tetlock, *supra* note 3.

91. See, e.g., Edward Donnerstein et al., *Variables in Interracial Aggression: Anonymity, Expected Retaliation, and a Riot*, 22 J. PERSONALITY & SOC. PSYCHOL. 236, 238–40 (1972) (describing an experiment in which white male participants were led to believe that they were able to deliver electric shocks to black people, either anonymously or non-anonymously; participants in the anonymous condition exhibited greater aggressiveness); Leon Mann, James W. Newton & J. M. Innes, *A Test Between Deindividuation and Emergent Norm Theories of Crowd Aggression*, 42 J. PERSONALITY & SOC. PSYCHOL. 260 (1982) (describing an experiment in which subjects acted as an audience to a discussion; were either identifiable or anonymous to other group members; and could administer loud noises to the discussants; participants in the anonymous condition administered significantly higher levels of noise); Fabio Sticca & Sonja Perren, *Is Cyberbullying Worse than Traditional Bullying? Examining the Differential Roles of Medium, Publicity, and Anonymity for the Perceived Severity of Bullying*, 42 J. YOUTH & ADOLESCENCE 739 (2013) (discussing the impact of anonymity on cyberbullying).

92. D. Lynn Hazelwood & John C. Brigham, *The Effects of Jury Anonymity on Jury Verdicts*, 22 LAW & HUM. BEHAV. 695 (1998).

93. Robert Jones, *Rights, Wrongs and Referees*, 61 NEW SCIENTIST 758, 758 (1974). For similar concerns, see Campario, *Part 2*, *supra* note 82, at 285.

C. Types of Conflict-of-Interest

It is important to distinguish between (1) cases where there is a conflict between the direct interests of the decision-maker (or people closely associated with him or her) and those of other people or entities, and (2) cases where there is a conflict of interest among other people or entities affected by the decision who might, in turn, harm or reward the decision-maker. In the former type of cases, anonymity is not only unlikely to promote impartiality but indeed is likely to produce more biased decision-making. Thus, decision-makers should not allocate benefits—a prize, an appointment, a raise in salary—if the list of possible recipients includes their family members, business associates, protégés, or the like. Similarly, decision-makers should not impose sanctions or costs on people who are their personal enemies, professional rivals, or commercial competitors. In such cases, not only is full transparency called for, but people with such conflicts of interest should be disqualified altogether from taking part in the process.⁹⁴ This is true when decision-makers are identified and accountable and even more so when they are anonymous and therefore immune to public scrutiny.

Implementing this rule may, however, pose practical difficulties, especially when the group of people out of which the decision-maker may be selected is relatively small, as, for example, in instances where unique academic expertise is necessary to review a paper submitted for publication. This difficulty is exacerbated when the process is anonymous because sometimes the main (or only) safeguard against conflict of interest is the decision-maker's declaration that he or she has no such conflict.

That said, although this difficulty weighs against anonymity, it need not preclude it. Thus, the fact that both the S&P Index Committee and Michelin's inspectors are full-time employees of the respective organizations and are forbidden from having conflicts of interest in relation to their work largely alleviates this concern in these cases. The difficulty may be somewhat greater in the context of academic reviews, where the people who select the reviewers—such as the journal editors or appointment committees—may be unaware of personal ties or rivalries between the reviewer and the person whose scholarship is being reviewed. The fact that reviewers are seldom paid for their efforts may also heighten the concern that some of them may be undertaking the task for the wrong reasons. Nonetheless, most academics regard the writing of peer reviews as part of their job, acknowledge the underlying reciprocity, and strive to fulfill the task conscientiously, and therefore, decline invitations to write a review when it involves a conflict of interests.⁹⁵

D. Position of the Affected Entities

The previous discussion implies that the real dilemma lies in whether or not to adopt anonymous decision processes when the people or entities potentially

94. See, e.g., Canon 3.C of the Code of Conduct for United States Judges, which instructs judges whose impartiality might reasonably be questioned in any proceedings to disqualify themselves. https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [<https://perma.cc/N8GA-AKHK>] (last visited Sept. 22, 2021).

95. See also *infra* notes 99–103 and accompanying text.

affected by a decision are *not* directly associated (or in direct conflict) with the decision-makers yet can still potentially harm or benefit them. In such cases, anonymity can shield decision-makers from external pressures and temptations because it is impossible to harm or reward a person whose identity is unknown. Within this category, one important factor is whether the people or entities potentially affected by the decision are in a similar position in terms of their ability and motivation to harm or benefit the decision-maker. Anonymity works particularly well when the potential gainers and losers from a decision are similarly positioned in this regard. In such cases, decision-makers are less likely to reveal themselves to the gainers (in order to be rewarded for their decision) because once their identity is made known, they expose themselves to retaliation by the losers. For example, a member in a committee that allocates competitive research funds, who reveals his or her identity to one of the recipients of such funds, runs a greater risk of being exposed to applicants whose applications were denied. The same is true of the S&P 500 Index Committee when it decides to add certain firms to the index and not others.

In other instances, the potential gainers and losers are not similarly situated. Regulatory decisions are a case in point. Very often, the public at large cannot effectively influence policymakers' decisions—due to information costs and the collective-action problem—while special-interest groups can do so through lobbying and (explicit or implicit) threats and promises. In such cases, policymakers are more likely to advance the interests of the special-interest groups.⁹⁶ Anonymity may reduce regulatory capture by making it impossible (or at least much more difficult) for special interests to interact with public decision-makers.

However, inasmuch as public officials are rational maximizers of their own utility, they might reveal themselves to the special-interest group in order to be rewarded for their decisions, without being overly concerned about retaliation by the general public. The decision-makers' identity may also be leaked inadvertently. Similar concerns may be voiced about jurors, academic referees, and the like.⁹⁷

This is a cogent concern, but its significance should not be overstated. First, the picture may change, inasmuch as public interest groups and NGOs counterbalance the special-interest groups.⁹⁸ In such cases, revealing oneself to the special-interest group may well result in exposing oneself to censure by public-interest groups as well. Second, the assumption that public officials and other agents care only about their self-interest is exceedingly simplistic. Dozens of studies have demonstrated that people do care about moral, social, and legal norms, and often comply with them even when their self-interest militates otherwise.⁹⁹ This may be particularly true of civil servants. The *public service motivation theory* suggests that

96. See *supra* notes 41–43 and accompanying text.

97. See, e.g., Keleher, *supra* note 14, at 536–37 (describing an instance of paying a bribe to a supposedly anonymous juror).

98. Cf. Ian Ayres & John Braithwaite, *Tripartism: Regulatory Capture and Empowerment*, 16 L. & SOC. INQUIRY 435 (1991) (envisioning a regulatory process in which NGOs actively participate in regulatory negotiations along with, and as a counterweight to, the regulated industries).

99. For a brief overview, see ZAMIR & TEICHMAN, *supra* note 18, at 94–110.

self-selection in the processes of joining the public sector results in organizations whose typical staff are disproportionately motivated by prosocial concerns¹⁰⁰ which, in turn, mitigates the agency problem. In fact, one experimental study has shown that merely assigning participants to the role of a disinterested supervisor of other (randomly selected and anonymous) participants induced the former to exert costly efforts in keeping misbehavior in check.¹⁰¹ Other professionals similarly internalize vocational norms and rules of conduct.¹⁰² Such norms may be enforced informally through peer reactions, as well as by formal sanctions. For example, in a related context, under California law, “[a]ny court employee who has legal access to personal juror identifying information sealed under [the pertinent provision], who discloses the information, knowing it to be a violation of this section or a court order issued under this section, is guilty of a misdemeanor.”¹⁰³

In conclusion, some anonymous decision-makers may violate the rules of anonymity—especially when their decisions benefit a few, identified people, while harming the public at large. Others—most likely the great majority of decision-makers—abide by the rules of confidentiality, thereby facilitating anonymous decision-making even in such situations.¹⁰⁴

E. Types of Decision-Makers

The choice between transparency and anonymity may affect not only the process and outcomes of decision-making but also the *ex ante* selection (including self-selection) of decision-makers. This concern cuts both ways. Some people, who fear pressure, who do not want to be in unpleasant situations, or who abhor publicity may refuse to assume decisional roles unless their identity is kept secret. Conversely,

100. See generally James L. Perry & Lois Recascino Wise, *The Motivational Bases of Public Service*, 50 PUB. ADMIN. REV. 367 (1990) (arguing that public officials are driven by rational, norm-based, and affective motives and examining the implications of this typology); James L. Perry, *Measuring Public Service Motivation: An Assessment of Construct Reliability and Validity*, 6 J. PUB. ADMIN. RES. & THEORY 5 (1996) (constructing a scale for measuring public service motivation that includes the following factors: attraction to policymaking, commitment to public interest, compassion, and self-sacrifice); Yannis Georgellis, Elisabetta Iossa & Vurain Tabvuma, *Crowding Out Intrinsic Motivation in the Public Sector*, 21 J. PUB. ADMIN. RES. & THEORY 473 (2011) (analyzing British longitudinal data and finding that individuals are attracted to the public sector by the intrinsic, rather than the extrinsic, rewards that the sector offers).

101. Christoph Engel & Lilia Zhurakhvoska, *You Are in Charge: Experimentally Testing the Motivating Power of Holding a Judicial Office*, 46 J. LEGAL STUD. 1, 1–2 (2017).

102. See, e.g., Lotte Bøgh Andersen, *What Determines the Behaviour and Performance of Health Professionals? Public Service Motivation, Professional Norms and/or Economic Incentives*, 75 INT’L REV. ADMIN. SCI. 79, 79 (2009) (empirically examining the determinants of the behavior of health professionals, and finding that “when strong professional norms exist [which is not always the case], economic incentives are unimportant”).

103. Cal. Civ. Proc. Code § 237(e) (West 2017). Section 237(f) complements this rule by criminalizing the intentional solicitation of such information and the disclosure of such unlawfully secured information to other people.

104. As further discussed below (*infra* note 115 and accompanying text), organizational and societal norms play an important role in this regard.

people who are not concerned about pressure or unpleasantness or who like to be in the limelight may be uninterested in undertaking anonymous roles.

Although it is difficult to draw general conclusions from such personal differences, it is possible to make tentative observations about the people who work in various domains, such as public administration, the judiciary, or the financial industry. Specifically, people vary in terms of their risk aversion. Suppose that some people, possibly public officials, are more risk-averse than others. Inasmuch as this is true, risk aversion can have a deterrent effect. Even if, in reality, neither the addressees of a decision nor other interested parties are exerting pressure on the public official, he or she may fear such an eventuality, which may bias his or her decisions. In such instances, anonymity may be particularly beneficial. In contrast, anonymity may be unnecessary for justice seekers who are attracted to the judiciary and are highly committed to impartiality.

Financial markets are another case in point. It is possible that management-school studies and earlier professional experience train fund managers to seek, rather than avoid, risk. If true, then on the one hand, there is less reason to worry about the abovementioned chilling effect. On the other hand, the call of duty may sound less loudly in the financial industry. Similarly to other private-sector employees, fund managers also typically enjoy much less job security than public officials.¹⁰⁵ Collectively, these features may make them even more susceptible to threats (of losing their job when not performing well in the short run) or to temptations (to jump to the next, better-paid job)—which may make anonymity all the more desirable.

These examples illustrate that the behavioral qualifications must be studied separately for every domain. However, the underlying concern is likely to be the same—namely, that decision-makers are vulnerable to threat or reward from addressees or other interested parties. This concern looms particularly large if it is not (at least partly) kept in check by those who stand to lose from a biased decision (as is often the case).¹⁰⁶

F. Anonymity and Accountability Combined

The choice between transparency and anonymity need not be categorical. An intermediate solution may keep the identity of the decision-maker confidential for some people yet hold him or her accountable to others. In fact, in the real world this intermediate solution is the rule. Even if in principle anonymity is guaranteed, the identity of decision-makers is hardly ever kept entirely secret: there are always some people who are aware of the identity of the decision-maker(s). Specifically, when decisions are made by collective bodies after a group deliberation—such as juries, academic-appointment committees, and the S&P Index Committee—group members are accountable to each other. Even academic reviewers—who write their reports individually and whose identities are kept secret from the author or candidate whose work they are assessing—are accountable to the editor of the journal, the book's publisher, or the committee that decides about appointments and promotions.

105. See Andrew Clark & Fabien Postel-Vinay, *Job Security and Job Protection*, 61 OXFORD ECON. PAPERS 207, 207 (2009) (finding that permanent public jobs “are perceived to be by and large insulated from labor market fluctuations”).

106. See *supra* Part III.D.

Similarly, decision-makers may be accountable to other people within the organization, such as their superiors, internal auditors, and others involved in the decision process.¹⁰⁷ Thus, although anonymity diminishes the virtues of transparency, it does not eliminate them altogether as long as there are some people that the decision-maker is accountable to.¹⁰⁸ Such a combination of accountability and anonymity may retain the benefits of accountability while avoiding the fear of external pressure.

Anonymity and accountability may be combined in yet another way. As previously noted, the identity of the decision-maker(s) may be confidential while at the same time the grounds of their decision may be explained to the affected people or even made public.¹⁰⁹ While the anonymity of the decision-makers reduces their personal accountability, the organization that they are part of is known and may be held accountable. Such institutional accountability can reintroduce external pressures, but there may be instances in which such a combination of personal anonymity and institutional accountability may be the best arrangement, all things considered.

G. Anonymity and Secret Voting

Unlike anonymous decision-making—where the substance of the decision is known but the identity of the decision-maker is not—sometimes the identity of the decision-makers is known but the decision of each one of them is kept secret.¹¹⁰ Secret ballots in general elections and in the nomination of the winners of Academy Awards (the Oscars) are obvious examples,¹¹¹ but this method is also used in many other contexts where decisions are made collectively. Given overlapping goals and means, some of the discussion of anonymous decision-making may possibly be relevant to secret voting. For the present purposes, however, the key point is that secret voting may complement anonymous decision-making when decisions are made by groups—such as committees. However, in such cases, secret voting is a double-edged sword. On the one hand, it strengthens the insulation of decision-makers from external pressures and temptations (at least as long as decisions do not need to be unanimous). On the other hand, it reduces the internal accountability among committee members.¹¹²

107. On the distinction between governmental transparency towards the public and towards technical experts, see Hood, *supra* note 49, at 193–97.

108. See generally Ashley Deeks, *Secret Reason-Giving*, 129 YALE L.J. 612 (2020) (discussing the benefits of giving reasons for decisions, and sharing them with other governmental entities, future administrations, and foreign allies, even when those reasons are not disclosed to the public).

109. See *supra* note 16 and accompanying text.

110. Cf. Skopek, *supra* note 13, at 1755 (drawing a similar distinction between *privacy* and *anonymity*).

111. See, e.g., *94th Academy Awards® of Merit*, ACAD. OF MOTION PICTURE ARTS & SCIENCES Rule 5(4), https://www.oscars.org/sites/oscars/files/94aa_rules.pdf [<https://perma.cc/HA2Y-DHS7>] (last visited Sept. 23, 2021) (“Voting for nominations and awards shall be by secret ballot.”).

112. See *supra* note 107–108 and accompanying text.

H. Scope of Anonymity

Between the extremes of knowing nothing about the decision-makers and knowing everything about them, the entities affected by the decision and the public at large may have varying amounts of information about the former. For example, the names, addresses, and workplaces of jurors are sometimes kept secret, while their age, gender, education, and occupation are not.¹¹³ Determining the scope of anonymity along each of these dimensions provides various degrees of anonymity and transparency, with their respective pros and cons. The more details about decision-makers are revealed, the easier it may be for interested parties to identify them eventually. This concern is particularly apposite when the group of people that the decision-maker may be drawn from is small—as in the case of an academic review that requires particular expertise. In fact, when the relevant community is small, once the content of the review is revealed to the person whose work is assessed, that person may sometimes identify the reviewer even if no details about the reviewer are revealed. Setting aside such rare instances, however, the designer of anonymous decision processes should strike a balance between the various competing concerns. To promote prudent and unbiased decisions, the scope of information revealed about the decision-makers should not make it possible to identify them.

I. The Time Dimension

The identity of the decision-maker may be kept anonymous indefinitely or revealed (to some or all people concerned) at a certain juncture—possibly after the decision process has ended.¹¹⁴ However, effective isolation of decision-makers from external pressures and temptations often requires keeping their identity confidential even after the decision is made, to negate the fear or expectation of retaliation or reward.

J. Social and Organizational Norms

The relevance and import of the considerations discussed thus far vary between people, organizations, and societies. Some people are more likely than others to keep their identity as decision-makers secret, and some organizations are able to inculcate norms of anonymity more successfully than others. On the one hand, the greater the concern about biased decision-making, the greater the need to keep the identity of decision-makers anonymous. On the other hand, anonymous procedures are unlikely to be effective if the appointed decision-makers are unable to keep a secret or if they believe that nobody else keeps secrets. These issues cannot be adequately discussed here.¹¹⁵ Suffice it to note that when considering the adoption and design of anonymous decision processes, one must take into account the unique characteristics of people and organizations.

113. See *supra* note 61 and accompanying text.

114. See *supra* notes 63, 81 and accompanying text (discussing the issue in the contexts of jury anonymity and the Emergency Committee of the World Health Organization, respectively).

115. On people's heterogeneity in terms of their ethicality, and on the impact of social norms on people's compliance, see generally YUVAL FELDMAN, *THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR* 105–51 (2018).

K. Summary

This Part systematically surveyed issues that must be considered when contemplating the introduction and design of anonymous decision processes. These include the weight of the moral and constitutional values protected by the identifiability of the decision-maker and the possible adverse effects of anonymity on decision-makers' diligence and decency. As previously noted, the disadvantages of anonymity in these respects can be mitigated through combinations of anonymity and accountability: imposing anonymity vis-à-vis some people but not others, requiring the anonymous decision-makers to explain their decisions, and so forth.

The discussion has further highlighted two distinctions. One pertains to two types of conflict of interest: direct conflict with the decision-maker and a conflict arising from possible threats or promises by the people affected by the decision. In the former instance, anonymity is inappropriate. In the latter, anonymity may be more effective and easier to implement when the potential gainers and losers from the decision are similarly placed in terms of their ability and motivation to harm or benefit the decision-maker compared with when they are differently situated in this regard. It was nevertheless emphasized that anonymity can be beneficial in the latter cases as well. Another consideration is the possible chilling effect of decision-makers' fear of outside pressure, and the differences between various domains in this regard.

Finally, the analysis demonstrated how anonymous processes can be fine-tuned, by combining anonymity with reason-giving and with secret voting within groups; varying the scope of concealed information; and determining the scope of anonymity chronologically. It was also noted that, in designing anonymous decision processes, one must consider organizational and societal heterogeneity in terms of compliance with laws and social norms.

CONCLUSION

Contrary to the convention that transparency and accountability are the best guarantees of prudent and disinterested decisions, this Essay examined the unconventional notion that, in the right circumstances, anonymity of the decision-makers may produce better and more unbiased decisions. To this end, it analyzed the virtues and pitfalls of transparency and accountability, described existing uses of anonymity in decision processes, and examined various policy and practical considerations that pertain to the design of anonymous procedures. It showed that the choice between accountability and anonymity is not dichotomous. Because each of these notions is multi-dimensional, various combinations of the two may be appropriate in any given case. The upshot of the discussion is that a "one-size-fits-all" approach is untenable. Rather, a careful examination of the characteristics of each context is called for to establish whether anonymity would be viable and, if so, how exactly to fashion it. Notwithstanding the need for attention to the specific context, we venture that the beneficial potential of concealing the identity of the decision-maker should be more intensely exploited. We do concede, however, that given the pioneering nature of our proposal, further empirical and theoretical studies of the topic are needed, and policymakers should proceed with caution.