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Blinding as a Solution to Institutional Corruption

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Blinding as a Solution to Institutional Corruption

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Edmond J. Safra Research Lab Working Papers, No. 21
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Abstract

This Working Paper provides a framework for understanding how blinding may be a solution for institutional corruption, a situation where a funding dependency causes biased outcomes and thus a lack of trust. A funding dependency can be disaggregated into three functions: a subsidy, a selection of the decision maker, and an identification between the funder and the decision maker. These dynamics are shown in the settings of litigation witnesses, biomedical scientists, and candidates for public offices, all of whom may be biased by funding dependencies.

Drawing from a long history of blinding in the biomedical sciences, blinding operates by allowing the subsidy function, while eliminating the selection and identification functions, which cause bias. In some settings, even the funders themselves will have self-interested reasons to prefer blinding over the status quo, which suggests the potential for market-based solutions to institutional corruption.

Blinding is motivated by a recognition that a subsidy-dependency is sometimes unavoidable for practical reasons (including constitutional, political, economic realities), making a ban on conflicting interests unattainable. Blinding is also motivated by a recognition that other solutions to institutional corruption, such as professionalism and mandatory disclosure of conflicting interests, require strong assumptions about psychological capacities, which often fail.

Blinding has its own limitations: some biasing functions cannot be disaggregated from the subsidy, and even if blinding works to eliminate bias, it may fail to rescue a dependent institution from perceptions of illegitimacy. Still, blinding should be understood as a primary tool in the fight against institutional corruption. The Working Paper concludes by showing how blinding strategies are a primary mechanism of the civil and criminal jury trial institution, which suggests other similar applications to minimize bias in other institutions.

Keywords: Institutional Corruption, Blinding, Conflicts of Interest, Randomization, Masking, Expert Witnesses, Biomedical Science

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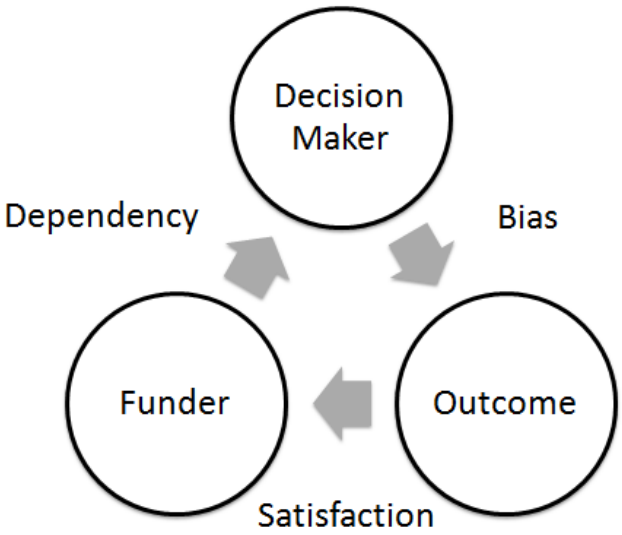
Institutional Corruption and the Failure of Common Solutions to Solve for Bias

As this is a Working Paper within the Institutional Corruption Lab series, I need only sketch the problem of institutional corruption, to highlight some particular features, as a framework for understanding how blinding may work as a solution.[1] In Figure 1, I highlight the concept of "bias" as the primary problem.[2] In this model of institutional corruption, a funder creates a dependency, which then causes a decision maker to alter his or her behavior in a way that biases an outcome. That change in outcomes is what motivated the funder in the first place, providing satisfaction thereto. This notion of "bias" presumes that we can specify a counterfactual situation—a normative conception of the uncorrupted institution that achieves a proper set of outcomes.[3]

Figure 1—Schematic Model of Institutional Corruption



[1] Lawrence Lessig, following and modifying Dennis Thompson, has defined "institutional corruption" as "the consequence of an influence within an economy of influence that illegitimately weakens the effectiveness of an institution especially by weakening the public trust of the institution." Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It* (Twelve, 2011) and Dennis Thompson, *Ethics in Congress: From Individual to Institutional Corruption*, (Brookings Institution Press, 1995) (writing that institutional corruption is "a form of corruption in which an institution or its agents receives a benefit that is directly useful to the institution, and systematically provides a service to the benefactor under conditions that tend to undermine legitimate procedures of the institution.").

[2] See Lessig, *Republic, Lost*, 29-32 (discussing concerns about bias).

[3] See id., chapter 10 (discussing a "baseline of independence") and Donald W. Light, "Strengthening the Theory of Institutional Corruptions: Broadening, Clarifying, and Measuring," Edmond J. Safra Research Lab Working Papers, No. 2 (2013): 15-18, http://ssrn.com/abstract=2236391 or http://dx.doi.org/10.2139/ssrn.2236391.

My work has focused on institutional corruption in areas relating to science and medicine, and these will be my running examples for this paper, in addition to the campaign finance dynamic that Lessig and Thompson have explicated so well. First, I am concerned that in civil litigation, expert witnesses will be biased by their dependency on litigants, who hand-pick them, affiliate them as teammates, and compensate them, contingent on them providing favorable opinion.[4] Such "hired guns" provide biased guidance to jurors, who are trying to discern whether to impose liability, and thereby degrade the accuracy of those outcomes. Second, I am concerned that in biomedical science, researchers are dependent on the drug makers and device makers that select them and fund their experiments, which biases researchers in the many discretionary decisions about how to design, conduct, and report those experiments.[5] If most biomedical science is industry-funded and biased in this way, it may ultimately change the opinions of physicians on whether and how to use these products, and thus negatively affect the health of patients.

There are three go-to solutions for institutional corruption: proscription, professionalism, and the provision of disclosures.[6] These regulatory devices are the obvious ones, and their shortcomings are what motivate my use of blinding, a solution which is less intuitive.

The first go-to solution is a proscription, or ban, on the dependency. (This mode strikes out the left arrow in Figure 1.) For example, the Bi-Partisan Campaign Finance Reform Act of 2002 provided that, "it is unlawful for any corporation . . . to make a contribution in connection with any election."[7] The theory was that, if we prohibit corporations from supporting candidates for Congress, then Members of Congress will no longer be dependent on and biased towards them. The Supreme Court has, however, interpreted the First Amendment to forbid Congress from

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[4] Christopher Robertson & David Yokum, "The Effect of Blinded Experts on Jurors' Verdicts," *Journal of Empirical Legal Studies* 765.4 (2012) and Christopher Robertson, "Blind Expertise," *New York University Law Review* 85.1 (2010): 174-257.

[5] Christopher Robertson, "The Money Blind: How to Stop Industry Bias in Biomedical Science, Without Violating the First Amendment," *American Journal of Law and Medicine* 37.2/3 (2011): 358-387.

[6] See generally, Christopher Robertson, "Biased Advice," *Emory Law Journal* 60.3 (2011); 653-703 (discussing "many potential policy solutions to the fundamental problem, from outright bans on conflicting interests to disclosure mandates").

[7] 2 USC § 441b.

regulating political spending in this way.[8] Political will for an amendment to change the Constitution may or may not materialize. Similarly, in the domain of litigation, it would be possible for courts to forbid litigants from selecting and paying experts, and judges could instead appoint experts free of any such dependency.[9] However, the American "adversarial" legal system has resisted such reforms for over 100 years. One might even argue that the institution of adversarial litigation requires that litigants be allowed to fund their own experts, and that banning that sort of transaction would actually undermine the institution. Likewise, we could forbid industry from funding biomedical science, but such a ban would likely be an unconstitutional infringement on scientific speech, and furthermore it is not obvious that we can create an alternative source of funding.[10] Biased science may be better than no science.

The second ready regulatory solution for institutional corruption is for a policymaker to allow a dependency to persist, but ask the decision maker to exercise a professionalism to resist being influenced by that dependency. (This mode strikes out the right arrow in Figure 1.) For example, the Federal bribery statute allows officials to accept money but not ". . . in return for . . . being influenced in the performance of any official act."[11] Similarly, when testifying as expert witnesses, the AMA Medical Code allows that physicians can enter into financial relationships with litigants, but says that, "physician testimony must not be influenced by financial compensation."[12] Likewise, scientists are supposed to maintain professional discretion to design a rigorous study, regardless of funding source. As a solution to institutional corruption, professionalism has important limitations. Most fundamentally, it presumes a psychological ability: that an

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[8] See *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[9] The American Medical Association does say (in § 9.07 of its Code of Ethics) that "it is unethical for a physician to accept compensation that is contingent upon the outcome of litigation," which is an attempt to ban certain relationships. The ban is too narrow to solve the dependency problem, however, because the expert's payments can still be contingent on him giving testimony that is favorable to his sponsor. Currently, a litigant is allowed to interview an expert to find out the substance of the expert's opinions prior to deciding whether to hire him for the much more expensive work of preparing a formal report and testifying in depositions and trials. Thus the payment is contingent, notwithstanding § 9.07. American Medical Association, Code of Medical Ethics Opinion 9.07, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion907.page.

[10] But see the tax-based model argued by Marc A. Rodwin, "Conflicts of Interest, Institutional Corruption, and Pharma: An Agenda for Reform," *Journal of Law, Medicine & Ethics* 40.3 (2012): 511-522, http://ssrn.com/abstract=2162597.

[11] 18 USC § 201.

[12] American Medical Association, *Code of Ethics* § 9.07.

individual who is exposed to a potentially biasing factor can successfully suppress any resulting bias, and behave just as she would have behaved if she had not been so exposed. The scientific literature suggests that professionals are rarely so immune.[13] Humans find it difficult to recognize their own biases.[14] It is even more difficult to properly correct for a bias, once recognized.[15]

The third solution is the provision of disclosures. This approach allows a dependency (unlike a ban), and allows that the decision maker may succumb to it (unlike professionalism), but discloses the fact of dependency. Campaign finance laws have long required that candidates disclose the names of all major donors. In litigation, Federal Rule of Civil Procedure 26(a) requires expert witnesses to disclose how much litigants pay for their services. Journals require that authors disclose the funding sources in small print at the end of their articles (but most journals do not prominently display this information in the abstracts of the articles, which most busy physicians rely upon to inform their clinical decisions). Figure 1 is unhelpful for depicting the disclosure strategy. Aside from hackneyed analogies (for example, sunlight being a disinfectant), the causal story for how disclosure is supposed to solve institutional corruption is complicated and dependent on the particular situation in which the device is employed. In some situations, the "decision maker" shown in Figure 1 is actually an advisor, for a second decision maker (such as a juror), who is supposed to use the disclosure in deciding how to weigh the information provided by the advisor, so as to modulate its own decision in a way that neutralizes the advisor's biases in producing a final outcome. This

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[13] Christopher Robertson, Susannah Rose, and Aaron S. Kesselheim, "Effect of Financial Relationships on the Behaviors of Health Care Professionals: A Review of the Evidence," *Journal of Law, Medicine & Ethics* 40.3 (2012): 452-466, doi: 10.1111/j.1748-720X.2012.00678.x.; Jason Dana & George F. Loewenstein, "A Social Science Perspective on Gifts to Physicians From Industry," *Journal of the American Medical Association* 290.2 (2003): 252-255; and Association of American Medical Colleges, "The Scientific Basis of Influence and Reciprocity: A Symposium," June 12, 2007, 7-8, http://www.ohsu.edu/xd/about/services/integrity/coi/gifts/upload/AAMC-The-Science-of-Influence.pdf. Also see Maryam Kouchaki, "Professionalism and Moral Behavior: Does a Professional Self-Conception Make One More Unethical?" Edmond J. Safra Research Lab Working Papers, No. 4 (2013), http://ssrn.com/abstract=2243811; Sunita Sah and George F. Loewenstein, "Second Thoughts on Second Opinions: Conflicted Advisors Reduce the Quality of Their Advice When They Know They Will Be 'Second-Guessed'," Edmond J. Safra Research Lab Working Papers, No. 13 (2013), http://ssrn.com/abstract=2274251; and Susann Fiedler, "Bad Apples and Dirty Barrels," Edmond J. Safra Research Lab Blog, April 29, 2013, http://www.ethics.harvard.edu/lab/blog/301-bad-apples-and-dirty-barrels.

[14] Daniel Y. Lin, Emily Pronin and Lee Ross, "The Bias Blind Spot: Perceptions of Bias in Self versus Others," *Personality & Social Psychology Bulletin* 28.3 (2002): 369-381.

[15] See generally, Timothy D. Wilson & Nancy Brekke, "Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations," *Psychological Bulletin* 116.1 (1994): 117-142.

dynamic is exceedingly complex, however.[16] The recipient of information must discern whether the conflicting interest actually biased the advisor, and if so how much, and adjust accordingly. However, that dynamic just reduces reliance on the advice; it doesn't somehow make the advice better or make alternative clean advice appear in its stead. Where all the advisors have conflicting interests, a disclosure just breeds cynicism, without actually improving outcomes. Further, a disclosure mandate may actually make the advisor more biased, if it functions as a "moral license."[17]

Thus, the three primary solutions to institutional corruption have important limitations. Blinding provides another alternative.

How Blinding Works

Blinding has an interesting history spanning three centuries. It was first used in the 1700s, as a robust test that could distinguish science from charlatanism.[18] Benjamin Franklin was apparently the first to conduct a blindfolded experiment, and did so in his own home, leading a royal scientific commission appointed by Louis XVI to test a new "healing fluid" that Franz Anton Mesmer claimed to have "discovered" as a natural phenomenon similar to gravitation. Mesmerists claimed that certain individuals could perceive this mysterious substance in nature when the mesmerist performed certain procedures to bring it forth. Franklin blindfolded the subjects to determine whether the subjects were responding to the mesmerist's ritual (what scientists now call a "demand-effect') or perceiving the natural phenomenon itself. The blindfolded subjects failed to see the substance when the mesmerist elicited it, but purported to see it other times. Franklin's conclusions were clear: "this fluid has no existence." Instead, any effects were due to "imagination."[19]

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[16] See Robertson, "Biased Advice," (explicating these difficulties with a series of laboratory experiments).

[17] See Daylian M. Cain, George F. Loewenstein, and Don A. Moore, "When Sunlight Fails to Disinfect: Understanding the Perverse Effects of Disclosing Conflicts of Interest," *Journal of Consumer Research* 37.5 (2011): 836-857.

[18] See generally, Ted J. Kaptchuk, "Intentional Ignorance: A History of Blind Assessment and Placebo Controls in Medicine," *Bulletin of the History of Medicine* 72.3 (1998): 389-433, 394 (discussing Benjamin Franklin, Majault, Le Roy, et al., *Report of Dr. Benjamin Franklin, and Other Commissioners, Charged by the King of France, with the Examination of Animal Magnetism, as Now Practiced in Paris*, translated by William Godwin (J. Johnson, 1785)).

[19] Kaptchuk, "Intentional Ignorance," 395 (quoting Franklin).

Since the mid-20th century, blinding of both subjects and researchers has become routinely used wherever feasible, as the double-blind randomized, placebo-controlled trial has become the gold standard for scientific inquiry.[20] Blinding is especially important when outcomes are subjective, requiring human judgment.[21] Meta-analyses have shown that blinding reduces the chance that an experiment will yield a false positive.[22] As one leading methodologist concludes, "any process using a human as a perceptor, rater, or interpreter should be 'as blind as possible for as long as possible.'"[23] Still, the practice of blinding continues to be studied and improved, in recognition that some blinding protocols may not be robust.[24]

Editors of scholarly journals now routinely use blinding to allow them to assess the scientific merits of an article, rather than deciding based on the author's prestige, or worse, her gender.[25] Likewise, to avoid possible favoritism for particular students, law professors routinely use blinds when grading papers.[26] These efforts tease apart the proper target of evaluation from extraneous factors.

Borrowing from science, the use of blinding as a solution to institutional corruption starts by similarly recognizing that a dependency is complex. It consists of several functions as shown in Figure 2. Blinding attempts to disaggregate and filter, such that the biasing functions are caught, while allowing other functions to proceed through. In this way, a dependency can exist, without causing a bias.

Specifically, a dependency relationship typically involves a transfer of wealth, a subsidy from the funder to the decision maker. The food maker pays for

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[20] See Kenneth F. Schulz, David A. Grimes, "Blinding in Randomised Trials: Hiding Who Got What," *Lancet* 359.9307 (2002): 696-700.

[21] See Lesley Wood, Matthias Egger, Lisa Lotte Gluud, *et al*., "Empirical Evidence of Bias in Treatment Effect Estimates in Controlled Trials with Different Interventions and Outcomes: Meta-Epidemiological Study," *British Medical Journal* 336 (2008): 601, doi:10.1136/bmj.39465.451748.AD.

[22] See Bruce M. Psaty and Ross L. Prentice, "Minimizing Bias in Randomized Trials: The Importance of Blinding," *Journal of the American Medical Association* 304.7 (2010): 793-794 (reviewing prior literature, showing that properly blinded studies were half (OR: .41) as likely to report favorable conclusions).

[23] Robert Rosenthal, "How Often Are Our Numbers Wrong?" *American Psychologist* 33.11 (1978): 1005-1008, 1007.

[24] See e.g., Irving Kirsch, *The Emperor's New Drugs: Exploding the Antidepressant Myth* (Basic Books, 2010), 15-18 (arguing that in trials of antidepressant drugs, the participants are often able to detect whether they are receiving the investigational treatment rather than the placebo).

[25] Richard Snodgrass, "Single- Versus Double-Blind Reviewing: An Analysis of the Literature," *SIGMOD Record* 35.3 (2006): 8-21, 18 (reviewing literature and concluding that, "most scientific journals now employ double-blind reviewing").

[26] See Paul D. Carrington, "One Law: The Role of Legal Education in the Opening of the Legal Profession Since 1776," *Florida Law Review* 44.4 (1992): 501-603, 565 (discussing the history of blind grading).

advertisements that the politician needs to get elected, the litigant pays for the expert witness to render an opinion, and the drug maker pays to recruit patients for the research. Without such payments, the ads might not run, the opinions might not be rendered, and the research may not be performed.

The subsidy itself may not be biasing. Because money is fungible, the institution's outcomes may be indifferent to the source of funds. The production of these goods and services may have an impact on outcomes that is not contrary to our normative conception of the institution. Depending on how we specify the counterfactual world of a non-corrupted institution (Lessig's "baseline of independence"), it may turn out that such expenditures would be necessary even in an ideal world in which the institution was achieving its proper function. If so, then the source of funds may be irrelevant, and blinding is a feasible solution to institutional corruption.

Figure 2—Disaggregating Three Functions of a Dependency

	Subsidy	Selection	Identification
Definition	funder provides financial support for decision maker	funder chooses which potential decision maker receives subsidy	funder has special opportunities to influence decisions
Potential Biasing Mechanism	goods and services are produced that might otherwise not be	decision makers disproportionately reflect funder's preferences	decision maker internalizes preferences of funder as funder
How to Eliminate	create alternative source of funding, or lose subsidized goods and services	intermediary performs alternative selection (random or intelligent)	decision maker is unable to distinguish funders from non-funders
Risks and Cost of Elimination	subsidy may be necessary for production of institutional outcomes; alternative funding source may be unreliable or create new biases; participatory funding may be important to institutional values	funder may lack incentive to contribute blindly; funder may have more expertise in selecting decision maker with fitness for function; intermediary may itself be corrupted by funder (sham)	information about source of funding may be inextricable from necessary information for decision; identification may be important to institutional values

The selection function is that the funder typically gets to decide who will receive his or her largesse (and who will not). This selection function exploits a natural heterogeneity in potential decision makers. The funder naturally prefers to use its money in ways that maximize its chances of achieving satisfaction, and some potential decision makers are more likely to provide that satisfaction. Thus, the funders will tend to prefer potential decision makers that are inherently biased towards the funder's preferred outcomes (perhaps because they are ideologically committed to a certain sort of decision), and the funders will tend to prefer those potential decision makers who will be most responsive to whomever provides funding (because they lack any ideological commitments at all).

This selection function creates a demand-effect in a world of scarcity, such that potential recipients of funding rationally try to appear attractive in these ways to potential funders. This dynamic becomes especially strong in a world of iterative interactions, where a decision maker can signal its behavior in round one to increase the odds of receiving more in round two.

The identification function arises because a funder typically gets special access to the decision maker, which gives the funder an increased likelihood of biasing the outcomes. Beyond merely getting a hearing for requests and information in a noisy world, the funder seeks to build a more substantial relationship, and even an identification, between its interests and that of the decision maker. The decision maker begins to internalize the values and preferences of funder, becoming part of a common team. When the decision maker begins to satisfy the funder for non-instrumental reasons, a more profound conversion has been achieved.[27]

As a regulatory solution to institutional corruption, blinding seeks to preserve the subsidy function while blocking the selection and/or identification functions. To block the selection function, the regulator must substitute the funder's selection with some other mode of selection, whether a randomized selection or an independent but intelligent selection. Random selections are the most extreme form of "blinding," like drawing a lottery ball from a hopper without looking. But random selection often unnecessarily blinds too much information about the

[27] See e.g. Ken Silverstein and Brooke Williams, "Membership Has Its Privileges: Donor Perks and the Atlantic Council," Edmond J. Safra Research Lab Blog, February 20, 2013, http://www.ethics.harvard.edu/lab/blog/282-membership-has-its-privileges, and Jonathan H. Marks, "The Perils of Public-Private Partnerships," Edmond J. Safra Research Lab Blog, May 23, 2013, http://www.ethics.harvard.edu/lab/blog/311-the-perils-of-public-private-partnerships,

relative qualities of the candidates, throwing babies out with the bathwater. Instead, an intelligent chooser can weigh those appropriate factors, while being blinded from the interests of the funder. Hybrid schemes are possible, where an intelligent chooser screens potential decision makers based on minimal criteria, and then a random selection is made from the screened list.

Usually, the blinding of selection is partial, allowing the funder to retain discretion about whether to give or not to give. The funder may also be allowed to specify coarse criteria for the recipients of its funds, a level of discretion that is appropriate to reflect *bona fide* preferences, without unduly biasing outcomes. These design decisions will often depend on the regulator's normative conception of the institution, and sometimes the necessity of maintaining proper economic incentives to maintain the subsidy function.

To block the identification function, blinding prevents the decision maker from knowing the source of funding. If such a blind is robust, it thus prevents the decision maker from preferentially affiliating with the funder. To be sure: a blind is not a ban on certain forms of interaction; it is only a filter on certain information. The blinding of identification is partial. The decision maker may still receive information and requests from the funder, and perhaps even build an affiliation, relationship, and ultimately an identity with the funder. However, these interactions are not with the funder *as funder*, since that predicate fact is unknown to the decision maker. In most institutions, we must tolerate lobbying along with friendships and other personal affinities, as long as these are *bona fide* rather than purchased.

When paired with the causal model of institutional corruption (see Figure 1), a provocative point can here be made. If identification of the funder as funder does actually change the decision maker's behavior, compared to his behavior when blinded to the identity of the funder, then unblinded interactions are likely illegal already. A violation of the Federal gratuity statute (18 USC § 201(c)) is a lesser crime than bribery, because it does not require the corrupt state of mind: the intentional *quid pro quo*. The gratuity crime proscribes the giving of anything of value "because of" any official act by any public official, or the giving of anything of value "because of" testimony by a witness in court. The gratuity conception is

causal, not intentional—merely requiring a "link" between the gift and official action.[28] It is one thing if a Congressman meets with a constituent. Another, if he meets with a constituent "because of" knowledge that the constituent is a major donor. The gratuity crime recognizes this sense in which the institution can be corrupted, even while the individual official does not have a corrupt intent. Of course, the statute is not enforced in this way, perhaps because of a conception that the First Amendment prohibits such enforcement.[29]

Blinding Applied to Litigation, Science, and Politics

Our three examples are useful to illustrate these blinding dynamics. As it happens, blinding is likely to work better in some contexts than others, and these examples highlight some of the key considerations for its applicability.

The clearest example is likely in the domain of litigation expert witnesses, since the interactions are already highly structured by a defined set of rules and practices. I have proposed that civil litigants could specify certain objective criteria for an expert witness, and an intermediary would then perform the selection function.[30] The selected expert would then render an opinion on the case, without knowing which side requested his or her opinion, eliminating identification. The expert could receive information from one or both sides, even for example performing a psychological examination on the plaintiff, without knowing whether it was the plaintiff or the defendant that requested that exam. The litigant would pay for the expert's opinion in advance, and the intermediary would transfer the funds to the expert, regardless of whether the opinion is favorable to the litigant. Similar solutions have been proposed in the criminal context.[31]

I have argued that such a reform is possible without banning unblinded experts, and without any changes to law or court rules. Instead, it could be driven by self-interested litigants themselves. I argued that current rules of "attorney work

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[28] *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 406 (1999) (requiring such a "link").

[29] In the setting of campaign finance donations, the Supreme Court has (inconsistently) said prosecution requires *quid pro quo* corruption. *See* Daniel H. Lowenstein, "When Is a Campaign Contribution a Bribe?" in William C. Heffernan & John Kleinig eds., *Private and Public Corruption* (Rowman & Littlefield, 2004), 127, 130.

[30] See Robertson, "Blind Expertise."

[31] D. Michael Risinger, Michael J. Saks, William C. Thompson, and Robert Rosenthal, "The *Daubert/Kumho* Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion," *California Law Review* 90.1 (2002): 1-56, 45.

product" minimize the risk of an unfavorable opinion hurting the litigant, while also preventing iterative use of the procedure to eventually get a preferred expert. If my argument goes through, we can allow this modicum of negative selection, without creating a selection bias.

Thus, rational litigants could have self-interested reasons for using blinding, if it makes the ultimate expert testimony more persuasive to a fact finder than a hired-gun expert witness, whose testimony is infected by known sources of bias. Indeed, laboratory experiments with mock jurors confirm that hypothesis: a blinded expert doubles the odds of winning, for whichever side chooses to use a blinded expert rather than a hired gun.[32] This finding demonstrates one way that blinding can come about through incentives internal to the institution, here building on the adversarial norms and incentives that are built into American litigation.

The blinding of litigation experts will only be as robust as its intermediary is independent. If the intermediary selects from a skewed pool of experts, or fails to adequately blind the information provided to those experts, then the blinding procedure may descend to a sham.

In this domain, the subsidy function itself does not create a bias, if we suppose that the institution of adversarial litigation requires such expenditure for counterpoised experts even in its counterfactual world, free of institutional corruption. Of course there are other normative conceptions of litigation, where we might suppose that adversarial funding over-produces experts, and such a conception would demand a centrally-planned provision of expertise rather than adversarial provision.

Similarly, I have argued for blinding as a solution to the institutional corruption of biomedical science.[33] A drug maker or device maker would provide the funds to test the safety and efficacy of its own products to an intermediary, perhaps the National Institutes of Health (NIH). The drug maker could specify a particular hypothesis that it wants tested, and perhaps objective criteria for the researchers and research design, but would not be allowed to hand-pick the researchers, to

[32] Robertson and Yokum, "The Effect of Blinded Experts on Jurors' Verdicts."

[33] See Robertson, "The Money Blind."

favor those most likely to produce positive results for the product being tested. Instead, the intermediary would select the researchers, based on scientific merit.

If the NIH funded a significant amount of similar research using public funds, then individual researchers might be unable to determine whether their particular project is funded privately or publicly. The identification function may thus be successfully blinded. Still, the researcher is likely to be able to identify the particular product, and its provenance. For many experiments, such as those that pre-date the FDA approval for a drug, a researcher may be able to infer the source of funding. But once the researchers know that their ability to secure subsequent grants is not dependent on them producing favorable results for the company, then that knowledge and interaction may be harmless. (If one specifies the counterfactual of a world in which government itself funded the research on company products, one could imagine a similar set of interactions by government scientists leading to the same outcomes.)

Once the biasing effects of selection and identification are resolved, one can more clearly assess whether the industry subsidy, along with limited selection, should itself be considered a bias. If so, then blinding will be insufficient, and a regime of taxing-and-spending on scientific research will be required instead. Under the blinded regime, the drug makers will still set the scientific agenda, deciding which diseases and chemical compounds should be prioritized for testing. Thus, we can expect that fewer scientific research projects will be undertaken to test the effects of generic drugs and for treatments of rare diseases. To be sure, however, these agenda-setting effects are distinct from the false knowledge that comes with the biasing of the scientific research projects that *are* undertaken. We might see those problems as being external to the institution which is the private market for pharmaceutical drug development, and solvable through public funding or private philanthropy, alongside that market. Thus, the private market institution itself may be optimized by blinding, even while remaining an incomplete solution to public health.

How could such a blinding of biomedical science funding be achieved? I have argued that leading biomedical journals could require blinding as a condition for funding where feasible, and suggested that the Food and Drug Administration could require blinding in a way that is consistent with the First Amendment. Alternatively, it is possible that physicians are becoming suspicious of industry-

sponsored science, and that an effective disclosure regime could cause them to severely discount the reliability of such science. The makers of quality drugs and devices would thus welcome a robust blinding procedure, which allowed physicians to be more confident about positive findings, and thus more quickly adopt the new drug or device, during the limited period of market exclusivity. Recent empirical evidence, supported by the Edmond J. Safra Center, is promising in this regard.[34]

Thus, here again, a well-functioning market may select a blinding solution, if its infrastructure is provided by a credible intermediary. Although the evidence is promising in both the blinded experts and blinded science contexts, it bears emphasis that these are contingent questions. It may turn out that a perfectly blinded institution successfully avoids biased outcomes, but that the public does not appreciate the robustness of the blinds. In that case, an institution may still lack trust and lack the incentives to undertake blinding. A rational funder may perceive that the biasing power it gives up is not offset by sufficient increases in reliance, and thus rationally prefer not to blind. An elite regulatory intervention may instead be required.

For the institutional corruption of Congress, the blinding story is not so optimistic. Ian Ayres and Jeremy Bulow have suggested a blinding solution, which inverts the normal regulatory impetus for disclosure of campaign finances, and instead borrows the anonymity norm of the voting booth.[35] Under the Ayres-Bulow proposal, donors would still be able to select the recipients or beneficiaries of campaign money (as the First Amendment arguably requires), but the recipient would be blinded from knowing the source of the largesse (identification). Thus, a selection bias will remain, compared to a world where all individuals somehow had equal abilities to spend political money to influence their fellow citizens' votes. (Whether this is in fact a "bias" depends on a substantive theory of political justice,

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[34] Aaron S. Kesselheim, Christopher T. Robertson, Jessica A. Myers, et al., "A Randomized Study of How Physicians Interpret Research Funding Disclosures," *New England Journal of Medicine* 367.12 (2012): 1119-1127. This evidence is merely suggestive for present purposes, because we did not actually test physician responses to an industry-funded but NIH-conducted research study. We compared industry-funded versus NIH-funded studies, and found that the former suffered significantly in its perceived reliability.

[35] See Ian Ayres, "Should Campaign Donors Be Identified?" *Regulation*, 24.2 (2001), http://papers.ssrn.com/abstract=272787 and Ian Ayres and Jeremy Bulow, "The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence," *Stanford Law Review* 50.3 (1998): 837-891. See also Lessig, *Republic, Lost*, 265-272 and Lawrence Lessig, "To Rescue Politics, Adopt Small-Donor Reforms," Bloomberg.com, October 3, 2011 (both discussing an alternative reform based on small donations).

which could specify a plausible counterfactual institution, in which all individuals had such equalized capacities for persuasion.)

The Ayres-Bulow blinding solution is complicated by the First Amendment in another way, since it would presumably not allow a regulator to prohibit a funder disclosing the fact of his donation to the decision maker. Such speech would be protected, as a value internal to the institution of American politics. Instead of banning that speech directly, Ayres and Bulow suggest a "cheap talk" regime in which individuals would be free to claim they made such donations, but would be unable to prove such claims. An intermediary institution would disburse the money to the candidate at random intervals, eliminating timing as a meaningful signal of identity. Nonetheless, some individuals (for example, the richer people) will be able to make such claims that they have given lavishly more plausibly than other individuals can.[36] Thus, the identification function would seem to be weakly blinded.

Thus, the Ayres-Bulow blinding solution fails to solve the selection-bias problem (to the extent that it is a problem, rather than an implication of a core value of politics—free speech), and Ayres-Bulow only imperfectly solves the identification bias problem. The Ayres-Bulow solution also faces severe problems of political feasibility, since those with the greatest political power currently have the most to lose under the reform, assuming it will be at all effective in reducing their influence.

Extensions and Further Study of Blinding

Blinding should be understood as a key tool of institutional design.[37] We have become accustomed to "following the money," as we seek to understand how an institution works, and we are accustomed to trying to channel that money as a way to improve the functioning of the institution. The foregoing analysis has suggested that we can attend separately to the selection and identification functions that come with the money. Under certain situations, it may be feasible and optimal to allow the economic dependency, while filtering away the bias. We can take the

[36] See Pamela S. Karlan, "Elections and Change under Voting with Dollars," *California Law Review* 91.3 (2003): 705-722.

[37] See Jeffrey M. Skopek, "Anonymity, the Production of Goods, and Institutional Design," *Fordham Law Review*, forthcoming 2013, http://ssrn.com/abstract=2310868.

money for granted but manage the information available to the selectors and the decision makers, so they know all and only what they need to know, in order to achieve the institution's proper outcomes. Who really needs to know what when?

Research is continuing on new applications of blinding. For example, in the field of forensic science (e.g., fingerprint analysis) the National Academy of Sciences recently issued a report expressing concern about scientists' close relationships with police departments, and scholars have begun to explore the use of "masking" to prevent such scientists from having operational knowledge when they are making professional judgments.[38] Often, statisticians will blind themselves, creating plans for testing the data prior to seeing it, and Anup Malani and colleagues have suggested more robust measures in this regard.[39]

Adrian Vermeule has argued that the American Constitution includes "veil of ignorance" rules that cause decision makers to make generalized, prospective decisions, without knowing how they may impact particular constituencies or benefactors.[40] Other structural solutions may be possible to effectively blind decision makers, to better approximate the "veil of ignorance" that philosophers have conceived as a regulatory ideal for justice.[41]

Random or blinded selection should get more attention as a selection device for decision makers. James Fishkin has developed the concept of deliberative polling, which relies on random selection of participants (rather than self-selection) to deliberate on a question of public concern, not unlike that of the American jury.[42] For all the criticism that the American jury receives, it is virtually immune from institutional corruption, due to the random selection and limited term of office. The jury "represents" the public from which it is drawn in a statistical sense, rather than via the political process of electoral representation. Could such selection functions be used more broadly for regulatory decision-making, rather than for merely consultative and adjudicatory purposes?

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[38] See Daniel E. Krane, Simon Ford, Jason R. Glider, et al., "Sequential Unmasking: A Means of Minimizing Observer Effects in Forensic DNA Interpretation," *Journal of Forensic Sciences* 53.4 (2008): 1006-1007.

[39] See Anup Malani, Oliver Bembom and Mark van der Laan, "Accounting for Differences among Patients in the FDA Approval Process," John M. Olin Law & Economics Working Paper, No. 488 (2d Series), http://www.law.uchicago.edu/files/file/488-281-am-fda.pdf.

[40] Adrian Vermeule, "Veil of Ignorance Rules in Constitutional Law," *Yale Law Journal* 111.2 (2001): 399-433.

[41] See Robertson, "Blind Expertise," 202-203 (reviewing such concepts in Hume, Smith, Harsyani, and Rawls).

[42] James S. Fishkin, Robert Luskin, and Roger Jowell, "Deliberative Polling and Public Consultation," *Parliamentary Affairs* 53.4 (2000): 657-666.

The jury trial also provides a useful model with regard to blinding of information. A major purpose of the Rules of Evidence is to circumscribe the epistemic space in which a decision is rendered, to exclude irrelevant, unreliable, and prejudicial information. In this light, the Rules of Evidence are an elaborate form of blinding, and they are predicated upon having a judge act as an intermediary that filters the information that reaches the ultimate decision maker. Strikingly, these prior restraints on speech have not suffered any First Amendment scrutiny.[43] Yet in other domains, we exert much less attention to constructing a high-quality epistemic space for a regulatory decision maker. Perhaps similar procedures would be useful to resolve other contested questions to set policy more prospectively?

Like any real-world intervention, blinding depends on the contingencies of the situation. Under certain conditions, it may be the best solution to institutional corruption.

[43] See Christopher T. Robertson, "When Truth Cannot Be Presumed: The Regulation of Drug Promotion under an Expanding First Amendment," *Boston University Law Review* 94 (2014), forthcoming; Arizona Legal Studies Discussion Paper No. 13-43, http://ssrn.com/abstract=2318618.

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