



Democracy Beyond Disclosure: Secrecy, Transparency, and the Logic of Self-Government

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**Democracy Beyond Disclosure:
Secrecy, Transparency, and the Logic of Self-Government**

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Abstract

“Transparency” is the constant refrain of democratic politics, a promised aid to accountability and integrity in public life. Secrecy is stigmatized as a work of corruption, tolerable (if at all) by a compromise of democratic principles. My dissertation challenges both ideas. It argues that secrecy and transparency are best understood as complementary, not contradictory, practices. And it develops a normative account of liberal democratic politics in which (qualified) duties of transparency coexist with (qualified) permissions to act behind closed doors.

The project begins with some history. I show that the language of transparency gained currency only in the last quarter century, and explain how its proximate sources promote three dubious assumptions—that disclosure should in principle be maximized, that it prevents misrule more or less automatically, and that its value is either instrumental, or rooted in a reductive notion of democracy as the rule of popular opinion.

Against these assumptions, I sketch an alternative account of liberal democracy centered on the logics of representation, liberty, and equality. These three “logics of self-government” give rise to duties of transparency binding on public and private actors alike. Such obligations have bite, I argue, but they are not all-encompassing. Indeed, the same ideals of representation, liberty, and equality license concealment in a range of important contexts, including deliberation and dissent. Having made this case, I go on to explain how secrecy and transparency can form a “democratic dyad,” deepening rather than undermining the project of self-rule.

Lastly, I address the limits of conventional transparency practices. Taken alone, disclosure is subject to a range of pitfalls, often failing to produce the results promised in transparency's name. While my non-instrumental case for openness is not destabilized by this analysis, it does suggest that mandating disclosure is rarely enough. I therefore propose a series of adversarial practices to facilitate the checking of unjustifiable secrecy, and highlight the critical role of interpretation in efforts to make power intelligible. In the end, my dissertation offers a novel defense of secrecy and transparency that highlights rather than minimizes the hard work of political engagement.

CONTENTS

Acknowledgments.....	vi
Introduction.....	1
1 Inventing Transparency, from Bentham to Big Data	15
A Traditional Value?	17
Before Transparency: The Meanings of Publicity	25
The Pathologies of Publicity and the Post-War Right to Know.....	51
Inventing Transparency: The Technocrat’s Dream	63
2 Disclosure and the Logic of Self-Government	74
“Accountable Without Doors For What They Say Within”.....	75
The Logic of the People—And Its Limits.....	82
The Logic of Representation	90
The Logic of Liberty	105
The Logic of Equality	114
A Qualified Case for Transparency	120
3 Secrecy and Transparency: From False Choice to Democratic Dyad	129
Why Not Maximize Transparency? A Qualified Case for Secrecy	131
A Dyadic Relationship.....	143
What Secrecy Can Do for Transparency	159
What Transparency Can Do for Secrecy	168
4 Ironies of Openness: Why Disclosure Fails	177
Warnings	180
Disclosure as a Tool of the Mighty.....	180
Disclosure as a Boon to Special Interests.....	186
Disclosure as a Driver of Distrust	190
Disclosure and the Difficulty of Knowledge	196
5 The Struggle for Information—and Its Limits	201
Ministries of Truth	202
Confronting Official Secrets.....	203
Can Secrecy Stop Special Interests?.....	216
Interpretation, Acknowledgment, and Trust.....	221
Conclusion	229
Bibliography	232

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As the time came to start developing my own line of research, I alighted on transparency thanks, in part, to Todd Rakoff's course in administrative law. There, for the first time, I read carefully President Obama's "Memorandum on Transparency and Open Government." And to my surprise, alarm bells went off. Transparency seemed important, I thought, but there was something bizarre about the way this document—and (come to think of it) popular discourse generally—explained and defended it. Soon I was off and running.

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who never made a secret of their love.*

[T]he besetting danger is not so much of embracing falsehood for truth, as of mistaking part of the truth for the whole.

—John Stuart Mill, *Essay on Coleridge*¹

¹ *Essays on Ethics, Religion and Society*, ed. John M. Robson (New York: Routledge, 1996), 122.

INTRODUCTION

Most of the machinery of modern language is labour-saving machinery; and it saves mental labour very much more than it ought.

—G. K. Chesterton¹

ON a Thursday in September, 2016, Senator Elizabeth Warren wrote to the Federal Bureau of Investigation. Her letter professed to be a simple request for information. The Senator from Massachusetts, a noted Wall Street critic, wanted to know why the chief investigative branch of the U.S. Department of Justice had failed to recommend any prosecutions for the 2008 financial crisis, which had thrust “uncounted millions of Americans” into economic ruin.² The question was old, but the theory under which Senator Warren now demanded answers was new. She appealed to a standard of transparency articulated only weeks earlier by the FBI director himself, who had cited it to justify the Bureau’s publication of documents related to its investigation of Hillary Clinton.

Clinton, a presidential candidate and former Secretary of State, had allegedly mishandled classified information during her tenure at the State Department, and found herself in the FBI’s crosshairs at the height of the fall campaign for the White House. Presumably sensing that the Bureau’s impartiality would be called into question no matter what its recommendation in her case, the FBI director took the extraordinary step of holding a press conference and testifying before Congress to explain his decision, and then published detailed documentary records of the Bureau’s investigation, in an attempt to dispel claims of politically motivated bias. “[T]he American people

¹ G. K. Chesterton, *Orthodoxy* (New York: Image Books, 2001), 129.

² Elizabeth Warren, Letter to James Comey, September 15, 2016, accessed Jan. 1, 2017, http://www.warren.senate.gov/files/documents/2016-9-15_Comey_letter.pdf.

deserve those details in a case of intense public interest,” he said.¹ According to an official press release, the FBI “ma[de] these materials available to the public in the interest of transparency.”²

For Warren, of course, the matter of foremost “public interest” was the massive economic recession caused by the misconduct of the big banks—and the government’s failure to prosecute the responsible bankers. Why, the Senator now asked, should the FBI’s recommendation against pursuing the relevant cases, including those of nine individuals specifically referred to the Bureau by a watchdog agency in the aftermath of the financial crisis, remain so thoroughly opaque? Why should the relevant investigatory documents not be published “in the interest of transparency,” just as the documents from the Clinton investigation had been? Indeed, Warren argued, the director’s “new standards present a compelling case for public transparency” surrounding the FBI’s inquiries of alleged securities fraud and other financial crimes leading up to the crisis.¹

If her letter presented itself as a routine request for information, it was also a brilliant (if perhaps unwitting) demonstration of the instability of appeals to transparency, which in the last quarter century have become the common refrain of democratic politics. The FBI director’s invocation of that principle, characteristically ambiguous as it was, failed to explain why investigative documents from Clinton’s case belonged in the public record, but not those from any other such inquiry into matters of “intense public interest.” At the same time, Warren’s letter underscored transparency’s unavoidably political character. Though presented as a neutral principle of information handling and endorsed by citizens and officials of all ideological stripes, transparency in fact implicates intensely controversial questions—whether Hillary Clinton is a crook, whether the

¹ Alex Emmons, “FBI Director Comey’s Disclosures Set Stage for a Public Interest Exception to Secrecy,” Oct. 31, 2016, accessed Jan. 1, 2017, <https://theintercept.com/2016/10/31/comeys-disclosures-set-stage-for-a-public-interest-exception-to-fbi-secrecy/>.

² “FBI Releases Documents in Hillary Clinton E-Mail Investigation,” Press Release at FBI.gov, Sept. 2, 2016, accessed Jan. 1, 2017, <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-documents-in-hillary-clinton-e-mail-investigation>.

financial crisis was essentially criminal—that seem to be inseparable from decisions about the merits of public disclosure in any given case. If in the abstract transparency enjoys all but universal appeal, in democracy’s everyday it is the subject of pitched and partisan battle.

Recognizing this point makes any theoretical inquiry into the value of transparency a difficult undertaking. There is a constant temptation to judge these matters *ad hoc*, and a corresponding danger that citizens of different political persuasions will find no common ground on which stand together. When the people (or the partisans) we like hold power, we will opt to expand their room for maneuver, and aim to free them from the burdens of transparency. When those we dislike hold power, we will revert to the basically conservative outlook (in the non-ideological sense) that transparency implies—“the belief that it is better to prevent some number of bad decisions even at the cost of preventing some good ones than it is to maximize the number of good decisions even at the cost of allowing more bad ones”—and demand maximum disclosure.²

Of course, this also explains precisely why such theoretical reflection is necessary. Demands for transparency are everywhere, and everywhere we have difficulty adjudicating them. Aside from the vague rhetorical sense in which transparency sounds virtuous and secrecy raises the specter of skullduggery, we lack even basic theoretical moorings, and find ourselves very much at sea among these conflicting demands.

The language of transparency itself is often unhelpful. It is an absolute concept; literally, a transparent object “can be seen through,” and “render[s] bodies lying beyond *completely* visible.”³ It therefore lends itself to the accusation, whenever some process is not entirely open to view, that the parties involved are not *really* being transparent. Moreover, our discourse often reifies transparency.

¹ Warren Letter to Comey, Sept. 15, 2016.

² Frederick Schauer, “Transparency in Three Dimensions,” *University of Illinois Law Review* 2011, no. 4 (2011): 1353.

³ *Oxford English Dictionary*, s.v. “transparent,” accessed Jan. 1, 2017, <http://www.oed.com.ezp-prod1.hul.harvard.edu/view/Entry/204969> (emphasis added).

We discuss it as if it were a thing, of which there might be “more” or “less.” But this is too reductive, and causes us to lose sight (ironically) of important distinctions that go beyond quantity. Indeed it is hard to resist the conclusion that the language of transparency, bequeathed to us by economic theory and administrative science and, most recently, by the civic technology movement, has become a bit of labor-saving machinery in our political discourse, masking some essential questions.

In reflecting on the practices of transparency, one always needs to look beyond quantity: not simply *how much transparency*, but *what* is to be made transparent *to whom*, at *what time*, and by *what method*? More broadly, it is important to ask *why* transparency? Here two kinds of answers predominate. The first are consequentialist, the second appeal to notions of democratic accountability. Of these two, consequentialism is more pliable, with the assessment of transparency turning on how various possible outcomes are predicted and weighed against one another. Despite this contingency, however, results-based reasoning has long been a launching pad for celebrations of transparency. Here the most familiar claim is that openness prevents corruption—that “under the auspices of publicity, no evil can continue” (Jeremy Bentham), that “[y]ou can’t be crooked in the light” (Woodrow Wilson), that “[s]unlight is . . . the best of disinfectants” (Louis Brandeis).¹ More affirmatively, transparency is said to promote economic and human development. This has been the common rallying cry for open political systems throughout the last quarter-century.

Meanwhile, the democratic accountability argument also retains some flexibility. It might endorse some kinds of transparency but not others. As a rule, however, the sense in which political agents should be accountable to the public has been radically underspecified. And into this void there come some very crude conceptions of democracy—above all, the populist or plebiscitarian

¹ Jeremy Bentham, *Political Tactics*, ed. Michael James, Cyprian Blamires, and Catherine Pease-Watkin (Oxford: Clarendon Press, 1999), 37; Woodrow Wilson, *The New Freedom: A Call for the Emancipation of the Generous Energies of the People* (New

notion that decision-makers should simply translate popular opinion into law. On this view, it is as if every public decision were rightly made to turn on the balance of yeas and nays, and thus to unfold in the full light of day. Though attractive on the surface, and though it bears the ring of “common sense,” this theory, I will argue, deserves to be rejected.

For all this, it is worth remembering that transparency is not necessarily democratic. Just like secrecy, it can be embraced for all sorts of reasons. And indeed, transparency now plays a significant role in non-democratic regimes.¹ I do believe, nevertheless, that a special connection ties openness to self-government—only not the one that has been quietly assumed, based on the underdeveloped idea of accountability just mentioned. This dissertation attempts to understand that connection more clearly. In the process, it sets out to dispel the idea that transparency is a cure-all for our political ills, and also to dissipate some of the stigma against political secrecy. Any decent conception of liberal democracy will recognize that transparency and secrecy are both essential to this form of politics.

The project builds on a growing body of scholarship and commentary on transparency, which has helped to demonstrate the limitations of an earlier enthusiasm. If in the previous decade it was possible to laud openness as the key to a government of wisdom and integrity, since then a small band of critics has taught us better.² Even within the civic technology movement, which had done so much to encourage enthusiasm for transparency, Aaron Swartz offered a wise caution: “Justice Brandeis’s clever aphorism to the contrary, sunlight is not in fact the best disinfectant; actual disinfectant is. Sunlight just makes it easier for people to look at the pus.”³

York: Doubleday, Page & Co., 1913), 116; Louis D. Brandeis, *Other People’s Money, and How the Bankers Use It* (New York: Stokes, 1914), 92.

¹ See, e.g., Greg Distelhorst, “The Power of Empty Promises: Quasi-Democratic Institutions and Activism in China,” *Comparative Political Studies* (forthcoming).

² Evgeny Morozov, *To Save Everything, Click Here: The Folly of Technological Solutionism* (New York: PublicAffairs, 2013), 63–99; Dave Eggers, *The Circle* (San Francisco: McSweeney’s Books, 2013).

³ Aaron Swartz, “Disinfecting the Sunlight Foundation,” *Raw Thought* (blog), Nov. 20, 2006, accessed Jan. 1, 2017, <http://www.aaronsw.com/weblog/dissunlight>.

Legal scholars, political scientists, and philosophers have done the most to complicate the standard story about the virtues of transparency. Onora O’Neill’s early work on this question underscored the limits of transparency as a response to political distrust.¹ And Mark Fenster questioned its model of linear communication, casting doubt on the dream of a fully legible political world.² Finally, Kristin Lord’s thoughtful book stressed the dangers of overestimating transparency’s value in global politics, explaining that openness is no recipe for liberal democracy—at least not on its own.³

In the wake of these early contributions, most research on the subject came to recognize the contingent nature of transparency’s benefits. As Christopher Hood remarked in his conclusion to an important collection of essays from 2006, “the devil is always in the bureaucratic detail, and prudence seems to justify a strong element of ‘practical scepticism’ about the way transparency measures work out on the ground.”⁴ This lesson has largely stuck. Among scholars of public administration, for example, Alasdair Roberts saw early on that technological change, networked government, and anxieties about security were limiting what transparency policies could achieve in practice.⁵ And a number of recent overviews likewise count the ways in which transparency falls

¹ Onora O’Neill, *A Question of Trust: The BBC Reith Lectures 2002* (New York: Cambridge University Press, 2002), 61–80. See also Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (New York: Cambridge University Press, 2008), 257–59.

² Mark Fenster, “The Opacity of Transparency,” *Iowa Law Review* 91, no. 3 (2006): 885–949. Fenster’s subsequent work on transparency includes “Seeing the State: Transparency as Metaphor,” *Administrative Law Review* 62, no. 3 (2010): 617–72; “Disclosure’s Effects: WikiLeaks and Transparency,” *Iowa Law Review* 97, no. 3 (2012): 753–807; and “Transparency in Search of a Theory,” *European Journal of Social Theory* 18, no. 2 (2015): 150–67.

³ Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy, or Peace* (Albany: State University of New York Press, 2006).

⁴ Christopher Hood, “Beyond Exchanging First Principles? Some Concluding Comments,” in *Transparency: The Key to Better Governance?*, ed. Christopher Hood and David Heald (New York: Oxford University Press, 2006), 224.

⁵ Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age* (New York: Cambridge University Press, 2006).

short.¹ Amitai Etzioni goes even further, arguing that “transparency *cannot* fulfill the functions its advocates assign to it, although it can play a limited role in their service.”² If the cautious assessment of a recent report published by the World Bank—once a much less measured promoter of transparency—is any indication, a more sober attitude now prevails.³

Even so, transparency remains a priority in many quarters. Cass Sunstein summarized the argument in a recent column.⁴ First, transparency means releasing information from which the public can benefit. Second, it promises more accountability: “If the air quality is terrible in Los Angeles, if a particular university is unusually expensive, if crime is on the rise in Dallas, or if a company has a lot of recalled toys, transparency can spur change.” Third and finally, openness allows government agencies to benefit from the dispersed knowledge of the citizenry.

Unsurprisingly, perhaps, these arguments echo the ones advanced in Barack Obama’s famous memorandum on open government, promulgated his first day in office. There, the new president promised that even as it empowers the public, “[o]penness will strengthen our democracy and promote efficiency and effectiveness in Government.”¹

In light of this focus by advocates and critics alike on transparency’s instrumental advantages, one major scholarly approach has been to search for what makes transparency initiatives work. If Larry Lessig is right that the “naked” release of information too often yields misunderstanding and cynicism, then how can disclosure be improved to produce results that are

¹ Albert Meijer, “Transparency,” in *The Oxford Handbook of Public Accountability*, ed. Mark Bovens, Robert E. Goodin, and Thomas Schillemans (New York: Oxford University Press, 2014), 507–21; Maria Cucciniello, Gregory A. Porumbescu, and Stephan Grimmelhuisen, “25 Years of Transparency Research: Evidence and Future Directions,” *Public Administration Review* 77, no. 1 (2017): 32–44.

² Amitai Etzioni, “Is Transparency the Best Disinfectant?” *Journal of Political Philosophy* 18, no. 4 (2010): 389.

³ World Bank, *Making Politics Work for Development: Harnessing Transparency and Citizen Engagement*. Policy Research Report. (Washington, D.C.: World Bank, 2016), 81–99.

⁴ Cass Sunstein, “In Praise of Radical Transparency,” *BloombergView*, Aug. 30, 2016, accessed Jan. 1, 2017, <https://www.bloomberg.com/view/articles/2016-08-30/in-praise-of-radical-transparency>.

actually desirable?² Archon Fung and his colleagues have published thoughtful work in this vein, advocating what they call “targeted transparency,” a disclosure strategy specifically adapted to promote better decision-making.³ In a recent summary, Elena Fagotto and Fung identify what they take to be the three common features of effective transparency: it communicates (1) relevant information (2) in an easily understandable format, and (3) “this new information relates to real choices people can actually make,” like the choice between one savings bank or car or restaurant and another.⁴ More broadly, Fung has emphasized that access to valuable, “targeted” information can protect us from government threats and also from the dangers posed by the private sector.⁵ Yet critics maintain that so-called “democracy by disclosure”—mandating disclosure as a mode of social policy or regulation—overburdens ordinary citizens, and saps political energy that would better go to establishing direct regulation.⁶

An alternative approach is represented by scholarship that imagines even more ambitious or capacious notions of transparency. In his work on open government, for example, Richard Mulgan has placed renewed emphasis on institutions of oversight and investigation.⁷ Meanwhile, two of the

¹ Barack Obama, “Transparency and Open Government,” 74 Fed. Reg. 4685 (Jan. 26, 2009).

² Lawrence Lessig, “Against Transparency,” *The New Republic*, Oct. 21, 2009, 37–44.

³ Archon Fung, Mary Graham, and David Weil, *Full Disclosure: The Perils and Promise of Transparency* (New York: Cambridge University Press, 2007).

⁴ Elena Fagotto and Archon Fung, “Too Much Information: Making Transparency Good for You,” *Boston Review*, August 17, 2015, accessed Jan. 1, 2017, <http://www.bostonreview.net/books-ideas/elena-fagotto-archon-fung-transparency>.

⁵ Archon Fung, “Infotopia: Unleashing the Democratic Power of Transparency,” *Politics & Society* 41, no. 2 (2013): 183–212; Archon Fung and David Weil, “Open Government and Open Society,” in *Open Government: Transparency, Collaboration, and Participation in Practice*, ed. Daniel Lathrop and Laurel R. T. Ruma (Sebastopol, CA: O’Reilly, 2010), 105–13.

⁶ Mary Graham, *Democracy by Disclosure: The Rise of Technopopulism* (Washington, D.C.: Brookings Institution, 2002). For criticism of this approach to regulation, see Omri Ben-Shahar and Carl E. Schneider, *More than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton, NJ: Princeton University Press, 2014); Etzioni, “Is Transparency the Best Disinfectant?”

⁷ Mulgan, *Making Open Government Work* (New York: Palgrave Macmillan, 2014).

chief architects of open data policy in the United Kingdom have recently argued for what they call “transparency 2.0,” which would make public not only “aggregated information” but “data ... in its rawest verifiable format.”¹ In a rather different mode, the political theorist Pierre Rosanvallon wants to look beyond the goal of making political action visible, toward an ideal of transparency as legibility.² And Matthew Fluck advances a deliberative model of “transparency as publicity,” in which citizens mediate and interpret disclosures together, reasoning with one another in a global public sphere.³

Finally, several recent critics have emerged to call into question the value of transparency for present political realities. Francis Fukuyama argues that policymakers in the U.S. are already overburdened by an excess of procedural constraints, and blames transparency for the resultant sluggishness of government.⁴ David Frum gives voice to a similar lament, suggesting that transparency prevents leaders from achieving benefits for the public.⁵ Matt Yglesias worries that it discourages efficient collaboration and communication within the ranks of officialdom.⁶ And finally, from a certain perspective within critical theory, transparency is dismissed as “a neoliberal

¹ Roger Taylor and Tim Kelsey, *Transparency and the Open Society: Practical Lessons for Effective Policy* (Chicago: Policy Press, 2016), 4.

² Pierre Rosanvallon, *Democratic Legitimacy:*

Impartiality, Reflexivity, Proximity, trans. Arthur Goldhammer (Princeton: Princeton University Press, 2011), 210; Pierre Rosanvallon, *Le Bon Gouvernement* (Paris: Seuil, 2015), 234.

³ Matthew Fluck, “The Promise of Global Transparency: Between Information and Emancipation,” in *Reclaiming Democracy: Judgment, Responsibility, and the Right to Politics*, ed. Albenaz Azmanova and Mihaela Mihai (New York: Routledge, 2015), 158.

⁴ Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (New York: Farrar, Straus and Giroux, 2014), 521.

⁵ David Frum, “The Transparency Trap: Why Trying to Make Government More Accountable Has Backfired,” *The Atlantic* (September 2014), 15–18.

⁶ Matthew Yglesias, “Against Transparency,” *Vox*, Sept. 6, 2016, accessed Jan. 1, 2017, <http://www.vox.com/2016/9/6/12732252/against-transparency>.

dispositive,” a fetishized ideology adapted to what one critic calls the “society of control,” in which “[u]nrestricted freedom and communication switch into total control and surveillance.”¹

The response to these critiques, which tend to extrapolate from particular, narrow circumstances to categorical claims about transparency *tout court*, has been quick and fierce.² In an influential policy paper, for example, Gary Bass, Danielle Brian, and Norman Eisen rebut such claims as a series of “myths” about transparency. They deny that openness harms deliberation or serves special interests, and reject the notion that party cooperation in smoke-filled rooms is likely to improve the quality of government. Rather, they maintain:

Transparency helps an open society solve problems before they become crises—and at its best, avoids those problems in the first place. It also provides the public with a better understanding of who to blame when problems arise and government fails, and who to praise when things go well. ... Done properly, transparency makes governing better and less likely to be corrupt.³

Understandably, these authors are concerned with the excuses that such a forthright airing of transparency’s limitations could give to wrong-doers and would-be conspirers against the public interest. But their response, and indeed this entire way of framing the discussion, seems to me shortsighted. In this project, I too engage with arguments about transparency’s effects; undeniably these bear on the question of how transparency is best practiced at ground level. But the consequentialist framing also obscures a more fundamental point—that transparency is not only, and not even primarily, about making things better.

¹ Byung-Chul Han, *The Transparency Society*, trans. Erik Butler (Stanford: Stanford University Press, 2015), viii, 1. Elsewhere in this account, Han raises the interesting question whether transparency discourages long-term thinking by tempting us to focus on whatever is immediately at hand. Nevertheless, his sweeping dismissal of transparency as the enemy of community and trust, as a form of “violence” that “flattens out the human being itself” can only be called hyperbolic. *Ibid.*, 3, 48–49.

² See, e.g., Nate Jones, “Against Transparency?,” *Unredacted* (blog), Sept. 7, 2016, accessed Jan. 1, 2017, <https://nsarchive.wordpress.com/2016/09/07/against-transparency/>.

³ Gary Bass, Danielle Brian, and Norman Eisen, *Why Critics of Transparency Are Wrong* (Washington, D.C.: Brookings Institution, 2014), 15, accessed Jan. 1, 2017, <https://www.brookings.edu/research/why-critics-of-transparency-are-wrong/>.

In the pages that follow, I argue that transparency and secrecy are both integral to liberal democratic politics. They arise from what I call the logic of self-government—from ideals of representation, liberty, and equality. And their normative basis is not, in the first place, a matter of downstream benefits; they occupy a more fundamental place. Transparency can be owed even if it proves useless in the redress of injustice, or in attempts to dispel political ignorance. Secrecy can be permissible even if it might prove useful to the corrupt. Neither is absolute, yet both have non-instrumental foundations.

Effects still matter. Again, they rightly inform the concrete design of secrecy and transparency at the level of day-to-day practice, and they have an important role in identifying how the two are best intertwined. What is more, an appreciation of transparency's contingent consequences can help us to assess the promise of openness in a more sober frame of mind. If it sometimes becomes a tool for the entrenchment of power, and a driver of political distrust, we should learn not to make too much of transparency in any story about the ethics of democracy.

To put it another way, the awareness of such pitfalls should inspire a vision of liberal democracy *beyond disclosure*. In such a vision, secrecy too has its proper place, even as some of the power over secrecy is wrested away from the most powerful actors. In such a vision, adversarial practices invest independent monitors with the tools of investigation and interrogation. The interpretation of information becomes at least as important as its availability. Political narratives, and plain political struggle, become central to the story. Transparency, in short, is less about bypassing the hard work of democratic engagement on this view, and more about fueling it.

The dissertation proceeds in five chapters. In the first, I offer a bit of history, highlighting transparency's surprisingly recent advent. In an earlier era it was secrecy that was considered the political virtue, until, in an age that rallied to the cry of "Enlightenment," a clear preference for openness emerged. In these early days, it was typically called "publicity," a name bequeathed by the

likes of Bentham and Kant to thinkers of the late 19th and early 20th centuries, like James Bryce, Louis Brandeis, and Marie Collins Swabey. Indeed, it was not until the 1990s that the language of transparency gained currency in mainstream political discourse. With roots in economic theory, public administration, and “civic tech,” this nomenclature imports several unhelpful assumptions, I argue, including the notions that transparency is a purely instrumental good, that it ought in principle to be maximized, and that it works automatically to prevent a range of political ills, from corruption to indolence to injustice.

Although I reject these assumptions about transparency, I nevertheless affirm its importance to liberal democracy, a task that occupies Chapter 2. There, I introduce the logics of representation, liberty, and equality, which give rise to qualified duties of transparency. These duties are neither absolute nor all-encompassing, on my account, but can bind public officials and private political agents alike. Moreover, they demand something deeper than raw disclosure. Although representatives are sometimes entitled to act in private, I argue, they must explain and answer for all final decisions, as well as for the standing policies or procedures that guide their action, and all completed performance. Under the logic of liberty, meanwhile, infringements of basic liberties must be made publicly knowable. And the same goes for disproportionate political influence, and the facts about social and economic disparities, under the logic of equality.

As significant as this role for transparency is, it leaves ample room for secrecy, and in Chapter 3 I present a qualified case for secrecy in the life of liberal democracy. So far from being anathema to self-government, practices of concealment are actually rooted in the logics of representation, liberty, and equality, I argue. Thus, in the vision of liberal democracy I advance, secrecy and transparency are complementary, interdependent qualities, not mutually exclusive alternatives. I show how secrecy can serve transparency, while transparency can make secrecy safe for democracy.

Although neither of these arguments is founded on an assessment of likely consequences, in the final two chapters of the dissertation I offer an analysis oriented to that dominant outlook. Transparency undoubtedly produces valuable benefits in a range of circumstances. Nevertheless, I show in Chapter 4 that it can also have paradoxical effects, like exacerbating distrust and entrenching established powers. This is no reason to dispense with transparency, or to cast it aside as a political distraction. But it should inspire us to imagine forms of transparency that avoid these pitfalls.

In Chapter 5, I offer some suggestions along these lines, focusing on what I call the struggle for information. Practices that enable independent parties to force disclosure even in the face of official recalcitrance, and to put the powerful on the spot in circumstances in which their discursive maneuvering is restricted, can help to dislodge unnecessary and unjustifiable secrets. Finally, I emphasize the importance of interpretation and criticism for making sense of what disclosure reveals.

In the end, liberal democracy needs much more than well-designed practices of secrecy and transparency. It needs citizens' critical engagement. It needs our commitment to understanding the facts, and our readiness to be surprised by reality. And insofar as we hope to reform our institutions or redress political injustice, it needs a great deal of hard political work—work from which transparency cannot excuse us.

* * *

Senator Warren never did get the information she requested from the FBI—an objectionable result, it seems to me, but not for the reasons her letter suggests. The issue is not simply that the prosecution of financial crimes is a matter of public interest. (At some level, *everything*

the government does is a matter of public interest.¹) It is that the Bureau made a final decision not to prosecute, and yet failed to explain that decision. Ordinarily there are good reasons, grounded in the logic of liberty, to maintain the confidentiality of evidence against criminal suspects who are not, in the end, charged with any crime. Yet in this case, a watchdog agency had already recommended prosecution based on the available evidence; these recommendations were already made public; and yet the Bureau simply demurred—this despite the fact that defending its non-prosecution decisions would presumably tend to *exculpate* the alleged fraudsters, rather than doing unjustifiable harm to their reputations.

If my account suggests that the duty of transparency was not adequately discharged here, that judgment is only the beginning. It also points to the limits of such duties—to the ways in which they are inevitably sidestepped, and to the limited mileage for reform such duties can offer even when they are faithfully carried out. Were the FBI director to explain his decision tomorrow, the public might be marginally better equipped to deliberate about the financial industry’s effective impunity. But for the moment, at least—indeed for the foreseeable future—that impunity would continue to burden our collective life. The most basic lesson of my dissertation is that the ethical basis of transparency is nonetheless to be found in the deep normative logic of liberal democracy.

¹ This helps to underscore the limited critical purchase of accounts which tie transparency’s scope to a standard of “public interest.” See, e.g., Daniele Santoro, “The Value of Transparency,” *Daily Nous* (blog), July 29, 2016, accessed Jan. 1, 2017, <http://dailynous.com/2016/07/29/philosophers-dnc-leaks/>.

**INVENTING TRANSPARENCY:
FROM BENTHAM TO BIG DATA**

‘TRANSPARENCY’ is one of those political concepts that strike us as timeless. An apparently “trans-ideological” value, it seems (or seemed until very recently) to be on every lip and in every heart. One could say that it constitutes a parcel of that common ground upon which even the fiercest political adversaries gather together. The parcel presents an ancient frontage. No visible sign suggests that its enclosure is recalled by the living. For all intents and purposes, this piece of the political landscape has no history.

In fact, like most such concepts, transparency only conceals its history (and indeed the very fact of its historical development). Such concealment is familiar to anyone who has studied the history of ideas. So often what is chalked up to the common sense of humanity is, in truth, the invention of some forgotten forebear, or the agglomeration of times and events. This goes for the notion of common sense itself.¹ In transparency’s case, our forgetting takes on a special irony. Transparency describes the state of affairs in which all may be seen: it evidently fails, however, to ensure that condition in reference to itself.

Ahistorical understandings of political transparency are problematic for at least two reasons. First, they leave us with an impoverished sense of our own choices when we invoke this concept. They leave us unaware of the paths not taken, and of the directions followed by default. As I hope to show in the pages that follow, transparency encapsulates a particular way of thinking about the proper roles of disclosure and discretion in politics. Yet without some attention to history, the

¹ Sophia Rosenfeld, *Common Sense: A Political History* (Cambridge, MA: Harvard University Press, 2011).

partiality of this vision remains obscure. Even a selective historical inquiry can make transparency's meaning less opaque.

Second, and no less worryingly, without history we deprive ourselves of a precious resource for renewal. Along the paths of transparency's conceptual development are scattered alternatives left by the wayside, and abandoned thoughts that might, if retrieved, become aids to present rethinking. Insofar as the ideal of transparency we inherit carries with it unwanted pathologies, historical inquiry may prepare us to address and perhaps even to transcend them.

I therefore regard it as my initial task to throw some light on transparency's background in ideas. Considerations of time and space dissuade me from attempting anything like a comprehensive intellectual history. What follows is therefore a limited sketch only, leaving much to future research. My aim is to identify a few critical moments in the history of this concept. Even such a limited undertaking will begin, I hope, to clarify how our commitment to transparency shapes and channels contemporary political thinking. Briefly, I shall be arguing that transparency is a largely technocratic ideal, of surprisingly recent vintage. Only in the last century did the older, Enlightenment concept of 'publicity' begin to lose favor. And only in the last few decades was 'transparency,' originally little more than an economic and bureaucratic term of art, appropriated as a novel political ideal. To characterize this transition is to reveal transparency's apolitical character. If we tend to believe that disclosure by governments will hinder corruption, trigger reform, and make public institutions responsible and effective—all this, as if by automation—then transparency's history will help to explain why.¹

¹ For two additional views of transparency's historical development, see Christopher Hood, "Transparency in Historical Perspective," in *Transparency: The Key to Better Governance?*, ed. Christopher Hood and David Heald (New York: Oxford University Press, 2006), 3–23; and Burkart Holzner and Leslie Holzner, *Transparency in Global Change: The Vanguard of the Open Society* (Pittsburgh: University of Pittsburgh Press, 2006), 12–46. Notwithstanding some important differences, the account offered here shares the most ground with Tero Erkkilä's *Government Transparency: Impacts and Unintended Consequences* (New York: Palgrave Macmillan, 2012), which describes an "ideational shift" from publicity to transparency in the late twentieth century.

A Traditional Value?

It would be natural to suppose that the notion of political transparency is at least coeval with democracy, since in modern social imaginaries the one implies the other. Democracy for us makes little sense without some idea of the people's oversight of government, and of the government's susceptibility to such oversight—some idea, in other words, of what it is for public institutions or officials to be 'transparent.'¹

In fact, the theory and practice of democracy long predates talk of political transparency. In Greece, it is true, democratic rule involved the demand for answers by popular assemblies: office-holders were tested in the crucible of public examination, and faced the fierce judgment of the *demos*.² Yet even where this mode of accountability is made explicit in ancient political writing, terms akin to transparency are absent. In Herodotus' *Histories*, for example, the Persian Otanes testifies that, unlike monarchy, "[r]ule by the majority" constrains officials to "wield [their authority] in a way that is strictly accountable," with "[e]very policy decision . . . referred to the commonality of the people."³ Certainly, this characterization implies popular knowledge of official action. But the people's opportunity to learn of their leaders' conduct, or the requirement that that conduct be disclosed for all to see, is not marked out as a distinct principle here. It is apparently an element of democratic accountability, but is never set apart from that broader matrix of political practices.

¹ As John Dunn observes, "[g]overnmental seclusion is the most direct and also the deepest subversion of the democratic claim, sometimes prudent, but never fully compatible with the literal meaning of the form of rule. The more governments control what their fellow citizens know the less they can claim the authority of those citizens for how they rule. The more governments withhold information from their fellow citizens the less accountable they are to those who give them their authority." *Setting the People Free: The Story of Democracy* (London: Atlantic Books, 2005), 185–86.

² See, e.g., Melissa Lane, *The Birth of Politics: Eight Greek and Roman Political Ideas and Why They Matter* (Princeton: Princeton University Press, 2014), 70; Josiah Ober, *Mass and Elite in Democratic Athens: Rhetoric, Ideology, and the Power of the People* (Princeton: Princeton University Press, 1990), 329.

³ Herodotus, *The Histories*, trans. Tom Holland (New York: Viking Penguin, 2014), 228 [3.80].

Thucydides comes closer to singling out what we might call transparency. In his celebrated rendering of Pericles' funeral oration, we hear the great general of democratic Athens declare of his city:

We are open and free in the conduct of our public affairs and in the uncensorious way we observe the habits of each other's daily lives We maintain an open city, and never expel foreigners or prevent anyone from finding out or observing what they will—we do not hide things when sight of them might benefit an enemy: our reliance is not so much on preparation and concealment as on our own innate spirit for courageous action. . . . [O]ur politicians can combine management of their domestic affairs with state business, and others who have their own work to attend to can nevertheless acquire a good knowledge of politics. . . . We are all involved in either the proper formulation of or at least the proper review of policy, thinking that what cripples action is not talk, but rather the failure to talk through the policy before proceeding to the required action.¹

Pericles describes a polity built upon practices of deliberation and participation, eschewing secrecy toward outsiders, and propelled by a liberal sharing of civic knowledge. These commitments are surely in harmony with contemporary ideals of political transparency, though again the concept itself is absent. Yet there is also a difference worth noting. In Pericles' statement there is no sense that leaders and magistrates are bound in the daily execution of their duties to proceed in the public eye, as familiar conceptions of transparency now hold. No mention is made of rules requiring that the work of such officials be open to popular supervision, except perhaps after the fact, in connection with retrospective holdings-to-account, or with deliberations devoted to “the proper review of policy.”² None of this necessarily makes it wrong to claim that “[t]he practice of transparency was central to the spirit of the Athenian culture.”³ It does suggest, however, that by projecting such terminology backward into antiquity, we are at least flirting with anachronism, and that we risk falsely attributing to earlier societies our own sense of a close affinity between democratic and transparent government.

¹ Thucydides, *The Peloponnesian War*, trans. Martin Hammond (New York: Oxford University Press, 2009), 91–93 [2.37–40].

² *Ibid.*, 92 [2.40].

³ Brook Manville and Josiah Ober, *A Company of Citizens: What the World's First Democracy Teaches Leaders about Creating Great Organizations* (Cambridge, MA: Harvard Business School Press, 2003), 132.

For the two acknowledged titans of Greek political philosophy, democracy bears little special relation to questions of secrecy and exposure. Plato's critique of a politics in which the many "share the regime and the ruling offices . . . on an equal basis" makes no mention of excessive openness, or of the people's inability or unwillingness to keep confidences.¹ The main problem with democracy, for Plato, is indiscretion in a wider sense. It is the tendency of popular rule to undermine every attempt to govern human immoderation, and the resultant drift toward social disintegration.² For Aristotle, meanwhile, democracy obtains whenever "the free and poor, being a majority, have authority to rule," and do so "with a view to the advantage of those who are poor," whatever the degree of disclosure involved.³ Aristotle was ambivalent about democracy (thus defined), generally recommending in lieu of its pure form a sort of mixed regime that combined democratic and aristocratic elements.⁴ What is notable for our purposes is that his criticism of popular rule desists, like Plato's, from questions of public exposure. Some forms of democracy are tyrannical and unstable, Aristotle notes.⁵ All are more or less susceptible to revolution, with popular leaders currying favor by ostentatious injustice toward the wealthy.⁶ Yet we find here no complaint of the sort Hobbes would later make, that citizen assemblies are indiscreet, or unable to maintain secrets.⁷

¹ Plato, *The Republic*, trans. Allan Bloom, 2nd ed. (New York: Basic Books, 1991), 235 [557a]. This notwithstanding Plato's apparent endorsement of an economy of truth-telling, in particular his infamous discussion of the "noble lie," at 93–96 [414b–17a].

² *Ibid.*, 235–40 [557a–62a].

³ Aristotle, *The Politics*, trans. Carnes Lord (Chicago: University of Chicago Press, 1984), 96 [1279b9], 123 [1290b18]. It is true that Aristotle associates democracy with collective deliberation, "[f]or all will deliberate better when they do so in common—the people with the notables and these with the multitude." *Ibid.*, 141 [1298b19–21]. However, at no point does he emphasize what this seems to imply: that democratic deliberation will typically involve exposure of the polity's affairs, at least to those free citizens attending the assembly. Nor does Aristotle indicate that popular rule ceases to be democratic when deliberation is undertaken, in some though not in all matters, by a subset of designated officials rather than by the entire free population. *Ibid.*, 140 [1298a11–34].

⁴ *Ibid.*, 133–36 [1295a25–1296b12].

⁵ *Ibid.*, 125–26 [1292a3–38].

⁶ *Ibid.*, 155–56 [1304b20–1305a35].

⁷ Thomas Hobbes, *Leviathan*, ed. Richard Tuck, rev. ed. (New York: Cambridge University Press, 1996), 181.

Even where Aristotle praises democracy, what is underscored is not the tendency of popular rule to expose politics to the (limited) ‘public’ of free male citizens. Instead, the philosopher invokes a notion of the wisdom of crowds: democracies may govern well because they draw on citizens’ distinct moral and intellectual virtues.¹ Elsewhere, he singles out the possibility that with the right sort of citizens—hardworking agricultural types—democracies will flourish by placing magistracies “in the hands of the best persons,” so that “the respectable rule without falling into error, while the multitude does not get less than its due.”²

Transparency is similarly absent from discussions of democracy in ancient Roman political thought. In the background of that literature is the theory of the cycle of regimes advanced by the Greek historian Polybius, whose seminal account of the Roman constitution as a mixture of three good forms—monarchy, aristocracy, and democracy—would cast a long shadow over all subsequent discussion of Roman politics. For Polybius the distinctive features of democracy were “equality and the right of every citizen to speak his mind,” while in Rome’s mixed constitution, the specifically democratic elements placed popular constraints upon the powers of consul and Senate.³ One such constraint, according to Polybius, was the prospect of ex post accountability: “a consul [must] take the people into consideration . . . because, on laying aside his office, [he] has to undergo an audit by the people of his conduct while in office.”⁴ To modern readers this seems to hint at (delayed) transparency, but that concept is entirely absent from the historian’s account. For Cicero, too, whose treatise *De Re Publica* is deeply influenced by Polybius, a democracy or “popular” state (*civitas popularis*) is one dedicated to equal liberty, in which all free citizens share in “power” (*imperii*) and

¹ Aristotle, *Politics*, 101 [1281a42–b10]. See also Josiah Ober, “Democracy’s Wisdom: An Aristotelian Middle Way for Collective Judgment,” *American Political Science Review* 107, no. 1(2013): 109–12.

² Aristotle, *Politics*, 186–87 [1318b5–1319a5].

³ Polybius, *The Histories*, trans. Robin Waterfield (New York: Oxford University Press, 2010), 377 [6.9], 383 [6.15–16].

⁴ *Ibid.*, 383 [6.15].

“public deliberation” (*consilii publica*).¹ From context it is clear that such deliberation is ‘public’ because it concerns the affairs of the commonwealth (*res publica*); the reference here is not specifically to disclosure or openness, although presumably the practice of deliberation among all citizens must involve the free and mutual exchange of information. Indeed, it is not openness but secrecy that Cicero associates with “the people” (*populus*) when, in a discussion of the proper regulation of voting, he considers the secret ballot.² I do not claim that Cicero proposed a special link between popular government and political secrecy: only that he did not envision any such connection to transparency, either. In this he was hardly alone. Roman thinkers as divergent as Livy and Lucretius are alike in discussing democracy, when they do, wholly apart from the issue of the openness of the political process.³

A number of ancient thinkers did write of the public character of law. For example, in the *Laws*, Plato’s Athenian Stranger maintains that legal rules and their rationales should be publicly promulgated.⁴ Later, the Roman historian Suetonius cited popular demands for publication, and described Caligula’s infamously empty compliance: “he at last . . . had the law posted up, but in a

¹ Cicero, *On the Commonwealth and On the Laws*, ed. James E. G. Zetzel (New York: Cambridge University Press, 1999), 19–21 [DRP 1.42–47].

² *Ibid.*, 169–71 [DL 3.33–39]. I am not claiming that Cicero proposed a special link between popular government and political secrecy. I cite the example only as evidence that he did not envision any such link to political transparency, either.

³ See, e.g., Livy, *The Rise of Rome: Books 1–5*, trans. T. J. Luce (New York: Oxford University Press, 1998), 79 [2.8], 196–97 [3.55]; Lucretius, *On the Nature of Things*, trans. Walter Englert (Newburyport, MA: Focus Publishing, 2003), 157 [5.1136–60].

⁴ Plato, *The Laws*, trans. Thomas L. Pangle (Chicago: University of Chicago Press, 1988), 106–10 [IV.720a–23b]. In Book IV, the Athenian Stranger persuades his interlocutors that the laws of their proposed regime should not merely “explain straightaway what must and must not be done, add[ing] the threat of a penalty,” but should also add “encouragement” and “persuasion” (720a) in the form of a preamble. Such preambles provide some account of the law’s rationale, “so that he who receives the law uttered by the legislator might receive [it] in a frame of mind more favorably disposed and therefore more apt to learn something” (723a). For our purposes, the key phrase is “receives the law uttered by the legislator,” which strongly suggests public promulgation. Indeed, another translation has here, “the person to whom [the legislator] promulgated his laws.” *The Laws*, trans. Trevor J. Saunders (New York: Penguin Books, 2004), 139 [IV.723a].

very narrow place and in excessively small letters, to prevent the making of a copy.”¹ The proposition that law should be publicly knowable, either by its nature or in order to meet the requirements of legitimacy, was subsequently endorsed by a wide variety of thinkers throughout Western history.² It bears some relation, to be sure, with contemporary notions of political transparency. But they remain importantly distinct. To say that the law must or should be promulgated is not to say anything about the extent to which exercises of political power more generally—in the making of laws, say, or in the administration of justice, or in the conduct of war—should be disclosed to parties other than those who rule. A norm of legal promulgation is not yet a norm of political transparency, even if they share a common impulse.

There is, I will suggest, a special connection between what we mean by transparency and the modern form of *representative* democracy. But even in that case, the term ‘transparency,’ with its particular political signification, is absent from political theorizing (and from public discourse more generally) until the very recent past.³ The Enlightenment, concerned as it was to throw light on Europe’s civic, religious, and intellectual life, and to dispel what it saw as so much darkness, forms the crucial cultural background of contemporary thinking about transparency in politics.

¹ Suetonius, *Lives of the Caesars: Volume I*, rev. ed., trans. J. C. Rolfe (Cambridge, MA: Harvard University Press, 1998), 481 [IV.xli.1]. This episode is mentioned by Lon Fuller in his celebrated study, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969), 93. For Fuller, “[e]ach of the [moral] demands of legality can be outraged in ways that leave no doubt.” Caligula’s questionable acquiescence is cited as Exhibit A, because his inadequate posting of the laws clearly flouted the requirement of promulgation.

² This includes Aquinas, Hobbes, Montesquieu, Blackstone, and too many others to name. For discussion, see, e.g., Gilbert Bailey, “The Promulgation of Law,” *American Political Science Review* 35 (1941): 1059–84.

³ There are a few exceptions. Jeremy Bentham on rare occasions uses “transparency” in reference to the visibility of public functionaries, or to the official duty of clear communication. See, e.g., *Panopticon; or, the Inspection-House*, in *The Works of Jeremy Bentham*, ed. John Bowring, vol. 4 (Edinburgh: William Tait, 1843), 40–41, 45–46; Jeremy Bentham, *Constitutional Code: Volume I*, ed. F. Rosen and J. H. Burns (Oxford: Clarendon Press, 1983), 146 [VII.13]. (All subsequent references to the Bowring edition will follow the format: *Works*, 4: 40.) Jean-Jacques Rousseau is also associated with transparency, though he appears not to have used that particular word himself—and, in any event, his reflections on the subject are more concerned with psychological and interpersonal existence than with the disclosures of public institutions. See Jean Starobinski, *Jean-Jacques Rousseau: Transparency and Obstruction*, trans. Arthur Goldhammer (Chicago: University of Chicago Press, 1988). Jonathan Marks has argued that Rousseau did not in fact believe that genuine social transparency is possible under modern conditions. See “Jean-Jacques Rousseau, Michael Sandel and the Politics of Transparency,” *Polity* 33:4 (2001), 619–42.

Nevertheless, even the thinkers of the Enlightenment addressed the openness of political systems, when they did, in quite different terms.

Indeed, as late as the 1970s and 80s, talk of transparency was still largely absent from political discussion in the United States. Major American newspapers appear to have completely avoided the term in their prolific coverage of the Watergate scandal of 1972–74.¹ Nevertheless, that affair helped to establish a national mood of skepticism toward government secrecy. The result was major disclosure legislation: in 1974, Congress strengthened the Freedom of Information Act (FOIA), initially enacted eight years earlier; and in 1976 it passed the Government in the Sunshine Act (GITSa). Remarkably, although today these laws are identified as the cornerstones of U.S. transparency policy, the word itself went unuttered in discussions surrounding their enactment.² Little had changed a decade later, when leading newspapers covering Gorbachev’s program of Glasnost (“openness” or, literally, “publicity”) again omitted the term.³ As for official or bureaucratic language, I can find no usage of transparency in this sense—denoting norms or

¹ For example, searches of the *Washington Post* and *New York Times* archives reveal no stories about Watergate published during that period that use the term. “Candor,” “disclosure,” and “openness” are more common. It is noteworthy that in a major speech delivered as the scandal was growing in the late spring of 1973, Nixon used the adjective “transparent” in a pejorative sense, as a synonym for what is false or deceiving: “We must maintain the integrity of the White House, and that integrity must be real, not transparent. There can be no whitewash at the White House.” See “Nixon: ‘Justice Will Be Pursued Fairly, Fully and Impartially,’” *Washington Post* (May 1, 1973), A11.

² See, e.g., “Amending the Information Act,” Editorial, *Washington Post* (Oct. 5, 1974), A18; “More Open Government,” Editorial, *New York Times* (Oct. 17, 1974), 40; Martin Arnold, “Congress, the Press and Federal Agencies Are Taking Sides for Battle Over Government’s Right to Secrecy,” *New York Times* (Nov. 15, 1974), 15; Richard L. Lyons, “Open Sessions Voted for Agencies: House Passes ‘Sunshine’ Act,” *Washington Post* (July 29, 1976), A3. These articles and editorials are typical in their use of the terms “open government” and “freedom of information,” rather than transparency.

³ Similar searches of the *Washington Post* and *New York Times* archives reveal no contemporaneous stories about Gorbachev’s program that mention “transparency.” The only exception, apparently, is an English translation of remarks delivered before the UN by the Soviet Union’s Foreign Minister, in 1989. See “Excerpts From the Speech by Shevardnadze Before the General Assembly,” *New York Times* (Sept. 27, 1989), A12.

practices of public disclosure by governments—in the *Congressional Record* before 1976, or in the *Federal Register* before 1979.¹

By the early 1990s, things had begun to change. It is suggestive that although a few years earlier the writers and editors of the *Washington Post* had placed “transparency” (as a feature of public officials or institutions) in quotation marks, signaling a novel or unusual usage, by 1990 the same paper apparently ceased to wave such grammatical red flags.² The broader shift reflected in this particular editorial change is illustrated by the following “Ngram.”³

Figure 1.



¹ It is noteworthy that in both of these early cases, the term “transparency” is used in connection with international economic policy agreements. 122 Cong. Rec. 16663 (1976) (statement of Rep. Gibbons) (“[T]he U.S. has led the way for many years in an OECD discussion of a possible code on government procurement practices. In this forum, the U.S. has been seeking the achievement of transparency of practices”); 44 Fed. Reg. 1936 (Jan. 8, 1979) (presidential memorandum calling for “[g]reater transparency in subsidy practices (including provision for notification to the GATT of practices of other countries)” and defining transparency in terms of “public notice requirements etc.”).

² Stuart Auerbach, “Japan Fears More Trade Friction; Washington Denies Planning New Moves,” *Washington Post* (Nov. 13, 1984), D1 (“The issue of ‘transparency’ creates a major conflict between the Japanese and American ways of conducting government business. The openness of the U.S. system allows Japan to lobby the administration and Congress, while the more closed Japanese society keeps out foreign interests until it is too late.”); Andy Stark, “The Man Who Knew Too Little; Now We Have More Facts About Public Figures Than They Have About Themselves,” *Washington Post* (April 1, 1990), C5 (“[W]hile in certain cases, the increased transparency of the public figure’s life may be bringing it ever more within the public’s range of vision, its growing complexity may be taking it farther outside his own.”).

³ Here the vertical axis measures the rate of occurrence of the word “transparency” in Google’s digitized book archive. Google’s Ngram Viewer is available at <http://books.google.com/ngrams>.

Figure 1 charts the proliferation of the term “transparency” in the 1990s. Some of this growth in usage comes from economic literature. But transparency was also increasingly being used of government agencies and procedures. For the moment, I want simply to underscore how recently the term entered our political lexicon. Although now regarded as a “traditional” democratic value, transparency took its place among the fixtures of our mental and linguistic life only a quarter-century ago.¹ As it did so, our sense of the term’s novelty—our awareness even of the fact that we once spoke differently about issues of secrecy and disclosure in politics—rapidly dissipated.

If transparency emerged as a specifically political concept only in the late twentieth century, it had significant precursors. Of these, the most important arose from the political theory of the later (and post-) Enlightenment. It is to that period that we now turn. To understand transparency’s meaning, it is crucial first to consider the concept that it has largely replaced.

Before Transparency: The Meanings of Publicity

Before transparency became an ideal for politics, European thinkers of the late eighteenth century came increasingly to write about (and to recommend) what they called publicity. In its most straightforward sense, publicity meant simply the quality of being public, as opposed to private or secret; thus, a fiscal administration honored standards of publicity by opening its books to external scrutiny, and an assembly did so by publishing its debates and resolutions. It was no coincidence that within the term publicity we find the public itself: publicity entailed not mere disclosure, but disclosure to a social or civic collectivity characterized by its habits of reading, discussion, and

¹ See, e.g., Daniele Archibugi, “The Hope of Global Democracy as a Challenge for the Twenty-First Century,” in *Democracy versus Modernization: A Dilemma for Russia and for the World*, ed. Vladislav Inozemtsev and Piotr Dutkiewicz (New York: Routledge, 2013), 215.

writing, and open, in principle, to all (educated) persons.¹ It meant *public* disclosure. Publicity's history is thus tightly bound up with the development, in European social imaginaries, of the notions of the public sphere and public opinion (which themselves coincided with a richly expanding print culture). An illuminating scholarly literature describes the germination and evolution of these two fundamental ideas.² Without retelling their story here, we can scarcely overemphasize their importance to early conceptions of publicity. The sheer existence of an acknowledged sphere of public discussion, with its object or output designated 'public opinion,' was pivotal to overturning older assumptions that made disclosure a vice, and secrecy and discretion cardinal virtues—especially in politics.³ Likewise, the recognition of a public sphere tended to alter expectations about the availability of information, and to recommend norms of public disclosure in matters of state that had previously been regarded as the privileged domain of *arcana imperii*.

To many writers of the Enlightenment who invoked the concept, publicity's value lay precisely in its capacity to transform politics. The intended transformation was at least twofold. By exposing official action to what Jeremy Bentham called "the superintendence of the public," disclosure promised both to discipline lawmakers (and judges and administrators), and to facilitate the mutual enlightenment of citizens and government.⁴ Each of these ideas—that publicity could

¹ In principle but not always in practice. On the role of gender and the participation of women in eighteenth-century publics, see Michael Schaich, "The Public Sphere," in *A Companion to Eighteenth-Century Europe*, ed. Peter H. Wilson (Malden, MA: Blackwell Publishing, 2008), 132–33.

² See, e.g., Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger (Cambridge, MA: MIT Press, 1991), 89–140; Roger Chartier, *The Cultural Origins of the French Revolution*, trans. Lydia G. Cochrane (Durham, NC: Duke University Press, 1991), 20–37; Keith Michael Baker, *Inventing the French Revolution: Essays on French Political Culture in the Eighteenth Century* (New York: Cambridge University Press, 1990), 109–27, 167–99.

³ Daniel Jütte, *The Age of Secrecy: Jews, Christians, and the Economy of Secrets, 1400–1800* (New Haven, CT: Yale University Press, 2015), vii–viii, 18–22; Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (New York: Vintage Books, 1989), 6–9; Ernst H. Kantorowicz, "Mysteries of State: An Absolutist Concept and Its Late Mediaeval Origins," *Harvard Theological Review* 48:1 (1955), 65–91.

⁴ Jeremy Bentham, *Political Tactics*, ed. Michael James, Cyprian Blamires and Catherine Pease-Watkin (Oxford: Clarendon Press, 1999), 29.

regulate, and that it could educate—had been advanced prior to Bentham’s own writing on the subject. Before the sun set on the *ancien régime*, for example, Malesherbes had argued in his *Remonstrances* (1775) that fiscal openness would make of the whole French nation a kind of extended royal council, placing at the disposal of Louis XVI a rich new source of information and suggestion.¹ In effect, Malesherbes wanted the same publicity that pervaded judicial proceedings to extend to the administration of national finances: not only did the anonymity of functionaries provide cover for the most appalling abuses, he wrote, but the failure to publish fiscal records unnecessarily silenced “the voice of the People,” that precious resource of enlightened rulers.² As Keith Michael Baker has noted, for Malesherbes “[t]he creation of an enlightened public, through the saving grace of the printed word, would reconstitute the wholeness of the body politic and recreate the link between king and people.”³ Publicity would become an instrument of mutual edification.

There were also precedents for Bentham’s claim that government disclosure served to regulate and discipline officialdom. In a work on law reform written in the mid-1780s, Bentham credited Jean Louis De Lolme’s *The Constitution of England* (1775) with focusing his attention on this aspect of publicity—its capacity to make of public opinion a virtual “tribunal,” before which even the acts of government would face judgment.⁴ According to the Genevan De Lolme, the English people exercised directly, through the communication of their political opinions, a “Censorial

¹ He implored Louis XVI to “régner à la tête d’une Nation qui sera toute entière votre Conseil.” Chrétien-Guillaume Lamoignon de Malesherbes, *Les «Remonstrances» de Malesherbes: 1771–1775*, ed. Elisabeth Badinter (Paris: Union générale d’éditions, 1978), 275. See also Baker, *Inventing the French Revolution*, 117–20.

² Malesherbes, *Les «Remonstrances»*, 274.

³ Baker, *Inventing the French Revolution*, 119. See also Robin J. Ives, “Political Publicity and Political Economy in Eighteenth-Century France,” *French History* 17, no. 1 (2003): 1–18.

⁴ Emmanuelle de Champs, “Utility, Morality, and Reform: Bentham and Eighteenth-Century Continental Jurisprudence,” in *Bentham’s Theory of Law and Public Opinion*, ed. Xiaobo Zhai and Michael Quinn (New York: Cambridge University Press, 2014), 204. De Lolme’s book appeared first in French in 1771, then in a slightly expanded English edition in 1775. The chapters on public opinion, from which my quotations here are drawn, appeared in the original French edition of 1771. See Jean Louis de Lolme, *Constitution d’Angleterre* (Amsterdam: Chez E. van Harrevelt, 1771), 222–40 [ch. XIX–XX].

power” capable of policing official misconduct.¹ The liberty of the press, together with England’s relatively loose norms governing the disclosure of official records and proceedings, gave “to the People themselves the province of openly canvassing and arraigning the conduct of those who are invested with any branch of public authority” and of keeping such officials “within their respective bounds.”²

Even before Malesherbes and De Lolme wrote, the Enlightenment impulse to openness had already left its mark on European politics. The principle of publicity had gained sufficient traction in Scandinavia, for example, to prompt legislation in the Swedish kingdom, in 1766, that required courts and functionaries to disclose for publication most documentary records of their proceedings.³ Such practices (if not yet such legislation) became increasingly widespread in the final three decades of the eighteenth century. If Malesherbes did not see his wish for publicity fulfilled immediately, just a few years later Louis XVI’s director-general of finance, Jacques Necker, published for the first time the national budget of France in his legendary *Compte rendu* (1781).⁴ As Jürgen Habermas notes, Necker was dismissed by the king just a few months later.⁵ Nonetheless, a trend larger and more powerful than any monarch was firmly in motion: across Europe the new political reality of *opinion publique* was finally coming to be acknowledged, and in the subsequent years the wave of pressure for public disclosure of government activity would never truly recede.

¹ Jean Louis De Lolme, *The Constitution of England; Or, An Account of the English Government*, ed. David Lieberman (Indianapolis: Liberty Fund, 2007), 199. In explaining just how this power could be effective, De Lolme appealed both to officials’ concern for reputation—“the invincible sensibility of Man to the opinion of his fellow-creatures”—and to the translation of adverse public opinion into concrete electoral sanctions. *Ibid.*, 206, 210–11.

² *Ibid.*, 201, 205.

³ Anders Chydenius, *Anticipating The Wealth of Nations: The Selected Works of Anders Chydenius (1729–1803)*, trans. Peter C. Hogg (New York: Routledge, 2012), 25–27, 219–50; Juha Manninen, “Anders Chydenius and the Origins of World’s First Freedom of Information Act,” in *The World’s First Freedom of Information Act: Anders Chydenius’ Legacy Today*, ed. Juha Mustonen (Kokkola, Finland: Anders Chydenius Foundation, 2006), 18–53.

⁴ See, e.g., Aurelian Craiutu, *Liberalism under Siege: The Political Thought of the French Doctrinaires* (Lanham, MD: Lexington Books, 2003), 249.

⁵ Habermas, *Structural Transformation*, 69.

* * *

It took Bentham, however, to provide an express foundation in theory for the new trend in political practice. Unquestionably, it was the English utilitarian who gave publicity its fullest and most vigorous defense among thinkers of the late eighteenth and early nineteenth centuries. As Elie Halévy and others have noted, the ideal of publicity was a common thread running through almost the whole of Bentham's intellectual career.¹ First developed at length in an early essay on *Political Tactics*, Bentham's interest in publicity touched nearly all of his subsequent political writings, up to and including that immense final labor, the *Constitutional Code*.² His views on the subject were remarkably consistent throughout. For Bentham, the main purpose of publicity is always to regulate government.

Bentham sometimes cites other, subsidiary advantages, as well. For example, he argues that publicity promotes “the confidence of the people” by removing that “[s]uspicion [which] always attaches to mystery.”³ Second, it is a source of sheer amusement, which can tilt the utilitarian scales

¹ Elie Halévy, *The Growth of Philosophical Radicalism*, trans. Mary Morris (Boston: Beacon Press, 1960), 403. See also Nancy L. Rosenblum, *Bentham's Theory of the Modern State* (Cambridge, MA: Harvard University Press, 1978), 84–85; Philip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (New York: Oxford University Press, 2006), 260.

² Begun late in 1788 in anticipation of the French Estates-General, and pursued as the new National Assembly took shape, *Political Tactics* was first printed in fragmentary form in London in 1791, and more completely in Geneva and Paris—in a French edition compiled by Étienne Dumont—only in 1816. Though addressed most immediately to the needs of politicians establishing a new legislature across the Channel, the first printed fragment would have little influence in France during the revolutionary era. See “Editorial Introduction,” xix. The question has recently been raised to what extent the second chapter of *Political Tactics*, “Of Publicity” (which was first printed in the French edition of 1816), incorporates Dumont's own additions to Bentham's original manuscript. See Jeremy Bentham, *Selected Writings*, ed. Stephen G. Engelmann (New Haven, CT: Yale University Press, 2011), 291–92. As the editor of that volume notes, the true division of labor may never be known, because Bentham's original manuscripts are largely lost. Nevertheless, it is clear that the account of publicity was integral to Bentham's original conception of the work. Appended to the 1791 fragment was a table of contents of the full projected text, which reflects almost exactly the scope and arrangement of the several sections on publicity that would appear in Dumont's edition—the edition that formed the basis for Bowring's English text in *The Works of Jeremy Bentham* (1843), itself the primary source of the modern *Collected Works* edition (1999) cited here. The table in question can be found at Jeremy Bentham, *Essay on Political Tactics* (London: T. Payne, 1791), 65; and is reproduced at *Political Tactics*, 176.

³ Bentham, *Political Tactics*, 30. Of course, more trust or confidence is not always better, in Bentham's view. As he acknowledged just a few pages later, publicity is in fact a “system of *distrust*,” the attitude upon which “every good political institution is founded.” *Ibid.*, 37.

as truly as any other advantage.¹ And finally, as we noted a moment ago, Bentham held that publicity has educative purposes. On the one hand, this means that citizens can be enlightened by liberal practices of public disclosure. Here Bentham has in mind not only public understanding of the relevant political processes or institutions themselves, but learning more generally. When the doors of parliament are thrown open to the public, he writes, “[a] habit of reasoning and discussion will penetrate all classes of society.”² This goes for official deliberation more generally—and perhaps especially for administrative deliberation—which trains citizens in the “new public rationality called utility.”³ Furthermore, publicity allows voters to learn what they must about the conduct of their representatives.⁴ And it ensures that opinion-makers “who judge for themselves” in matters of public affairs have access to whatever information may be germane to their judgments.⁵ On the other hand, the direction of learning is sometimes reversed, and publicity can make office-holders like students of the citizens on whose trust they govern. To proceed openly is to generate public feedback, Bentham suggests. When given a chance to learn about official plans and projects, the people will communicate their own opinions, reactions, and proposals in turn—all of which can be useful.⁶ As this makes clear, publicity for Bentham involves not only the disclosure of official action, but its disclosure in a context of robust freedoms of speech and press. Accordingly, another reason to value publicity is that it “enable[s] the governors to know the wishes of the governed,” and

¹ Ibid., 34.

² Ibid., 31.

³ Rosenblum, *Bentham’s Theory of the Modern State*, 153. For Bentham, Rosenblum observes, “[t]he exigencies of utility must not be secreted, not even to keep the peace or to spare the public conscience.”

⁴ Ibid., 33. This includes the reasons for legislative deputies’ official conduct, as articulated in parliamentary debates and other such “discourses,” which in Bentham’s constitutional system legislators must pledge to report sincerely. See Bentham, *Constitutional Code*, 145–46 [VII.13].

⁵ Bentham, *Political Tactics*, 35.

⁶ In fact, Bentham writes, they will do so whether benefiting from access to relevant information or not. “[T]he public do judge and will always judge.” This is one reason to ensure such access: “they judged ill upon imperfect information; they will judge better when they are in possession of the true documents.” Ibid., 35.

provides assemblies with “the means of profiting by the information of the public.”¹ Again, when officials act openly, the whole “national intelligence” can be brought to bear on questions touching the public interest, and “useful suggestions” elicited and allowed to bear fruit.² Nor is this analysis limited to legislatures. Similar results can accrue when administrative officials exercise their “information-elicitative function,” as assigned by Bentham’s *Constitutional Code*, and gain useful knowledge from relevant industries, organizations, or individuals.³

Having said all this, the core of Bentham’s case for publicity remains regulatory, in two distinct senses. Negatively, publicity regulates by ensuring discipline when governments behave badly; positively, it does so by guiding governments to behave well. In the former case, the harms opposed are inefficiency, neglect, corruption (that “sinister sacrifice” of public for private interests), and, in a word “misrule”—Bentham’s umbrella term for official conduct producing anything less than maximal utility.⁴ In the latter case, the good to be promoted is misrule’s opposite: responsible government in accordance with utilitarian principles, for “the greatest happiness of the greatest number,” writes Bentham, “is to the ruler or rulers of [a] community . . . the only right and proper measure of the goodness or badness of all their actions.”⁵

¹ *Ibid.*, 33.

² *Ibid.*, 33–34.

³ Bentham, *Constitutional Code*, 290–91 [IX.11.A1–4]. L. J. Hume observes: “As [Bentham] gave government more responsibility for such things as monetary policy and the arrangements and structures (both public and private) affecting the health, the wealth, the welfare and the intellectual and moral state of the community, he was extending the range of its contact with members of the community and was making it more dependent on the gathering and the dissemination of information. He was increasing the number of people with whom it might come into contact – who might have something to seek from it, or from whom it might want to secure information (evidence) or something else . . .” L. J. Hume, *Bentham and Bureaucracy* (New York: Cambridge University Press, 1981), 228.

⁴ Jeremy Bentham, “Constitutional Code Rationale,” in *First Principles Preparatory to Constitutional Code*, ed. Philip Schofield (Oxford: Clarendon Press, 1989), 270, 276. See also Jeremy Bentham, *Securities Against Misrule and Other Constitutional Writings for Tripoli and Greece*, ed. Philip Schofield (Oxford: Clarendon Press, 1990), 25; *Political Tactics*, 29–30.

⁵ Bentham, *Securities Against Misrule*, 78. See also, e.g., “Constitutional Code Rationale,” in *First Principles Preparatory*, 232; and *Constitutional Code*, 36 [V.4.A4].

How can publicity achieve all this? How can the mere disclosure of government action (in an environment where speech is free) serve to scotch corruption and secure good government? Bentham answers by invoking what he calls the “Public Opinion Tribunal.”¹ The purpose of this institution is, as the name suggests, to pass judgment on officialdom. It is a fictive tribunal, insofar as it lacks a formal commission, and sits at no particular time and in no particular location. Its judgments, however, are terrible: though this tribunal “wears . . . the colour of fictitiousness,” says Bentham, still “it possesses the substance of reality.”² Judicial in character, the Public Opinion Tribunal is a kind of national committee of the whole, composed not only of electors, but of all the polity’s members and residents—and indeed any outsiders “to whom it happens to take cognizance” of the issues at hand.³ Publicity is this tribunal’s bailiff, calling it into action and laying before it as much evidence of official conduct as can be had. In particular, publicity ensures: (a) the creation and maintenance of public records; and (b) the opening, wherever possible, of state proceedings to public observers. The former furnishes a trove of official documents, from “Register Book[s]” to “Remuneration Draught[s],” making it possible to reconstruct how a given ministry, department, or assembly has behaved during some interval in the past.⁴ And lest judgment be delayed, the latter

¹ Bentham, *Constitutional Code*, 35–39 [V.4–5]. For excellent discussions of this institution, see, e.g., Gerald J. Postema, “The Soul of Justice: Bentham on Publicity, Law, and the Rule of Law,” in *Bentham’s Theory of Law and Public Opinion*, ed. Xiaobo Zhai and Michael Quinn (New York: Cambridge University Press, 2014), 47–50; Schofield, *Utility and Democracy*, 259–63; Frederick Rosen, *Jeremy Bentham and Representative Democracy: A Study of the Constitutional Code* (Oxford: Clarendon Press, 1983), 24–33.

² Bentham, *Securities Against Misrule*, 54.

³ Bentham, *Constitutional Code*, 35 [V.4.A2]. In Bentham’s constitutional state, only literate adult men can vote, but all people can participate as members of the court of public opinion. See *ibid.*, 29 [V.1.A2–A3]. Elsewhere, Bentham explains that the Public Opinion Tribunal is composed of all “members of the political community . . . by whom any cognizance is taken of public affairs.” In this sense, he writes, it is “a sort of Committee of the whole body formed in the manner of a Committee of the English House of Commons in the case where, at the institution of the Committee, it is ordered that every Member of the House who *chooses* to attend, attends accordingly and has a voice.” *Securities Against Misrule*, 28 (emphasis added).

⁴ See, e.g., Bentham, *Political Tactics*, 38; *Constitutional Code*, 168–69 [VIII.12.A1], 425 [IX.25.A19–A23] (emphases omitted). On the importance of record keeping in Bentham’s constitutional system, see Rosen, *Jeremy Bentham and Representative Democracy*, 121–26.

permits popular oversight in real time, along with the rapid dissemination, by means of the press, of any observers' written accounts of what they have seen.¹ Both varieties of publicity disclose to this imaginary court all official conduct affecting the public interest, and thus liable to public judgment. "It is by publicity," Bentham concludes, "that the Public Opinion Tribunal does whatsoever it does."²

Once publicity provides the evidence, the tribunal sets to work. Bentham assigns to the Public Opinion Tribunal four distinct functions: the "statistic," the "censorial," the "executive," and the "melioration-suggestive."³ The first concerns the provision of evidence that we have just discussed; the rest describe the tribunal's possible responses. Most basically, the public may respond by communicating some "judgment of approbation or disapprobation."⁴ Does the official record show that a particular functionary has made the 'sinister sacrifice,' neglecting the interests of many for private gain? The tribunal of the public expresses its judgment by this censorial function: He has done wrong. Has the assembly recently enacted reforms that will make some administrative department more efficient? Again the tribunal expresses a verdict: The responsible legislators have acted well. Contrast with these censorial judgments what Bentham calls the executive function. Only when such verdicts of blame or praise are carried into action, and thereby made to impact "the happiness of the person in question," have we entered its domain.⁵ If, for example, the members of the Public Opinion Tribunal refuse the corrupt functionary the least social intercourse, or reward the reforming legislators with support at the next election, then they have effectively executed the

¹ See, e.g., *Political Tactics*, 62–64; *Works*, 4: 40–41, 45–46.

² *Securities Against Misrule*, 28.

³ *Constitutional Code*, 36–37 [V.5.A1–A4].

⁴ *Ibid.*, 36 [V.5.A2]. Bentham is careful to provide a wide berth for such communication, "how strong soever the terms," subject only to the limits of the law of defamation, and to the Public Opinion Tribunal's own adverse judgments upon "[v]ituperation." *Ibid.*, 39–40 [V.6.A2].

⁵ *Ibid.*, 37 [V.5.A3].

judgments previously rendered. Finally, our imaginary court of public opinion may progress from the censorial function (judgment) not to the executive (punishment and reward), but to the melioration-suggestive (reform). This function is carried out, Bentham writes, whenever “from the observation of what is amiss, or wanting, a conception of something better” is brought by some member (or members) of the Public Opinion Tribunal “to the view of those whom it may concern, to the end that, if approved, it may be brought into practice.”¹ The ‘melioration’ function would seem particularly important to the positive or constructive aspect of publicity’s regulatory purpose—that of promoting good government.

In order for publicity to achieve what Bentham promises, however, at least three further points must be true. First, the Public Opinion Tribunal must be a constant or near constant presence. The people must be attentive, and the information revealed through publicity must not be allowed to go unnoticed or unacknowledged.¹ Absent such constancy, the regulatory potential of publicity is merely hypothetical, and can never become real. Second, the Public Opinion Tribunal must actually judge according to utilitarian principles. Otherwise its judgments are liable to detract from—rather than to promote, as Bentham promises—the greatest happiness of the greatest number. Third and finally, public officials and functionaries must indeed be sensitive to the public’s judgments of praise and blame. They must not be shameless, or votaries of elite rather than public opinion. Without such responsiveness, publicity is very unlikely to transform official behavior in fact.

In one way or another, Bentham defends each of these propositions. In the first place, he is keen to acknowledge that not all of the public will be attentive all of the time. Such universally heroic diligence is neither reasonable to expect, nor necessary to carry the Public Opinion Tribunal

¹ Ibid. [V.5.A4].

into action, Bentham writes. It is enough that we can expect some *subset* of the public to fulfill its oversight role in any given case, acting as a special “Committee” on behalf of the larger tribunal.² There may be as many such committees as there are issues to be judged. In practice, presumably, shifting groups of citizens will at various times oversee the particular policy questions or institutions that most concern them. In each case, the subset of individuals “by whom actual cognizance is taken of the matter in question” expresses an opinion, and the remaining members of the Public Opinion Tribunal either concur, or else decide to study the relevant issue themselves.³ Whatever the details of this operation, the important point for Bentham is that the Public Opinion Tribunal can and does rely on a division of labor. As a whole it remains constantly vigilant, even if the same cannot be said for each of its members individually. Of course, Bentham might have taken a different tack here. He might have argued instead that publicity bears fruit even without the public’s attention. Some interpreters have read Bentham in just this way. Most influentially, Foucault portrayed the Panopticon as a means of *internalizing* the disciplinary force of publicity, so that the warden’s oversight ultimately becomes superfluous.⁴ On this view, it is simply because a superintendent *could* be watching that the institution’s prisoners (or patients or pupils) feel an inner compulsion to behave *as if* one were watching. Such one-way or non-reciprocal publicity thereby becomes a fully inward restraint. As Foucault writes, “the major effect of the Panopticon [is] to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power.”⁵ Admittedly,

¹ As L. J. Hume observes, Bentham’s theory of publicity regards “the participation and at some points the initiative of members of the community as an indispensable part of its working.” *Bentham and Bureaucracy*, 100.

² Bentham, *Securities Against Misrule*, 121.

³ *Ibid.*

⁴ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995), 200–9.

⁵ *Ibid.*, 201. “[T]he perfection of power should tend to render its actual exercise unnecessary,” Foucault continues. “[T]his architectural apparatus should be a machine for creating and sustaining a power relation independent of the

Bentham sometimes seems to encourage this kind of reading. In one flourish, he exclaims that the advantages of the Panopticon plan are guaranteed “*all by a simple idea in architecture!*”¹ Moreover, it is clear that he does imagine state officials consulting (prospectively) the public’s likely judgments of their actions; such introspection is what allows publicity to become “an instrument of security for appropriate aptitude on the part of all public functionaries.”² Nevertheless, for Bentham the internal restraint cannot stand alone. It depends on actual enforcement of the relevant standards of behavior, on a regular basis.³ Absent this, the internal restraint falls apart like a house of cards, just as soon as the targets of publicity venture a few infractions, and see that they go unnoticed or unpunished. Foucault may speak of ‘automatic’ power, but Bentham understood that there could be nothing automatic about publicity’s regulatory function. A foundation of genuine vigilance was always necessary, he insisted.⁴

The second proposition we considered—that the judgments of the Public Opinion Tribunal are generally congruent with utilitarian principles—Bentham also defends. He is well aware that the people are not infallible. Public opinion can be infected by all sorts of “current prejudice[s]” and

person who exercises it To achieve this, . . . what matters is that [the prisoner] knows himself to be observed . . . [but] he has no need in fact of being so.” Ibid.

¹ Bentham, *Works*, 4: 39.

² Bentham, *Constitutional Code*, 163 [VIII.11.A4].

³ “You will please to observe,” Bentham writes, “that though perhaps it is the most important point, that the persons to be inspected should always feel themselves as if under inspection, at least as standing a great chance of being so, yet it is not by any means the *only* one. If it were, the same advantage might be given to buildings of almost any form. What is also of importance is, that for the greatest proportion of time possible, each man should actually *be* under inspection. This is material in *all* cases, that the inspector may have the satisfaction of knowing, that the discipline actually has the effect which it is designed to have: and it is more particularly material in such cases where the inspector, besides seeing that they conform to such standing rules as are prescribed, has more or less frequent occasion to give them such transient and incidental directions as will require to be given and enforced, at the commencement at least of every course of industry.” *Works*, 4: 44.

⁴ “[E]ven transparency is of no avail without eyes to look at it.” *Works*, 4: 130. As Nancy Rosenblum observes, for Bentham “popular sovereignty is [ultimately] found in an attitude of vigilance and self-defense on the part of subject individuals.” *Bentham’s Theory of the Modern State*, 88.

“generally prevalent bias[es],” especially when the public is starved of relevant information.¹

Similarly, the people will not always appreciate the gravity of issues that seem technical or abstruse.

Late in his career, for example, Bentham lamented that the popular sanction is useless against

officials who oppose codification and law reform, because “among men in general, the importance

of the sort of work in question seems not as yet to have been sufficiently understood.”² Finally,

public opinion is susceptible to the sophistry that Bentham analyzed in *The Book of Fallacies*.³ As these

examples make clear, Bentham acknowledged that public opinion—though hardly the capricious

force its detractors imagine—still may wander from the path of reason.⁴ But this did not make

public opinion useless, in Bentham’s view, or undermine the efficacy of the Public Opinion

Tribunal. The crucial point is that the judgments of public opinion, while fallible, are constantly and

progressively approaching the standard of utility:

Public Opinion may be considered as a system of law, emanating from the body of the people. ...Even at the present stage in the career of civilization, its dictates coincide, on most points, with those of the *greatest happiness principle*; on some, however, it still deviates from them: but, as its deviations have all along been less and less numerous, and less wide, sooner or later they will cease to be discernible; aberrations will vanish, coincidence will be complete.⁵

¹ Bentham, *Deontology together with A Table of the Springs of Action and the Article on Utilitarianism*, ed. Amnon Goldworth (Oxford: Clarendon Press, 1983), 254.

² Jeremy Bentham, *‘Legislator of the World’: Writings on Codification, Law and Education*, ed. Philip Schofield and Jonathan Harris (Oxford: Clarendon Press, 1998), 154.

³ To counteract the effects of such rhetoric, Bentham proposed to bring down “the frown of general indignation” upon any invocation of the several fallacies that he identified. To this end, he wrote, they should be listed together and posted in government buildings—above all in legislative chambers—and their usage highlighted in publicly accessible records and “Report[s] of the Debates.” Jeremy Bentham, *The Book of Fallacies*, ed. Philip Schofield (Oxford: Clarendon Press, 2015), 73–74. Moreover, Bentham believed that newspapers would tend to filter “the passionate harangues” of members of parliament through “a medium which cools them,” and present them alongside “the opposite arguments.” *Political Tactics*, 36.

⁴ “He who, in judging of the course that will be taken by public opinion, follows the light of reason, will but too often miss the mark: but his chance of hitting it will at least be less bad than were he to take for his guide the *ignis fatuus* of caprice.” Jeremy Bentham, “Necessity of an Omnipotent Legislature,” in *Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution*, ed. Philip Schofield, Catherine Pease-Watkin, and Cyprian Blamires (Oxford: Clarendon Press, 2002), 276. If anything, this remark overstates Bentham’s view of the likelihood that public opinion may err. In context, the emphasis is on the fallibility of *prediction* (especially given that we never know how the facts will change), not on the fallibility of public opinion itself.

⁵ Bentham, *Constitutional Code*, 36 [V.4.A4].

Present imperfections cannot be denied. But in time, the Public Opinion Tribunal will become a perfect promoter of government according to the greatest happiness of the greatest number. Thus, “recognizing the fallibility of the public, it is proper to act as though it were infallible.”¹ The belief on which this conclusion rests—that “coincidence will be complete”—is fundamental to Bentham’s argument for publicity. Unless this is true, and unless the overlap between public opinion and utility is already substantially whole, publicity cannot be the instrument of good government (as judged by utilitarianism) that Bentham claims it is. The point is elaborated in other writings. “[E]very one feels,” according to *Political Tactics*, “that though this tribunal may err, it is incorruptible; that it continually tends to become enlightened; that it unites all the wisdom and all the justice of the nation.”² In an important text on legal codification, Bentham explains that the Public Opinion Tribunal is composed of “two *sections*: the *democratical* and the *aristocratical*.”³ The judgment of the former coincides with the greatest happiness of the greatest number; the judgment of the latter with “the greatest happiness of the ruling and influential few.”⁴ It is only because the ‘democratical’ section far outnumbers the ‘aristocratical’ that the Tribunal as a whole typically renders verdicts in keeping with the principle of utility.⁵ In the course of this explanation, we should note, Bentham stresses the role of interests in driving opinions: “the judgments of the tribunal are of necessity

¹ Bentham, *Political Tactics*, 144.

² Bentham, *Political Tactics*, 29. “Publicity is the only means of subjecting the voters [in an assembly] to the tribunal of public opinion, and of holding them to their duty by the restraint of honour. This supposes that publicity is in accordance with the public welfare. In general, this supposition is well founded. The opinion formed by the public . . . is always opposed to misconduct; it always respects the probity, the fidelity, the firmness of its governors and judges.” Ibid., 144.

³ Bentham, “Codification Proposal, Addressed by Jeremy Bentham to All Nations Professing Liberal Opinions,” in *Legislator of the World*, 281.

⁴ Ibid.

⁵ “In the tribunal of public opinion . . . there are . . . two grand sections. In your situation, on a thousand occasions, the suffrages of that *one* [i.e., the aristocratical] are irresistibly forced from the line of rectitude by the pressure of a swarm of particular interests. In the inferior and more numerous section [i.e., the democratical], is the only steady seat of that virtue, which has for its object the greatest happiness of the greatest number.” Jeremy Bentham, “Letters to Count

determined by the interest of the judges,” he writes.¹ Public opinion is therefore not simply a matter of reason, or of collective rational deliberation, as Habermas at one point suggests.² In fact, Bentham’s conception of public opinion has both rationalistic and voluntaristic aspects. The judgments of the tribunal reflect the will of the people, as determined by (their understanding of) their own interests.³ Yet in the aggregate, as we have seen, that popular will coincides (generally and progressively) with the universal standard that Bentham believed reason dictates—namely, the principle of utility.

A third proposition must be true if publicity is to regulate official action in the way that Bentham promises. Public officials must be sensitive to the judgments of the Public Opinion Tribunal; they must be moved by its approvals and disapprovals. Bentham has no doubt that this is so. Just by virtue of being human, public officials have a desire of good reputation; for this is among the basic motives of human conduct that Bentham identifies in his “Table of the Springs of Action.”⁴ Even the desire for money is weaker than the desire we all share to be well regarded by others, according to Bentham.⁵ Undoubtedly, the pursuit of reputation can lead to abuses of political power.⁶ But it also has a salutary effect, which is to enforce the judgments of public opinion by a

Toreno,” in *On the Liberty of the Press, and Public Discussion: And Other Legal and Political Writings for Spain and Portugal*, ed. Catherine Pease-Watkin and Philip Schofield (Oxford: Clarendon Press, 2012), 253.

¹ Bentham, “Codification Proposal,” in *Legislator of the World*, 281. See also Bentham, *Political Tactics*, 144 (“The opinion formed by the public is always conformable to what appears to be its interest; and in the ordinary course of things it sees its own interest, whatever it may be.”); *Deontology*, 101 (“In this, as in every other instance, in which any thing is either done or said, whatsoever is done or said is the result of *interest* . . .”).

² “Bentham conceived of the parliament’s public deliberations as nothing but a part of the public deliberations of the public in general. Only publicity inside and outside the parliament could secure the continuity of critical political debate and its function, to transformation domination . . . from a matter of will into a matter of reason.” Habermas, *Structural Transformation*, 100. For criticism of this interpretation, see Slavko Splichal, *Principles of Publicity and Press Freedom* (Lanham, MD: Rowman & Littlefield, 2002), 47.

³ See, e.g., Schofield, *Utility and Democracy*, 263.

⁴ Bentham, *Deontology*, 83.

⁵ *Ibid.*, 229.

⁶ *Ibid.*, 230–33.

“moral sanction.”¹ When official misbehavior is at issue, “the penalty . . . is forfeiture of a correspondent degree of popularity;” when good conduct is at issue, the reward is to grow in popularity.² Thus, when the public opinion tribunal acts, “judgments of approbation and disapprobation are pronounced, and thereby in various proportions good reputation and bad reputation are distributed.”³ Accordingly, although any official “may pretend to disregard its decrees,” no profession of immunity can alter the fact that the tribunal of the public “always decides the destiny of public men; and . . . the punishments which it pronounces are inevitable.”⁴ What are the effects of publicity, Bentham concludes, if not “respect for public opinion—dread of its judgments—desire of glory?”⁵

We have seen that the core of Bentham’s case for publicity is regulatory. We have seen that he recognized its educative potential, as well. It remains only to underscore that in Bentham’s theory of politics, the instrument of publicity is not marginal or supplemental, but the very cornerstone—a uniquely precious security for responsible government.⁶ Publicity lights the way of the Public Opinion Tribunal, and it is “to this place of refuge or to none” that we must turn if we are to check official power, “for no other has the nature of things afforded: to this tribunal [we] must on every

¹ Ibid., 101. See also Bentham, *Constitutional Code*, 436 [IX.25.A54].

² Bentham, *Constitutional Code*, 134 [VII.1.A1, note a].

³ Bentham, “Letters to Count Toreno,” in *On the Liberty of the Press*, 293.

⁴ Bentham, *Political Tactics*, 29.

⁵ Ibid., 37

⁶ L. J. Hume characterizes the force of publicity in Bentham’s constitutional system as “supplementary to the electoral process.” See *Bentham and Bureaucracy*, 216. In fact, while both elections and publicity are necessary, Bentham reversed this ordering. Publicity provides a more complete check on official conduct—not only because the Public Opinion Tribunal acts continuously, while elections are periodic; but also because publicity regulates officials in the judicial and administrative departments, whether elected or not. See Bentham, *Constitutional Code*, 36 [V.4.A4], 39 [V.6.A9], 86 [VI.25.A50], 90 [VI.25.A53], 401 [IX.21.A37], 425 [IX.25.A23], 440 [IX.26.A10]. Moreover, election would be a mere formality, and a false test of legislators’ fitness, without publicity “to enable the electors to act from knowledge.” Bentham, *Political Tactics*, 33.

occasion make appeal.”¹ As Bentham’s *Constitutional Code* puts it, public opinion is “[t]o the pernicious exercise of the power of government . . . the *only* check; to the beneficial, an indispensable supplement.”² These statements indicate just how unbounded Bentham’s enthusiasm for publicity could be. Of the judicial context, he declared that “[*n*]here there is no publicity, . . . there is no justice.”³ And in what may be his most widely quoted words on the subject, Bentham reduced the matter to aphorism: “Without publicity, no good is permanent; under the auspices of publicity, no evil can continue.”⁴ On the other hand, a close reading of Bentham’s work shows that he was anything but an absolutist about publicity. Secrecy, he frankly acknowledged, is sometimes to be preferred. For example, voting should ordinarily be by secret ballot.⁵ And secrecy should be maintained in certain matters of national defense and foreign affairs.⁶ The proper policy is therefore not to make publicity an absolute rule, but to maximize it.⁷ Importantly, maximization is consistent with exceptions, and of these Bentham envisioned several. “Publicity ought to be suspended in those cases in which it is calculated to . . . favour the projects of an enemy . . . [u]nnecessarily to injure innocent persons [or] . . . [t]o inflict too severe a punishment upon the guilty.”⁸ The succinctness of this list should not distract us from the fact that Bentham here countenances some (potentially) very far-reaching exceptions to the rule of publicity. In the *Constitutional Code* he goes even further, acknowledging that

¹ Bentham, *Securities Against Misrule*, 125.

² Bentham, *Constitutional Code*, 36 [V.4.A4] (emphasis added).

³ Bentham, *On the Liberty of the Press*, 96.

⁴ Bentham, *Political Tactics*, 37. “The efficacy of this great instrument extends to everything,” Bentham adds—“legislation administration, judicature.” Ibid.

⁵ Bentham, *Constitutional Code*, 439–40 [IX.26.A8–A9]. Bentham held that inside a legislative assembly, members’ own voting should be open wherever possible. Even in this context, however, he foresaw many possible exceptions. Bentham, *Political Tactics*, 145–49.

⁶ Bentham, *Constitutional Code*, 164 [VIII.11.A6].

⁷ Ibid., 162 [VIII.11.A2].

⁸ Bentham, *Political Tactics*, 39.

on some occasions the mere expense of publicity may outweigh its benefits, while in others “the evil of publicity would, in the instance of this or that particular person or class of persons, be preponderant over the good.”¹

Notwithstanding Bentham’s sensitivity to such special cases, the general sense imparted by his political theory is that “[s]ecrecy is an instrument of conspiracy.”² He is willing to recognize the occasional utility of shielding government action from public view, but in general, political secret keeping remains the trademark of tyranny.³ In one memorable passage, Bentham declares that anyone aiming “to weaken the effective power of the Public Opinion Tribunal, or . . . by suppression of the truth, to misdirect it,” may be counted “among the enemies of the human species.”⁴ Every attempt to suppress relevant information—including (presumably) by means of political secrecy—“is evidence, of hostility . . . to the greatest happiness of the greatest number: evidence of the worst intentions, and generated by the worst motives.”⁵ Publicity, we may conclude, is a virtue of political institutions; secrecy, a vice. The fact that Bentham’s own view is more complex than this, and more sensitive to the nuances of context, is obscured by the very potency of his expression. Bentham indeed provided a theoretical foundation for novel practices of political publicity: one that could be (and has been) enlisted in support of schemes Bentham himself would have rejected.

* * *

Such are the ironies of history that two figures most often portrayed as intellectual adversaries—Kant the deontologist and Bentham the consequentialist—were alike in this respect, at

¹ Bentham, *Constitutional Code*, 163 [VIII.11.A3–A5].

² Bentham, *Political Tactics*, 39.

³ Bentham, *Constitutional Code*, 386 [IX.20.A12].

⁴ *Ibid.*, 41 [V.6.A5].

⁵ *Ibid.*

least: that they both regarded publicity as worthy of philosophical reflection. This shared interest is perhaps not surprising, given the historical currents into which each was born. Kant was Bentham's elder by a generation, but they were equally inhabitants (and luminaries) of the culture of *Aufklärung* in late eighteenth-century Europe. What may be more surprising is that, on publicity, anyway, the voices of our contending ethicists sometimes converge in eerie harmony.

As we observed, Bentham goes so far as to profess that “under the auspices of publicity, no evil can continue.”¹ And conversely (speaking here of law courts): “*Where there is no publicity . . . there is no justice.*”² Nearly three decades before the latter of these declarations would be published, the philosopher of Königsberg had advanced what sounded like a similar proposition in the essay, “To Perpetual Peace” (1795). It was in this important text that Kant articulated what he dubbed “the transcendental principle of the publicity of public right”:

‘All actions that affect the rights of other men are wrong if their maxim is not consistent with publicity [*Publizität*].’ . . . If my maxim cannot be *openly divulged* without at the same time defeating my own intention, i.e., must be kept *secret* for it to succeed, or if I cannot *publicly acknowledge* it without thereby inevitably arousing everyone’s opposition to my plan, then this necessary and universal, and thus *a priori* foreseeable, opposition of all to me could not have come from anything other than the injustice with which it threatens everyone.³

Here is a principle “found *a priori* in reason,” says Kant. Because publicity is the very “form” of public right [*öffentliches Recht*], this thought experiment constitutes a test of the rectitude of political action.⁴ If the maxim of such an action cannot be disclosed without thereby undermining that action, then the action in question is unjust. Kant is quick to point out that this test is “merely *negative*”: it purports to identify cases of *injustice* only, and it does not follow from the stated formula

¹ Bentham, *Political Tactics*, 37.

² Bentham, *On the Liberty of the Press*, 96 (emphasis in original). Bentham allows that there are a few rare exceptions to this “incontestable rule,” but these are “too minute to be here worth mentioning,” he writes. *Ibid.*

³ Immanuel Kant, *Perpetual Peace and Other Essays*, trans. Ted Humphrey (Indianapolis: Hackett, 1983), 135–36.

⁴ *Ibid.*, 135.

that actions compatible with publicity are necessarily compatible with justice.¹ Even in this limited form, Kant's formula may be overbroad.² For the moment, though, I want to set aside such reservations.

If we focus simply on characterizing Kant's account, it is perhaps most important to recognize that publicity here functions as a "bridging principle between politics and morality."³ It indicates how the moral law delimits what is permissible in politics, and suggests a way to the reconciliation of these two spheres. "[A]ll politics must bend its knee before morality," Kant declares.⁴ The transcendental principle of publicity is an aid to this necessary genuflection, effectively translating the categorical imperative to the context of political action.⁵ In explaining the principle's construction, Habermas makes reference to "public opinion."⁶ It is important to recognize, however, that Kant's publicity test does not contemplate disclosing the maxims of political actions to the actually existing public. Insofar as 'public opinion' suggests empirical rather than idealized opinion, the term may be misleading here. Kant's publicity principle takes men and women not as they are, but as they might be. For if it will retain any value as an *a priori* test of political injustice, then, as one interpreter puts it, Kant's thought experiment "depends on conceiving the reaction of

¹ Ibid., 136, 138.

² See, e.g., David Luban, "The Publicity Principle," in *The Theory of Institutional Design*, ed. Robert E. Goodin (New York: Cambridge University Press, 1996), 154–98.

³ Habermas, *Structural Transformation*, 102.

⁴ Kant, *Perpetual Peace*, 135.

⁵ Kevin R. Davis, "Kantian 'Publicity' and Political Justice," *History of Philosophy Quarterly* 8, no. 4 (1991): 412. See also Melissa Zinkin, "Making the Ideal Real: Publicity and Morality in Kant," *Kantian Review* 21, no. 2 (2016): 237–59.

⁶ Habermas, *Structural Transformation*, 108. "Political actions . . . were themselves declared to be in agreement with law and morality only as far as their maxims were capable of, or indeed in need of, publicity. Before the public it had to be possible to trace all political actions back to the foundation of the laws, which in turn had been validated before public opinion as being universal and rational laws." Just prior to this statement, Habermas remarks that in Kant, publicity "only lacked the name of 'public opinion.'" Ibid.

an *ideal* public,” one “composed of rational beings who demand only that others not interfere with their freedom to act,” and who do not themselves intend what is unjust.¹

In this respect, Kant and Bentham are up to two very different things. We saw earlier that for Bentham, the judgments of actually existing public opinion approximate the moral judgments of utilitarianism. Moreover, any gap between them is progressively shrinking, and can be expected before long to close completely. Bentham therefore calls for the actual public disclosure of government action: the effect of such publicity will be to make government comport with the principle of the greatest happiness of the greatest number, through the action of the Public Opinion Tribunal. For Kant, by contrast, the distance between the judgments of actual, empirical publics and those of rational agents faithfully obedient to the universal moral law may be vast. Recognizing this gap, Kant invokes publicity only hypothetically, in the form of what he calls “an experiment of pure reason.”² Unlike Bentham’s, his is not an argument that governments must in fact proceed openly. Kant’s principle holds only that when the maxim of an action in politics lacks “the hypothetical capacity of being made public,” then we have a sign of its injustice.³ Rulers ought to consult this thought experiment, to be sure. But Kant nowhere maintains that they should make it real by actually disclosing their maxims to subjects or citizens.

‘Where there is no publicity, there is no justice.’ Bentham extracted actual political directives from this principle; Kant held it only hypothetically. The association of publicity with political justice remains nonetheless a central feature of the legacy of Kant’s account. Leaving the essay on ‘Perpetual Peace,’ it is difficult to avoid the impression that, hypothetical or otherwise, publicity is a

¹ Davis, “Kantian ‘Publicity’ and Political Justice,” 413–14 (emphasis added).

² Kant, *Perpetual Peace*, 135. As Davis observes, “though Kant requires just actions to be *capable* of publicity, this principle by no means sanctions action against government which legislates in secret or even suppresses public discussion of politics.” Davis, “Kantian ‘Publicity’ and Political Justice,” 417 (emphasis added).

³ *Ibid.*, 415.

mark of righteous policy, while secrecy and insincerity are the hallmarks of every “political moralist” who would disfigure morality “to suit the statesman’s advantage.”¹

* * *

A generation after Kant published his essay on ‘Perpetual Peace,’ the French political theorist François Guizot developed his own novel account of publicity. Although he remains an object of unwarranted neglect, Guizot is unique in the history of political thought for having placed publicity at the very center of his theoretical vision.² One of a band of Restoration-era philosophers and politicians dubbed ‘Doctrinaires’ for their alleged intellectual rigidity, and for the formality of their parliamentary rhetoric, Guizot was in fact neither doctrinaire nor dogmatic in any conventional sense.³ Unlike Bentham (and like Kant), he rejected the ideal of popular sovereignty. Though he recognized the importance of democracy as *état social*, Guizot disparaged familiar forms of political democracy—including the extension of suffrage without regard to citizens’ capacities—as setting up an illegitimate “empire of the majority over the minority.”⁴ Instead of universal suffrage, Guizot’s theory of representative government stressed the sovereignty of universal reason, which is only ever imperfectly realized by fallible human agents; and, correspondingly, the strictly limited character of all legitimate public authority:

All power which exists as a fact, must, in order to become a right, act according to reason, justice, and truth, the sole sources of right. No man, and no body of men, can know and

¹ Kant, *Perpetual Peace*, 128, 130–32, 139.

² “Theoretically,” Guizot observes, “publicity is perhaps the most essential characteristic of a representative government.” *The History of the Origins of Representative Government in Europe*, trans. Andrew R. Scoble, ed. Aurelian Craiutu (Indianapolis: Liberty Fund, 2002), 69. See also Aurelian Craiutu, *Liberalism under Siege: The Political Thought of the French Doctrinaires* (Lanham, MD: Lexington Books, 2003), 252–56.

³ *Ibid.*, 26.

⁴ “So far as force is concerned, the majority possesses no right different from that possessed by force itself, which cannot be, upon this ground alone, the legitimate sovereignty. As to the expression of opinion, is the majority infallible?—does it always apprehend and respect the claims of reason and justice, which alone constitute true law, and confer legitimate sovereignty? Experience testifies to the contrary.” Guizot, *History of the Origins of Representative Government*, 60. See also *ibid.*, 60–65; Craiutu, *Liberalism under Siege*, 108, 133–39.

perform fully all that is required by reason, justice, and truth; but they have the faculty to discover it, and can be brought more and more to conform to it in their conduct.¹

For Guizot, political power—above all the power to make law—was therefore conferred as a conditional trust, requiring continuous justification, “both before it is assumed and all the time that it is exercised.”²

Representatives were bound to govern in accordance with the authoritative standards of reason and justice, as best they understood them. Yet no official (or set of officials) could be permitted to judge of such matters in private. Publicity, Guizot maintained, was prerequisite to the collective project of discerning reason’s commands: “Thus does a representative government impel the whole body of society . . . to enter upon a common search after reason and justice; it invites the multitude to reduce itself to unity [in universal reason], and it brings forth unity from the midst of plurality.”³ Even those citizens who hold neither offices nor the right to vote—this wider public—may, by deliberating alongside parliament, and by drawing upon their own knowledge and experience to scrutinize ideas vying for public approval, contribute to the government’s general aim of establishing just and enlightened rule. “The problem evidently is to collect from all sides the scattered and incomplete fragments of this power [of reason, justice, and truth] that exist in society, to concentrate them, and from them, to constitute a government.”⁴ While election is a necessary component of this process, it is publicity that embraces the entire public, ensuring that “public reason, which alone has a right to govern society, may be extracted from the bosom of society itself.”⁵ These passages make it tempting to regard Guizot as an intellectual forbear of modern

¹ Guizot, *History of the Origins of Representative Government*, 55.

² *Ibid.*, 58.

³ *Ibid.*, 54.

⁴ *Ibid.*, 295.

⁵ *Ibid.*, 296.

theorists of deliberative and epistemic democracy. With the former he insisted upon the central importance of public deliberation; with the latter he maintained that intelligence dispersed throughout the community may be gathered together through public procedures. Unlike such theorists, however, Guizot clearly imagined the public's role in less-than-egalitarian terms. He maintained, for example, that it would be those with greater "capacity to act according to reason and justice" whose contributions would best inform their representatives' decision making.¹ And he defended expanding the franchise only to a degree commensurate with "the real state of society," and never beyond.²

If Guizot held that publicity tends to enlighten government by the public's deliberative activity, one needs to underscore that he was advancing a form of rationalism, rather than voluntarism, in politics. Though he sometimes spoke of *opinion publique*, Guizot explicitly disavowed the notion that publicity should channel the popular will.³ Not will but reason confers legitimacy. The public's role, and the content and function of public opinion, must therefore be understood in relation to universal reason. While particular citizens may intend only to advance their own opinions, rendering judgments of public affairs on the basis of personal conviction, the public considered collectively is working, in effect, to identify what reason and justice demand. "The end of representative government," says Guizot, "is to bring publicly into proximity and contact the chief interests and various opinions which divide society, and dispute for supremacy, in the just confidence that from their debates will result the recognition and adoption of the laws and measures

¹ Ibid., 61. As Craiutu stresses, however, capacity is not in Guizot's theory an "aristocratic inheritance" belonging to the wealthy or wellborn. Although some minimum of property may be necessary to political capacity (because it permits independence of judgment), it is hardly sufficient: capacity also requires such qualities as "intellectual maturity, reason, and liberty." Ibid., 175 n.2. Craiutu elaborates on the concept of capacity in nineteenth-century political thought in *Liberalism under Siege*, 223–27.

² Guizot, *History of the Origins of Representative Government*, 337, 342.

³ "In no possible case can will of itself confer upon the acts which it produces the character of legitimacy; they have, or they have not this characteristic, according as they are or are not conformed to reason, justice, and truth, from which alone legitimate power can spring." Ibid., 292.

which are most suitable for the country in general,” and which most accord with “the reason of the community”—that is, with the community’s best estimation (or fullest understanding) of what Guizot calls “eternal reason.”¹ In emphasizing reason’s universality, Guizot strikes a Kantian chord. What is remarkable, however, is that unlike the philosopher of Königsberg, Guizot made publicity a practical requirement of legitimate representative government—no mere hypothetical test. “Power proves its legitimacy, that is to say, its conformity to the eternal reason, by making itself recognized and accepted by the free reason of the men over whom it is exercised.”²

In all this, Guizot also maintained that publicity effectively disciplines and constrains political authority. Under representative government, “the public powers which actually exercise sovereignty ought to be constantly required and constrained on every occasion to seek after the true law,” i.e., reason and justice.³ Yet without publicity, this search is impossible. Without publicity, the powerful are necessarily released from the test of public justification. And without publicity, even elections fail as reliable constraints.⁴ Accordingly, Guizot writes, it is characteristically aristocratic governments that avoid publicity:

When each one of those who participate in the rightful sovereignty possesses it by the mere accident of birth . . . he need not recognise any one as claiming a right to call him to account. No one has any right to inquire into the use which he makes of his power, for he acts in virtue of a right which no one can contest, because no one can deprive him of it. It is a right which needs not to justify itself, since it is connected with a fact that is palpable and permanent.⁵

In representative states, by contrast, publicity extends to the whole people the power of demanding explanations and justifications for official conduct. And this is the source of its checking power. In this Guizot echoed not Kant but Bentham. As we have seen, these “two great architects of the

¹ Ibid., 294, 296, 348.

² Ibid., 296–97.

³ Ibid., 345.

⁴ Ibid., 54 n.3, 252–54.

⁵ Ibid., 58.

publicity principle” each left their mark on Guizot.¹ Taken together, all three illustrate the variety of meanings attached to publicity in eighteenth- and nineteenth-century political theory.

* * *

It is difficult to ascertain precisely how Bentham, Kant, and Guizot affected the subsequent development of ideas about publicity and transparency. Occasionally intellectual debts can be traced with certainty. More often, attempting to disentangle the obscure patterns of causation in this field is a tricky business. I will avoid doing so here. It is enough for my purposes to point out that, whatever the character of their actual historical impacts, each of these theorists articulated ideas about publicity that remain very much with us (though that particular word has today a different signification). From Bentham, we have a threefold bequest: first, the notion that public disclosure is primarily about preventing corruption and other forms of political mischief; second, the idea that such disclosure facilitates the reign of public opinion, and therefore makes government more publicly responsive; and third, the association of popular oversight of government officials with visual forms of surveillance. Kant’s legacy is more briefly stated but no less consequential, for we still live with the idea that public disclosure is a test of political justice, and, conversely, that secrecy in politics is a sign of malfeasance or wrongdoing. Finally, Guizot’s insistence that publicity is the cornerstone of representative government, and his view that it purifies and authenticates representative decision making by calling forth the judgments of “public reason,” both remain with us—albeit in highly modified forms. It is true that today’s transparency thinking implicitly rejects the sharp distinction in Guizot between representative and democratic government; nevertheless, it largely agrees that to publicize politics really is the one thing needful. And among contemporary democratic theorists, especially, we hear resounding echoes of Guizot’s appeal to public reason as

¹ Splichal, *Principles of Publicity and Press Freedom*, 164.

“the reason of the community,” and of his view that political institutions must “collect from all sides the scattered and incomplete fragments of this power [of reason] that exist in society.”¹

Before modern concepts of political transparency could take root, however, the heirs of our three publicity theorists had to taste disillusionment. It came bitterly, in the first half of the twentieth century, when a generation of public intellectuals in the United States was chagrined to find that the advantages promised in publicity’s name were forbiddingly difficult to secure in practice. Too often the effect of publicizing politics was simply to inaugurate a pitched battle for citizens’ limited attentions. No individual could process, much less judge responsibly, the glut of information pouring out of Washington (and other centers of officialdom) every day. In light of that inconvenient truth, publicity became above all a matter of messaging, of marketing and amplification. Its engineers, ‘publicity men,’ practiced the dark arts of manipulation, working not to inform public opinion but simply to form it, in accordance with their paymasters’ wishes. The question was: in such an atmosphere, why value publicity at all? What desirable end could it serve under modern conditions?

The Pathologies of Publicity and the Post-War ‘Right to Know’

“Public opinion is a sort of atmosphere,” wrote the Viscount Bryce, “fresh, keen, and full of sunlight, . . . and this sunlight kills many of those noxious germs which are hatched where politicians congregate.”² During his tenure as Regius Professor of Civil Law at Oxford, James Bryce recreated Tocqueville’s trek through the United States, preparing to compose a study that would avoid the Frenchman’s errors, as he saw them.³ The resultant book, *The American Commonwealth* (1888), would

¹ Guizot, *History of the Origins of Representative Government*, 295.

² James Bryce, *The American Commonwealth*, vol. 2, (Indianapolis: Liberty Fund, 1995), 1012.

³ See, e.g., Gary L. McDowell, “Introduction,” in James Bryce *The American Commonwealth*, vol. 1 (Indianapolis: Liberty Fund, 1995), xv, xxiv–xxvii.

be a spectacular success on both Atlantic shores. In its pages, Bryce discussed the twin functions of publicity that we considered earlier: education, and the regulation of official conduct. His famous sunshine metaphor, quoted just above, captured both of these functions. The emphasis, however, fell clearly on detecting (and deterring) government misconduct. “[T]he genius of universal publicity,” Bryce wrote, “has some disagreeable results, but the wholesome ones are greater and more numerous. Selfishness, injustice, cruelty, tricks, and jobs of all sorts shun the light; to expose them is to defeat them.”¹ This remarkable claim was qualified in Bryce’s very next sentence: “serious evils . . . in the body politic” are in fact only “*half* destroyed” by public exposure.² Even with this qualification, Bryce’s vision of publicity’s disciplinary power was exceedingly grand, and left its mark on American audiences.

Among those influenced by it were some of the leading lights of the Progressive movement. By 1909, Herbert Croly could reference “all the current talk about the wholesome effects of ‘publicity.’”³ Croly was of course well aware that one major source of such talk had been the oratory of the outgoing president, Theodore Roosevelt. A correspondent of Bryce’s even before the latter’s appointment as Ambassador to the United States, Roosevelt had been entrusted with prepublication proofs of *The American Commonwealth* while a young member of the New York State Assembly.¹ Years later, on the national stage, he was professing its solid faith in publicity while advocating for a federal “Bureau of Corporations,” to police the forces of industry. “Publicity can do no harm to the honest corporation,” Roosevelt hushed his critics. Rather, it would be an indispensable aid in the task of “curbing and regulating . . . combinations of capital” harmful to the public interest. In making

¹ Bryce, *The American Commonwealth*, vol. 2, 1012.

² Ibid. (emphasis added).

³ Herbert Croly, *The Promise of American Life* (Princeton: Princeton University Press, 2014), 419.

this case, Roosevelt effectively paraphrased Bryce (and anticipated Brandeis): “Daylight is a powerful discourager of evil. Such publicity [of industry] would by itself tend to cure the evils of which there is just complaint; it would show us if evils existed, and where the evils are imaginary, and it would show us what next ought to be done.”²

Woodrow Wilson, who published a laudatory review of *The American Commonwealth* the year after its publication, would later elaborate on the themes of sunlight and publicity in his campaign for the White House.³ In *The New Freedom* (1913), a collection of Wilson’s speeches from the 1912 election, the imperative of publicity is raised (so to speak) to a higher power:⁴

Wherever any public business is transacted, wherever plans affecting the public are laid, or enterprises touching the public welfare, comfort, or convenience go forward, wherever political programs are formulated, or candidates agreed on,—over that place a voice must speak, with the divine prerogative of a people’s will, the words: “Let there be light!”⁵

The transposition of Biblical dictum here is arresting. For Wilson, as for Bryce (and Bentham before him), the primary reason we ought “to open the doors and let in the light” is that such publicity protects against government misconduct.⁶ “Nothing checks all the bad practices of politics like public exposure,” says Wilson, for “[y]ou can’t be crooked in the light.”⁷ Yet publicity is no merely discretionary instrument in this telling. It has been elevated to the status of supreme commandment,

¹ Theodore Roosevelt to James Bryce. January 10, 1911. Theodore Roosevelt Papers. Library of Congress Manuscript Division. <http://www.theodorerooseveltcenter.org/Research/Digital-Library/Record.aspx?libID=o214920>. Theodore Roosevelt Digital Library. Dickinson State University.

² Theodore Roosevelt, *The Roosevelt Policy: Speeches, Letters and State Papers, Relating to Corporate Wealth and Closely Allied Topics*, vol. 1 (New York: Current Literature Publishing Co., 1908), 38.

³ See Woodrow Wilson, “Bryce’s American Commonwealth,” *Political Science Quarterly* 4, no. 1 (1889): 153–69.

⁴ This is an homage to Patrick Riley, who in a personal communication to Eric Nelson once quipped that theology is but “political theory raised to a higher power.”

⁵ Woodrow Wilson, *The New Freedom: A Call for the Emancipation of the Generous Energies of a People* (New York: Doubleday, Page & Co., 1913), 135.

⁶ *Ibid.*, 111.

⁷ *Ibid.*, 116. As if channeling Bentham, Wilson asserts that “[w]e are never so proper in our conduct as when everybody can look and see exactly what we are doing.” *Ibid.*, 115.

arising directly from the will of the people. Wilson therefore speaks of the public's "right to know" about decisions and processes affecting its interests.¹ Indeed, he comes close to declaring that right unconditional: "Government must, if it is to be pure and correct in its processes, be *absolutely public* in everything that affects it."² Accordingly, every "public man with a conscience" must studiously avoid keeping "secret[s] . . . from the people about their own affairs."³

If Wilson made publicity a matter of political justice, and therefore the duty of public officials, his adviser, the trustbuster Louis Brandeis, emphasized the constraints it placed upon private interests. Like Wilson, Brandeis was also moved by Bryce's sunshine metaphor. In his influential brief against concentrated economic power, *Other People's Money* (1914), Brandeis pointed to the remedial effects of publicity in terms that would inspire the most stubborn shibboleth of today's transparency advocates. "Sunlight is said to be the best of disinfectants," he wrote, "electric light the most efficient policeman."⁴ When this sentence is quoted, it generally goes unmentioned that Brandeis was concerned here mainly with the publicity of the "Money Trust," rather than with government processes and institutions.⁵ That he nowhere mentions public opinion underscores the point. For Brandeis, publicity was not a means of bringing public opinion to bear on officialdom,

¹ Ibid., 111, 129, 134.

² Ibid., 130 (emphasis added).

³ Ibid. Wilson again echoes Bentham when, drawing a connection between secrecy and suspicion, he writes: "Everybody knows that corruption thrives in secret places, and avoids public places, and we believe it a fair presumption that secrecy means impropriety." Ibid., 114.

⁴ Louis D. Brandeis, *Other People's Money: And How the Bankers Use It* (New York: Frederick A. Stokes Co., 1914), 92. The chapter from which this quotation is drawn was originally published as "What Publicity Can Do," *Harper's Weekly* (Dec. 20, 1913), 10–13. Brandeis did not credit Bryce explicitly, but he was certainly familiar with *The American Commonwealth*. He quoted the book at length in another work published the same year as *Other People's Money*. See Louis D. Brandeis, *Business—A Profession* (Boston: Small, Maynard & Co., 1914), 317–21.

⁵ Nor was this the first time Brandeis broached the subject. See, e.g., Louis D. Brandeis, *Life Insurance: The Abuses and the Remedies: An Address Delivered Before the Commercial Club of Boston* (Boston: Policy-Holders Protective Committee, 1905), 23. In this speech Brandeis called for clear and consistent accounting at insurance firms, and argued that "[p]ublicity as to the policy-holders . . . is essential to insure the proper conduct of the business by officers and directors."

but of enabling market actors to see the true costs and benefits of the goods offered to them.¹ It is true, of course, that Brandeis would later support efforts to regularize the publication of executive branch regulations, and that the requirement of adequate promulgation remained a concern throughout his legal career.² But in his fullest and most influential discussion of the subject, publicity was above all a means of empowering investors against the bankers who would profit from their ignorance. According to Brandeis, much of the financial industry's clout in the early twentieth century came from its "huge tolls" upon the transactions of unsuspecting buyers and sellers.³ "Is it not probable," he wagered, "that, if each investor knew the extent to which the security he buys . . . is diluted by excessive underwritings, commissions and profits, there would be a strike of capital against these unjust exactions?"⁴ Because Brandeis believed such an outcome to be very probable indeed, he cast publicity as a "potent force" against the banks, one that could be made a "continuous remedial measure" in the face of their abuses.⁵ The method was simple enough: let federal law "[c]ompel bankers when issuing securities to make public the commissions or profits they are receiving."⁶ The most basic argument for such a mandate is that potential buyers are "fairly entitled" to the knowledge of these figures.⁷ But for Brandeis there was another, yet more compelling reason:

¹ "[I]t is now recognized in the simplest merchandising, that there should be full disclosures. The archaic doctrine of caveat emptor is vanishing. The law has begun to require publicity in aid of fair dealing. The Federal Pure Food Law does not guarantee quality or prices; but it helps the buyer to judge of quality by requiring disclosure of ingredients." Brandeis, *Other People's Money*, 103.

² See Lotte E. Feinberg, "Mr. Justice Brandeis and the Creation of the *Federal Register*," *Public Administration Review* 61, no. 3 (2001): 359–70.

³ Brandeis, *Other People's Money*, 94.

⁴ *Ibid.*, 99.

⁵ *Ibid.*, 92.

⁶ *Ibid.*, 101.

⁷ *Ibid.*

Require a full disclosure to the investor of the amount of commissions and profits paid; and not only will investors be put on their guard, but bankers' compensation will tend to adjust itself *automatically* to what is fair and reasonable. Excessive commissions—this form of unjustly acquired wealth—will in large part cease.¹

This little passage telescopes brilliantly the assumptions that publicity advocates were beginning to make about disclosure's (ostensibly automatic) effects. The market would simply 'adjust' to new information; reform would be inevitable.

It is perhaps needless to say that not every contemporary of Wilson and Brandeis was so enthusiastic about the demand for publicity. In 1913, for example, Abbott Lawrence Lowell, then president of Harvard University and a former president (after Bryce and before Wilson) of the American Political Science Association, argued that publicity was suitable in certain limited contexts only.² “When a legislator or officer is acting as a sample of the public,” and is expected to apply “the ordinary good sense of the community,” then, Lowell argued, “he should be placed in the full light of publicity.”³ For the people “recognize a fair sample of the public, gifted with common sense, when they see him.”⁴ If, however, an official's role involves the application of expert knowledge—as many functions of the modern state require—then publicity is quite inappropriate. The people, Lowell reasoned, “know little about experts”: they simply are “not in a position to obtain or weigh” the sort of evidence that is required to evaluate technical aptitude.⁵ Accordingly, Lowell distinguished sharply between “expert administrators,” who should be highly professionalized, apolitical, appointed “without limit of time,” and insulated from popular scrutiny, from the “political chiefs” who oversee them, representing the public and “lay[ing] down the general policy to be

¹ *Ibid.*, 103–4 (emphasis added).

² Abbott Lawrence Lowell, *Public Opinion and Popular Government* (New York: Longmans, Green, & Co., 1913).

³ *Ibid.*, 257–58.

⁴ *Ibid.*, 261.

⁵ *Ibid.*, 261.

pursued.”¹ Undergirding this account is Lowell’s assumption that “the public wants not means but ends; not methods but results.”² The activity of political chiefs should therefore be publicized at regular intervals; they should be “in close touch with public opinion, and should from time to time give account of [their] stewardship.”³ But judgments of public opinion need not extend to “every rung of the official ladder.”⁴ In particular, they need not (and should not) extend to administrative tactics, or to technical decisions taken in furtherance of substantive policy goals. That publicity is inapposite in such matters follows from Lowell’s demanding conception of public opinion. Not every mass attitude achieves such noble stature. Citing Rousseau, Lowell maintains that true public opinion must be adequately “general.”⁵ Unless “the minority feel bound to acquiesce in the decision of the majority,” the opinion in question is not genuinely public.⁶ And unless the attitude in question stems from “settled convictions,” or rests upon facts which “the bulk of the people are in a position to determine,” it is not a genuine opinion.⁷ Accordingly, many of the affairs of the modern state—especially those involving expertise—are simply beyond public opinion. While the light of publicity should shine on the political heads of administrative bodies, it should not therefore extend to their expert staffs. For “a political system wisely framed will refer to public opinion those questions alone on which such an opinion can reasonably be expected to exist.”⁸

¹ Ibid., 295–300.

² Ibid., 296.

³ Ibid., 299.

⁴ Ibid., 296.

⁵ Ibid., 5–8.

⁶ Ibid., 41.

⁷ Ibid., 46.

⁸ Ibid., 53.

If Lowell's approach was to idealize public opinion while denying the authority of less developed mass attitudes, other thinkers undertook a more direct assault. Max Weber argued, for example, that under modern conditions of bureaucratization and "mass democracy," public opinion is little more than "communal conduct born of irrational 'sentiments,'" typically "staged or directed by party leaders and the press."¹ In the United States, Walter Lippmann developed a similar critique, famously declaring the public a "phantom."² Publicity had ceased to be the mere conduit of public opinion. It was now an instrument of control, a flexible tool for what Lippmann dubbed "the manufacture of consent."³ In effect, publicity was propaganda by another name.⁴ "Publicity men" did what was necessary to garner attention for a given issue or question on behalf of their paying clients.⁵ Public attention was a scarce and precious resource: the trick was to grip and to hold it. Bryce himself had observed that competition for popular notice is intense.⁶ But it was Lippmann who concluded that "[t]he amount of attention available is far too small" for any political system in which "all the citizens of the nation" are expected to "become alert, informed, and eager on the multitude of real questions" affecting the public interest.⁷ Instead, Lippmann argued, the substantive

¹ Max Weber, "Bureaucracy," in *From Max Weber: Essays in Sociology*, ed. H. H. Gerth and C. Wright Mills (New York: Oxford University Press, 1958), 221. The passage in question is drawn from the second volume of Weber's *Economy and Society*, which was published posthumously in 1922.

² Walter Lippmann, *The Phantom Public* (New Brunswick, NJ: Transaction Publishers, 1993).

³ Walter Lippmann, *Public Opinion* (New York: Harcourt, Brace & Co., 1922), 248. Even in the hands of muckraking journalists, Lippmann had earlier acknowledged, public opinion was malleable. The messages "insisted upon" by those deprecating witnesses—"the dishonesty of politicians" and the corruption of industry—generated "clouds of accusation" in the public consciousness. *Drift and Mastery: An Attempt to Diagnose the Current Unrest* (Madison: University of Wisconsin Press, 2015), 27.

⁴ *Ibid.*, 345. Compare Habermas, *Structural Transformation*, 196–222; Splichal, *Principles of Publicity*, 64–70.

⁵ Lippmann, *Public Opinion*, 329.

⁶ "Publicity is the easiest thing in the world to obtain; but as it is attainable by all notions, phrases, and projects, wise and foolish alike, the struggle for existence—that is to say, for public attention—is severe." Bryce, *The American Commonwealth*, vol. 2, 975. For a helpful reconstruction of Bryce's concerns about the disadvantages of 'government by public opinion,' including especially the danger of excessive public confidence, see Adrian Vermeule, *The Constitution of Risk* (New York: Cambridge University Press, 2014), 91–106.

⁷ Lippmann, *Public Opinion*, 398.

judgments involved in modern government must be left to “the men inside” public institutions, for “the outsider, and every one of us is an outsider to all but a few aspects of modern life, has neither time, nor attention, nor interest, nor the equipment for specific judgment.”¹ In the form of elite rule that Lippmann came (at least momentarily) to embrace, information sharing would not disappear. Thus, a system of “intelligence bureaus” would ensure “a circulation of data and of criticism” across government agencies and private industries.² But the purpose of such circulation was not, as Lippmann charmingly put it, “to bring in Public Opinion like a providential uncle in the crisis of a play.”³ It was simply to equip ‘insiders’ to perform well. What Lippmann calls intelligence is finally “an instrument for doing public business better, rather than an instrument for knowing better how badly public business is done.”⁴

Writing just a few years after the appearance of Lippmann’s *Public Opinion*, the political philosopher Marie Collins Swabey sought to rehabilitate publicity for modern politics.⁵ Democracy required some means of “activating the public mind,” Swabey observed; this was in fact the principal task for any modern system of self-government.⁶ And against less sanguine judgments, Swabey argued that publicity, that “great new means to rouse and educate mankind,” could equip even imperfect citizens to meet the challenge:⁷

¹ Ibid., 400.

² Ibid., 394.

³ Ibid., 401.

⁴ Ibid., 399. Lippmann’s faith in elite expertise was fleeting. Already in *The Phantom Public* (1925), doubts about the judgment and reliability of “the men inside” were clouding his once sunny endorsement.

⁵ I owe this discussion to Alexander A. Guerrero’s retrospective essay, “On Marie Collins Swabey’s ‘Publicity and Measurement,’” *Ethics* 125 (2015): 555–58. Swabey’s first article on publicity appeared in the *International Journal of Ethics* (now simply *Ethics*) in 1930. Her subsequent book, *Theory of the Democratic State*, was published in 1937.

⁶ Marie Collins Swabey, *Theory of the Democratic State* (Cambridge, MA: Harvard University Press, 1937), 10.

⁷ Ibid., 15.

The difficult fact must be recognized, in the words of Walter Lippmann, that “the items the public finds interesting do not often coincide with its real interests.” But if democracy is not to be abandoned, new ways must be devised by which what is of genuine public concern may be made to concern the public. . . . [M]an should still be able to direct his efforts toward self-government, and to develop a technique of publicity by which (without arousing a stampede of crowd emotion) important general issues can be clothed in simple, appealing dress so as to claim the attention they deserve.¹

By the application of this “technique of publicity,” three things may be achieved, according to Swabey.

First, complex matters may be simplified by the tools of “analysis and measurement.” Quantification and statistical inquiry, together with “the skillful use of charts, graphs, and pictures,” can render the social facts that bear on public affairs widely intelligible.² Second, these same facts may be rendered attractive “by utilizing man’s largely reflective interest in art and science.”³ Here Swabey contrasts the technique of publicity with that of propaganda.⁴ While the former exploits our intellectual attractions (to art, for example) for the more general end of public enlightenment, the latter seeks merely to manipulate social action by “emotional suggestion and sensuous appeal, rather than through reflection or education by the facts themselves.”⁵ Third and finally, information relevant to public decisions, now rendered “attractive and intelligible,” may be disseminated widely among citizens.⁶ This ought to be the work, Swabey proposed, of “a great national bureau of publicity,” which institution she likened to the ‘intelligence bureaus’ that Lippmann imagined peppering the government.⁷ The crucial difference was this, that whereas Lippmann wished information to be shared primarily among elites inside the government, Swabey conceived of an agency for the enlightenment of the rest of us—Lippmann’s ‘outsiders.’⁸ In this

¹ Ibid., 125–26.

² Ibid., 133–34.

³ Ibid., 126.

⁴ “Strangely enough the strongest support (as well as the gravest danger) to self-government today is to be found in the technique of publicity.” Ibid., 15.

⁵ Marie Collins Swabey, “Publicity and Measurement,” *International Journal of Ethics* 41, no. 1 (1930): 102.

⁶ Swabey, *Theory of the Democratic State*, 132.

⁷ Ibid., 130.

⁸ “[W]hereas the chief function of such an office in Mr. Lippmann’s view would be to prepare the facts for the use of executives in charge of the administration, the service we have in mind would be more concerned with distributing

way, by performing the triple function of simplification, attraction, and dissemination, publicity made possible a form of democracy founded on “the method of criticism,” which “arouses deliberative doubt and resistance to suggestion,” and facilitates “the arrival at conclusions . . . on the basis of searching, evidence, cause.”¹

At stake in the debate between thinkers like Lippmann and Swabey was the fate of publicity as a political ideal for the modern world. Could it be salvaged in a context of increasing social complexity and finite time and attention (to say nothing of political apathy) among the public? In such a context, could publicizing official conduct accomplish all that Bentham, Bryce, and Wilson had claimed? It is a testament to the power of Lippmann’s more pessimistic view that as the twentieth century progressed, the ideal of publicity lost its luster, and eventually came to be overshadowed by an emerging concept of political transparency. I consider the lasting significance of that shift just below; first, though, a brief word about the developments that prepared its way.

In the aftermath of World War II, the United States beginning to reckon with its status as superpower, old anxieties about the status of the federal bureaucracy came to a head. After lengthy negotiations, Congress passed the Administrative Procedure Act (APA) of 1946, which mandated (among other things) the public announcement of new rules or regulations under consideration, plus publication of any finally adopted rule, together with a “concise, general statement of [its] basis and purpose.”² The APA had a durable effect on federal bureaucratic practice. Yet, as Michael Schudson observes, the law’s disclosure provisions left the administrative process largely opaque—at least

information to the country at large. In other words, the institutions which we are envisaging would serve not only as an intelligence bureau for the government, but as a publicity and educational organ for the people. It would function as a great agency of news, culture, and instructive diversion for the common man, widening his horizons and preparing him to take a greater part than hitherto in public affairs.” *Ibid.*, 131–32.

¹ *Ibid.*, 10.

² See Martin Shapiro, “A Golden Anniversary? The Administrative Procedures Act of 1946,” *Regulation* 19, no. 3 (1996): 40–47.

when the responsible administrators wished it so.¹ In this environment, a group of journalists organized through the American Society of Newspaper Editors launched a public campaign to vindicate what they called “the people’s right to know.”² There should be a strong presumption in favor of disclosure, they argued; existing standards of information withholding by government agencies were unjustifiably permissive. The moniker would stick, and at length these journalistic efforts contributed to the development of the Freedom of Information Act (FOIA) of 1966, which required certain proactive publications by federal agencies and, most significantly, the disclosure of documents (subject to various exceptions) upon request by “any person.”³ Both concepts—the public’s right to know and the freedom of information—became important touchstones in the public culture of the Cold War.⁴ Such markers were soon counted among the features that distinguished free societies west of the Iron Curtain from totalitarian forces to its east. As such, they planted deep roots in U.S. national consciousness.⁵ The people’s ‘right to know’ now required the ‘freedom of information,’ understood as a mandate not only for post-hoc records disclosure, but also for visibility in real time. The latter demand took shape in law and practice in the 1970s, most

¹ Michael Schudson, *The Rise of the Right to Know: Politics and the Culture of Transparency, 1945–1975* (Cambridge, MA: Harvard University Press, 2015), 34.

² Among the first fruits of this effort was an important book cataloguing and laws governing the handling of public information in the United States. See Harold L. Cross, *The People’s Right to Know—Legal Access to Public Records and Proceedings* (New York: Columbia University Press, 1953).

³ Schudson, *The Rise of the Right to Know*, 34–63. For a helpful look at the political conflicts which prepared the way for FOIA’s enactment, see Sam Archibald, “The Early Years of the Freedom of Information Act—1955 to 1974,” *PS: Political Science and Politics* 26, no. 4 (1993): 726–31.

⁴ See, e.g., Margaret A. Blanchard, *Exporting the First Amendment: The Press-Government Crusade of 1945-1952* (New York: Longman, 1985); Wallace Parks, “The Open Government Principle: Applying the Right to Know under the Constitution,” *George Washington Law Review* 26, no. 1 (1957): 1–22; Edward A. Shils, *The Torment of Secrecy: The Background and Consequences of American Security Policies* (Glencoe, IL: Free Press, 1956).

⁵ As evidenced, for example, by Norman Rockwell’s painting, “The Right to Know,” which was first printed in the magazine *Look* in 1968. Rockwell depicts a diverse band of closed-lipped citizens (“any person”) standing before a desk belonging to an unseen public official. The viewer’s perspective is precisely that of the missing official, who is apparently on the verge of sitting down and, presumably, honoring the people’s right to know by providing some account of the government’s doings. “The Right to Know,” *Norman Rockwell Museum*, accessed Jan. 1, 2017, <http://collection.nrm.org/search.do?id=548955&db=object&view=detail>.

importantly under the banner of the Government in the Sunshine Act (GITSAs) of 1976, whose title revived Bryce's sunlight metaphor. And it is no coincidence that legislation mandating public access to the business meetings of government agencies was contemporaneous with the birth of congressional television. (After a few earlier experiments, the House of Representatives embraced cameras in 1979, and before long the Senate followed suit.)¹ Video broadcasting of legislative proceedings would be a particularly important factor in solidifying what Bernard Manin calls "audience democracy," that model of representative government in which the relationship between legislator and public is dominated by "image" and other "shortcuts in the costly search for political information."² Yet transparency was still not on the scene. The introduction of that term in the political environment just described had other sources. Central among these were the technical literatures of economics and public administration.

Inventing Transparency: The Technocrat's Dream

As we have seen, by the early twentieth century the publicity approach had lost much of its appeal. Political reforms promised in its name failed to materialize; the manipulation of political messages alone seemed to flourish. As far as thinkers like Lippmann were concerned, it had become clear that publicity was no guarantee of an attentive public, much less of good or responsible government. Thus by century's end, when a new generation of political actors sought to name the

¹ During the Watergate scandal, House and Senate committees drawing up articles of impeachment permitted "gavel-to-gavel" television coverage of nearly all of their proceedings in 1973 and 1974. In the wake of this coverage, and in anticipation of President Nixon's impeachment trial, both chambers made tentative provisions for the televising of their plenary (floor) proceedings. When Nixon abruptly resigned in August 1974, however, Congress lost its sense of urgency. The matter was allowed to rest for several years, until in 1979 the House established real-time video coverage of its proceedings, controlled and operated by employees of the chamber, and broadcast around the U.S. by the cable television service known as C-SPAN. The Senate, concerned that it was losing the limelight as House members became more visible, quickly followed suit, first allowing broadcast coverage of its floor proceedings in 1986. William McKay and Charles W. Johnson, *Parliament and Congress: Representation and Scrutiny in the Twenty-First Century* (New York: Oxford University Press, 2010), 101–2.

² Bernard Manin, *The Principles of Representative Government* (New York: Cambridge University Press, 1997), 218–34, 228.

underlying value of policies such as FOIA and GITSA, it is little wonder that they turned elsewhere. ‘Transparency’ would be their favored nomenclature. This choice had at least three crucial sources.

First and most importantly, transparency had been a term of art in economics. As early as 1922, it was used to describe the wide availability of information about consumption and production levels, particularly in the form of aggregate statistics. In *Wealth and Income of the American People*, the industrialist W. R. Ingalls—a co-director of the recently incorporated National Bureau of Economic Research (NBER)—called for increasing the “transparency of industry.”¹ This task he proclaimed “the greatest development in practical economics that lies ahead of us.”² Though business cycles were all but inevitable, Ingalls argued, the impact of economic shocks could be minimized with more complete information, allowing for better planning and more efficient allocation of resources, especially by industrial managers. “If everybody could see clearly those conditions [of supply and demand] at all times the markets would be comparatively stable,” Ingalls declared.³ Such transparency would enable buyers and sellers “to cut their cloth accordingly,” effectively clearing the market, minimizing waste and inefficiency, and thwarting speculation. In a phrase, transparency would facilitate market equilibrium: “the conception of transparency in industry leading to equilibrium in industry is economically basic,” Ingalls concluded.⁴

¹ Walter Renton Ingalls, *Wealth and Income of the American People: A Survey of the Economic Consequences of the War* (York, PA: G. H. Merlin Co., 1922), 259.

² Ibid.

³ Ibid. “Industrial statisticians and economists are now courageously entering the new field of forecasting statistics. This is pioneering in the great conception of increasing the transparency in industry, development of which is the greatest responsibility of management.” Ibid., 273. If Ingalls regarded the provision of economic statistics as a matter of industrial leadership, some of his contemporaries assigned yet wider significance to the light they shed on national affairs. The social theorist A. B. Wolfe noted, for example, that works like Ingalls’s were for the first time making public the unequal distribution of income in the United States. See A. B. Wolfe, “The Rôle of Sympathy and Ethical Motivation in Scientific Social Research,” *Journal of Philosophy* 20, no. 9 (1923): 233.

⁴ Ibid., 261. For Ingalls, that the benefits of market equilibrium can be secured under conditions of economic transparency requires managerial leadership and coordination, but not socialism or even the unionization of labor. “[T]he cure for [interruptions in employment] is not state control of industry, nor industrial democracy, but merely industrial coöperation in a sound and simple manner,” which is made possible by the availability of accurate statistical information. *Wealth and Income*, 260.

If the concept was regarded as basic, the word transparency was apparently novel in this context.¹ Writing a half-century before Ingalls, Walter Stanley Jevons, one of the forebears of neoclassical economics, described the principle upon which Ingalls was drawing: “A market . . . is theoretically perfect only when all traders have perfect knowledge of the conditions of supply and demand, and the consequent ratio of exchange.”² Or, as Alfred Marshall would put it some twenty years later: “Perfect competition requires a perfect knowledge of the state of the market.”³ This assumption of perfect knowledge (or perfect information) became a cornerstone of the neoclassical theory of exchange. According to that theory’s efficient market hypothesis, prices represent equilibria that are “informationally efficient,” in the sense that they take into account all available information deemed relevant by buyers and sellers.⁴ The theory long predated Ingalls, but by the second half of the twentieth century it was his word—transparency—that would become a standard label for this condition of complete information.⁵ I find no evidence that *Wealth and Income of the American People* precipitated this terminological shift. Still, one thing is certain: whatever its

¹ I can find no such usage prior to Ingalls’s. It may be significant, in this connection, that the *American Economic Review*’s brief comment on Ingalls’s lengthy book makes a point to quote the phrase, “[a] transparency in industry leading to equilibrium in industry.” A. J. Hettinger, Jr., “Statistics and Its Methods,” *American Economic Review* 12, no. 4 (1922): 680.

² Jevons drew from this principle the following recommendation, which Ingalls would later echo: “So essential is a knowledge of the real state of supply and demand to the smooth procedure of trade and the real good of the community, that I conceive it would be quite legitimate to compel the publication of any requisite statistics. Secrecy can only conduce to the profit of speculators who gain from great fluctuations of prices.” W. Stanley Jevons, *The Theory of Political Economy* (London: Macmillan & Co., 1871), 87.

³ Yet, while “older economists . . . often seemed to imply that they did assume this perfect knowledge,” Marshall was keen “to insist that we do not really need to assume the members of any industrial group to be endowed with more ability and forethought, or to be governed by motives other than those which are in fact normal to . . . the members of that group, account being taken of the general conditions of time and place.” Alfred Marshall, *Principles of Economics* (London: Macmillan & Co., 1890), 540–41.

⁴ Colin Read, *The Efficient Market Hypothesis: Bachelier, Samuelson, Fama, Ross, Tobin and Shiller* (New York: Palgrave Macmillan, 2013), 77. See also Joseph E. Stiglitz, “Information and Economic Analysis: A Perspective,” in *Selected Works of Joseph E. Stiglitz, Volume II: Information and Capital Markets* (New York: Oxford University Press, 2013), 7–19.

⁵ Erkkilä, *Government Transparency*, 14; Louis Philips, *The Economics of Imperfect Information* (New York: Cambridge University Press, 1988), 182. For early uses of the term, see, e.g., Erich Schneider, “Wirklichkeitsnahe Theorie der Absatzpolitik,” *Weltwirtschaftliches Archiv* 56 (1942): 92–114; Louis Philips, “Common Markets: Towards a Theory of Market Integration,” *Journal of Industrial Economics* 10 (1962): 81–92.

immediate source, “market transparency” soon had a very wide currency. Moreover, the term’s meaning in this economic context was pregnant with political implications. In effect, transparency enabled the ‘invisible hand’ to function. Unless markets were transparent, they would not reach efficient equilibrium. Transparency therefore became a symbol of economic efficiency—that great good which (according to this story) information could all but guarantee, as if automatically, and without external planning or coordination.

Economics was the earliest source for today’s transparency talk. Yet in the final two decades of the twentieth century, some additional streams of discourse became equally critical. Principally, I have in mind here the languages of international development and public administration. Had transparency not been part of their technical lexicons, it is difficult to imagine the term’s transmission from economics to politics. Consider first the development literature. Beginning in the late 1970s and early 80s, transparency was used in this field to denote the openness (real or desired) of state regulations governing industrial activity. From the first it was an imperative—the question was not whether but how to promote such transparency. A 1982 article by two Organisation for Economic Cooperation and Development (OECD) officials illustrates the point. The authors, who participated in the OECD’s first ‘Subgroup on Transparency,’ wrote to introduce a novel concept:

In a bid to stimulate industries bogged down by slow economic growth and changes in comparative advantage, governments have increasingly resorted to subsidies in recent years, both to alleviate the problems of industries in difficulty and to enhance the performance of growth sectors. . . . Identifying such subsidies and assessing how much they cost and what ultimate effects they have is what is meant by the term “transparency.”¹

Here transparency was a feature (or not) of a particular sort of government policy—namely, the use of tax breaks, trade protections, and other such instruments of economic subsidy. That transparency was a virtue of public policy the authors simply took for granted: the Subgroup sought “to examine

¹ George Eads and Edward M. Graham, “Transparency: A Prerequisite for Positive Adjustment,” *OECD Observer* 119 (Nov. 1982): 8. According to the article, Professor Eads chaired the Subgroup on Transparency from November 1979 to January 1981.

the methods used by governments to improve the transparency of subsidy schemes, on the assumption that greater transparency would be welcomed by all OECD governments.”¹ More was typically better when it came to transparency (or so the reader was left to conclude). This meant not only standardized reporting of national subsidy programs, but also the publication of cost-benefit analyses carried out by “technically qualified experts.”² For it was on this quantifiable and apparently scientific basis, the authors explained, that political officials ought to judge such programs. Other criteria might also be applied, but cost-benefit analysis should offer an initial negative “screen”: any program lacking a net benefit, under this rubric, should be scrapped.³

As this brief exposition begins to demonstrate, transparency not only had a place in development discourse from the late 1970s, but it became linked from the outset with notions of quantification, rationalization, and the tempering of political judgment by technocratic intelligence.⁴ In the years that followed, transparency became a kind of keyword in development circles, its meaning expanding well beyond the narrow context of subsidy policy. In effect, transparency was beginning to function as a catchall for the openness, visibility, and clarity—in a word, for the publicity—of conduct undertaken by actors as diverse as governments, international agencies, NGOs, and private corporations.⁵ The most salient example of this new usage came in 1993, when a former World Bank official and his colleagues dubbed their new anti-corruption organization

¹ Ibid.

² Ibid., 11.

³ Ibid.

⁴ Cf. Erkkilä, *Government Transparency*, 15–18.

⁵ See, e.g., Alan Fowler, “Building Partnerships between Northern and Southern Development NGOs: Issues for the 1990s,” *Development in Practice* 1, no. 1 (1991): 5–18; Peter Sollis, “Multilateral Agencies, NGOs, and Policy Reform,” *Development in Practice* 2, no. 3 (1992): 163–78.

Transparency International (TI).¹ The name said it all. Make the behavior of key players transparent—bring a sort of surveillance to government officials and their private sector counterparts, particularly in areas like public procurement—and bribery, patronage, and other sins of corruption would soon subside. Needless to say, reform has proven much more elusive in practice. But TI’s prominent work under the banner of transparency underscores the power this term has accrued among advocates of economic development and ‘good governance.’ Taken together, this network of advocates has given currency not only to the concept, but also to transparency’s globalization in law, especially through the promotion of new disclosure legislation in nearly every corner of the earth.²

Just as transparency was becoming a key concept in international development, the term was also getting traction among scholars and practitioners of public administration, especially in Europe. A glance back at the *Official Journal of the European Communities* shows the economic sense of the term in use by the early 1970s.³ Indeed, by one account, European officials were already speaking of “market transparency” in the 50s and 60s.⁴ Within just a few years, however, bureaucratic discourse in Europe became another locus of the expansion of transparency’s meaning. Christopher Hood suggests that it was in the mid-1970s and 80s, initially with the French locution *transparence administrative*, that the word came to signify disclosure of administrative records and fiscal accounts, by both public and private entities.⁵ In this connection, it is noteworthy that in one of the earliest

¹ Alexia Duten, “Peter Eigen,” in *International Encyclopedia of Civil Society*, ed. Helmut K. Anheier and Stefan Toepler (New York: Springer, 2010), 630.

² See, e.g., Greg Michener, “FOI Laws Around the World,” *Journal of Democracy* 22:2 (2011), 145–59; Colin Darch and Peter G. Underwood, *Freedom of Information and the Developing World: The Citizen, the State and Models of Openness* (Witney, UK: Chandos Publishing, 2009).

³ See, e.g., “Opinion on the memorandum from the Commission on the technological and industrial policy programme,” 1974 O.J. (C 115) 8–16.

⁴ Philips, *The Economics of Imperfect Information*, 182.

⁵ Hood, “Transparency in Historical Perspective,” 14–16.

references to transparency in the *Congressional Record*, a U.S. senator takes umbrage at a proposal of the European Commission (EC) that would have required American companies doing business in Europe to provide certain accounts of their holdings to employees. “It is ironic,” he retorted, “that the legal system which is proposing to legislate ‘transparency’ for U.S. companies is itself one of the most opaque in the free world.”¹

If by 1981 the word had migrated from the literature of bureaucracy in Europe to the floor of Congress, it was in the years immediately following that such transparency talk began to flourish in public administration circles.² One source of this popularization was the predominately Anglophone movement known as “New Public Management” (NPM), which sought to modernize and rationalize administrative practices.³ At the center of the NPM model was an embrace of measures intended to render government policy, and the policymaking process, transparent to public observation.⁴ By the early 1990s, transparency in this broader sense was mainstream in policy discourse on both sides of the Atlantic. One prominent example can be taken from the Treaty of Maastricht, which in 1993 formed the European Union from its predecessor institutions. That agreement’s “declaration on the right of access to information” made explicit reference to transparency, calling for expanded public access to “the information available to the [EU] institutions,” on the ground that ensuring the “transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the

¹ Senator Symms, speaking on S. 1592, on Aug. 3, 1981, 97th Cong., 1st sess., *Congressional Record* 127, 19361. For background on the EC proposal at issue, see Dietrich Hoffmann and Jurgen Grewe, “The Vredeling Proposal of the European Commission,” *Stanford Journal of International Law* 20, no. 2 (1984): 329–51.

² Erkkilä, *Government Transparency*, 29, 231 n.13.

³ Christopher Hood, “Public Management, New,” in *International Encyclopedia of the Social & Behavioral Sciences*, vol. 18, ed. Neil J. Smelser and Paul B. Baltes (Kidlington, UK: Elsevier Science, 2001), 12553–56.

⁴ A particularly important document in this regard was the New Zealand Treasury’s *Government Management: Brief to the Incoming Government*, vol. 1 (Wellington: Government Printing Office, 1987), which made transparent policymaking a core principle: “There is a need to ensure that there is transparency not only in the objectives being pursued but also the

administration.”¹ By the 1990s, then, transparency was no longer simply a feature of markets. It had become a central imperative of democratic governance, a tool for building trust and a means of honoring the public’s right to know, particularly in the administrative context.² From there it was a short step to President Obama’s memorandum on “Transparency and Open Government,” issued his first full day in office, and promising that openness, including disclosure programs such as FOIA, would “strengthen our democracy,” “promote efficiency and effectiveness in Government,” and help “to ensure the public trust.”³

* * *

From these three sources—economic theory and the discourses of international development and public administration—the modern ideal of transparency was born. It quickly expanded into the sphere of politics, and came to occupy the conceptual space formerly held by publicity, as thinkers from Bentham to Swabey had called it. Enthusiasm for transparency grew and grew during a period in which computing technology transformed the conditions of modern life.⁴ New feats of number crunching made information disclosure an essential task for organizations both public and private. In the words of one guru, “[r]adical transparency for firms and governments is not just a decision but a technological fact of life.”⁵ Indeed, transparency came to be seen as a requirement for unleashing benefits of all kinds. And this conception has continued to thrive under the rubric of ‘Big Data’—only the latest in a line of techno-utopian ideals steeped in

means by which objectives are to be achieved.” Ibid., 48. See also Christopher Hood, “De-Sir Humphreyfying the Westminster Model of Bureaucracy: A New Style of Governance?” *Governance* 3, no. 2 (1990): 205–14.

¹ Treaty on European Union, 1992 O.J. (C 191) 101.

² Cf. Erkkilä, *Government Transparency*, 9–10.

³ 74 Fed. Reg. 4685 (Jan. 26, 2009).

⁴ See, e.g., Nathaniel Tkacz, *Wikipedia and the Politics of Openness* (Chicago: University of Chicago Press, 2015), 14–38.

⁵ Quoted in Evgeny Morozov, *To Save Everything, Click Here: The Folly of Technological Solutionism* (New York: PublicAffairs, 2013), 63.

what Evgeny Morozov calls “technological solutionism,” the belief that complex and chronic challenges of collective life are problems which admit of technical solutions.¹

Given transparency’s popularization, it should come as no surprise that it was under this banner that FOI laws recently spread across the globe—adopted, often enough, at the behest of the development agencies and NGOs we mentioned earlier.² Today, transparency has seized our collective political imagination, becoming what Pierre Rosanvallon calls “the new democratic ideal,” and displacing truth and the public interest as the “paramount virtue” of modern politics.³ Transparency is now a major theme even in the symbolism of the democratic state.⁴ It is therefore supremely ironic that the concept we have inherited is so profoundly apolitical. As this chapter’s brief historical tour has shown, transparency’s proximate sources are overwhelmingly technocratic. From the economistic claim that it frees the invisible hand of the market to produce efficient outcomes, to the development doctrine that it tempers the messy (and potentially corrupt) judgments of political representatives, to the bureaucratic thesis that it builds public trust and makes administration efficient and democratic: what these accounts of transparency share is the conviction that disclosure can improve government without the headaches and uncertainties of politics. In this vision, all of the difficulties with which theorists like Lowell, Lippmann, and Swabey grappled—all of the pathologies of public opinion—simply disappear. For transparency implies perfectly visible and perfectly intelligible institutions of government, communicating information directly (without

¹ Ibid., 5–9.

² Darch and Underwood, *Freedom of Information and the Developing World*, 47–90.

³ Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust*, trans. Arthur Goldhammer (New York: Cambridge University Press, 2008), 258.

⁴ See, e.g., Deborah Ascher Barnstone, *The Transparent State: Architecture and Politics in Postwar Germany* (New York: Routledge, 2005).

mediation) to ceaselessly vigilant citizens.¹ No wonder the architects of this model have so often cast transparency's benefits as abundant, and accruing as if automatically.

That the invention of transparency has been a technocrat's dream has important ramifications for the present. For one thing, the ascendance of this ideal means that our primary concept for understanding government discretion and disclosure is now absolute: it is transparency, not translucency, that we have come to expect of state institutions. By contrast, the older notion of publicity was more flexible, since state action might be considered public even if not literally observable. Second, the metaphorical space that we inhabit when speaking of political transparency is dominated by notions of vision and sight. Whereas publicity was neutral as between different methods of rendering official action public, transparency implicitly favors methods that allow citizens literally to see what is happening, or that can be said to give them a 'window' onto the activity of state institutions. It puts a premium, in other words, on popular surveillance of public institutions. Third and not least, transparency pays too little attention to the processes of public uptake and response. The concept of publicity kept the public always in view, but in the models of transparency we have been exploring, the public's role is passive at best. Transparency says nothing about the practices citizens must undertake to gain an understanding of state action, to hold officials accountable, or to effect reform. It says nothing about politics in this sense.

Self-consciously or not, most contemporary demands for government transparency are inflected in these ways. The concept's history has left its mark. Happily, though, we are not stuck with the flawed ideals of our political inheritance. They are ours to recast and reconsider—and transparency is ripe for such reconsideration. I have shown here that it remains a largely technocratic

¹ Mark Fenster, "Transparency in Search of a Theory," *European Journal of Social Theory* 18, no. 2 (2015): 150–67. Fenster has been an especially forceful critic of transparency's implicit model of communications. See also Mark Fenster, "The Opacity of Transparency," *Iowa Law Review* 91 (2006): 885–949.

ideal. In the chapter that follows, I attempt to salvage transparency by placing it within a more richly political vision of democratic life.

DISCLOSURE AND THE LOGIC OF SELF-GOVERNMENT

UNDERLYING nearly all conventional accounts of transparency is the notion that openness yields favorable outcomes, and that its value turns on its fruitfulness. Transparency, in short, is about consequences. It generates stronger and stabler economies, and smarter, more responsible government—or so the promise goes. For both promoters and skeptics of transparency, the crucial question seems to be what disclosure can *do*.

This instrumental outlook springs directly from transparency's sources in economics, administration, and development. And despite the circulation of deontic concepts like "the right to know," the prevailing logic of transparency remains firmly consequentialist.¹ The invisibility of this assumption—that the good of transparency is a function of its good consequences—only underscores its wide compass. Indeed, contemporary politics has almost completely lost sight of the possibility that openness might be otherwise valued. In particular, it has forgotten that an agent's relationship to the public might give rise to a *duty of transparency*, qualified perhaps, but binding independently of any benefits it may produce.

I set out to reconstruct such an account in the pages that follow. To begin, I glance briefly back at an instructive 18th-century debate over just this question—to whom, and to what extent, do representatives owe an account of their conduct? Next, I argue that conventional transparency talk implies a maximizing answer. At least in principle, power should be exercised entirely in the open,

¹ Two important exceptions are Any Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Harvard University Press, 1996), and Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Cambridge, MA: Harvard University Press, 2016), which I discuss below.

because democratic rule should be maximally responsive to public opinion. Against this dubious conception, I sketch an alternative account of liberal democracy, and make it the foundation of my own (qualified) case for transparency. The duty of transparency arises, in my view, not from the logic of plebiscitarian democracy, but from the logics of representation, liberty, and equality.

“Accountable Without Doors For What They Say Within”

English law in the 18th century protected parliamentary debate as “privileged,” private talk.¹ Though observers might occasionally be admitted at the discretion of the members, both Lords and Commons were effectively closed conclaves, as far as policy was concerned. “All who are not members of the assembly,” lamented Bentham, “are prohibited from entering, under pain of *immediate imprisonment*.”² Yet Parliament remained an object of public fascination, and in the face of such fascination the bar on visitors was frequently relaxed. By the 1790s, the House of Commons could accommodate 150 observers in a dedicated gallery, while the Lords permitted special guests at their discretion (albeit in “burthensome” conditions, without seats).³ Sufficient numbers attended Parliament in this period that one member could grumble of the House of Commons becoming a “Play House” and a “Coffee House,” from which “ignorant or Malicious People” gleaned “false or partial representations of Debates.”⁴ Nevertheless, critics like Bentham were dissatisfied with de facto access. Parliament’s “indulgence is precarious,” he observed, since to exclude a visitor at any

¹ Legislative secrecy was in fact a longstanding tradition, in England and colonial America alike. For an illuminating discussion of its roots, and of the historical significance of its gradual erosion in the 18th century, see J. R. Pole, *The Gift of Government: Political Responsibility from the English Restoration to American Independence* (Athens: University of Georgia Press, 1983), 87–116.

² Jeremy Bentham, *Political Tactics*, ed. Michael James, Cyprian Blamires, and Catherine Pease-Watkin (Oxford: Clarendon Press, 1999), 41

³ *Ibid.*, 42–43.

⁴ Quoted in Bob Harris, “The House of Commons, 1707–1800,” in *A Short History of Parliament: England, Great Britain, The United Kingdom, Ireland and Scotland*, ed. Clyve Jones (Woodbridge, UK: Boydell Press, 2009), 185.

moment “it [was] only necessary that a single member should require the observation of the standing order [against guests], which being always in force, is irresistible.”¹

Of yet greater concern was the posture of the law toward printed records. To publish what transpired in either House could (and did) land London’s printers in the city’s eponymous Tower.² Here too, however, evasions flourished. Newspapers postponed their reports until Parliament recessed, and could not readily assert the privilege. Or they framed their accounts as the proceedings of some fictitious assembly, which inevitably bore a suspicious resemblance to the House of Commons.³ For his part, Bentham looked upon such tricks with admiration; though the printers were engaged in a criminal enterprise, theirs were “fortunate crimes,” to which England owed (in part) “her escape from an aristocratic government.”⁴

Needless to say, Parliament saw the matter differently. Its members continued to threaten punishment, intermittently, until 1771, when the “printers’ case” ended with a bruising public defeat for the enforcers of secrecy. In that episode, a mass demonstration (and the specter of mass violence) won release for two men whom Parliament had locked in the Tower, and thenceforth England’s great assembly would forbear from asserting its deliberative privilege.⁵ Détente energized

¹ Bentham, *Political Tactics*, 42–43. This order would survive until 1875, when, to the great chagrin of the House of Commons, a member by this method triggered the unceremonious expulsion of the Prince of Wales, the German Ambassador, and a group of peers “boasting the bluest blood in England.” The same year, a new order requiring a majority for expulsion took effect. Robert Luce, *Legislative Procedure: Parliamentary Practices and the Course of Business in the Framing of Statutes* (Boston: Houghton Mifflin, 1922), 332.

² Joshua A. Chafetz, *Democracy’s Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions* (New Haven: Yale University Press, 2007), 197.

³ See Harris, “The House of Commons, 1707–1800,” 186; Pole, *The Gift of Government*, 110.

⁴ Bentham, *Political Tactics*, 43.

⁵ “The Commons, indignant because their speeches were reported while the Lords were able to secure secrecy, determined to punish some of the printers, among them one Miller, who refused to come when summoned to be reprimanded. A [parliamentary] messenger sent to fetch him was arrested, and the Lord Mayor [of the City of London], with [City] Aldermen [Richard] Oliver and [John] Wilkes, sustained the arrest. The Mayor and Oliver were [themselves] members of the House, which promptly sent them to the Tower. Mobs gathered. The City of London took up the cause of its Mayor and Oliver. So threatening was the situation that the House let the matter drop. When prorogation came the prisoners were allowed to leave in triumphal procession. The matter was not brought up again and the liberty of

both printers and public. The demand for “full and timely reports” was unrelenting, and accounts of the debates in Parliament “rapidly assumed a central place within most types of newspaper,” including those which furnished literate London with its daily reading.¹

Though secrecy proved unsustainable in practice, there remained the question of principle, which was hotly debated on both Atlantic shores during this period. Politicians and pamphleteers clashed over what, if anything, justified the traditional strictures against public access (now partly replicated in the United States).² And more than a few wondered why a representative assembly should not rather welcome external scrutiny.

In these debates, appeal was sometimes made to the good or ill effects of exposure. Among legislators, the declining quality of deliberation was a constant theme. William Wilberforce, the great antislavery advocate, complained in 1798 that the public audience in the House of Commons elicited from his fellows a flood of “empty sound and flirting nonsense.”³ Another member later explained that with each delegate intent on being seen to have participated, debates lost their integrity as conversation: “honourable gentlemen [now] delivered arguments that had been urged by former speakers, not regarding what had been previously stated, provided they had the opportunity of delivering their sentiments.”⁴

reporting was established.” Luce, *Legislative Procedure*, 338–39. For a fuller account, see Peter D. G. Thomas, *John Wilkes: A Friend to Liberty* (New York: Oxford University Press, 1996), 125–40.

¹ Harris, “The House of Commons, 1707–1800,” 188.

² The Senate, for example, met secretly from its inception. The practice was vehemently contested during debates over the proposed Constitution in the late 1780s, and remained a flashpoint of political discord through the new republic’s first few years. The Senate eventually gave up such secrecy in 1794. See Luce, *Legislative Procedure*, 334–35; Pole, *The Gift of Government*, 133–39.

³ Christopher Reid, “Whose Parliament? Political Oratory and Print Culture in the Later 18th Century,” *Language and Literature* 9, no. 2 (2000): 133–34.

⁴ Philip Salmon, “The House of Commons, 1801–1911,” in *A Short History of Parliament: England, Great Britain, The United Kingdom, Ireland and Scotland*, ed. Clyve Jones (Woodbridge, UK: Boydell Press, 2009), 260–61.

On the other side of the question, Bentham argued that openness would in fact tend to elevate discussion, both inside and outside the assembly. The “presence of strangers,” he wrote, “is a powerful motive to emulation [of the assembly] among them, at the same time that it is a salutary restraint upon the different passions to which the debates may give rise.”¹ Moreover, official publication meant message control. As congressman Eldridge Gerry of Massachusetts argued in 1792, an authentic record of debates would shield representatives from the error-prone synopses of newspapers.² Accuracy offered security, Bentham added, “against malignant imputations and calumnies,” and a ready answer to “false discourses,” wrongly attributed.³

For all this, disagreement over public access went deeper than assessments of effect. Ultimately, it turned on conflicting ideas of representation. The central questions were these: What did a legislator owe his constituents (or the wider public) in the way of a record of his representative activity? And conversely, which aspects of his conduct in office were the people entitled to probe and assess? For a utilitarian like Bentham, even these questions were best answered in terms of

¹ *Political Tactics*, 40–41. The same point applied to printed records, Bentham maintained. “Among a people who have been long accustomed to public assemblies, the general feeling will be raised to a higher tone—sound opinions will be more common—hurtful prejudices, publicly combated, not by rhetoricians but by statesmen, will have less dominion.” *Ibid.*, 31. As for the temptations of grandstanding, “[t]he publicity of debates has ruined more demagogues than it has made. A popular favourite has only to enter parliament, and he ceases to be mischievous. Placed amid his equals or his superiors in talent, he can assert nothing which will not be combated: his exaggerations will be reduced within the limits of truth, his presumption humiliated, his desire of momentary popularity ridiculed; and the flatterer of the people will finish by disgusting the people themselves.” *Ibid.*, 36–37.

² In moving to that effect on April 20, 1792, Gerry complained of the misrepresentations endemic to newspapers: “Sometimes members were introduced as uttering arguments directly the reverse of what they had advanced. At other times, the substance of the arguments, as published, wore an aspect widely different from what they had when offered in debate. In some instances, their arguments were so garbled that they themselves were unable to recognise them in print; in others, they were disfigured with grammatical errors, and rendered totally unintelligible; and, on many occasions, the arguments on one side of the question only were published.” *Annals of Congress*, House of Representatives, 2nd Congress, 1st Session, 564. It would ultimately take Congress until 1873 to begin publishing a substantially verbatim account of its proceedings in the *Congressional Record*. Prior to that year, and from about 1851, debates were printed in nearly verbatim form in the *Congressional Globe*. Yet earlier, the *Globe* (1833–1850) and two predecessor publications, the *Register of Debates* (1824–1837) and *Annals of Congress* (1789–1824)—all privately printed and publicly subsidized—offered unofficial, non-verbatim reports of congressional debates. See John Spencer Walters, *U.S. Government Publication: Ideological Development and Institutional Politics from the Founding to 1970* (Lanham, MD: Scarecrow Press, 2005), 17.

³ *Political Tactics*, 36. As J. R. Pole observes, this sort of argument gained a wide currency in debates over official publication. “[T]he only corrective to these abuses,” it seemed, “was accurate reporting.” *The Gift of Government*, 168 n.63.

advantages—here, the advantage publication would confer on voters. “In an assembly elected by the people,” he wrote, “publicity is absolutely necessary to enable the electors to act from knowledge.”¹ Elbridge Gerry made a similar point in proposing that the House of Representatives should provide for the regular publication of its debates. “[S]tating accurately [its] Legislative measures, and the reasons urged for and against them, is a desirable object, inasmuch as it may aid . . . the Governments and citizens of the several States in forming a judgment of the conduct of their respective Representatives.”²

Beneath both remarks, however, lay a hidden principle of representation—that voters are right to sit in judgment of their legislators’ speech. John Francis Mercer of Maryland, in rising to support Gerry’s motion, made this proposition explicit:

We are at a distance from our constituents; and it is a misfortune that we are withdrawn from their inspection, by being placed in a part of the Union [Philadelphia] where it is not easy to compare our circumstances and conduct in private life with the motives which may be supposed to influence our political conduct. Our constituents ought to be acquainted with our proceedings here; and it is only from a full and accurate publication of the debates of this House that they can obtain any satisfactory information on the subject.³

Adopting essentially the same view, critics of secrecy in the Senate condemned its decision to exclude the public as a show of contempt for those whom it claimed to represent; as belying, in other words, a failure of representation. “The Peers of America disdain to be seen by vulgar eyes,” charged one editorialist. “The Senate . . . usurp[s] the *secret privileges* of the House of Lords—But whom do the lords represent? not a free people, but a nobility; and who does the Senate represent? not a free people, not a nobility *as yet*, but *themselves*.”⁴

¹ “To conceal from the public the conduct of its representatives, is to add inconsistency to prevarication: it is to tell the constituents, ‘You are to elect such or such of your deputies without knowing why—you are forbidden the use of reason—you are to be guided in the exercise of your greatest powers only by hazard or caprice.’” *Political Tactics*, 33.

² *Annals of Congress*, House of Representatives, 2nd Congress, 1st Session, 563.

³ *Ibid.*, 565.

⁴ Mirabeau, “To the Freemen of America,” *National Gazette*, Feb. 13, 1793, 122.

Each of these arguments for publicity took the view that representatives are rightly subject to what Bentham called “the superintendence of the public.”¹ The representative relationship, on this account, demanded far more than what Parliament printed in its *Votes*—a spare account of the assembly’s collective decisions. It required members to account for their personal action along the way, for their motions and speeches and their specific Yeas and Nays. The underlying principle was perhaps best expressed by the Tory William Wyndham in 1738, as the Commons debated whether to renew its prohibition against the printing of members’ speeches: “I do not know but [the public] may have a *right* to know somewhat more of the proceedings of this House than what appears” in the *Votes*, lest they be denied the opportunity “to judge of the merits of their representatives within doors.”²

If proponents of publication stressed constituents’ right to evaluate their legislators’ conduct, it is little surprise that opponents tended to conceptualize the relationship between electors and elected more remotely. While Bentham preferred to think of lawmakers as “deputies of the people,” and Gerry supported a constitutional amendment empowering citizens to instruct their representatives in Congress, opponents of publishing parliamentary debates often insisted on what they deemed to be a legitimate distance between official conduct and public judgment.³ In 1738, for example, William Pulteney defended such separation during the aforementioned debate in the Commons: “I think no appeals should be made to the public with regard to what is said in this assembly, and to print or publish the Speeches of gentlemen in this House . . . looks very like *making them accountable without doors for what they say within.*”⁴ Pulteney’s explicit reference to what he

¹ *Political Tactics*, 29.

² Quoted in W. Charles Townsend, *Memoirs of the House of Commons*, vol. 2 (London: Henry Colburn, 1844), 445 (emphasis added).

³ Bentham, *Political Tactics*, 42; Walters, *U.S. Government Publication*, 17.

⁴ Reid, “Whose Parliament?,” 124 (emphasis added).

considered an illicit form of accountability is revealing. In his view, the traditional privileges of Parliament included freedom from popular judgment of the assembly's intramural deliberations, in which members properly addressed not the public writ large, but one another.

Even after Parliament's practice was liberalized, and records of debates were routinely tolerated, opponents of publication remained concerned about the sort of judgments to which newspaper reports were subjecting the members. In the late 1770s, again in the Commons, William Meredith argued that electors had a rightful claim to information about Parliament's final decisions, recorded in the *Votes*, but not to anything more comprehensive. "The arguments, the motives, the policy, and the influence that might induce those decisions, [a]re out of the pale of popular enquiry," and "[t]he world at large, even our immediate constituents, ha[ve] no just claim to be apprised of all the *minutiae* of debate."¹

Here was an uncompromising denial of the pro-publication party's most fundamental premise. Meredith explicitly repudiated the proposition that electors had a right to know what their representatives said in Parliament. As the Whig William Windham argued in 1798—seeming to channel his late colleague Edmund Burke, who famously insisted on representatives' independence of judgment²—the continued publication of parliamentary debates would fundamentally alter Britain's form of government, inducing a "democratical" transformation. "By these daily publications," he explained, "the people [a]re taught to look upon themselves as present at the discussion of all the proceedings of parliament, and sitting in judgment on them."³

¹ Ibid., 125.

² See Monica Brito Vieira and David Runciman, *Representation* (Cambridge: Polity Press, 2008), 41. As Burke put it in a 1792 letter, "We know of no *publick* to which we are accountable—because it is a vague name; and a sort of fictitious Tribunal, before which we never can be acquitted. Above all, we do not submit to the Idea, that it should be represented by the Newspapers." Quoted in Reid, "Whose Parliament?," 131. Though Burke opposed publication of members' speeches, he came to embrace it for "divisions," or lists of Yeas and Nays on particular motions, with each member identified by name. See Pole, *The Gift of Government*, 112.

³ Reid, "Whose Parliament?," 125.

Legislative publicity remade representation as a form of popular accountability. For Bentham and Gerry and Mercer, that was precisely the point: the people *should* supervise their legislators; they *should* sit in judgment of them. If such an arrangement was indeed “democratical,” then so was representation, properly understood.

The Logic of the People—and Its Limits

In contemporary politics, too, defenders of disclosure have embraced the banner of democratic accountability, whether for representative lawmakers or for the lower ranks of officials. Consciously or not, transparency’s champions now carry on the dream of Bentham and the Progressives—the dream of democracy through public opinion, which radicalizes the insight behind an earlier era’s comparatively mild proposals for publishing parliamentary debates. Its plot line is simple and seductive. A constant exposure makes rulers liable to public judgment, and directs their conduct accordingly. It hems them in by popular disapprobation, and guides them by popular demand.

The language of transparency simultaneously fits and transforms this story. Reinforcing the imperative of a politics open to inspection, it nonetheless understates the energy required for the civic disciplines of vigilance and deliberation. Above all, it appeals to a kind of political automation: disclosure is supposed to set reform in motion, giving institutions and officials reason enough to begin responding faithfully to the people’s shifting verdicts.

Attractive though it may seem, this vision of responsive government should give us pause. Its difficulties become manifest once we look more closely at transparency’s latent democratic theory. The supremacy of public opinion, excluding so much that is integral to self-government, soon loses its luster.

A Folk Theory' of Democracy

Transparency and democracy share a widely acknowledged affinity. But as the historical excavation of Chapter 1 demonstrates, that need not be the case. Transparency first emerged as an aid to market efficiency, and a stumbling block to corruption; and it is still defended by a range of instrumental arguments which have nothing especially to do with democracy. Furthermore, while political scientists do find a correlation between democracy and transparency, regimes with an authoritarian streak have found uses for openness, too.¹

Nevertheless, I want to take seriously the arguments for transparency that suffuse public discourse and scholarly literature. And for the most part, these are arguments focused on disclosure's value to democratic politics. Here the traditional view associates the exposure of government conduct with the pursuit of public "accountability."² Although this concept is not always clearly defined, it usually takes either a strong or a weak form. Strong accountability implies the vulnerability of officials to political sanction ("Vote the bastards out!"), weak accountability (or answerability) to being questioned on the record, or simply criticized. Either way, accountability is usually taken to be democracy-enhancing, because it leaves citizens less defenseless (though not necessarily well-protected) against the abuse of power, and offers some opportunity to influence the direction of public policy.

As for transparency, its "key value," to quote one representative formulation, "lies in the contribution that openness of information makes to holding individuals and organizations accountable."³ President Obama's much-vaunted memorandum on "Transparency and Open

¹ James R. Hollyer, B. Peter Rosendorff, and James Raymond Vreeland, "Democracy and Transparency," *Journal of Politics* 73, no. 4 (2011): 1191–1205. See also Greg Distelhorst, "The Power of Empty Promises: Quasi-Democratic Institutions and Activism in China," *Comparative Political Studies* (forthcoming).

² See, e.g., Mark Warren, "Accountability and Democracy," in *The Oxford Handbook of Public Accountability*, ed. Mark Bovens, Robert E. Goodin, and Thomas Schillemans (New York: Oxford University Press, 2014), 46.

³ Richard Mulgan, *Making Open Government Work* (New York: Palgrave Macmillan, 2014), 6.

Government,” issued his first day in office, invokes a highly distilled version of this theory. It declares that disclosure “promotes accountability and provides information for citizens about what their Government is doing.” In this way, the memo promises, transparency “will strengthen our democracy.”¹

What do these arguments imply about how democracy New York: Oxford University Press?² In his critique of transparency, Amitai Etzioni argues that openness typically falls flat because it misconceives modern politics as a species of direct democracy. It overburdens the average citizen, and assumes time, attention, and expertise where few of these resources are in fact to be found. “The main reason transparency is vastly oversold,” Etzioni writes, “is that it rests on a popular but naive theory of the way democracy functions,” implying “that voters can learn about the ins and outs of the numerous programs the government carries out or affects, evaluate them, and determine which they favor or seek to discontinue.” Most of the time, in truth, we cannot do so. And in any case, the few of our fellow citizens who can and do watch political affairs closely “have but one vote.” “[A]ll they can do is vote up or down on their representative.”² They have no tailored sanction available with which to punish this or that transgression, or reward this or that good work.

Certainly, some disclosure practices traveling under the banner of transparency do imagine citizens acting directly on the information made public.³ Nevertheless it seems to me that Etzioni’s diagnosis is misleading. The image of politics in the background of most accounts of transparency is not in fact “direct democracy,” in which the people themselves run their political affairs, free of

¹ Barack Obama, “Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies,” 74 Fed. Reg. 4685 (Jan. 26, 2009). See also Cass Sunstein, “In Praise of Radical Transparency,” *BloombergView*, August 30, 2016, accessed Jan. 1, 2017, <https://www.bloomberg.com/view/articles/2016-08-30/in-praise-of-radical-transparency>.

² Amitai Etzioni, “The Limits of Transparency,” *Public Administration Review* 74, no. 6 (2014): 687–88.

³ For example, Archon Fung imagines what citizens can do directly (and also through intermediaries) with the right kind of information about powerful institutions in society. “Infotopia: Unleashing the Democratic Power of Transparency.” *Politics & Society* 41, no. 2 (2013): 183–212.

agents or intermediaries. Rather, the arguments from democratic accountability discussed a moment ago recognize all too well the reality of elite rule—the reality that a massive body of representatives and officials stands between the people at large and the proverbial levers of power. These intermediaries are in fact transparency’s entire *raison d’être*. Transparency is about keeping them properly accountable to the people.

Of course, accountability can be interpreted in many different ways. In principle it might be so thoroughly circumscribed that the basis for transparency would all but disappear, except, say, during fleeting moments of electoral choice. Most commonly, however, the concept is framed open-endedly—and therefore expansively. The lion’s share of contemporary discourse about transparency is silent on the question: it invokes accountability but fails to specify its meaning.¹ But in part because the language of transparency is everywhere shadowed by the maximizing logic I identified in the last chapter, something like the following thought usually fills the void. Power should be exercised in the open because the people must be able to monitor, judge, and make known their judgment of official action. And to the extent possible, that judgment should become the government’s lodestar. Here the visions of Bentham, Bryce, and Wilson return, and are radicalized.

In short, the image of democracy to which transparency appeals is not government directly by the people, but government by elites *responsive to public opinion*. On this roughly plebiscitarian logic, “politics can and should give the people what they want, and should change in response to changes

¹ See, e.g., Albert Meijer, Paul ‘t Hart, and Ben Worthy, “Assessing Government Transparency: An Interpretive Framework,” *Administration & Society* (published electronically August 19, 2015), doi:10.1177/0095399715598341. For an exception, see Christopher Hood, “Accountability and Transparency: Siamese Twins, Matching Parts,

Awkward Couple,” *West European Politics* 33, no. 5 (2010): 989–1009.

in what they want.”¹ In its fullest expression, the dream of this approach is a gapless correspondence between public opinion and public law.²

Responsiveness has been called a “folk theory” of democracy, and at first glance it does seem sensible and attractive. What else could democracy be, after all, but the carrying into effect of the will of the people? Is a government in which policy *fails* to respond to the people’s widely-shared preferences genuinely democratic? There are good reasons to answer ‘no’ to the latter question, in my view. But as it turns out, there are equally good reasons not to give responsiveness the outsized role it has in transparency’s latent democratic theory.

Responsiveness, Interrupted

If public policy fails, reliably, to respond to the people’s wishes, then a genuine democratic deficit exists. In his research on inequality in the United States, Martin Gilens finds that national policy responds only to the preferences of the wealthiest decile of citizens, on issues subject to wide disagreement.³ Though perhaps unsurprising, these findings are powerful evidence of a pathology in U.S. democracy. The issue is not simply that the wealthy sometimes get their way. In a political system that welcomes participants from all quarters, everybody sometimes gets their way. The problem, instead, is that majorities consistently do not. Policy is *reliably* non-responsive to the greater part of the public. And in a non-trivial way such a state of affairs calls into question the polity’s democratic character.

¹ Andrew Sabl, “The Two Cultures of Democratic Theory: Responsiveness, Democratic Quality, and the Empirical-Normative Divide,” *Perspectives on Politics* 13, no. 2 (2015): 347.

² Mark Fenster, “Seeing the State: Transparency as Metaphor,” *Administrative Law Review* 62, no. 3 (2010): 628–32.

³ Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (Princeton: Princeton University Press, 2012).

Nevertheless, it is a mistake to conclude on this basis that democracy is merely a matter of responsiveness, or that a perfect democracy is perfectly responsive. We can recoil from the findings of research like Gilens's without acquiescing in such reductive views of self-government. Policy responsiveness is best understood, I want to argue, as a loosely regulative ideal. At the level of politics writ large, democracy requires that public policy should at least roughly track public opinion over time. Law cannot be the plaything of strongmen, or the program of a single party committee, or the exclusive province of the economically advantaged. If Gilens is correct about public policy in the U.S., then democracy is substantially incomplete here. But this does not make responsiveness the sole criterion of democracy. And it does not make public opinion the proper guide of every official action.

To put it another way, responsiveness must not be mistaken for an iron rule. It has a place among democracy's multiple regulative ideals. But to make it immanent, or binding at the level of particularized decision-making, would jeopardize basic norms of liberal democratic life, including respect for political minorities.¹ Although public opinion must have some guiding influence on the direction of the government as a whole, not every official responsibility can be discharged by cleaving to it. A good example is criminal adjudication, where acceding to the immediate demands of the people would often mean the destruction of due process. Legal justice for defendants is slow and deliberate, and this must inevitably dissatisfy communities hungry for punishment. Democracy may require responsiveness, but it also frequently requires its interruption.

Nadia Urbinati's conception of democracy as a "diarchy" offers another way of speaking about this necessary distinction between opinion and law—between what the people believe or

¹ For two distinct but concordant arguments, see Lisa Disch, "Beyond Congruence," in *Political Representation: Roles, Representatives, and the Represented*, ed. Marc Bühlmann and Jan Fivaz (New York: Routledge, 2016), 85–98; and Philip Pettit, "Varieties of Public Representation," in *Political Representation*, ed. Ian Shapiro et al. (New York: Cambridge University Press, 2009), 77.

demand, and what public authorities may legitimately choose to do in any given case.¹ The former Urbinati calls the field of “opinion,” the latter “will.” (Voting, too, is an instance of will on this account.)² Opinion and will do not replace one another in this diarchic model, but exist in parallel. The vectors of mutual influence are multiple. Popular opinion can and often does mold political will, but not uniformly and not as its exclusive barometer. As Urbinati puts it, these two powers “influence each other and cooperate without merging.”³

More positively, I want to say that the logic of self-government involves at least three distinct ideas which point beyond responsiveness. I proceed with the caveat that what follows is a rough, no doubt incomplete, picture of democracy, which nonetheless begins to fill in the gaps beneath so much conventional transparency discourse. It gives transparency an alternative foundation in theory, which transcends the implicitly plebiscitarian models I have criticized.

First, democracy in a large, modern society must involve a patchwork of *representation*. This implies a wide range of different representative roles—from diplomat to lawmaker, bureaucrat to police chief, magistrate to president—along with a correspondingly diverse repertoire of accountability practices.

Second, democracy needs *equality*. It promises (roughly) equal opportunities for political influence. And it tolerates social and economic inequalities only to the point at which they jeopardize disadvantaged citizens’ basic recognition, or deny their effective capacity to participate in public life.

¹ Nadia Urbinati, *Democracy Disfigured: Opinion, Truth, and the People* (Cambridge, MA: Harvard University Press, 2014), 2, 22–24.

² *Ibid.*, 24–28.

³ *Ibid.*, 2.

Third, democracy needs *liberty*. Not only civil freedoms like speech and assembly, but also a more basic set of personal liberties must be safeguarded. Without the security such freedom affords, citizens at risk lose their capacity for civic agency, and democracy becomes an empty promise.

By emphasizing representation, liberty, and equality, I am interpreting democracy not merely as an electoral process, or as a form of government by deliberation—though surely democracy embraces both. I am conceiving it, above all, as a mode of liberal self-government for mass society. My reasons for doing so are basically two, neither having any special claim to originality. I focus on liberal democracy, first, because (by my lights) those forms of democracy which cannot be called liberal are easily conceived but impossible, ethically speaking, to vindicate; and second, because the complexity of modern life (to say nothing of the scarcity of political commitment) makes the state and the mediating institutions of civil society unavoidable, and puts Greek-style direct democracy, and other more immanent forms of popular rule, largely beyond reach—except perhaps at the margins, in participatory budgeting initiatives and other modest experiments.¹

In short, I am striving to think about what democracy might mean *for us*, in the globalized world of nation-states we actually inhabit. No doubt some readers will balk here. But I want to insist that my approach does not ignore democracy's aspirational dimension, or give up on its transformative potential. Even on the terms I have described, democracy remains an ideal pointing far beyond our present state of affairs, toward a much more just and humane society. And yet by doing political theory in this way, upon the far too great expanse between real and ideal, it is possible to gain insights having purchase on the problems of political ethics we face here and now.

Representation, liberty, equality: these three “logics of self-government” will be central to my account. In the pages that follow, I set out to show how each provides grounds for transparency distinct from the consequentialist and plebiscitarian ones that remain most familiar. And I show how

¹ See David Plotke, “Representation is Democracy,” *Constellations* 4, no. 1 (1997): 19–34.

each points toward transparency's limits, and indeed toward a legitimate domain of democratic secrecy.

The Logic of Representation

Standing alone, what I have called the logic of the people counsels strict accountability, and thus a maximum of transparency, for public officials generally. In principle, every exercise of power should be open to popular supervision, on this view. By contrast, the logic of representation I want to defend here resists such uniform prescription. It avoids flattening down the diversity of roles played by different types of representatives. And because the normative relationships between citizen-principals and their representative agents vary so widely, so too do the obligations of transparency to which those relations give rise.

Even allowing for such differences, I will venture two broad principles in what follows. First, nearly all forms of representation allow for disclosure to be delayed, within limits. Real-time transparency is the exception, not the rule. And second, nearly all forms of representation tolerate confidential planning and conversation. Officials' intramural talk is often legitimately concealed, provided that final proposals, standards, and decisions are promptly disclosed.

Accountability and the Diversity of Representative Roles

Recall that in the battle over the status of parliamentary debates, William Pulteney rejected publication out of hand. The operative principle, to his mind, was the principle of representation. Reporting members' words to the reading public would transform their roles in Parliament. And it would alter the substance of their relationships—to their electors and constituents, and to the public at large. In short, a public record would make them "accountable without doors for what they say

within.”¹ It would make them accountable not only for the collective decisions of the Commons, but for their individual parts in those decisions, and indeed for their personal forensic participation. It would make them accountable, for all this, to what Bentham later called (with an enthusiasm to match Pulteney’s horror) “the great *open committee* of the tribunal of the world.”²

If to Pulteney that prospect was unthinkable, today the possibility that such accountability might *not* obtain seems equally astonishing—judging, at any rate, from conventional transparency talk. Its conventional silence on the meaning of accountability invites an expansive, uniform reading, in which any public official might in principle be held to the same exacting standards. Apparently all representatives should be strictly accountable to popular opinion—not only legislators for their votes (and their speech), but executives for their administrative performance, judges for their rulings, and so forth. As Bernard Williams has pointed out, a similar implication lurks between undifferentiated assertions of “the public’s right to know.”³

Again political accountability may be framed in multiple ways, but the most familiar variants follow a vertical principal-agent model.⁴ In this vision, public officials are authorized agents, and the people their overseers. Transparency is essential to the story because it enables citizens to monitor whether (or to what extent) their will is done.¹ Much depends on the terms in which the relationship between citizens and officials is conceived; some theory of representation or delegation is needed to define those terms. In the absence of such an account, what much transparency-and-accountability

¹ Reid, “Whose Parliament?,” 124.

² This particular formulation appears in Bentham’s *Panopticon*. See *Works* 4: 46.

³ Bernard Williams, *Truth and Truthfulness: An Essay in Genealogy* (Princeton: Princeton University Press, 2004), 212.

⁴ Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Basingstoke, UK: Palgrave Macmillan, 2003), 8–25. See also Andreas Schedler, “Conceptualizing Accountability,” in *The Self-Restraining State: Power and Accountability in New Democracies*, ed. Andreas Schedler, Larry Diamond, and Marc F. Plattner (Boulder, CO: Lynne Rienner, 1999), 23, 28n28; Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Cambridge, MA: Harvard University Press, 2016), 167–94.

talk seems to imply is the simple “responsiveness” model I described above, in which the measure of the government agent is the degree to which that agent *conforms* to the wants or beliefs or demands of the people.²

In principle the logic of representation can underwrite transparency without assuming that representatives should be strictly responsive. In her classic account, for example, Hannah Pitkin underscores the need for “explanation or justification” precisely when an independent representative diverges from the judgment of her constituents.³ And Bernard Manin suggests that so-called “audience democracy,” in which public issues receive a public exposition, actually reinforces representatives’ independence of judgment.⁴ Nevertheless, a strict idea of responsiveness easily infiltrates received ideas about transparency, because they remain largely unmoored from any more plausible account of what accountability or democracy ought to involve.⁵

Meanwhile, in at least one case, accountability has been framed explicitly to support a general, uniform, and highly demanding duty of transparency across the institutions of government.

¹ Albert Meijer, “Transparency,” in *The Oxford Handbook of Public Accountability*, ed. Mark Bovens, Robert E. Goodin, and Thomas Schillemans (New York: Oxford University Press, 2014), 513.

² According to Mulgan, for example, “one of the key purposes of accountability mechanisms is to make sure that agents are responsive to the wishes and interests of their principals.” *Holding Power to Account*, 21. See also Mark Bovens, “Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism,” *West European Politics* 33, no. 5 (2010): 955. For an illuminating critical assessment of the principal-agent framework, see Craig T. Borowiak, *Accountability and Democracy: The Pitfalls and Promise of Popular Control* (New York: Oxford University Press, 2011), 53–76.

³ Hannah Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967), 164.

⁴ Bernard Manin, *The Principles of Representative Government* (New York: Cambridge University Press, 1997), 228.

⁵ Here John Dunn’s deflationary critique provides a helpful corrective: “What is fundamental is to acknowledge that democracy is one (very broadly defined) form of being ruled To be ruled is both necessary and inherently discomfiting (as well as dangerous). For our rulers to be accountable to us softens its intrinsic humiliations, probably sets some hazy limits to the harms that they will voluntarily choose to do to us collectively, and thus diminishes some of the dangers to which their rule may expose us. To suggest that we can ever hope to have the power to make them act just as we would wish them to suggests that it is really we, not they, who are ruling This is an illusion, and probably a somewhat malign illusion: either a self-deception, or an instance of being deceived by others, or very probably both.” John Dunn, “Situating Democracy Political Accountability,” in *Democracy, Accountability, and Representation*, ed. Adam Przeworski, Susan C. Stokes, and Bernard Manin (New York: Cambridge University Press, 1999), 342–43.

Here I have in mind Jeremy Waldron’s account of “democratic agent accountability.”¹ Waldron begins with the idea of a conventional principal-agent relationship of the sort that might bind an attorney (agent) to her client (principal). In adapting this model to democratic politics, he argues that government officials should be understood as agents of the people “severally as well as jointly”: sometimes they act on behalf of the public writ large, sometimes on behalf of smaller, more particular groups, yet by obligation they are answerable to all. “[T]he key premise of accountability in a democracy,” Waldron asserts, is that “government business is *our* business and we are entitled to be treated as *principals* in regard to the agency of our rulers.”² What this means concretely is that “there must be free access to information about what the government is doing,” and that the obligation to ensure such access falls squarely on the state and its officials. “In a democracy, the accountable agents of the people owe the people an account of what they have been doing, and a refusal to provide this is simple insolence.”³

It is important to acknowledge that Waldron does gesture, here and there, toward the possibility that such a requirement might not apply uniformly. “Agent accountability in modern democracies is often mediated,” he writes. Thus, “a civil servant may be accountable to a minister, the minister to the parliament, and the parliamentarians to voters in their constituencies.”⁴ But the implications of this allowance are never spelled out. And as far as I can tell, it is not meant to justify limits on Waldron’s broad “normative requirement of open and transparent governance.”⁵ Indeed,

¹ Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Cambridge, MA: Harvard University Press, 2016), 167–94.

² *Ibid.*, 180, 188.

³ *Ibid.*, 190 (emphasis omitted).

⁴ *Ibid.*, 179.

⁵ *Ibid.*, 173. He explains that in the case of cascading accountability—as between civil servants, ministers, parliamentarians, and finally voters—each intermediate principal has a duty, “owed to the ultimate principals” (i.e., the voters), to hold their immediate agents accountable. And the very notion of “ultimate principals” seems to suggest that, notwithstanding accountability’s “mediation,” the people have a right to know about the conduct of officials at all levels of government. *Ibid.*, 179.

throughout the essay under discussion, Waldron asserts the public's entitlement to transparency about all aspects of government action, excepting those few "very specific areas" in which official secrecy is genuinely requisite.¹ "If the rulers are truly the agents of the people," he writes, "then they have a responsibility (owed to the people) to give the people the information that is required concerning what they have been doing."² In short, "the business of government is public business"—full stop.³

I am eager to affirm Waldron's thought that transparency might be conceived as a *relational duty*, owed by representatives to their constituents or the public at large. My own account will elaborate the same basic thought. But I take issue with the uniformity implied by his theory. It seems to me to entail an unduly rigid view of representation, which cannot do justice to the diversity of public roles in a liberal democratic polity.⁴ That rigidity gives rise, in turn, to a standard of transparency at once excessive and invariable. It is excessive because it fails to acknowledge (what I argue below) that most representatives enjoy a qualified ethical permission to speak and act out of public view, provided their final decisions and finished performance are accounted for. And it is invariable because it fails to allow that distinct conceptions of accountability—and therefore differently delineated duties of transparency—rightly correspond to different sorts of officials and institutions.

In a very loose sense, every public official acts on behalf of the people. But each is bound to carry out that charge in accordance with her particular office.⁵ A legislator, for instance, has a fairly

¹ Ibid., 193–94.

² Ibid., 173.

³ Ibid., 183.

⁴ See in this connection Andrew Sabl, *Ruling Passions: Political Offices and Democratic Ethics* (Princeton: Princeton University Press, 2002).

⁵ Philip Pettit makes essentially this point in "Representation, Responsive and Indicative," *Constellations* 17, no. 3 (2010): 426–34.

broad mandate to make law in furtherance of the common good, as best she understands it, and to advocate on behalf of her more particular constituents if she has some geographical constituency. (Obviously these aims might clash; for present purposes, however, I remain agnostic as to which should prevail. In either case, I argue below, her duty of transparency will be owed to the public at large.) A civil servant, meanwhile, has an obligation to carry out the mission of her agency or department, consistent with the broad policy goals (subject perhaps to certain limits) of the political official who heads it up. And a judge is bound to treat litigants impartially; to render judgments in accordance with her best reading of the applicable legal materials, including binding precedents; and within those limits to seek justice.

These are just a few examples. Indeed there are far more representative roles than I could possibly enumerate here; ambassador, prison warden, police officer, president—the list goes on. To be clear, I understand all of these roles as “representative” in some sense; my use of that term is not restricted to elected legislators (or to any other subgroup). They are all representative because whatever their particular mandates, they all act to some extent on behalf of, or in the name of, the public. Even agents who “constructively” press representative claims without any official mandate, like civil society groups or the leaders of social movements, likewise incur obligations toward the individuals or groups they purport to represent.¹

But what kinds of obligations do these various representatives (official and nonofficial) incur? The basic point I wish to make is that distinct representative roles generally entail distinct normative conceptions of the relationship between representative and citizen. And as far as duties of accountability and transparency are concerned, some of these conceptions are rightly more

¹ See, e.g., Michael Saward, *The Representative Claim* (New York: Oxford University Press, 2010); Lisa Disch, “Toward a Mobilization Conception of Democratic Representation,” *American Political Science Review* 105, no. 1 (2011): 100–14; Sabl, *Ruling Passions*.

demanding than others.¹ Some representatives are properly subject to electoral sanction; others are not. Some representatives should be answerable more or less constantly; others may be entitled to periods of insulation. Some representatives owe a public account of nearly everything they do in office; others—like jurors in deliberation, for instance, or intelligence agents cultivating sources—are rightly entitled to maintain the confidentiality of certain parts of their conduct.

Despite this variation, I want to suggest that even representatives having wide discretion, and not in any way bound to reflect public opinion in their decision-making, owe some duty of transparency.² Typically, it is a duty owed *by* the representative *to* the entire public. In some instances of “constructive” representative claims, the relevant set of constituents may be narrower—the population, for example, of persons with disabilities on whose behalf an accessibility organization claims to work. As a rule, though, the recipient of the duty will be the entire people. The reason, simply enough, is that all representatives act to some degree in the public’s name, or on behalf of the public’s interests, and all make decisions that, if they do not bind the people directly, at least affect the conditions of our common life. In this sense, every member of the public counts among representatives’ “moral constituents.”³

So much for the parties. Now what does the duty of transparency actually require? What is its scope? Jane Mansbridge has it right, I think, when she rejects as a baseline that “extreme transparency in process” that would demand openness, or public observability, for all of a

¹ On differences in the aims, sources of judgment, and sanctions proper to different representative roles, see Andrew Rehfeld, “Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy,” *American Political Science Review* 103, no. 2 (2009): 223.

² See Suzanne Dovi, *The Good Representative* (Malden, MA: Blackwell Publishing, 2007), 139–40; Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995), 182. In Pettit’s terms, both responsive and indicative representatives should in at least a minimal way face the “discipline of public reason.” See “Varieties of Public Representation,” 82.

³ Gutmann and Thompson, *Democracy and Disagreement*, 8.

representative's meetings and deliberations.¹ Instead, I want to argue, the duty of transparency generally kicks in once a representative's decisions are made, or performance completed. And its objects include final decisions and (at least some) guiding rules or practices, but not ordinarily a record of every conversation and maneuver behind the scenes.

Before elaborating on that, however, I want to address a pair of possible objections to the approach I am defending here. First, it might be argued that by taking the existing landscape of representative roles more or less for granted, I am giving up on transparency's transformative power, and smuggling in a kind of political quietism. Particularly within the world of civic technology, and the political movements it has inspired (like the Pirate Parties of northern Europe), it has been an implicit credo that transparency can help to bypass tired and dysfunctional representative institutions like legislatures, or else to remake them as more faithful conduits of public opinion.²

My basic response is the one I gave earlier—that responsiveness is insufficient as a basis for democracy. In large part, then, the disagreement here is rooted in different substantive visions of democratic politics. Yet even with a broadly liberal democratic framework, I want to stress that my appeal to the logic of representation is no surrender of transparency's potential. Actually existing governments are neck high in unjustifiable secrecy, and in empty gestures toward transparency. Changing that would improve the quality of representation. So this is not a quietist account, despite my rejection of transparency utopianism.

A second objection is more plausible. It claims that I am treating as settled *a priori* what are in fact highly contestable (and highly contested) conceptions of the different representative roles at

¹ Jane Mansbridge, "A 'Selection Model' of Political Representation," *Journal of Political Philosophy* 17, no. 4 (2009): 386 (emphasis omitted).

² This is the view that Dave Eggers satirizes so brilliantly in *The Circle* (San Francisco: McSweeney's Books, 2013), 391–92.

issue. To be sure, variously demanding duties of transparency arise from different sorts of representative-citizen relationships. But the very norms of those relationships are subject to disagreement. (Think of Burke’s famous controversy with the electors of Bristol, or, in the United States, of the longstanding debate over judicial elections.)¹ The worry, then, is that the logic of representation cannot yield conclusions about transparency in any sort of neutral or non-controversial way. Behind those conclusions are no immutable principles of representative government, but particular normative interpretations of the roles and institutions in question. And part of what activists mean when they demand more or better transparency from those institutions—like cameras in the Supreme Court, for example—is that the relevant representative’s relationship to the public ought to evolve.

I want to embrace the basic premise of this objection. It is precisely correct that my arguments about transparency here commit me to particular normative interpretations of different representative roles. But then, so do anyone else’s. And that is precisely my point in emphasizing the importance of the logic of representation. As the participants in the debates over parliamentary privilege recognized, it is not enough to appeal to consequences. Debates about transparency unavoidably bear on representation. And I am happy to acknowledge that to the extent readers disagree with my arguments about transparency, what divides us is likely to involve our conceptions of the representative roles in question.

The Timing of Transparency

¹ Edmund Burke, “Speech at Mr. Burke’s Arrival in Bristol,” in *The Portable Edmund Burke*, ed. Isaac Kramnick (New York: Penguin, 1999), 155–57; Jed Handelsman Shugerman, *The People’s Courts: Pursuing Judicial Independence in America* (Cambridge, MA: Harvard University Press, 2012).

Transparency is a metaphor. Literally, it describes things which let the light through, like glass or crystal, leaving “perfectly visible” what lies beyond.¹ Figuratively, it attributes an analogous quality to objects in politics. Though obvious, this fact about the language of transparency has gone curiously unremarked in the commentary on the subject. Recalling it can help to explain a common presupposition of conventional transparency talk—that in order to be meaningfully transparent, the individuals and institutions of democratic politics must open themselves to constant observation; that they must become, in this respect, like the permanently visible subjects of Bentham’s Panopticon. The incessant demand for live broadcasting of official proceedings is just one manifestation of this supposed imperative.

Whether transparency is ordinarily owed in real time seems doubtful, however. I have been arguing that the logic of representation generates standards of accountability tailored to the various roles representatives play, and that these standards give rise to corresponding duties of transparency. It is a necessary condition for the discharge of these duties, no doubt, that representatives communicate to the represented—generally the public at large—some record of their relevant conduct. But whether such reporting is owed instantaneously, as events unfold, is an open question.

In a few cases, perhaps, the answer is yes, and the represented may be entitled to fully Panoptical surveillance. But such exposure must remain the exception on my account. As a rule, the logic of representation affords political agents a degree of discretion over the moment and method by which their conduct is disclosed. And within limits, that discretion may be exercised by postponing publication. Representatives may be justified in acting quietly, behind the scenes, as they plan action in furtherance of their representative missions.

¹ *Oxford English Dictionary*, s.v. “transparent,” accessed Jan. 1, 2017, <http://www.oed.com.ezp-prod1.hul.harvard.edu/view/Entry/204969>.

Consider, for example, the preparation of new legislative or regulatory initiatives. A lawmaker and her staff draft statutory language to improve primary education, crossing party lines to cultivate cosponsors on the potential bill. Or officials in a consumer protection agency begin brainstorming measures to reduce the burdens of its rules on small business. In each case, the question arises whether such efforts ought to be disclosed from the outset, even before they have matured into fully-articulated proposals, ripe for wide consideration.

Forthright transparency has its advantages here, to be sure. It may offer opportunities to strengthen public support, and to elicit early feedback from the full range of stakeholders. It may promote the development of civic trust. By the same token, however, there are often strong, countervailing reasons for confidentiality. Proceeding quietly may blunt the pressures of hyper-partisanship just long enough to make compromise achievable. Or it may cabin the influence of powerful private interests, whose lobbying warps so many nascent policy proposals.¹ John Dunn makes the more general point that real-time transparency risks “[p]aralyzing rule,” denying “the freedom of action that professional political agents require in order to act boldly and effectively.” Without at all apologizing for limitless forms of “state furtiveness,” Dunn insists that accountability may be reconciled with state capacity so long as leaders are permitted, within reason, to delay disclosure.¹

The thrust of that argument is consistent with the logic of representation, on my reading. What democratic representation requires, in general, is *account-giving* and *answerability*. Individuals and institutions exercising power in the name of others must report periodically on their representative activity. They must give an account of the fruits of their completed labors—successfully enacted legislation, say—and, no less importantly, they must identify the policies they pursue, the sorts of

¹ See Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (New York: Oxford University Press, 2007), 197–201.

methods they employ (though not necessarily in full detail), and the principles that guide them. Additionally, they must answer for their conduct when the people or parties (said to be) represented raise questions. They must engage and communicate and explain themselves, without lying or evasion. A good representative does these things, whether or not her role makes her liable to sanctions.

Returning to the legislators and regulators of my example, it seems clear that their constituents (in both cases, the people generally) are owed some explanation of their concrete proposals. We ought to be able to know how they would alter the law. But let an account be made as soon as some formal motion is ventured—let our legislator publish the bill she has introduced, let the agency publish its “Notice of Proposed Rulemaking”—and the relevant standards of accountability will be satisfied. In the early planning stages I raised, secrecy is no cause of offense (at least to the logic of representation).

I should caution, however, that in stating the case against a general duty of real-time transparency, I do not mean to embrace the opposite extreme. If representatives generally have some legitimate discretion to delay disclosure, this discretion, like all others, is liable to abuse. No representative may say, “you will find out when my service is done,” or “you will know in time to cast your vote, but no sooner.” Democratic accountability ought not be reduced to a single moment of electoral choice, or a phony opportunity to assess so many *faits accomplis*.

I have said that representatives should account for themselves “periodically.” Any attempt to fix that interval with greater specificity soon brings us face to face with the limits of theory. As I pointed out earlier, the relevant standards are in part a function of the representative role in question. Is the official invested with a degree of prerogative power and a responsibility to protect public safety, such that secrecy might in some cases be maintained even after tactical decisions are

¹ Dunn, “Situating Democratic Political Accountability,” 339–41.

made? Or is she the member of a deliberative body which moves in a more or less formalized way from proposals to hearings to collective decisions?

Timing will also depend, in part, on the particular object of disclosure. A record of deliberations may have a more durable claim to confidentiality than an assessment of government performance, or a guideline for administrative action. To get clarity on these distinctions and their relevance, however, it is necessary to turn to the question of transparency's scope.

The Scope of Transparency

At first glance, it appears that the duty of transparency could embrace anything a representative does. And in some sense that must be correct. In principle, the represented have an interest in knowing about any action that affects their interests, or that could be relevant to assessing the representative's performance. This may even extend beyond her activities in office. We want to know, for example, about a representative's private entanglements, in order to understand her potential conflicts of interest. The philosopher Daniele Santoro adopts something like this open-ended approach by extending transparency to include whatever information is (presumptively) a matter of public interest.¹

But should transparency really extend to everything a public official does or says? According to a recent essay by Cass Sunstein, the balance of costs and benefits suggests not. Transparency should reach government "outputs" (decisions, policies, findings of fact, etc.), but not "inputs" considered along the way (above all, records of "who said what to whom").² Though I reject

¹ Daniele Santoro, "The Value of Transparency," *Daily Nous* (blog), July 29, 2016, accessed Jan. 1, 2017, <http://dailynous.com/2016/07/29/philosophers-dnc-leaks/>.

² Cass Sunstein, "Output Transparency vs. Input Transparency" (working paper, Aug. 18, 2016), accessed Jan. 1, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2826009.

Sunstein’s welfarist approach, the logic of representation suggests a similar distinction, on my account.

Generally speaking, representatives should be answerable for (1) decisions that have relative finality, and for (2) policies or standard procedures that have guiding influence on their action. In addition, they should account periodically for (3) their past performance. This might involve publishing records, for instance, of arrests made, or regulatory inspections carried out, or numbers of patients kept on waiting lists. As to decisions, I should underscore that the idea of relative finality depends on context, and will include much that is not final in an absolute sense—not yet fully adjudicated or voted upon. For example, it will include the legislative bills and proposed regulations discussed in the last section. What is more, finality may depend on the relevant officials’ own prior disclosures. When Donald Trump and Mike Pence began taking credit publicly for having saved 1,100 factory jobs in the deal they struck, on behalf of the state of Indiana, with the appliance manufacturer Carrier, they forfeited, I would argue, the (moral) entitlement to continue concealing the remaining terms of the agreement, in spite of its un-executed state.¹

There are of course some exceptions within the broad categories I have laid out. Can prosecutors rightly maintain the confidentiality of their internal charging guidelines, producing what Meir Dan-Cohen calls “acoustic separation”?² Under this practice, the public knows what the law prohibits, but not a specific statement of the prevailing enforcement priorities, or the limits below which prosecution is likely to be declined. We might think of this as the secrecy of the measure of mercy. A district attorney will not prosecute protesters, say, for modest disturbances of the peace. Yet one can certainly understand why it might not be prudent to advertise that fact in advance. In

¹ Danielle Paquette, “The Public is Being Kept in the Dark about Trump’s Deal with Carrier,” *Washington Post*, Dec. 30, 2016, accessed Jan. 1, 2017, <https://www.washingtonpost.com/news/wonk/wp/2016/12/30/the-public-is-being-kept-in-the-dark-about-trumps-deal-with-carrier/>.

² Meir Dan-Cohen, “Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law,” *Harvard Law Review* 97, no. 3 (1984): 625–77.

such cases, it seems to me, the relevant standards of accountability can be satisfied so long as there is transparency about completed cases. This way, the public (or watchdogs acting on our behalf) can still assess the fairness, consistency, and proportionality of prosecutors' charging decisions.¹

What transparency need not reach, on my account (as a baseline matter, anyway) is a category roughly equivalent to Sunstein's "inputs." Under plausible conceptions of the representative-citizen relationship, secret talk is often permissible, I want to propose, even if secret decisions and policies are suspect. (Here the paradigmatic examples are judicial and legislative deliberation. Yet this also extends, in principle, to planning conversations within the executive branch.²) The reason for the restriction is that, in the general course of events, we can adequately assess a representative's integrity and skill without listening in on every word she utters. Above all, she will be known by her fruits—by the decisions she makes and the policies and outcomes she brings about. (And if she harms or coerces others behind closed doors, that fact should be disclosed under the logic of liberty, discussed below). Typically, knowing all that is knowing enough, as far as accountability is concerned.³

¹ For the limitations of this approach in the context of the administrative state, see Gillian E. Metzger, "The Constitutional Duty to Supervise," *Yale Law Journal* 124 (2015): 1929; William H. Simon, "The Organizational Premises of Administrative Law," *Law and Contemporary Problems* 78, no. 1 (2015): 80. For an even more difficult case, consider the vexed question of government policy on the payment of ransoms to free hostages held by terrorists or criminal groups overseas. See, e.g., Anja Shortland, "Governing Kidnap for Ransom: Lloyd's as a 'Private Regime,'" *Governance* (forthcoming).

² Again, things change once those conversations become the substance of binding guidelines, like Office of Legal Counsel's (OLC) memos, when their interpretations of law are actually adopted by the president. See Brett Max Kaufman, "Still Secret: Second Circuit Keeps More Drone Memos From the Public," *Just Security* (blog), ed. Ryan Goodman and Steve Vladeck, Nov. 24, 2015, accessed Jan. 1, 2017, <https://www.justsecurity.org/27854/secret-circuit-drone-memos-public>.

³ I suppose John Ferejohn is correct that when "public decisions are made behind closed doors ... those decisions can be only partly accountable to the electorate," since focus shifts to "the results" of those decisions and away from the process of making them. "Secret Votes and Secret Talk," in *Secrecy and Publicity in Votes and Debates*, ed. Jon Elster (New York: Cambridge University Press, 2015), 233. But this does not mean that decision-making processes should be entirely opaque, or that the confidentiality of official deliberations should endure in perpetuity. And although Ferejohn is not wrong that deliberative secrecy will be of little concern to someone who "believes that officials tend to be virtuous and well-motivated people who can be trusted to pursue public purposes," the notion of accountability I am advancing hardly requires such confidence. *Ibid.*, 246.

For all this, the logic of representation is no blank check for non-disclosure. In particular, it is not acceptable on my account to maintain that a given role—traditionally, law enforcement or national security—is so sensitive that secrecy should become the norm in all things.¹ Nor is it permissible to exempt an actor merely because of her status as a private contractor, doing work on the government’s behalf. Such sweeping secrecy is wrong (and usually deeply counter-productive in ways the participants fail to recognize.) This helps to underscore that the logic of representation has limits, on my account. In particular, I reject the notion of a “right *not* to know” in matters of national security, together with the unqualified delegation of authority it implies.² This is a Hobbesian picture of representation, in which authorization is complete and unqualified, and it seems to me fundamentally undemocratic.³ Tempting though it may be to delegate our dirty work and simply look the other way, this approach offends the logic of representation.

The Logic of Liberty

“Jealousy,” says Bentham, “is the life and soul of government.”⁴ He meant that it is central to the discipline of governing one’s governors, that endless censorial task in which transparency serves as fundamental stratagem. Yet Bentham is only the best remembered among early writers who championed the idea that, if being ruled is unavoidable, the people can at least protect their liberties by a vigilant supervision of the powers that be. Freedom-based arguments for openness remain familiar. Philip Pettit maintains, for example, that transparency is necessary for effective

¹ See Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age* (New York: Cambridge University Press, 2006), 27–50.

² Gabriel Schoenfeld, *Necessary Secrets: National Security, the Media, and the Rule of Law* (New York: W. W. Norton & Co., 2010), 259.

³ But see David Runciman, “Hobbes’s Theory of Representation: Anti-Democratic or Proto-Democratic?,” in *Political Representation*, ed. Ian Shapiro et al. (New York: Cambridge University Press, 2009), 15–34.

⁴ Bentham, *Works*, 4: 130.

political contestation, which is the primary safeguard citizens have against liberty-curtailling domination by the state.¹

The logic of liberty seems rightly to bear on questions of concealment and disclosure. Many demands for openness are rooted in relationships of representation, and corresponding norms of accountability, as I have argued. But there are also contexts in which the concern for freedom is decisive. In exploring those cases below, I will argue that the logic of liberty does indeed give rise to obligations of transparency. These are special obligations, however. They demand not maximum openness in all things, but the disclosure and justification of infringements of basic liberties, in particular.

The reader will recognize that embracing additional bases for transparency sets up a potential conflict within my account. Suppose the logic of representation and the logic of liberty disagree, with respect to their implications for disclosure. Or, to foreshadow a bit, suppose the logic of liberty counsels secrecy in a given matter while the logic of equality seems to demand publication. These tensions are not merely illusory, and they do need to be acknowledged when they arise. But the basic coherence of the logic of self-government is not thereby jeopardized. As my discussion will make clear, the disagreements are neither systematic nor unmanageable. And as far as transparency is concerned, the logics of representation, liberty, and equality remain fundamentally consonant sources of obligation.

Coercion and Manipulation

Politics in the best of times (to say nothing of the worst) is a dangerous business. Let power be exercised ever so wisely, and its wages set the human frame trembling—or so they should. Indeed

¹ Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (New York: Cambridge University Press, 2012), 187, 215, 304.

I suppose it is only in ignorance, in parochialisms of time or place, that we can fail to regard this sphere with at least a frisson of dread. For all its potential to exalt—to nourish and succor and bind together—politics is a realm of dire choices. Relative democracy means that collective life is leavened by cooperation and reciprocity. But even democratic politics are full of gravity, if we take an honest look. They say whose suffering will be redressed, and whose redoubled. They say which violence will be punished, and which meted out in the people’s name. They are concerned inevitably with the application of force, legitimate though it may be.

The accuracy of this description can coincide with at least a moderate form of democratic faith—faith in the capacity of political engagement to serve the common good. But such faith needs to be tempered by a recognition of the dangers to human liberty the endeavor entails. This recognition is among the first impulses to liberal democracy. Here, it supports the proposition that when those threats materialize—when basic liberties are actually infringed—public justification is required. And the demand for justification gives rise, in turn, to a duty of transparency. Without it, the responsible political actors too easily escape the obligation of laying out the legal and moral grounds for their action.

There is, of course, considerable disagreement about what freedom requires. To the extent possible, I want to keep those polemics at arm’s length. Any attempt to defend a single, comprehensive theory of liberty here would take the discussion too far afield, and in any case would be narrower than is necessary for my purposes. The reader need not commit herself to the republican or the libertarian or the socialist view. Instead, my approach will be to conceive liberty in a pluralist mode, focusing on a set of concrete social and personal *liberties*, which might be endorsed from any number of different theoretical standpoints. Considerable mileage can be had from this common overlap, even if the approach forbears from attempting to define freedom’s scope too exactly.

The basic liberties I have in mind include a wide range of civil and personal liberties, from the freedom of speech to the freedom of association, and from personal privacy to bodily integrity to the freedom to own property. According to the logic of liberty, infringements of such liberties should be publicly knowable. We should know when human beings are manipulated, spied upon, despoiled, coerced, killed. We should be able to deliberate about whether, in any given case, such actions are justifiable. The point of the logic of liberty is not to claim that they never are, but only to insist that public justification is morally required.

Thus, for example, there is a duty of transparency with respect to the circumstances of convicted criminals' "hard treatment" in prison, or the circumstances of immigrants' confinement after illegal border crossings. This duty is owed *by* the officials or institutions responsible for the infringements of liberty *to* the public at large. Again something like the notion of "moral constituency" is crucial here, though we are no longer talking about representation. The reason transparency is owed to the people generally is that we all have a moral stake in knowing that such harms are (or are not) morally justifiable. The scope of the duty therefore extends not only to the facts of the infringement, but to the facts necessary to assess whatever justification is proffered for it.

Of course, infringements come not only from governments but also from private actors, like the operators of private prisons, or employers who threaten harm when their workers attempt to organize. On my account, the logic of liberty extends to the offending conduct of these private actors, too, at least as a matter of principle. Thus my account partly avoids a traditional shortcoming of transparency discourse, which has focused so strongly on the threats posed by governments while generally ignoring serious harms to freedom brought about by non-public actors.¹ No doubt there

¹ For a helpful critique of this short-sightedness, see Archon Fung and David Weil, "Open Government and Open Society," in *Open Government: Transparency, Collaboration, and Participation in Practice*, ed. Daniel Lathrop and Laurel R. T. Ruma (Sebastopol, CA: O'Reilly, 2010), 105–13.

will be some areas of tension, where a non-governmental actor's claims of privacy are strong. But certainly in the case of large, powerful institutions acting to restrict individual liberties, disclosure is obligatory.

Privacy, Association, and the Harms of Surveillance

Since long before the leaks that made Edward Snowden a household name, and long before the terror attacks of 2001, governments have been sponsors of surveillance. Snooping on subjects and citizens is nothing new, in itself. Often it has been targeted, with prying eyes trained on individuals already known to the state. And prior to the advent of digital technology, it was necessarily limited in scope. The dragnet programs that existed then were crude and narrow, by contemporary standards. Today's mass surveillance—with its extraordinary breadth, and the capacity to store and analyze the data it assembles—is different.

On its face this practice infringes two basic liberties, privacy and freedom of association.¹ Whether these infringements are justifiable is an open question, as far as my theory is concerned. What the logic of liberty says is not that personal or political freedom can never rightly be limited, but that its limitation requires public justification, along with the degree of transparency that process entails.

But there is a rub. Ordinarily, surveillance is undermined if it is disclosed. There are, of course, some forms of conspicuous surveillance, which like the convenience store CCTV monitor are calculated to deter wrongdoing. For the most part, however, modern mass surveillance happens behind the scenes, and its intelligence value would likely be undermined if terror cells and other targets knew enough about its scope or methods to evade reliably.

¹ See, e.g., Neil M. Richards, "The Dangers of Surveillance," *Harvard Law Review* 126 (2013): 1934–65.

This concern has long led intelligence professionals to shun disclosure, and to try to maximize secrecy wherever possible, in effect dispensing with public justification. Spy agencies more or less adopted Gabriel Schoenfeld’s idea that the public has a “right *not* to know,” and let the nature of their mission serve as justification enough.¹ “We will do whatever is necessary to prevent terrorism,” they said, essentially. “And if that entails the violation of certain civil liberties, less weighty than the fundamental imperative of security, then so be it.”

One need not question the public motives of the individuals who championed this approach to see that it falls short, as far as the ethics of liberal democracy are concerned. When liberties are violated, this fact must be knowable, and practices of public justification made possible. Transparency need not be absolute, however. What must be disclosed are the nature and circumstances of the infringement—in effect, the information necessary to determine whether it is in fact justified—but not all of the operational details, and not (in real time) the identity of the targets (if the surveillance is targeted).

Consider what official speech and disclosure had made knowable about mass surveillance by the U.S. government before Snowden’s leaks. In principle, citizens could have known quite a lot. We could have known that agencies like the CIA and NSA existed, and had developed advanced surveillance capabilities. We could have known of the enormous budget for national intelligence. And we could have known of the relevant legal provisions, which allowed courts to order that third parties—communications firms, for instance—should turn over to the government records of their users’ activities, provided these were relevant to a foreign intelligence investigation.

Yet two key issues were not publicly knowable. We could not have known how broadly the agencies interpreted these legal provisions, and we could not have known which interpretations received the blessing of the Foreign Intelligence Surveillance Court (FISC), whose rulings in this

¹ Schoenfeld, *Necessary Secrets*, 259.

area have the force of law, but are generally classified. In one critical case, the FISC determined that the set of “relevant” records could in principle include *all* records, provided the government’s aim “was to analyze possible links to hidden terrorists.”¹ In effect, then, the public could not have understood the breadth of the surveillance. A kind of double-speak had emerged, with the public statute suggesting one thing and its private interpretation licensing another. And although some evidence of this mismatch was to be found in the experience of early whistleblowers, who paid such a high price for their disclosures, and in the vague warnings of a few congressional leaders, the details were essentially unknowable.²

Under the logic of liberty, this was not enough. The scope of the intelligence agencies’ impositions on personal privacy was simply not clear, and the process of public justification was evaded. (This does not necessarily mean that Snowden’s leaks were justified, however. Many additional considerations, beyond the scope of this discussion, would have to factor into that kind of judgment.)

What might clarity mean in this context, and how could it be achieved without undermining legitimate counter-terrorism measures? The key issue, I think, is to ensure that the relevant legal limits are publicly explained, including by publishing the FISC’s substantive interpretations of statutory language. In addition, there should be some aggregate reporting of the numbers of individuals whose privacy is infringed, and their proximity, in terms of degrees of separation, to known terrorist cells or suspects.

Of course, for all the legitimate concern about government surveillance, it is important to remember how much data mining is done for commercial rather than political purposes.

¹ Charlie Savage, *Power Wars: Inside Obama’s Post-9/11 Presidency* (New York: Little, Brown & Co., 2015), 197.

² Mark Hertsgaard, “How the Pentagon Punished NSA Whistleblowers,” *The Guardian*, May 22, 2016, accessed Jan. 1, 2017, <https://www.theguardian.com/us-news/2016/may/22/how-pentagon-punished-nsa-whistleblowers>; Charlie Savage, “Senators Say Patriot Act is Being Misinterpreted,” *New York Times*, May 26, 2011, accessed Jan. 1, 2017, <http://www.nytimes.com/2011/05/27/us/27patriot.html>.

Presumably, the technology giants collect data about individuals at a faster clip than even the intelligence agencies. Yet their non-governmental status should not absolve them from the obligations of transparency. Even assuming the threats to freedom of association are less acute when data are held by private operators, privacy is still affected. The ways in which this liberty is constrained ought to be explained to users. It is not enough that we are asked to click through fifty pages of fine print on registration. The responsible firms owe the public an understanding of how users' data will be stored, queried, sold, and shared with public authorities. Experience suggests that many would still choose to participate even if all this were made clear.¹ But the purpose of transparency is not necessarily to change behavior. Under the logic of liberty, it is part of the obligation of justification.

The Projection of (Deadly) Force

One implication of the surveillance example is that the logic of liberty extends beyond borders. If many of the technology giants are headquartered in the U.S., their users are spread across the globe. And infringements of privacy and other basic liberties cross borders, as well.

Whereas the logic of representation is relational, focusing on the norms that govern the connection between the people and the officials who act in their name, the logic of liberty is different. It posits a duty of public justification not because such connections demand it, but because liberties are fundamental human interests—or so my account assumes. Thus the logic of liberty is not limited by bounds of territory; the duties of transparency to which it gives rise follow the relevant infringements. When states or corporations infringe basic freedoms abroad, the relevant conduct should be rendered publicly knowable.

¹ Bernard E. Harcourt, *Exposed: Desire and Disobedience in the Digital Age* (Cambridge, MA: Harvard University Press, 2015).

To repeat a caution, I do not argue that such infringements are always illegitimate—consider, for instance, the killing or confinement of combatants during bona fide defensive war. But demands for justification, and serious opportunities to scrutinize proffered justifications, require access to the relevant facts. I have no illusions that this sort of disclosure is likely to be forthcoming on a voluntary basis. (In Chapter 5, I spend some time reflecting on institutions and practices that might permit us to overcome unjustified resistance to transparency.) Nevertheless, it is important to underscore that such disclosure is an ethical duty, at least within a conception of liberal democracy.

Consider the example of targeted killing by drone. Again the infringement of basic liberty such force involves must be justified. But what sort of transparency is required, exactly? Under the logic of liberty, operational details and outcomes—general locations, numbers of combatants and civilians killed, and so forth—may be disclosed after the fact. But settled rules that guide action should be publicized while they are still in force. Above all, targeting protocols and rules of engagement should be explained and justified in the open. The absence of such disclosures has been one of the deepest problems with the development of targeted killing by the United States in recent years. Even the basic distinction between “personality strikes” (against known targets) and “signature strikes” (against individuals targeted on the basis of demographic or behavioral markers supposedly correlated with terrorist activity) has been classified for years.¹

President Obama argued in a 2013 speech at the National Defense University that Congress had been briefed on these matters.¹ But that was not enough, in my view. Under the logic of liberty, the point of disclosure is not to ensure oversight, per se, but to ensure public justification. Confidential communication to the public’s representatives was not therefore sufficient. As David Cole argues, the secrecy of these guiding principles cast a cloud of illegitimacy over the drone

¹ Hugh Gusterson, *Drone: Remote Control Warfare* (Cambridge, MA: MIT Press, 2016), 93–96.

program—but not only for the instrumental reasons he mentions.² The logic of liberty made disclosure an obligation in itself here.

Is Cole right to say that disclosure should extend not only to past but also to future killings, and that the program needs to be “subjected to transparent review,”³ with disclosure of “details about how [it] works in practice” to facilitate “independent testing of whether US practice matches the limits...announced”⁴ Perhaps. But this argument can be sustained, I think, only with some acknowledgment of the limits of transparency. As far as the logic of liberty is concerned, future operations need not be disclosed in advance. And the details about “practice” should focus on how, in fact, targets are selected, and whom, in fact, the killing kills. Again we most critically need to know what Michael Walzer calls “the moral and legal rules of engagement,” and whether those rules have been followed in completed strikes.⁵

The Logic of Equality

At the heart of liberal democracy is a broad, defining project—to reconcile freedom and equality in a functional system of government. It is easier said than done. In one sense the project is hopeless: eliminating the tension between liberty and equality would be to sacrifice one to the other. Reconciliation is therefore only ever partial; conflicts are unavoidable. Liberal democracy knows this and forges ahead, embracing the tensions, and resolving to let them structure the shifting

¹ Barack Obama, “May 23, 2013, Remarks of President Barack Obama at the National Defense University,” in *The Drone Memos: Targeted Killing, Secrecy, and the Law*, ed. Jameel Jaffer (New York: The New Press, 2016), 259–70.

² David Cole, “The Drone Memo: Secrecy Made it Worse,” *NYR Daily* (blog), June 24, 2014, accessed Jan. 1, 2017, <http://www.nybooks.com/daily/2014/06/24/awlaki-secret-drone-memo/>.

³ David Cole, “The End of the War on Terror?” *New York Review of Books* (Nov. 7, 2013).

⁴ Cole, “The Drone Memo.”

⁵ Michael Walzer, “Just and Unjust Targeted Killing and Drone Warfare,” *Daedalus* 145, no. 4 (2016): 21.

disagreements of politics. The marriage of liberalism to democracy can be happy, then—provided it aims (like a real one) to muddle through the inevitable difficulties, rather than to ignore them.

When such ideals clash, political theory is partly concerned to offer guidelines for prioritization. Like Rawls's two principles of justice, these criteria would regulate the relationship between liberty and equality, explaining which takes precedence under which conditions.¹ My aspiration here is different. Rather than defend one particular conception of liberal democracy over another, I want to work within the broad family of views, and ask what such an orientation teaches about the ethics of concealment and revelation. No doubt there are limits to this agnosticism. But in this case, the object of commitment is not a fully-articulated formula for combining freedom and equality. It is the principle that the fate of such ideals in practice should be open to public scrutiny.

So far I have argued that duties of transparency can arise from two sources—from the norms of representative relationships, and from the obligation to justify infringements of basic liberties. A third “logic of self-government” completes the account. Inequalities of influence ordinarily need to be disclosed, I argue, along with the facts about social and economic stratification. Such inequalities are not always forbidden. But they raise moral questions that cannot be engaged without a baseline of transparency.

Equal Citizenship and the Problem of Hidden Influence

Though equality is central to democracy, it is a mistake to think of democracy as a demand for strict equality of political influence. In ancient and modern forms, democratic politics have recognized that power must be exercised by a few, even if policy is driven by the deliberation of all, or by speechless expressions of general will. Rather than strict equality, democracy embraces an ideal

¹ John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), 47–93.

of *equal opportunity for political influence*.¹ Offices are formally open to all, and the mantra “one person, one vote” expresses our equal power at the polls.

A consequentialist approach would value transparency because (or insofar as) it promotes such equal opportunity for influence.¹ But on my account, the logic of equality gives rise to a duty of disclosure for different reasons. The point is not necessarily to lower the barriers to political action (though that would generally be a desirable outcome). Rather, the transparency of unequal influence is, on this view, a necessary condition for its toleration. In effect, the logic of equality holds that we should be able to know when equality no longer does. It is in that sense a kind of ethical backstop. When one group has special access to policymakers, or a seat at the negotiating table when international agreements are being forged, these facts should be disclosed.

The point extends not only to political influence, but also to material and social wellbeing. Inequalities may be tolerated, perhaps—but only on condition that we can know of their existence, in order to deliberate about their moral status. Thus the basic facts about the distribution of wealth should be publicly accessible and intelligible. Again the underlying principle of the logic of equality is that citizens should be able to know just how far in practice our institutions fall short of the democratic ideal of a society of equals.

Dark Money and Smoke-Filled Rooms

One implication of the principle is that uneven influence over electoral outcomes ought to be publicly knowable. That is, it should be possible to understand who contributed to a candidate’s victory or defeat, or to the success or failure of a ballot initiative, and by what means.

Epistemological barriers often stand in the way of such knowledge; we cannot typically isolate the

¹ See, e.g., Robert A. Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989), 107.

effects of a persuasive surrogate, or of a mobilizing ground game. Where indicators exist, however, the relevant facts ought not be secreted away.

For example, assessments of moneyed influence should always be possible. Cash is an imperfect proxy for electoral impact. It does not buy votes as reliably as commodities, and the under-financed do occasionally prevail. Still it constitutes a basic advantage that ought to be open to public scrutiny. Whatever the effectiveness of such spending, its existence demands disclosure—not, again, because inequalities of influence must always be rooted out, but because they must at least be open to deliberation.

In the jurisprudence of the U.S. Supreme Court, disclosure of electoral funds is primarily about detecting and deterring corruption, and allowing voters to discount campaign speech accordingly. As the *Citizens United* majority wrote, “transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”² But the logic of equality is broader than this, and less instrumental. It applies to spending not only on advertisements, but on “turnout” machines and voter suppression schemes and so-called “opposition research.” And it generates a duty of disclosure that is not grounded in any promise of downstream benefits, including the possible equalization of influence.

What exactly should be disclosed, on this account? In general, I want to argue, it should be possible to know who spent how much, when, and on what. But there are exceptions. Below a certain threshold, perhaps, privacy is defensible, because small-dollar funders are likely far more vulnerable to threats and intimidation than are their big-money counterparts. This would be a case of the logic of liberty curtailing obligations of transparency arising from the logic of equality.

¹ Thomas Christiano, “An Argument for Democratic Equality,” in *Philosophy and Democracy: An Anthology*, ed. Thomas Christiano (New York: Oxford University Press, 2003), 39–68; Dahl, *Democracy and Its Critics*, 83–131.

² *Citizens United v. Federal Election Commission*, 558 U.S. 310, 371 (2010).

Now, that logic may have more sweeping things to say about campaign finance. It might be taken to impose limits on how much can be spent by a single individual or group in any given election; certainly, the argument for public financing is not hard to conceive. My subject is more limited, however. The argument, again, is that whatever else it requires, the logic of equality requires that unequal spending be disclosed. It will not tolerate dark money—even if, as many commentators have plausibly argued, dispelling the darkness would do little in itself to root out the disparities of influence.¹

A similar analysis applies to lobbying. At a very low level—that of individual petitioners to Congress, for example—the privacy of such efforts to shape the course of public policy is defensible. Above such a modest threshold, however, a degree of transparency is mandatory. Paid advocacy should be publicly knowable, if it aims to influence policymakers: the logic of equality demands such openness to permit deliberation about the real extent of inequality. Again I agree that as a solution to the inequality of lobbying power, disclosure is likely to be a failure. But that is not its purpose, on my account. Its much more modest role is to subject such inequality to public deliberation.

Earlier I argued that in a variety of policymaking settings, the logic of representation permits a degree of confidentiality, including confidential deliberation. There may even be legitimate reasons for regulators to communicate quietly with regulated entities. But the fact of such communication, and the devotion of resources by these industries to shape outcomes, cannot legitimately remain secret. The problem with the proverbial smoke-filled room is not the sheer fact of private conversation. It is, rather, that anonymous agents (lobbyists) secretly peddle influence on behalf of unknown principals (industries).

¹ See, e.g., Dennis F. Thompson, *Just Elections: Creating a Fair Electoral Process in the United States* (Chicago: University of Chicago Press, 2002), 110–12.

Capital, Local and Global

Democratic equality is in part a matter of formal political influence. Its mantra is “one person, one vote.” It holds offices open to all. At the same time, its promise of equal citizenship sweeps beyond this formal sphere. Democratic equality envisions a society in which every member has a claim to basic social recognition, or (roughly) what Rawls calls “the social bases of self-respect.”¹ Every member has a claim to have her dignity reflected in the eyes of others. The obstacles to such recognition are everywhere: chauvinism in all its forms; the dull uniformity of consumer culture, which makes no room for the variety of human aspiration; and so on. But again one obstacle is especially salient and measurable, and that is economic inequality.

I draw no conclusions here about the extent to which the logic of equality limits disparities of wealth. That kind of argument would take us too far afield from the purposes of this project. My point is narrower: that the ideal of democratic equality makes economic inequality morally salient, and requires that the facts about it be knowable, so that reasoned deliberation becomes possible.

I want to go further and suggest that this logic, like the logic of liberty, stretches beyond borders. I have been talking about an ideal of equal citizenship, but this language is too restrictive, if “citizen” is taken in the literal, legal sense. The human equality to which it appeals runs deeper, and does not stop at national borders the way sovereignty does (at least under present historical conditions). This means that the obligations of openness to which wealth gives rise are owed not only to co-nationals, but to the broader global community.

Here too there are obvious privacy and security implications, and I am far from proposing that all interests in property be linked to publicly identifiable owners. Above a certain threshold,

¹ John Rawls, *A Theory of Justice*, 54, 478.

however, “there should be clarity about who owns what assets around the world.”¹ But how much clarity, and to whom? The logic of equality is satisfied, in my view, if wealth is reported to competent national and international authorities, and if these authorities make partially anonymized data available to the global public.² For scholars like Thomas Piketty, such transparency can help put an end to widespread tax evasion—the sort of deliberate, organized shirking laid bare by the Panama Papers leak of 2015.³ For theorists like Gillian Brock, it can be a positive element of the demands of global justice.¹ On my account, it is merely a measure to facilitate moral deliberation about the extent of global inequality.

A Qualified Case for Transparency

Representation, liberty, equality—these three touchstones of liberal democracy form the basis of my account of transparency. Each defines a branch of what I have called the logic of self-government. Each gives rise to duties of disclosure and explanation. And each points toward transparency’s limits.

The trio of principles is familiar, but it has been strangely neglected in theorizing about transparency. Indeed, by adopting this liberal democratic perspective I have rejected the two main alternatives on offer. The first of these imagines democracy (at least implicitly) as the rule of public opinion. It evaluates office-holders by a uniform standard of accountability—popular responsiveness—and it suggests that office holders should be maximally transparent to facilitate such responsiveness, and to enable watchdogs to assess just how closely officials cleave to popular

¹ Thomas Piketty, *Capital in the Twenty-First Century*, trans. Arthur Goldhammer (Cambridge, MA: Harvard University Press, 2014), 518.

² Gabriel Zucman advances a similar proposal in *The Hidden Wealth of Nations: The Scourge of Tax Havens* (Chicago: University of Chicago Press, 2015).

³ Piketty, *Capital in the Twenty-First Century*, 518.

will. As I have argued, this vision exerts a superficial attraction, particularly in contexts of corruption and distrust. But it crumbles under scrutiny. Its picture of democracy is crudely reductive, transforming healthy respect for the people into something perverse, and failing to recognize the appropriate diversity of representative roles.

In addition, my account rejects a purely consequentialist path to defending transparency. This familiar approach is not necessarily democratic; instead it takes its inspiration from the economic and technocratic sources discussed in the last chapter. And it harkens back to the old assumption linking Bentham to Bryce to Wilson to Brandeis (and beyond)—the idea that publicity is a purifying light, a deterrent to malfeasance. There is nothing in the logic of consequentialism that necessitates a maximizing take on transparency, but for years it was common to frame the calculus of expected outcomes that way. And although more recent contributions in this vein recognize that more transparency is not always better, still the orientation rests the case for openness entirely on results—on the promise of smarter government, or reduced corruption, or greater social utility.²

My account differs in principle, though it agrees that transparency needs some explicit normative foundation. To count it among the “core values” of democracy or simply to stipulate that transparency is a human right begs the question—and has the perverse effect of suggesting that something nefarious is happening whenever the fullest possible exposure is not guaranteed.³ In this chapter, I have been arguing that obligations of transparency arise from the logics of representation, liberty, and equality. I am eager to emphasize, however, that the resulting case for transparency is qualified: it does not always require full disclosure, and it rejects the call for maximum transparency

¹ Gillian Brock, *Global Justice: A Cosmopolitan Account* (New York: Oxford University Press, 2009), 125–30.

² See, e.g., Sunstein, “Output Transparency vs. Input Transparency.”

³ Adrian Vermeule uses the language of “core values” at *Mechanisms of Democracy*, 4, but only to convey the idea that different theories of democracy overlap in supporting transparency; he is clear that it requires some normative foundation. The same goes for Patrick Birkinshaw, who argues that a certain kind of transparency should be considered

across the board. At the same time, my account is sensitive to the limits of conventional disclosure practices. It helps to explain why, where they do apply, obligations of transparency are more demanding than has typically been supposed.

The Best Disinfectant?

“Publicity is justly commended as a remedy for social and industrial diseases,” wrote Louis Brandeis.¹ It is said to be “the best of disinfectants.” Although the essay in which these comments appear was not, in fact, about government openness, Brandeis’s motto has currency precisely as a thought about transparency in the public sector. The idea is that it can stop corruption, and promote reform.

As I highlighted in the Introduction, criticism of that assumption has been picking up in recent years. And the criticism is not altogether unpersuasive. Indeed it is not difficult to see why transparency sometimes fails. As critics like Onora O’Neill and Mark Fenster point out, the whole idea that disclosure can produce, *ipso facto*, shifts in understanding and changes in behavior, is wishful thinking. Bentham’s notion of the Public Opinion Tribunal guarding against “misrule” could assume a reading public, of which at least some members would be monitoring closely at any given time, and others’ opinions “borrowed” from those few.² But that model of the public sphere—to the extent we can even speak of a single, coherent public sphere—does not describe the contemporary reality. We are all too familiar with the difficulties, from inattention to “mass public indifference” to

a fundamental right. See “Transparency as a Human Right,” in *Transparency: The Key to Better Governance?*, ed. Christopher Hood and David Heald (New York: Oxford University Press, 2006), 47–58.

¹ Louis D. Brandeis, *Other People’s Money, and How the Bankers Use It* (New York: Stokes, 1914), 92.

² Bentham, *Political Tactics*, 35–36.

the very loss of objectivity in our culture of political conversation.¹ (Some of these problems I consider again in Chapters 4 and 5).

There is a danger, however, that in assuming consequentialist premises to criticize transparency, we will lose sight of its real basis: the logic of self-government. My dissertation charts a different path, looking beyond promises about transparency's purifying effects. Representation, liberty, and equality overlap to make openness obligatory—but not because transparency necessarily improves the quality of representation, or prevents incursions against liberty and equality. (Often it cannot). The most it can do is to make these things knowable—and that is enough. It is enough to subject them to public deliberation, and to allow demands for justification to be pursued. As Amy Gutmann and Dennis Thompson argue, “the main contribution of publicity is not to make politics public-spirited but simply to make it public so that citizens can decide together what kind of politics they want.”²

My account shares significant ground with Gutmann and Thompson's deliberative theory. Both are non-consequentialist. Both adopt democratic standpoints that go beyond the idea of rule of public opinion. Both adopt visions of democracy in which representative accountability and practices of public justification play a central role. However, their argument is built around the central pillar of moral deliberation about *public policy*.³ And it focuses on the principle of publicity—the public giving of reasons, and public sharing of the information necessary to assess those reasons. On their account, the presumptive rule (which can be rebutted in a range of cases) “requires that government adopt only those policies for which officials and citizens give public justifications.”⁴

¹ Gusterson uses this phrase to describe popular reaction to the U.S. government's use of drones to conduct targeted killing operations overseas. *Drone*, 141.

² Gutmann and Thompson, *Democracy and Disagreement*, 127.

³ *Ibid.*, 41–43, 100–1.

⁴ *Ibid.*, 101.

My own argument has swept in action by governments and also private actors. It has reached beyond borders. And it has looked beyond policy to implementation, administration, and other such actions. Yet it also takes seriously the idea of justification. It treats transparency not as a source of benefits but as an obligation arising from representative relationships, and from the need to justify infringements of liberty and equality. For all that, it is worth emphasizing that consequences remain relevant, on my account. They help to explain how this duty of transparency is best discharged in practice.¹ And they can offer pragmatic reasons for openness in particular contexts. But they do not explain the core liberal democratic reasons why the duty of transparency binds in the first place.

The Duty to Disclose

What does the duty of transparency require? Although I have adopted this ubiquitous idiom rather than introducing an alternative of my own, I do not mean to say that the relevant obligations demand literal transparency—measures to render the action in question completely visible. Perhaps there are circumstances in which it makes sense to broadcast the proceedings of public bodies. As a rule, however, transparency is not a matter of allowing citizens to become political spectators—at least not as far as the logic of self-government is concerned.

What obligations of transparency require, in the first place, is disclosure. The relevant facts—how a representative voted, in what conditions a prisoner is confined, for what purpose a lobbyist met with a given regulatory agency—must be made publicly knowable. The methods of disclosure will vary. In some contexts, publication online or in a forum like the *Federal Register* will be

¹ “[I]nstitutional design is perfectly sensible, and indeed unavoidable, conditional on adopting some high-level theory or other. Democratic theorists just cannot move directly from some abstract principle—say, equal concern and respect—to concrete arrangements on the ground—say, a simple majority voting rule. Empirical questions and tricky problems of design always and necessarily intervene between the high-level principles and the operating-level outcomes.” Vermeule, *Mechanisms of Democracy*, 15–16.

best. In others, it may be appropriate for the responsible agent to hold a press conference, or to welcome public visitors, or, yes, even to tweet.

In the world of civic technology, there has been great emphasis on open data—indeed, even a conflation of the idea of open government or transparency with open data.¹ The latter typically involves the demand for proactive publication by government agencies of raw, searchable data, to enable ready analysis by the world at large.² In a wide range of cases, it is hard to object to this request. But whether this is appropriate in any given situation is rightly governed by pragmatic judgments based upon the likely consequences.

The general point is that a representative’s relevant conduct, or the circumstances of an imposition on basic liberty, or of an exertion of unequal influence, must be made public. To posit such a duty of disclosure requires some immediate qualification, however. As I argued above, that duty is not all-encompassing. Not every action a representative takes, nor every word she utters, need be recorded and published. Sometimes countervailing concerns like privacy will make full disclosure undesirable. Indeed, the logic of self-government actually counsels secrecy—not transparency—in a range of important contexts. That will be the subject of my next chapter. First, though, I want to explain why disclosure is typically only a starting point on my account.

Beyond Disclosure: Visibility, Intelligibility, Knowledge

Duties of transparency are duties to make representative action, or facts about the infringement of liberty or equality, publicly knowable. They are duties to let those facts be known and understood sufficiently for informed moral evaluation.

¹ Harlan Yu and David G. Robinson, “The New Ambiguity of ‘Open Government,’” *UCLA Law Review Discourse* 59 (2012): 178–208.

² Roger Taylor and Tim Kelsey, *Transparency and the Open Society: Practical Lessons for Effective Policy* (Chicago: Policy Press, 2016), 4.

They are not, then, duties of disclosure only. To be sure, a measure of disclosure is typically necessary to make matters knowable. Notice, however, that selective disclosure can be used to obscure or deceive. In the summer of 2014, for example, police in Ferguson, Missouri released a video of Michael Brown stealing cigars and shoving a convenience store clerk. The (false) implication was that the officer who later shot Brown dead had been pursuing him as a potentially dangerous suspect in a robbery. (He was not.)

A similar point goes for massive, indiscriminate disclosure. When government agencies respond to FOIA requests with truckloads of paper (and correspondingly bloated bills for copying), the effect is to make it more difficult for the recipient to understand whatever she is trying to glean from such documentation. Indeed the data dump is a time-honored tactic of obfuscation.

If disclosure is insufficient, so too is visibility. Again the duty of transparency arises on my account because actions that are morally salient (from a liberal democratic point of view) must be open to moral evaluation. Visibility may sometimes aid in that evaluation, particularly where we have become numb or indifferent or prefer not to acknowledge what is being done in our name. Why a public that tolerates the death penalty should not at least be confronted with its ugly reality I cannot conceive. In the main, though, visibility is neither necessary nor sufficient to make political action knowable. If an agency broadcasts video of its meetings without explaining its regulatory authority, or procedural norms, or the scope of the decisions being deliberated, onlookers will be hard pressed to make sense of what is happening. That comprehension could easily arise from clear explanation and record-keeping, however, even if the proceedings are not themselves open to spectators.

Instead of visibility or the sheer fact of disclosure, what the logic of self-government demands is that the relevant facts should be rendered intelligible. The duty of transparency is not a duty of nakedness, then, but a duty of explanation. It is a duty to make public and comprehensible whatever is relevant to a moral evaluation of the action in question. There is some irreducible

complexity in the work of government. But representatives owe it to the public to explain their actions as clearly as they can, and to make available the information that would be necessary for a person to reach a mature understanding of it.

On the other hand, the responsible actors have no claim to monopolize this activity of explanation. As I argue in Chapter 5, the power to interpret facts and evidence, and to argue about their moral significance, ought to be more widely dispersed. But it remains that when a representative casts a vote or makes a binding decision, she owes the public some explanation of its meaning and significance. When a person's basic liberties are infringed, the responsible agent owes an explanation of the relevant circumstances. When inequalities prevail, their scope and sources should be clarified.

Here again it is worth noting the common ground I share with the deliberative democratic case for publicity. On my account, the logic of self-government generates obligations of public justification, and these are the source of the duties of transparency I have been discussing. Gutmann and Thompson therefore seem to me to get things right with their principle that “[t]he reasons that officials and citizens give to justify political actions, and the information necessary to assess those reasons, should be public.”¹ I want to interpret “political actions” broadly, to embrace not only conduct in the realm of formal politics but also informal actions (including by nominally private actors) that bear on liberty and equality. Yet their focus on enabling the moral reasons for or against such conduct to be assessed is entirely appropriate. Indeed it seems to me to be what is missing from the major accounts of transparency now on offer.

My addition in these pages has been to say that mere disclosure of information is not enough. To discharge the duty of transparency, responsible agents and institutions need to engage in more meaningful practices of communication. They need not only to set their work (or the artifacts

¹ Gutmann and Thompson, *Democracy and Disagreement*, 95.

of their work) before the eyes of the people, but to speak about it, to explain, and ultimately to be answerable for it. In short, the obligations of democratic transparency go beyond disclosure.

**SECRECY AND TRANSPARENCY:
FROM FALSE CHOICE TO DEMOCRATIC DYAD**

IN his study of democracy and distrust, Pierre Rosanvallon highlights the rhetorical power of contemporary transparency talk. Openness strikes us as something wholesome, a sign of political health. It bears the imprimatur of the upright. Indeed transparency has become “the new democratic ideal,” Rosanvallon writes. It claims the status of “paramount virtue” in modern politics.¹ And despite some recent criticism, the language of transparency still leverages what Jacqueline Best calls “a powerful array of moral and political associations.” As ever, its pretension to “moral superiority” makes arguing against transparency seem awkward, even perverse.² Who could be against it?

There is a corollary to this commendation of transparency. As our political culture lauds openness, so it stigmatizes secrecy. This is, in one sense, nothing new. Aspersions against what is hidden or covert date at least to the Enlightenment, and the association of darkness with evil is as old the New Testament (and no doubt older still).³ But with the rise of Bentham’s publicity paradigm, described in Chapter 1, those aspersion were translated to the sphere of politics. “Suspicion always attaches to mystery,” Bentham observes. “It thinks it sees a crime where it

¹ Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust*, trans. Arthur Goldhammer (New York: Cambridge University Press, 2008), 258.

² Jacqueline Best, *The Limits of Transparency: Ambiguity and the History of International Finance* (Ithaca, NY: Cornell University Press, 2005), 12, 142.

³ “And this is the judgment,” says the Gospel of St. John, “that the light has come into the world, and men loved darkness rather than light, because their deeds were evil. For every one who does evil hates the light, and does not come to the light, lest his deeds should be exposed. But he who does what is true comes to the light, that it may be clearly seen that his deeds have been wrought in God.” John 3: 19–21 RSV. Of course, the Gospels also record Jesus demanding secrecy of the sick he restores and the sinners he forgives. And his counsel to “go into your room and shut the door and pray to your Father who is in secret” suggests that if all things are transparent to God, nevertheless the practice of secrecy here, amidst constant temptations to vanity, can serve divine purposes. Matt. 6: 6 RSV.

beholds an affectation of secrecy; and it is rarely deceived.”¹ Such dread has deepened in the age of transparency. Still it exerts a powerful influence, as recent electoral contests have illustrated.

In this chapter, I contend that the demonization of secrecy in politics is frequently misplaced. Concealment and confidentiality are not anathema to self-government: they are essential to it. To make this case is not, however, to turn away from the argument of the last chapter—that duties of transparency arise from the deep logic of liberal democracy. It is only to affirm that those duties have limits. If we have sometimes been confronted with a stark choice between open government and the rule of “little coteries, ... of machines working behind closed doors,” in fact the alternatives we face are more interesting.² Secrecy and transparency look like opposites, but they can be mutually supportive in the ecology of politics writ large. They can be combined in lockstep with the logic of liberal democracy, I will argue.

If this is correct, then we recoil from secrecy too quickly, and our attitude of wariness needs narrowing. Perhaps the best heuristic would look to the identity of the secret-keeper. The power of concealment belongs rightly to the private individual, we might suppose, but is perilous in the hands of the ruling few. This has its grain of truth. Yet again it oversimplifies, because government secrecy, though highly liable to abuse, also has roots in liberal democracy’s normative logic—or so I will argue in the pages to come. Recognizing this invites reconsideration, not just of our “relatively unexamined democratic commitment” to transparency, but of the democratic opprobrium in which we hold all that happens beyond public view.³

¹ Jeremy Bentham, *Political Tactics*, ed. Michael James, Cyprian Blamires, and Catherine Pease-Watkin (Oxford: Clarendon Press, 1999), 30.

² Woodrow Wilson, *The New Freedom: A Call for the Emancipation of the Generous Energies of the People* (New York: Doubleday, Page & Co., 1913), 112.

³ Jane Mansbridge, “What Is Political Science For?” *Perspectives on Politics* 12, no. 1 (2014): 8.

Why Not Maximize Openness? A Qualified Case for Secrecy

It is not difficult to conceive why secrecy might be politically expedient. It can facilitate advice-giving, quiet dissension, quicken government process. It promises more efficiency, and buffers decision-makers from the incessant demand for explanation. This sort of case for covert methods is obvious, and boasts a lengthy pedigree. Whether it can actually justify secrecy is another question, however. Let each of these points count as a reason in its favor, and still proceeding *sub rosa* may run afoul of the ethics of democracy. Duties of transparency may apply even when they slow things down, or tend to unleash disagreement.

There is, nonetheless, a more principled case for secrecy to be made. Concealment and confidentiality find support not only as sources of utility but as counsels of the logic of self-government. In other words, the very notions of representation, liberty, and equality discussed in the previous chapter carve out a space for secrecy in democratic life. They do so in a variety of ways. They make secrecy permissible, or conditionally preferable, or simply obligatory. In each case, they help to explain why concealment need not be *ad hoc*, a scattered exception to the rule of transparency. In at least three crucial domains—citizens' roles, deliberation, and law enforcement—it can sometimes give expression to liberal democracy's own surprising normative logic.

Citizens' Roles: On Participation and Dissent

First, liberal democracy makes space for secret-keeping in the domain of civil participation. Most relevant here is the logic of liberty. The infringement of basic liberties, I argued in the last chapter, must ordinarily be made public, to enable deliberation about its moral warrant. Ironically, however, disclosure itself may be a means of infringing liberty. Not only criminal prosecution curtails the freedom of speech—mandatory identification of the speaker does, too. Not only a ban of “subversive” organizations undermines the freedom of association—forced publication of

member rolls does, too. The logic of liberty is not therefore categorically opposed to secrecy. In the civil sphere, it generates a permission for anonymous speech, and for the privacy of our collective affiliations.

These are permissions, not moral duties. Speaking openly and disclosing one's associations are equally protected by the logic of liberty. And these are permissions in principle, not absolute rights to secrecy. In each case, countervailing grounds for disclosure may override the license to conceal. For example, public authorities rightly pierce the veil when anonymous speech threatens physical harm. Likewise, the cloak of secrecy should be lifted when there is evidence of a directed campaign of misinformation, or when online avatars draw government paychecks for “public opinion guidance,” and other such projects of propaganda.¹ Still, the basic point bears repeating: fundamental social freedoms like expression and association sometimes require the ability to proceed in secret.

In formal channels of participation, too, non-disclosure may find its warrant in the logic of liberty. Consider jury service. In principle, there are strong grounds for making jurors' identities a matter of public information. On one reading of the logic of representation, jurors act on behalf of the community at large. They are bound to apply the law fairly and impartially, and only on proof to the relevant standard. There is a straightforward sense in which they owe the public some account of their findings and verdicts. Yet the logic of liberty places a limit on this kind of thought. Jurors' freedom from retaliation and harassment, and ultimately their freedom to judge in conscience—to judge on the basis of the law and evidence—creates a basis for the shield of secrecy. Though it might be a matter of public record who shirks, failing to serve when called, matching the names of empaneled jurors with particular cases and verdicts is another matter. Arguably, openness of that

¹ For a remarkable defense of this practice, see the remarks published by an official newspaper of the Chinese Communist Party, translated in Gary King, Jennifer Pan, and Margaret E. Roberts, “How the Chinese Government

kind would constrain jurors' decision-making, limiting their freedom to participate conscientiously—to participate, that is, by bringing their own good sense to bear on the administration of justice. This argument turns, however, on how jurors are likely to respond to the expectation of their votes' (eventual) disclosure. In that sense it involves reasoning about consequences, even if it is not a purely consequentialist logic that determines the question.

Jury anonymity finds support in the logic of representation, too. If in one sense the office of juror is a public trust, and it would seem fitting to make jurors accountable for applying the law without prejudice, there is another, I think weightier, argument that roots secrecy in the nature of the office. Jurors stand for the community; in a descriptive sense they (or the pool from which they are empaneled) should be representative. But the office requires judgment in accordance with the law and evidence, seen in the light of the jury's own best sense. Transparency would suggest a different basis of decision. It would transform the character of jury service, making jurors responsible not to the court and the law and the evidence, but to the public at large.

A similar analysis applies to voting. Here, John Stuart Mill put the case for openness best. Suffrage, he insisted, is a public trust; it is “strictly a matter of duty.” Every elector “is bound to [vote] according to his best and most conscientious opinion of the public good,” and to be prepared to ignore the inclination of “his own interest, pleasure, or caprice.” It follows that as voters we are obliged, at least presumptively, to make our selections in the light of day. For once our moral duty to act in the common interest is admitted,

it is at least a *prima facie* consequence that the duty of voting, like any other public duty, should be performed under the eye and criticism of the public; every one of whom has not only an interest in its performance, but a good title to consider himself wronged if it is performed otherwise than honestly and carefully.

Fabricates Social Media Posts for Strategic Distraction, not Engaged Argument,” *American Political Science Review* (forthcoming), Supplementary Appendix.

To be sure, Mill acknowledged that secrecy is sometimes “the smaller evil.” Where a large portion of the electorate would find itself bound by open voting to defer to the wishes of powerful masters—landlords or bosses, say—whose interests stand more fully opposed to the common good than their own unrestrained inclinations would be, the ballot is warranted. But Mill denied that such a circumstance obtained in England, at least after the 1850s. At the time of his writing, and arguably in our own time too, irresponsible voting was driven less by external pressures than by “the sinister interests and discreditable feelings which belong to [the voter] himself, either individually or as a member of a class.”¹

Implicit in Mill’s account is an assumption that the influence of publicity, and the dread of shame, will have a civilizing effect on vote choice. Here it is hard not to balk, with Annabelle Lever, at this assumption’s implicit “mistrust of ordinary voters, and confidence in their self-appointed tutors.”² Moreover, one has to wonder who those “tutors” might be in a society lacking any group of elites so widely respected as to command deference in matters of public moment. In our own circumstances, publicity seems less likely to expand the influence of the ethically serious than to empower extremists and bullies, and to encourage that all-too-human tendency to conform to local (familial, social, or cultural) expectations.³ Even if Mill is correct that outright coercion is likely to be rare, the logic of liberty still suggests a basis for secrecy.

The logic of equality comes into play here, too. In the last chapter I argued that a democratic commitment to equality requires disclosing unequal influence. But there are other situations in which secrecy of one sort or another can help to secure equality. The classic example comes not from politics but the arts. Orchestras began hiring many more women musicians in the 1970s and

¹ John Stuart Mill, *Considerations on Representative Government*, 2nd ed. (London: Parker, Son, and Bourn, 1861), 199–202.

² Annabelle Lever, “Mill and the Secret Ballot: Beyond Coercion and Corruption,” *Utilitas* 19, no. 3 (2007): 365.

³ See Bernard Manin, “Why Open Voting in General Elections is Undesirable,” in *Secrecy and Publicity in Votes and Debates*, ed. Jon Elster (New York: Cambridge University Press, 2015), 209–14.

80s, once their audition spaces were screened from view and carpeted to mask the sound of heels, so that selection committees began simply *listening* to the quality of the music.¹ In the context of voting, too, I suspect that confidentiality can help to make equality real. If we take seriously the ideal of “one person, one vote,” then the prospect of scaring away the trepidatious by the promise of publication ought to worry us. Likewise we should be worried about the resultant loss of independence and conscientious judgment, which the secret ballot at least in principle protects.

This is not, however, to argue that voluntary ballot disclosure should be prohibited. The logic of liberty protects the freedom to announce one’s vote as surely as it does the freedom to maintain its confidentiality. In a world in which disclosure were actually prohibited (and not merely permitted), Eric Beerbohm’s case for ballot publicity would be especially hard to resist. According to Beerbohm, the victims of unjust policies ought to be able engage the responsible individuals—to engage those co-citizens who played some partially contributory role, and who are in that sense “complicit”—in what he calls “moral address.” With the secret ballot, Beerbohm objects, “victims of unjust policies have no individual toward whom to direct their moral complaint.”¹ But in practice, it seems to me, some non-trivial number of voters (and not only a few diehard activists or volunteers) will generally disclose and defend their votes publicly, which leaves ample opportunity for the kind of moral remonstrance that Beerbohm has in mind. Although his case for the importance of such public ethical engagement is powerful and persuasive, the argument for open voting seems to me to overstate the practical problem, and to underestimate the liberty and equality concerns discussed in the preceding paragraphs.

The final form of participation I want to discuss here is adversarial, and looks beyond the formal channels of electoral process. I am talking about protest and dissent. This constitutes another

¹ Claudia Goldin and Cecilia Rouse, “Orchestrating Impartiality: The Impact of ‘Blind’ Auditions on Female Musicians,” *American Economic Review* 90, no. 4 (2000): 715–41.

setting in which secrecy finds a basis in the logic of self-government. The freedom to assemble, to object, and indeed to obstruct are essential. Often the trick in protest is to generate publicity, to garner attention, as Martin Luther King, Jr., did so masterfully in the Montgomery bus boycott.² But there is also a role for secrecy, for the ability to maintain an element of surprise, and to forestall potential retaliation. The campaign to desegregate buses in the 1950s and 60s, for instance, depended upon quiet planning—not only to limit the threat of harm from integration opponents, but to allow the protests to have the public persuasive effect that they did.³ Indeed throughout the civil rights movement, the ability to craft a winning narrative depended upon the protestors' ability to surprise authorities who, in the heat of the moment, often overreacted, and did more than perhaps anyone else to convert public sentiment toward the cause of civic equality for Black Americans.

Admittedly, philosophers of civil disobedience have often emphasized that law-breakers owe a duty of publicity to their fellow citizens. When we violate the law in conscience, they argue, we incur an obligation to account for our decisions in the light of day.⁴ Without denying the possibility of such an obligation, however, I worry that this demand might be pressed too far. Although some form of retrospective justification seems appropriate, I see no reason why that obligation may not be discharged collectively and retrospectively, for instance by the leaders directing the relevant protest campaigns. In this way, the secrecy of the participants' planning, and the anonymity of the individual protestors (who may be highly vulnerable to retaliation) becomes permissible, yet without denying a role for public justification.⁵ Again the governing logic here is the

¹ Eric Beerbohm, *In Our Name: The Ethics of Democracy* (Princeton: Princeton University Press, 2012), 258.

² See, e.g., Taylor Branch, *Parting the Waters: America in the King Years, 1954–63* (New York: Simon and Schuster, 1988), 143–205.

³ Raymond Arsenault, *Freedom Riders: 1961 and the Struggle for Racial Justice* (New York: Oxford University Press, 2006), 35.

⁴ John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), 321–22.

⁵ Kimberley Brownlee, *Conscience and Conviction: The Case for Civil Disobedience* (New York: Oxford University Press, 2012), 23.

logic of liberty. The worry is that by requiring the full disclosure that theories of civil disobedience occasionally seem to imply, we would lose sight of the importance of the freedoms of association and assembly.

Deliberation Behind Closed Doors: Three Conditions

There is a second type of practice in which the logic of self-government supports a case for secrecy—the practice of deliberation. In the last chapter, I argued that judicial deliberation and at least some forms of legislative negotiation are permissibly concealed—or rather, that no plausible conception of these representative roles would prohibit such secrecy. The argument can be expanded to other forms of secret talk.

In parliamentary systems, for example, discussions to form coalition governments are legitimately concealed. Again the logic of representation builds the case. I would interpret the relevant party leaders' mandates in the following way: that they should strive to form a governing majority by reaching some decent compromise on matters of disagreement, without however violating their most deeply held ethical or political commitments. Yet even the prospect of such compromise plausibly requires some opportunity for private conversation.¹ And provided the final terms of any agreement are promptly made public, it is hard to credit the complaint with such negotiation.

Indeed we might suppose that anyone insisting on total transparency in a process like this probably rejects my interpretation of her representative role. She may not, in fact, conceive of her mandate as a mandate to reach compromise—not in the slightest. Here the example of Italy's "Five Star Movement" comes to mind. When in 2013, Beppe Grillo and the other leaders of that surging

¹ Mark Warren and Jane Mansbridge present an argument along these lines in "Deliberative Negotiation," in *Negotiating Agreement in Politics: Report of the Task Force on Negotiating Agreement in Politics*, ed. Jane Mansbridge and Cathie Jo Martin (Washington, D.C.: APSA, 2013), 106–12.

party insisted on transparency in talks to form a government with the center-left Democratic Party, the nature of the exchanges, and Grillo's live tweeting from the conference room, made it clear that he had no intention of compromising for the good of the country.¹ As one author recounts, the grandstanding behavior of the Movement's leaders amounted to a disdainful door-slamming in the face of the other negotiators.² The group's broader ideology of anti-politics, and its dream of overcoming of the old institutions of representation with some more immanent form of democracy, underscores its embrace of a radical transparency calculated to harden positions, and to block any path to compromise with a corrupt "establishment."³

More prosaically, there is a case to be made for private, internal discussion among government administrators. I have in mind the ordinary, day-to-day talk of civil servants (and agency heads) about policy, or practices, or ongoing performance. This permission might be expressed in a system of communication insulated (at least for a significant interval) from public scrutiny. One commentator makes the case for such a system with his defense of private email. Bureaucratic staffs ought to be able to have discussions "with a presumption of privacy," he argues, including over email. The rationale for such privacy is that transparency destroys "frankness and honesty" in deliberation. "Officials who know their dialogue will be fodder for hot takes and cable news segments will either avoid speaking honestly or else shift their conversations to non-disclosable media." And to the extent that they shift, this evasion is a drag on efficiency. It is a drag that cannot be justified, since "effective government beats transparent government."⁴

¹ Rachel Donadio, "Italy's Talks on New Government Stumble," *New York Times*, March 27, 2013, accessed Jan. 1, 2017, <http://www.nytimes.com/2013/03/28/world/europe/in-italy-talks-on-forming-government-break-down.html>.

² Fabio Bordignon and Luigi Ceccarini, "The Five-Star Movement: A Hybrid Actor in the Net of State Institutions," *Journal of Modern Italian Studies* 20, no. 4 (2015): 459.

³ *Ibid.*, 456.

⁴ Matthew Yglesias, "Against Transparency," *Vox*, Sept. 6, 2016, accessed Jan. 1, 2017, <http://www.vox.com/2016/9/6/12732252/against-transparency>.

Perhaps. I have no particular view about which medium—email, telephone, face-to-face conversation—is the one in which confidentiality ought to be permitted. But as to the basic question whether confidential talk is justified in the first place, it seems to me that warnings about a potential loss of candor are not the weightiest consideration. Frank speech is all well and good, but the more fundamental point is just that the logic of representation generates a permission of private conversation here. The right sort of accountability simply does not require that every bureaucratic utterance become public record.

There are obviously limits on what can be concealed, as my analysis in Chapter 2 already suggested. Here, I want to posit three general conditions that must be met if deliberation behind closed doors is to remain morally legitimate. *First*, it must ordinarily be public record who has a seat at the proverbial table, and who does not. Under the logic of equality, this kind of access involves disproportionate opportunity for political influence, which must not remain hidden. Even as the content of such conversation remains confidential, then, there should be prompt public disclosure of who is involved, and under what circumstances.¹ *Second*, the logic of representation requires that any final decisions (or completed proposals) emerging from such talk, including new regulations, should be promptly published. And *third*, where major substantive proposals are concerned, there must be some opportunity for public deliberation before final decisions are taken. Here the details might depend on the particular, context-specific logic of representation that applies. But the general idea is that if a legislative bill is introduced, or what is called a “substantive” regulation (affecting citizens’ legal rights and obligations) under the Administrative Procedure Act, then some minimum period for public deliberation must be allowed prior to rejection or adoption.

¹ For a similar argument, see Simone Chambers, “Behind Closed Doors: Publicity, Secrecy, and the Quality of Deliberation,” *Journal of Political Philosophy* 12, no. 4 (2004): 389–410.

Consider whether these conditions were met in the case of the confidential “Trans-Pacific Partnership” trade negotiations during the Obama Administration. Arguably the most serious problem with the execution of these multilateral talks was the inequality of influence. Draft texts were reportedly shared with corporate behemoths but not with representatives of labor interests or with the wider public. As one commentator explains, the process “combine[d] a general shield from the public with privileged access for industry advisers.”¹ This imbalance of transparency created a form of hidden influence that was repugnant to the logic of equality. And to the extent that the relevant officials failed to disclose in public the fact that they were sharing draft agreements with private industry, my first condition was not met.

It has also been argued that there was a failure to ensure adequate time for public deliberation after the multilateral agreement was finally struck. So-called “fast track authority” required a simple up or down vote on the agreement in Congress, and placed an upper limit on the interval for public consideration: a vote would have to be taken within ninety days, and no more than twenty hours of floor debate would be permitted in either chamber. Although not ideal, perhaps, these intervals likely sufficed for public deliberation under the logic of representation. Arguably, my third condition was met here.

But Congress’s advance commitment to vote the deal up or down, without entertaining amendments, seems troubling. In effect, legislators precommitted themselves to take or leave a major international agreement *while its substance was still hidden from public view*. If the costs of rejection were low and the prospects of renegotiation strong, this might not have been objectionable; for then legislators could have easily sent negotiators back to the drawing board, with a directive (for example) to add provisions that would prevent dislocation of workers. But the costs of rejection

¹ Margot E. Kaminski, “Don’t Keep the Trans-Pacific Partnership Talks Secret,” *New York Times*, April 14, 2015, accessed Jan. 1, 2017, <http://www.nytimes.com/2015/04/14/opinion/dont-keep-trade-talks-secret.html>.

were not low, and all of the players knew that there would be only one chance to get the deal done. Given that, the most serious defect in the TPP process may not have been the hidden influence of industry (which to some extent leaked out anyway), but the legislature's abdication of its responsibility to consider major policy proposals in full, and its failure to keep its options open at least until the draft text became public.

Law Enforcement, Security, and Foreign Affairs

The last of the three domains I want to discuss is one in which claims of secrecy tend to raise the deepest concerns—and not without reason. The history of state secrecy, of concealment in law enforcement, security services, and foreign affairs, is so often the history of its abuse.¹ Nevertheless it would be foolish to deny the importance of closed methods in these domains. The standard way to defend such secrecy is instrumental: secrecy promotes intelligence, thwarts terrorism, and saves innocent lives, say the spy agencies. While this may not be wrong, I want to pivot away (here, as well) from an open-ended consequentialism. It seems to me that qualified secrecy in these domains is in fact deeply connected to the logic of self-government. Consequences still come into the analysis at times, but the point is that the consequences that matter most have to do with the ideals of self-government.

The logic of liberty is perhaps most germane in this context. It requires a measure of personal security and civil order. Yet the protection of those goods plausibly requires secret tactics in at least some scenarios. Police departments' use of unannounced sobriety checkpoints to stop drunk driving is one familiar example. Or again the surveillance techniques discussed in Chapter 2.

¹ See, e.g., Frederick A. O. Schwartz, Jr., *Democracy in the Dark: The Seduction of Government Secrecy* (New York: The New Press, 2015).

A similar thought applies to the logic of representation. Reasonable interpretations of the roles in question will incorporate some permission for (qualified) secrecy, I want to argue. Indeed, in the case of law enforcement, security, and foreign affairs, the permission should probably stretch beyond the domain of confidential deliberation I carved out from representative transparency's baseline in Chapter 2. A little more concretely, we might think of enforcement tactics and methods, like a police department's use of a confidential informant. Such methods often need to be used iteratively, and so disclosing too much detail about them, even after what I have called "completed performance"—after some arrest is made, or case closed—would do harm to the representative mission.¹

Again this cannot be a blank check. It is not enough to say that because law enforcement deals with "sensitive" issues and "open investigations," therefore everything within its portfolio should remain on "the dark side."² Even in the most extreme circumstances—in warfare—there should be some transparency relevant to moral evaluation, as illustrated by my brief discussion of drones and targeted killing. A similar point applies to foreign affairs more generally: there may be secrecy in diplomatic communications, but public disclosure is essential where the tactics at issue require moral evaluation, such as infringements of basic liberties, or covert attempts to influence electoral outcomes abroad.

Below I go into more detail on how secrecy ought to be limited. For now, I close by underscoring the more general point. Secrecy is not only useful in these domains but is sometimes part and parcel of what it means to faithfully execute the representative role.

¹ For a challenging case, consider the controversy over whether law enforcement should keep secret software security vulnerabilities it discovers (or purchases from hackers). See Ellen Nakashima, "FBI Paid Professional Hackers One-Time Fee to Crack San Bernardino iPhone," *Washington Post*, April 12, 2016, accessed Jan. 1, 2017, https://www.washingtonpost.com/world/national-security/fbi-paid-professional-hackers-one-time-fee-to-crack-san-bernardino-iphone/2016/04/12/5397814a-00de-11e6-9d36-33d198ea26c5_story.html.

² Jane Mayer, *The Dark Side: The Inside Story of How The War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008).

* * *

Why not maximize transparency? My answer has been that the logic of self-government also creates a case for its opposite—secrecy. But the question remains how these two fit together. In the remainder of the chapter, I want to describe how they can be held in a “dyadic” relationship. I will first advance some principles for calibrating secrecy and transparency in accordance with the logic of self-government. And then I will turn from the prescriptive to the (primarily) descriptive, discussing how in fact secrecy can serve transparency, while transparency can help to prevent secrecy’s abuse, and thereby fortify its legitimacy.

A Dyadic Relationship

Not every attempt to synthesize secrecy and transparency will be friendly to self-government. Liberal democracy needs both, I want to argue, but easily founders when they are misapplied. Machiavellian princes, too, will dominate by stealth and staging. Perhaps the worst approach would couple transparency for citizens with secrecy for governments and corporations—concealing, in effect, the unequal exercise of power, while constricting the freedom of individuals to associate and speak out.

My suggestion, nonetheless, is that the right kind of synthesis can unite secrecy and transparency in what might be called a democratic dyad. Here two apparently irreconcilable practices become mutually supportive. They rely upon and reinforce one another. They strengthen liberal democracy. They give expression to its normative logic.

Note that this approach differs from the familiar idea of “balancing” secrecy and transparency, which continues to frame them as opposites to be traded off against one another.¹ On

¹ Gary Bass, Danielle Brian, and Norman Eisen, *Why Critics of Transparency Are Wrong* (Washington, D.C.: Brookings Institution, 2014), 2, accessed Jan. 1, 2017, <https://www.brookings.edu/research/why-critics-of-transparency-are-wrong/>.

my reading, this is unhelpful because it misses both the variety and the complementarity of the two practices. To see why, notice first that concealment and exposure are not so incompatible as they seem. Even respecting a single object—a police report, say—the dimension of time allows them to be combined: confidentiality for a while; transparency after that. (Below I discuss some alternative forms of less-than-full disclosure, which work by varying either the degree of description or the identity of the audience.) Considering the wider set of possible objects of political knowledge, the opportunities for synthesis are even greater: confidentiality for a given conversation, transparency for the decisions to which it gives rise; secrecy for the substance of an elector’s vote, disclosure of the fact that she voted (or did not); and on and on.

Admittedly, to limn a comprehensive pattern for this dyadic relationship is more than I can offer here. It is more, I suspect, than any political theory could offer, so long as it remained alive to the limits of theory—alive, in other words, to the unpredictability of politics, and ready to credit the lessons of history and social science, and the testimony of practice. What my account *can* offer is guidance in the form of general principles. This should begin, however, with a bit of ground-clearing. I want to explain why my account rejects two such principles that stand ready at hand.

Perhaps the most familiar formula for calibrating secrecy and transparency holds that we should minimize the former while maximizing the latter.¹ Indeed this may qualify as the conventional wisdom on the subject. “Democracies die behind closed doors,” according to Judge Damon Keith’s dictum.¹ Yet if that admonition spoke wisdom in the context of post-9/11 secret deportations, in more universal terms it is transparently untrue. As I argued in the preceding pages,

¹ “Official secrecy may be necessary in very specific areas,” writes Jeremy Waldron. “But, as a general rule, transparency is required, and people

are entitled to insist on it. We are not required (or permitted) to subject each

other to this scrutiny, but we are permitted to apply it to our rulers.” *Political Political Theory: Essays on Institutions* (Cambridge, MA: Harvard University Press, 2016), 193–94.

certain forms of concealment are crucial to liberal democracy. Deliberation, voting, dissent—they all warrant systematic non-disclosure, in a wide variety of circumstances. Despite its beguiling music, then, the notion that secrecy is appropriate only in rare or marginal cases has to be rejected, from the perspective of liberal democracy.

A more plausible formula would make transparency the default rule of democratic politics, and secrecy the exception. Amy Gutmann and Dennis Thompson take this approach, for example, in their thoughtful account of the value of publicity within deliberative democratic theory.² Yet even here, it seems to me that a presumption of openness risks understating the legitimate place of political secrecy. Concealment needs public justification, to be sure, but so does transparency in its particular, concrete forms. And again, secrecy is not best conceived as exceptional, in either the epidemiological or the ethical senses of the term: it is common to liberal democracy, and commonly warranted.

Perhaps we would do better to think of a pair of matching presumptions—a presumption of transparency for policy decisions and past government performance; and a presumption of confidentiality for internal, preparatory deliberations. But this too would leave out much of the story. It would say nothing, for example, about what happens beyond the public sector, or with respect to the political action of individuals and associations. And it would deemphasize scenarios in which the logic of self-government calls for the reverse of these (hypothetically) presumptive measures—for the continued concealment of final decisions, or for the quick disclosure of still-pending deliberations. Rather than proposing a presumption one way or the other, then, I want to

¹ *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

² Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Harvard University Press, 1996), 96, 101. See also Warren and Mansbridge, “Deliberative Negotiation,” 108. From a very different ethical perspective, Peter Singer writes that “belief in the benefits of transparency ... does suggest that more information is generally better, and so provides grounds for a presumption against withholding the truth.” “Visible Man: Ethics in a World Without Secrets,” *Harper’s Magazine*, Aug. 2011, 36.

derive from the logic of self-government a few more specific guidelines for tailoring secrecy and transparency.

The Constitution of Secrecy and Transparency

At the outset, it is helpful to remember that the wisdom in snuffing out some but not all political secrets, in embracing openness only to a point, was once widely recognized. The concept of a democratic dyad I elaborate here in terms that are my own, but this approach takes inspiration from a longer tradition that affirmed the compatibility of secrecy and transparency—that framed them, indeed, as essential partners.

This tradition may be best exemplified by the United States Constitution. In our own time, it is true, constitutional activists tend to cast that governing charter as a source of checks upon political secrecy. And they are not wrong to do so. Such portrayals, however, capture only one part of the constitutional terrain. The Constitution limits secrecy, undoubtedly; but it also protects it, implicitly and explicitly, in every branch of federal government. Nor is this a grudging acceptance of hidden conduct of the sort even Bentham allowed, in circumstances in which openness would “favour the projects of an enemy” or “[u]nnecessarily . . . injure innocent persons.”¹ It was a deliberate pairing, an attempt to match secrecy and transparency in furtherance of what the framers called republican government.

As Heidi Kitrosser observes, for example, Article I prescribes a relatively open legislative process, while Article II provides for an executive bound by law and yet empowered to carry out the law behind closed doors. Kitrosser calls this “careful balance” a marriage of “macro-transparency” with “micro-secrecy”—that is, transparency in legislation together with secrecy in its implementation. Together, these two mechanisms help to secure a government of “contained

¹ Bentham, *Political Tactics*, 39.

energy,” a government at once capable and accountable. While secrecy allows the executive to perform effectively, particularly in the domains of national security and foreign affairs, its reliance on the legislature for appropriations, and its liability to be called to account, whether in Congress or in the courts or in the wider sphere of First Amendment debate, combine to keep secrecy in check.¹

To this characterization of inter-branch dynamics, I would add the more basic point that *within* each branch, the Constitution grants significant leeway for confidential action, punctuated by specific demands of communication or disclosure. In Congress, for instance, each chamber enjoys the implicit discretion to deliberate privately. This discretion is tempered, however, by the obligation to publish “from time to time” a “Journal of its Proceedings,” and (at the request of at least one fifth of those attending) an individualized listing of “the Yeas and Nays of the Members . . . on any question.” Yet even this modest publication requirement incorporates an exception for “such Parts [of the Journal] as may in their Judgment require Secrecy.”² And aside from the stipulation that it include “the Objections” transmitted by the president with his veto, and “the Names of the Persons voting for and against” any veto override, the journals’ contents go unspecified.³ In practice, they have always amounted to relatively spare records of formal action, of motions introduced and voted upon, rather than transcripts or anything more complete.⁴

In the executive branch, too, the Constitution allows regular activity beyond public view. Article II begins with that remarkably open-ended grant of authority: “The executive Power shall be vested in a President of the United States of America.” Explicitly, this includes the powers to

¹ Heidi Kitrosser, *Reclaiming Accountability: Transparency, Executive Power, and the U.S. Constitution* (Chicago: University of Chicago Press, 2015), 42, 45.

² U.S. Const., art. I, § 5, cl. 3.

³ U.S. Const., art. I, § 7, cl. 2.

⁴ Though recognizing this limitation, no less an authority than Joseph Story could maintain that the purpose of the Journals “is to ensure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents.” *Commentaries on the Constitution of the United States*, 3rd ed. (Boston: Little, Brown & Co., 1858), vol. 1, 580.

enforce duly-enacted legislation, to command the armed forces, to appoint high officials, and to grant pardons and reprieves. Implicitly, it embraces a great deal more besides. Article II gives indication that the president will direct (and, subject to congressional appropriations, perhaps even define) a whole panoply of “executive Departments.” And it requires each new president to pledge to act “to the best of my Ability ... [to] preserve, protect and defend the Constitution of the United States.”¹

In Federalist 70, Alexander Hamilton promoted this governing architecture by stressing that it would conduce to “[d]ecision, activity, secrecy, and dispatch.”² And while it has done exactly that, there are also limits to the proper extent of executive sequestration. Article II will not brook too much presidential silence. It provides, for example, that the president “shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.”³ (On its face, this language envisions far more than the annual pageantry of a presidential address on the floor of the House.)⁴ It requires that vetoes of legislation be conveyed to Congress along with a statement of the president’s reasons for non-acquiescence. And not least, as Kitrosser’s account stresses, the Constitution embeds the executive within a broader system of challenge and discovery.

¹ U.S. Const., art. II, § 2, cl. 1; art. II, § 1, cl. 7.

² Alexander Hamilton, “The Federalist No. 70,” in *The Federalist, with Letters of “Brutus,”* ed. Terence Ball (New York: Cambridge University Press, 2003), 342.

³ U.S. Const., art. II, § 3.

⁴ Here is Joseph Story’s commentary on the provision: “From the nature and duties of the executive department, [the president] must possess more extensive sources of information, as well in regard to domestic as foreign affairs, than can belong to congress. The true workings of the laws; the defects in the nature or arrangements of the general systems of trade, finance, and justice; and the military, naval, and civil establishments of the union, are more readily seen, and more constantly under the view of the executive, than they can possibly be of any other department. There is great wisdom, therefore, in not merely allowing, but in requiring the president to lay before congress all facts and information which may assist their deliberations; and in enabling him at once to point out the evil and to suggest the remedy. He is thus justly made responsible, not merely for a due administration of the existing systems, but for due diligence and examination into the means of improving them.” *Commentaries on the Constitution*, vol. 2, 417–18.

Open and closed procedures are carefully matched in the judiciary, as well. Implicitly, the Constitution assumes that judges and juries will deliberate confidentially. This was common practice in English law, and in the young United States; and the charter makes no attempt to modify it. Yet Article III simultaneously assumes a degree of trial transparency. The text makes reference to proceedings “in open Court.”¹ And the Sixth Amendment explicitly guarantees to all criminal defendants “the right to a speedy and public trial, by an impartial jury.”² Together, these provisions create a framework in which courts can leverage both secrecy and transparency to maintain the rule of law.

As for political action outside of government, the Constitution is again two-sided. The First Amendment creates the basis for a sphere of discussion that is, in Justice Brennan’s formulation, “robust, uninhibited, and wide-open.”³ By preventing Congress (and eventually also the states) from “abridging the freedom of speech, or of the press,” the Amendment shields citizens from punishment for the candid utterance of what is unpopular or offensive or even dangerous. At the same time, however, it protects expression under cover of anonymity.⁴ And the scope of protected secrecy is considerably widened by the Fourth Amendment’s recognition of “the right of the people to be secure in their persons, houses, papers, and effects.”⁵ This limitation on government intrusion protects citizens’ capacity to speak and act free of external oversight. Dissent and collective political engagement are nowhere mentioned here. But a fair reading of the text shows that Fourth

¹ U.S. Const., art. III, § 3, cl. 1. This section polices the scope and methods of prosecution for treason. But its reference to “open Court” recalls a more general judicial practice, rather than introducing a new one for this limited context.

² U.S. Const., amend. VI.

³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁴ No requirement of speaker identification is mentioned, at any rate. U.S. Const., amend. I.

⁵ U.S. Const., amend. IV.

Amendment privacy is not only a matter of personal retreat (though it is surely that, too). It prohibits the forced exposure of citizens' political activities.

Together, these examples help to illustrate what I have in mind in speaking of the dyadic relationship between secrecy and transparency. The Constitution admits concealment and disclosure alike, and attempts to reconcile them in keeping with certain fundamental governing ideals. Here the relevant ideals concern efficacy and accountability, “domestic Tranquility” and “the Blessings of Liberty.”¹ My own account is largely consonant with this approach. Its emphasis, however, on the logics of representation, liberty, and equality yields a distinctive understanding of the secrecy-transparency dyad.

The Logics of Representation, Liberty, and Equality

Secrecy and transparency form not only a matched pair but a *democratic* dyad, in my sense, when their scope is governed by the logic of self-government. That logic, recall, embraces the following basic principles:

1. Representatives, including not only elected legislators but the wide range of officials entrusted with authority for specified public purposes, plus individuals or groups making constructive representative claims, may typically talk in secret.
2. Their final decisions, however, along with their past performance and the rules or procedures that guide their conduct, are ordinarily subject to duties of transparency. This means they need to be disclosed and explained (though not necessarily in real time).
3. Infringements of basic liberties like bodily integrity, personal privacy, and the freedoms of speech and association ordinarily need to be disclosed, as well. This is so whether the agents

¹ U.S. Const., pmb1.

responsible are inside or outside government, and whether the infringements occur within or across borders.

4. A degree of transparency should extend, lastly, to facts about social and economic stratification, and to the exercise of unequal political influence. This requirement likewise extends beyond borders.

The four principles themselves provide some guidance for tailoring secrecy and transparency. A few questions immediately arise, however. Earlier in the chapter I considered tensions within the logic of representation. What happens when transparency for guidance rules, such as prosecutorial charging guidelines, would interfere with a representative's ability to execute her office? In such cases, I argued, secrecy is generally permissible, provided the public can access sufficient information about the official's completed performance. Information is "sufficient," for these purposes, when it allows for a factually-anchored moral assessment of the official's use of her discretion. In the prosecution example, the public would need to know, at a minimum, how the state's attorneys have in fact levied (and threatened) charges in the range of criminal cases. In effect, the record should permit deliberation about the prosecutor's impartiality, proportionality, use of coercive pressure, and so forth.

In other cases, the principles may conflict amongst themselves. Suppose the logic of representation counsels transparency while the logic of liberty demands the reverse. This sort of situation is a recurrent feature of modern government. Agencies responsible for health and social welfare, for example, adjudicate sensitive personal benefits claims all the time. Their decisions, though subject to judicial review, are final and binding. Yet directly publishing those decisions would reveal medical data in which the applicants have a bona fide privacy interest.

Here the obvious answer is anonymity. Though it may involve various technical challenges, the strategy of releasing anonymized information holds real promise for reconciling the logics of

liberty and representation.¹ It permits the responsible agency to give an account of its conduct without, however, jeopardizing citizens' privacy. This suggests what might be called the anonymization maxim. When discharging the duty of transparency would undermine the privacy or personal security of individuals (other than high officials), the rule of thumb should be to continue publishing the relevant actions or decisions but to screen out all identifying information. I note in passing that anonymization can be understood as one species of the strategy Dennis Thompson calls "generalization."² Here the idea is to redescribe a public institution's conduct, abstracting from details that require secrecy without denying the public some substantive account of the institution's activity.

Another type of generalization can be helpful when the logics of liberty and equality conflict. Suppose the latter requires some disclosure of hidden political influence, while the former demands secrecy on the grounds of personal privacy, or to safeguard freedom of association. For example, imagine a group of donors supports the American Legislative Exchange Council (ALEC), which then uses the funds to advance economically *laissez-faire* legislation in the several states.

In this case, I can conceive of a two-part strategy to reconcile liberty and equality. First, we might use a threshold, protecting privacy for donations below some modest amount—\$1,000 annually, for example—but requiring disclosure of anything more sizable. The underlying thought is that when dollar figures are small, the influence is likely modest, while the donor's susceptibility to harassment is great. By contrast, when dollar figures are high, it is likely just the reverse: comparatively resilient donors are exercising greater influence, hence some requirement of disclosure.

¹ On the technical difficulties, see, e.g., Latanya Sweeney, "Only You, Your Doctor, and Many Others May Know," *Technology Science*, Sept. 29, 2015, <http://techscience.org/a/2015092903/>.

² Dennis F. Thompson, *Political Ethics and Public Office* (Cambridge, MA: Harvard University Press, 1987), 26.

The second part of the strategy is where “generalization” comes in. Even modestly wealthy donors may have some interest in privacy, I want to argue. If perhaps the superrich, those true megadonors who can almost singlehandedly shape political outcomes, exercise so much influence that the case for disclosing their identities is overriding, matters may be different at lower levels of support. There may be a case, in other words, for establishing some intermediate bracket (\$1,001 to perhaps \$100,000 annually?) in which disclosure reaches donors’ basic interests, but not their personal identities. Here “interests” would include things like occupation and household wealth. On such a model, it would be possible to determine which economic and professional classes are working to influence politics in which ways, while nevertheless protecting personal privacy. Call this the interest-disclosure maxim.

Of course, I readily acknowledge that this is hardly a “neutral” approach; it rests instead on a substantive view about what kinds of inequality matter most. The public does not need to know the race or religion or ethnic origin of donors who are attempting to influence politics but their class, because class-based domination seems to me the sort that needs guarding against. Readers who disagree are likely to regard the interest-disclosure maxim as misdirected.

In Chapter 2, I touched briefly on another sort of conflict between the logics of liberty and equality, in a discussion of global wealth reporting. There, I argued that assets should be reported to competent national and international authorities, and that these authorities should make partially anonymized data available to the global public, in turn. Notice that this approach combines two strategies: anonymization, discussed above; and what might be called audience-tailoring. To tailor the audience means to limit access in a certain way; it is a form of what Thompson calls “mediation.”¹ Recall that we can always ask of concrete transparency practices: What is being made transparent, how, when, and to whom? By varying the last of these—the “whom,” or the audience

¹ Ibid., 29–31.

of transparency—it is sometime possible to navigate tensions within the logic of self-government. Here, audience tailoring helps to safeguard property owners’ basic privacy while taking seriously the imperative to make wealth disparities public under the logic of equality.

The last sort of conflict to discuss pits the logic of equality against the logic of representation. I have been arguing that representatives are typically permitted to deliberate in private. Yet equality demands the disclosure of (opportunities for) disproportionate influence. Occasionally, these principles may clash in a way that requires yet another harmonization strategy: delay.

Imagine a regulatory agency like the Federal Aviation Administration (FAA) is considering new rules to bar airlines from holding passengers on the tarmac for too long. In the process, it meets with groups particularly concerned by the proposal. It meets, say, with airline industry lobbyists and with representatives of pilots’ unions. At some point, these contacts must be disclosed. Yet real-time disclosure might interfere with the FAA’s representative mission—by intensifying external pressures, say, or by discouraging testimony from passengers who have actually experienced hours-long delays from the confines of a fuselage. For these or other reasons, there may be cause for delaying disclosure—a tactic that permits, in Thompson’s terms, “retrospective judgment” of official action.¹ Admittedly, the maxim of delay will not be very helpful if the goal is actually to equalize influence, by opening agency discussions to the world at large.² But my account of the logic of equality is not rooted in such aims. Its more basic purpose is just to make inequality accessible to moral deliberation.

Anonymization, interest disclosure, audience tailoring, and delay—here are four maxims of harmonization. They offer guidance, I hope, in the management of conflicting directives regarding

¹ Ibid., 24–26.

² Adam Candeub, “Transparency in the Administrative State,” *Houston Law Review* 51, no. 2 (2013): 385–416.

secrecy and transparency, which arise from various applications of the logic of self-government. They make a good start, even if they cannot fully delineate a pattern for this democratic dyad. Now it only remains to spell out more clearly how this dyadic relationship limits secrecy.

Limiting Secrecy's Breadth, Depth, and Length of Life

“My dear boy, it is a contradiction in terms,” Sir Arnold declares. “You can be *open*, or you can have *government!*” With one quip of a fictional Cabinet Secretary, the writers of *Yes Minister* brilliantly caricatured the notorious shiftiness of a self-assured bureaucracy.¹ Here the butt of the joke was the British civil service of the 1970s and 80s. But its penchant for secrecy might have been attributed to almost any public administration. Max Weber, in his seminal study of bureaucracy, theorized that “[b]ureaucratic administration always tends to be an administration of ‘secret sessions’: in so far as it can, it hides its knowledge and action from criticism.”²

In fact, the impulse may be even more widely shared. Secrecy must be tempting from within almost any institution of government, bureaucratic or otherwise; for it offers officialdom a shield against criticism and interference, and eliminates the distraction of having to explain in public every misstep or change of course. As Sissela Bok observes, these advantages tend to make secrecy infectious. No sooner is it admitted in one circumstance than it “invites imitation” in others. Indeed it is constantly liable to being subsumed into the culture of an organization, and then to being practiced reflexively, almost as “an end in itself.”³ In short, secrecy spreads.

¹ The writers were Antony Jay and Jonathan Lynn, whose first episode was entitled, “Open Government.” Sir Arnold’s words are quoted in Graham McCann, *A Very Courageous Decision: The Inside Story of Yes Minister* (London: Aurum Press, 2014), 104.

² Max Weber, “Bureaucracy,” in *From Max Weber: Essays in Sociology*, ed. H. H. Gerth & C. Wright Mills (New York: Oxford University Press, 1958), 233.

³ Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (New York: Vintage Books, 1989), 177.

I have been arguing in this chapter that, like transparency, secrecy has an important place in democratic politics, and that these apparently conflicting practices can be reconciled under guidance of the logic of self-government. They constitute a “democratic dyad” when their scope is governed by that logic, I have argued. In cases of conflict, that means applying the maxims of anonymization, interest disclosure, audience tailoring, and delay. Now I want to suggest that it also means constraining political secrecy in three key respects.

First, secrecy’s scope must not be overbroad. The lesson of secrecy’s infectiousness makes this an especially urgent point. Perhaps the greatest risk of overbreadth arises in the national security state, where secrecy so easily becomes habitual—even obsessive, according to practitioners who know it from the inside.¹ In any case, the logic of representation imposes some strict limits here. It rejects unqualified delegations of authority of the sort that would free the relevant officials of any duty of account-giving or answerability. And it insists that final decisions, internal action-guiding principles, and completed performance should ordinarily be made public. Not every detail must be disclosed; indeed some form of generalization will often be permissible, particularly in a security sector in which sources and methods require protection. Nevertheless, secrecy must not extend so far that an agency’s basic mission, or its general *modus operandi*, become obscured.² Moreover, even if a great many operational details are secreted away, the imperative of transparency intensifies wherever an agency resorts to methods fraught with moral hazard, like deception or blackmail—even assuming these methods are directed only against criminal operations.

¹ Jack Goldsmith, “Three Years Later: How Snowden Helped the U.S. Intelligence Community,” *Lanfare* (blog), June 6, 2016, accessed Jan. 1, 2017, <https://www.lawfareblog.com/three-years-later-how-snowden-helped-us-intelligence-community>. See also Jack Goldsmith, *Power and Constraint: The Accountable Presidency After 9/11* (New York: W. W. Norton & Co., 2012), 57–82.

² When this happens, we become especially vulnerable to the form of deception Dennis Thompson calls “institutional hypocrisy.” See “Hypocrisy and Democracy,” in *Liberalism without Illusions: Essays on Liberal Theory and the Political Vision of Judith N. Shklar*, ed. Bernard Yack (Chicago: University of Chicago Press, 1996), 173–90.

Second, secrecy must not run too deep. “Depth” here refers to the degree to which concealment itself (i.e., the very fact that secrets are being kept) can be publicly known. “Deep secrets” are secrets the sheer existence of which is unknown and unknowable to the public.¹ Under the logic of self-government, deep secrets must always be suspect, because they block even the prospect of representative accountability. That is, they deny the public an opportunity to deliberate about the justifiability of the secrecy itself. In general, then, we need transparency about the fact that secrets are being kept. Or as Dennis Thompson puts it, “[f]irst-order secrecy (in a process or about a policy) requires second-order publicity (about the decision to make the process or policy secret).”²

Sometimes providing this much is straightforward, as in the police sobriety checkpoints mentioned earlier. The effectiveness of those checkpoints is not jeopardized when the police chief explains in public that her department will conceal their times and locations. In other scenarios, however, it may be that the least explanation would risk unraveling a novel tactic’s value. Yet even here deep secrecy is not the answer. I can imagine two alternative ways forward.

In the first place, we might settle for knowing whether the tactic in question, though otherwise opaque to us, infringes on basic liberties like privacy or self-determination. This would mean disclosing whether it deceives, manipulates, or coerces people; and on what basis of suspicion it can be deployed. Admittedly, lacking detail about the tactic itself might constrain public deliberation. But still a focus on targeting criteria and liberty infringements would mean access to the facts most relevant to assessing the tactic’s justification.

Alternatively (or in addition), there is the path of non-public disclosure—a variation of what I earlier called “audience tailoring.” Let the confidential details at issue be reviewed confidentially, by some competent third party, acting as public advocate. Such an agent would be charged with

¹ See, e.g., David E. Pozen, “Deep Secrecy,” *Stanford Law Review* 62, no. 2 (2010): 257–339.

² Dennis F. Thompson, “Democratic Secrecy,” *Political Science Quarterly* 114, no. 2 (1999): 185.

assessing what is secret in the agency's enforcement regime, and then publicly certifying that regime's reliability and integrity (or lack thereof).

This is admittedly an imperfect response. Non-public disclosure relocates the secrecy dilemma, but cannot entirely resolve it: arrangements like those described continue to prevent public learning about confidential details of an agency's enforcement practice. When truly independent reviewers get a look at those details, the danger of abuse diminishes accordingly. But a knowledge gap persists, and still the public must rely—in this case on the integrity of the review process. Even where there is effective “circular guardianship,” in which institution X oversees institution Y, Y oversees Z, and Z oversees X in turn, the existence of secrecy puts the governed at an unavoidable epistemic disadvantage, and necessarily entails some risk of official malfeasance.¹ Still this path is preferable to deep secrecy.

The third and final respect in which secrecy must be limited, on my account, is in its length of life. Even where positive grounds for secrecy exist, only a very small fraction of these apply indefinitely. The chief exception covers secrecy practiced not by governments but by individuals, in our associations and voting decisions and other forms of political engagement. The logic of liberty requires that individuals have the option to maintain the privacy of such matters on a permanent basis. Otherwise, the passage of time strengthens the imperative of transparency in nearly all cases.² This means quick disclosure of decisions once they become final, plus the eventual disclosure of records that include even confidential deliberations. This principle is reflected in declassification and disclosure policies that default to publication after twenty-five or thirty years.³

¹ On “circular” versus “hierarchical” models of oversight, see John Braithwaite, “Institutionalizing Distrust, Enculturating Trust,” in *Trust and Governance*, ed. Valerie Braithwaite and Margaret Levi (New York: Russell Sage, 1998), 343–75.

² Exceptions include cases in which disclosure would threaten international peace, as in the instance of government-held technical documentation associated with nuclear weaponry.

³ See Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, 2nd ed. (Paris: UNESCO, 2008), 150.

What Secrecy Can Do for Transparency

If secrecy and transparency in concert can express the normative logic of liberal democracy, there is also a sense in which the two practices can support one another. Their symbiosis has been understudied, in part because we often assume a simple tradeoff between the two. But in fact secrecy and transparency can be mutually reinforcing, and I want to try to characterize that symbiosis in the remainder of this chapter.

It is worth noting that this marks an inflection point in the project, a shift from the prescriptive to the (primarily) descriptive. That orientation will carry through Chapter 4, in which I explore how prevailing modes of political transparency—information disclosure, above all—can generate some surprising, perverse consequences. Finally, in Chapter 5, I return to a more prescriptive mode, articulating a repertoire of transparency practices that would generally avoid such pitfalls.

If secrecy and transparency can be mutually reinforcing, this cuts both ways. In the pages that follow, I want to begin by considering what secrecy can do for transparency.

Times of Confidence, Times of Evaluation

There is a constant temptation in democratic politics to embrace the maximalism about transparency I have criticized in this project. We are tempted to say with Wilson that “[t]here is not any legitimate privacy about matters of government,” that “public business is public business.”¹ Paradoxically, however, increasingly radical attempts to press what John Dunn calls “the democratic

¹ Wilson, *The New Freedom*, 129–31.

demand to be ruled in broad daylight” have a tendency to miscarry.¹ I am in sympathy with Dunn’s claim that a passage of time is sometimes necessary to reconcile transparency with the leeway representatives need to carry out their missions. Yet whether it is strictly necessary for effective government or not, I have argued that such leeway is typically consistent with the logic of representation (provided representatives offer timely explanations of their final decisions, action-guiding principles, and completed performance).

One way to understand the implications of this allowance involves a kind of bifurcation of time. We might say that there are periods during which representatives are permitted to act quietly, behind the scenes, and then there are periods during which their works must be revealed for public judgment. The former, in effect, are times of (provisional) trust, the latter times of assessment. The former are times of temporary confidence, the latter times of criticism and evaluation.

To speak of dividing time in two is perhaps misleading, however, because this sort of division is in fact iterated. Indeed for any given representative, multiple timelines (so to speak) are always running concurrently, each at its own pace.² For example, suppose a lawmaker’s agenda comprises several projects. She is planning a committee hearing on drug policy; she is voting on legislation that would raise the minimum wage; she is quietly lining up cosponsors for her own economic policy bill; she is urging diplomatic officials to negotiate for the release of her constituent held hostage overseas; finally, she is “dialing for dollars,” day after day after day. In each case, the logic of representation affords her the discretion to maintain secrecy until the work is done (roughly speaking). Her vote rightly becomes public without delay, and so should her completed fundraising and the hours she has devoted to it. But the efforts on behalf of her kidnapped constituent, the

¹ John Dunn, “Situating Democracy Political Accountability,” in *Democracy, Accountability, and Representation*, ed. Adam Przeworski, Susan C. Stokes, and Bernard Manin (New York: Cambridge University Press, 1999), 339.

² As I argued earlier, it is not enough to treat an electoral period (or other opportunity for formal sanctions) as a singular “time of evaluation,” before which all secrecy is permitted to the representative in question. Evaluation, in my sense, is not only a matter of sanctions, but a matter of judgment and public deliberation about completed performance.

hearing still in the works, the bill she has yet to introduce—all these may remain secret for the moment.

Suppose this were not the case. Suppose in a mood of suspicion we attempted to close the gap, and to maintain total surveillance of official speech and action, of the sort Dave Eggers envisions in *The Circle*. There, in a conceit no longer so far-fetched, a congresswoman outfits her necklace with a miniature camera, which conveys live video of her workday to the world, via the internet.¹ Suppose such radical transparency were enforced, and our hypothetical legislator could not keep quiet her legislative plans, or her tentative oversight hearing, or her attempts to free a hostage abroad.

With due recognition of the difficulty of prediction, it seems likely that one effect of such a scheme would be to push conversation about such matters underground, or after hours. Issues requiring discretion would be more likely to be discussed over drinks, after work, once the livestreaming had ceased. They would be pushed to the coffee shops and the bars and the fitness centers, like so many bumps beneath the carpet, popping up in different spots with every futile attempt to flatten them out.

By their own accounts, members of Congress have often reacted in just this way to the imposition of new forms of exposure.² The floors of the House and Senate were once spaces of conversation—not, perhaps, altogether frank, but at least deliberative and reciprocal in some meaningful sense. Now, as with the parliamentary proceedings that Christian Rostbøll describes as

¹ Dave Eggers, *The Circle* (San Francisco: McSweeney's Books, 2013), 208. "I intend to show how democracy can and should be," she proudly declares, "entirely open, entirely transparent."

² See, e.g., Tip O'Neill and William Novak, *Man of the House: The Life and Political Memoirs of Speaker Tip O'Neill* (New York: Random House, 1987), 290.

“mere show,” the chamber floors are spaces purely for reaching the public.¹ Inter-legislator debate and negotiation take place—to the extent that they do—elsewhere.

Critics of legislative transparency are wrong if they imply that this is altogether a loss. It would be perverse to deny the importance of a democratic legislature’s accessibility to the public. And there are surely advantages to making the chamber floor one forum of such access. But the point remains that exposure has changed the character of the legislative chamber, and altered the kinds of activity that can comfortably unfold there. In the years since video broadcasting in particular was introduced, the floor of Congress has seen something like the observer effect in physics: members’ awareness of an external audience has shifted how they are willing to behave in that space.

This helps to illustrate my more general hypothesis here: that secrecy will find a way, that if it serves some social or political purpose, it will typically find some outlet. If that is correct, then acknowledging and embracing such secrecy during the “times of confidence” I have imagined may have advantages of its own. This is not a novel idea. For example, the political scientist Daniel Naurin finds evidence that such closed conversations may actually be more hospitable than open forums to public-interest-oriented deliberation.² And another prominent group of scholars argues that in the legislative setting, particularly, secrecy can help to catalyze compromise.³ For myself, I want to make the separate point that embracing secrecy during times of confidence may help to promote transparency during times of evaluation. By tolerating confidentiality in due season, in

¹ Christian F. Rostbøll, *Deliberative Freedom: Deliberative Democracy as Critical Theory* (Albany: State University of New York Press, 2008), 276.

² Daniel Naurin, *Deliberation Behind Closed Doors: Transparency and Lobbying in the European Union* (Colchester, UK: ECPR Press, 2007).

³ Warren and Mansbridge, “Deliberative Negotiation,” 106–12.

other words, we can encourage a less evasive, more substantive accounting by officials when the moment for revelation comes.

The argument I have in mind turns on habit or disposition, or on what might be called the moral psychology of transparency. Earlier I mentioned Sissela Bok's observation that secrecy in organizations can take on a life of its own. If it becomes integral to an official culture, it spreads, soon becoming reflexive, and transforming the character of the individuals who practice it.¹ A corresponding phenomenon may well follow in the wake of a too-exacting transparency. For representatives subject to total surveillance, evasion may become the only option. It begins innocently, we might imagine: two legislators meet after work, off site, to discuss the investigative hearings they plan to call. But there is a risk that with time, the evasive impulse will become habitual. Representatives are then transformed. Furtiveness becomes second nature. And resistance widens, so that eventually representatives resist exposing not only unfinished business, but final decisions, and actions carried to completion—in short, much that falls plainly within their duties of transparency. In short, excessive exposure could generate customs and mindsets of prevarication.

Scholars of organizational behavior have observed a similar phenomenon in workplace settings subject to extensive supervision by managers. In his study of the world's second largest mobile phone factory, for example, Ethan Bernstein found that visual surveillance tended to induce "privacy through encryption."² When managers came around, line workers practiced "the art of appearing to perform the task the way it was 'meant' to be done according to the codified process rules." This behavior tended to depress productivity, but was commonplace nonetheless, because workers were convinced that any attempt to explain their "little tricks" openly would jeopardize

¹ Bok, *Secrets*, 177.

² Ethan S. Bernstein, "The Transparency Paradox: A Role for Privacy in Organizational Learning and Operational Control," *Administrative Science Quarterly* 57, no. 2 (2012): 207.

precious time, and would expose the workers to possible sanction by skeptical managers.¹

Clandestine deviance was the safer course. And as Bernstein explains, this created an environment in which workers were always on the lookout for observers, ready at any moment to begin dissimulating. One line leader commented that her delicate position between manager-observers and line workers required constantly “keeping one eye closed and one eye open.”² Precisely that sort of dispositional transformation is what I imagine might arise in the political context, if no allowance is made for action behind the scenes during temporary times of confidence.

Admittedly, the story I have told is speculative. Nevertheless it succeeds in identifying a potential danger of excessive surveillance of our representatives. Conversely, it suggests that by openly affirming their entitlement to act quietly for a time, we may prime them to cooperate in giving a substantive, public account once their efforts attain some degree of (relative) finality.

Of course this will not always be the case. In the security sector that Bok primarily has in mind, the obsession with secrecy may actually be fueled by the sort of qualifiedly permissive attitude I am recommending. But in most other contexts, where legislators and administrators and judges have no special reason to believe that the nature of their work demands systemic concealment, I suppose that affirming representatives’ dispensation to act out of view may promote a sort of reciprocal trust. As citizens we entrust them with a time-limited secrecy, in the expectation that they will trust us, in turn, with a substantial account of their completed performance.

I understand that some readers will suppose this amounts to naïveté about the character of public officials. Of chief concern may be the thought that by venturing such confidence, even if only for a time, we open ourselves to politicians’ deception. A legislator may claim, once a negotiation has concluded, that she extracted as many concessions as possible from lawmakers across the aisle. But

¹ Ibid., 188.

² Ibid., 193.

that claim may be false; it may exaggerate the resilience of the opposition. A chief executive may pretend that her purpose in issuing some order was to protect public safety, while in fact its motivation was political revenge against an adversary, or simple self-promotion. Similar concerns about insincerity extend beyond the domain of elected representatives. We might worry, for example, that a judge's written opinion fails to articulate the deepest or most fundamental reason why she ruled as she did.

The specter of such hypocrisy is real. Permitting any kind of secrecy means opening ourselves to less-than-sincere accounts of official motivation and constraint. But the extent to which such hypocrisy is a genuine problem for liberal democracy is easily exaggerated. In most cases, it seems to me, the risk is worth bearing. For one thing, allowing tailored argumentation may have significant advantages for building compromise on difficult policy matters. Hillary Clinton was pilloried during the presidential election of 2016 for her remark—foolishly concealed and then inevitably leaked—that during hard policy negotiations, it is necessary to have “both a public and a private position.”¹ If perhaps it was clumsily expressed, however, Clinton's point makes perfect sense. In contexts of deep disagreement, which pluralistic liberal democracies regularly encounter, it is often helpful to deploy what the political theorist Elizabeth Markovits calls “strategically position[ed] arguments.” Such argumentation is not necessarily deceptive but it stops short of stating in the same way to every person one's complete thinking on a subject.²

What matters, above all, is that representatives give reasons publicly for their completed actions. They must not deceive us, I argued in Chapter 2. But that prohibition against lying ought

¹ Jonathan Rauch, “Why Hillary Clinton Needs to Be Two-Faced,” *New York Times*, Oct. 22, 2016, accessed Jan. 1, 2017, <https://www.nytimes.com/2016/10/23/opinion/campaign-stops/why-hillary-clinton-needs-to-be-two-faced.html>.

² Elizabeth Markovits, *The Politics of Sincerity: Plato, Frank Speech, and Democratic Judgment* (University Park, PA: Penn State University Press, 2008), 21.

not be interpreted as a requirement of personal “authenticity.”¹ Authenticity’s notion of deep fidelity to self is of little use here, because a representative may well be unable to discern her truest, deepest motives for having made a given decision. In my view, it is enough if she believes in the account she gives publicly for her action.

This approach hardly leaves the public defenseless. Where a politician’s public explanation turns out to misrepresent the facts in order to conceal wrongdoing, just a little evidence of corruption will be enough to trigger investigations by prosecutors, ethics boards, and the like. Moreover, recall that there are limits on the permissible scope of secrecy even during what I am calling times of confidence. During policymaking negotiations, for example, the logic of equality requires disclosures about who has access and who exerts influence. The public may not be privy to every offer and counter-offer party leaders exchange, but we should at least be able to know who has a seat at the table, and who is empowered to vote when the time for decision comes. And again, this all assumes that final decisions will be promptly disclosed, and that representatives will have to answer for their support of those outcomes.

My claim is not that politicians’ lies cannot harm us. Often enough they can. Yet acknowledging secrecy’s place may be the more prudent course. In particular, I have been arguing, it may help to promote account-giving, and discourage prevarication out of sheer habit, once the representative’s work behind the scenes is done.

Oversight and Investigation

If secrecy can encourage public-facing testimony by public officials during times of evaluation, there is another, more straightforward sense in which it promotes transparency. This

¹ For a case against the politics of authenticity, see, e.g., Howard H. Schweber, *Democracy and Authenticity: Toward a Theory of Public Justification* (New York: Cambridge University Press, 2012), 130–62.

involves the practice of public oversight agencies, empowered to investigate the conduct of independent branches of government. If Bentham’s “superintendence of the public” imagines a kind of vertical oversight from below, watchdog groups like these practice horizontal oversight.¹ And experience suggests that their investigations can be a particularly effective means of illuminating how bureaucracies, in particular, operate behind the scenes. The key point I want to highlight is this: the revelatory power of such institutions rests upon their own ability to act covertly. Transparency (of the target) depends upon secrecy (of the investigator).

Consider the case of the U.S. Government Accountability Office (GAO), a congressional audit institution authorized, on the request of any legislator, to study the activities of bureaucracies across the federal administrative state. In one recent case, the GAO sought to demonstrate vulnerabilities in the federal government’s framework for governing the sale of radioactive material.² To do so, it secretly arranged a shell company; submitted a license application to Texas regulators, who had been deputized by the U.S. Nuclear Regulatory Commission (NRC) to review and adjudicate such applications; and, thanks to a failure of scrutiny by those state officials, successfully purchased the materials for a dirty bomb. Their ploy made headlines and, happily, led to some changes at the NRC.³ (The deputization of state officials is no longer permitted.)

Yet this investigation could never have worked without secrecy, even as it brought a necessary transparency to the government’s failure to secure highly dangerous nuclear material. Of course, this is not to suggest that oversight agencies should have a blank check where concealment is concerned. Here too the rule of finality applies. Once the risk of undermining a pending

¹ Bentham, *Political Tactics*, 29.

² U.S. Government Accountability Office, *Nuclear Security: NRC Has Enhanced the Controls of Dangerous Radioactive Materials, but Vulnerabilities Remain*, July 1, 2016, <http://www.gao.gov/products/GAO-16-330>.

³ Patrick Malone, “A Secret Group Bought the Ingredients for a Dirty Bomb—Here in the U.S.,” *Washington Post*, Aug. 4, 2016, accessed Jan. 1, 2017, https://www.washingtonpost.com/world/national-security/a-secret-group-bought-the-ingredients-for-a-dirty-bomb--here-in-the-us/2016/08/03/46901c6e-58ae-11e6-9767-f6c947fd0cb8_story.html.

investigation has passed, oversight officials' tactics (at least in general terms) must be made publicly knowable. Thus, in the case described, the GAO promptly explained its covert methods in the report it issued on NRC vulnerabilities.¹ But the basic point remains: secrecy in one domain can promote transparency in another.

The same lesson holds outside the formal sphere of government. Watchdog associations in civil society may also take advantage of secrecy to uncover details of the operations of public institutions. They might, for example, cultivate sources inside those institutions, and take advantage of insiders' expertise to understand how the government exercises its power. This method is of course essential to the press: journalists' maintenance of their sources' confidentiality may constitute the most obvious example of secrecy serving transparency. Admittedly, this assumes that the information sources convey is accurate, and, as I discuss in the next chapter, that may not always be the case. At least in principle, however, the shield of secrecy can embolden insiders to come forward with valuable evidence about reclusive public institutions.

What Transparency Can Do for Secrecy

In the symbiosis of secrecy and transparency, the direction of support is also reversed. Transparency can make secrecy safe for liberal democracy, I argue, by guarding against its abuse, and by preventing the loss of legitimacy that furtiveness tends to invite.

Earlier in the chapter, I made the case for democratic secrecy, and tried to show that practices of concealment are rooted in the logic of self-government. For precisely that reason, I argued, the scope of permissible secrecy is limited in several ways. Thus liberal democracy welcomes secrecy, but rejects it when unchecked, when it becomes an unanswerable weapon of deception and abuse of power.

¹ U.S. Government Accountability Office, *Nuclear Security*.

Part of what it means to check secrecy is to check it internally, at the level of political ethics. My account has attempted to do that by articulating the conditions under which political secrets may permissibly be kept. But internal constraints are not enough. Secrecy also needs to be checked externally, by distributing the powers of exposure and investigation. Liberal democracy achieves such a distribution by the institutional separation of powers, by devolving certain powers locally, and by protecting the freedoms of speech, press, and association.

Nevertheless, difficulties abound, and supposed checks on secrecy easily become what Bentham called “sham security”—“in demonstration, a bridle; in effect, a cloak.”¹ Here I want to discuss the difficulties raised by practices of deference toward government secret-keepers. If deference goes too far, checks on secrecy will cease to function.

The Dangers of Deference

Deference is the phenomenon whereby watchdogs become pliable, failing to exercise independent review, and acquiescing too readily in claims of secrecy by government or by private parties. It is especially prevalent in the national security context, where the mere invocation of that phrase raises powerful fears of doing harm by disclosure. Deference can overtake courts, legislatures, civil associations, journalists, and the public at large. Indeed it seems hard to deny that most of us are all too prepared to look the other way when national security is mentioned; as a functional matter, we act as though our delegation of authority to security agencies is made with no strings attached. As I argued in Chapter 2, however, such a radically unaccountable form of

¹ Jeremy Bentham, *The Works of Jeremy Bentham*, ed. John Bowring (Edinburgh: William Tait, 1843), vol. 5, 58.

representation runs afoul of the logic of self-government. Ethically speaking, we can have no “right *not* to know.”¹

Perhaps the most troubling sort of deference is that practiced by institutions specifically charged with checking executive secrecy. For instance, Margaret Kwoka describes a systematic failure by U.S. federal courts to review independently the government’s secrecy claims in suits arising under the Freedom of Information Act (FOIA).² Such deference would be particularly worrisome in the face of expansive claims of “executive privilege.” A traditional legal doctrine that gives presidents the right to withhold information or testimony in the face of court or congressional orders, executive privilege has always been the subject of controversy.³ Barack Obama asserted the privilege to withhold documents from a congressional investigation into “Fast and Furious,” a disastrous program in which federal law enforcement agents facilitated the sale of illegal firearms to drug cartels, in hopes of later prosecuting the superiors to whom those weapons would be funneled.⁴ George W. Bush asserted the privilege to block a probe by the House Judiciary Committee into his administration’s apparently politically-motivated firings of U.S. Attorneys.⁵ And perhaps most famously, Richard Nixon asserted it to justify his withholding of records subpoenaed as part of the Watergate investigation. That case soon wound up in the Supreme Court, and in *United States v. Nixon*, the Court gave its blessing to the doctrine, but explained that executive privilege could not be interpreted as an absolute, unquestionable right to secrecy. In particular, the Court

¹ Gabriel Schoenfeld, *Necessary Secrets: National Security, the Media, and the Rule of Law* (New York: W. W. Norton & Co., 2010), 259.

² Margaret B. Kwoka, “Deferring to Secrecy,” *Boston College Law Review* 54, no. 1 (2013): 185–242.

³ Mark J. Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability*, 3rd ed. (Lawrence: University of Kansas Press, 2010).

⁴ Ed O’Keefe and Sari Horwitz, “House Votes to Hold Attorney General Eric Holder in Contempt,” *Washington Post*, June 28, 2012, accessed Jan. 1, 2017, https://www.washingtonpost.com/politics/fast-and-furious-house-plans-vote-on-holding-eric-holder-in-contempt/2012/06/28/gJQAznIG9V_story.html

⁵ Rozell, *Executive Privilege*, 169–81.

wrote, the president's general interest in confidential communication "cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice."¹

What does the account of secrecy and transparency advanced here suggest about all this? As a matter of political ethics, not legal doctrine, how should executive privilege be regarded? On the one hand, I have argued that secret talk is permissible to government officials, including in the executive branch. In general, executive officials should be able to maintain the confidentiality of their conversations about policy or performance. And to the extent executive privilege facilitates such confidentiality, it seems a worthy principle. On the other hand, the permissible scope of official secrecy is not without limits. Thus an excessively categorical privilege in the hands of a president would be problematic. Surely the Court was correct that when serious evidence of criminality exists, the privilege should give way.

Whether it should also give way in the absence of criminality is a tougher question. Suppose a president determines that disclosing any information about some completed intelligence operation—that even acknowledging its existence—is simply too dangerous. Ordinarily the logic of self-government would demand some kind of account-giving here. If the mission is completed, the basic facts should be open to public deliberation; and doubly so if in the process (as we might suppose) government agents have infringed basic liberties abroad. Yet the president determines that saying anything publicly would endanger the relevant agency's sources and methods, and so asserts the privilege.

The argument for defeating the privilege is obvious, on my account: the president has an ethical duty of transparency—not to disclose everything, of course, but to give some account of the sort I have mentioned. On the other hand, there is also a reasonable case to be made for maintaining the privilege. The president's representative role plausibly entails an obligation to provide for

¹ 418 U.S. 683, 713 (1974).

domestic security, and if these two obligations clash, he faces an ethical dilemma which admits of no easy resolution. He must decide all the same, and be responsible for whichever course of action he chooses. To defeat the privilege in such cases would mean empowering another party—Congress or a federal judge—to make the determination in the president’s stead.

At the very least, what we can say is that too much deference in the face of such privilege claims is a dangerous proposition. Particularly if the privilege is no further circumscribed as a matter of doctrine, the institutions responsible for checking executive power should not merely acquiesce in executive invocations of national security. Some form of review is in order. Here it may be that the strategy of audience-tailoring mentioned earlier in the chapter offers a way forward. Courts might review the relevant facts confidentially, *in camera*, and then make an independent determination whether the government’s assertion of the privilege should be sustained.¹ Such a practice is the least that would be required to maintain some meaningful check on executive secrecy in cases like the one I have described, which are difficult but not unusual in modern states.

At this point, the value of transparency for secrecy begins to come into view. Unchecked, secrecy is all but certain to be abused. Before long some actor will come along and take advantage of its shield to deceive the public in pursuit of his own self-interest, or to facilitate some other form of corruption or wrongdoing. And such abuses, once their harms are felt, will only intensify public suspicion of government secrecy, with the likely result of a loss of legitimacy. Add to this the direct threat which unlimited secrecy poses to liberty and equality, and it becomes clear that some kind of bridle is needed. Transparency, in the form of external oversight, is the best candidate. If deference is avoided and secrecy remains in check, abuses will be less likely to succeed. And in this circumscribed form, secrecy becomes tolerable to liberal democracy.

¹ This was the procedure at issue in *U.S. v. Nixon*, 418 U.S. 683 (1974).

The point goes for non-governmental secrecy, as well. Deference manifests itself toward corporate confidentiality in myriad ways. Perhaps the most troubling is in the standard treatment of civil claims against corporate actors. In civil suits resolved by settlement, courts in the United States have been far too quick to acquiesce in demands for secrecy.¹ The problem is even worse in the parallel forum of arbitration that corporate actors have constructed over the past several decades, using contractual language whereby consumers sign away the right to sue in state or federal court.²

Yet the logic of liberty demands disclosure when private actors infringe on bodily integrity, property, or other basic liberties. As it stands, such disclosure is almost never forthcoming. Consider the case of the Hallowich family, formerly of Pennsylvania. After a fracking operation moved to their neighborhood in 2007, the family's well water soon became filthy and fetid. Analysis later confirmed that it contained significant quantities of a carcinogenic industrial chemical called acrylonitrile, plus a range of other dangerous organic compounds. The family sued, and eventually their claims were settled.³

The terms of the settlement followed a familiar pattern: the defendants admitted no wrongdoing, and the plaintiffs promised to keep quiet—forever.⁴ In this case, the parties were bound by law to file their settlement with the court, because the rights of minor children were at stake. (Ordinarily, settlements are shared with the court only at the option of the litigants). They did

¹ See Joseph F. Anderson, Jr., "Secrecy in the Courts: At the Tipping Point?," *Villanova Law Review* 53, no. 5 (2008): 811–28.

² Jessica Silver-Greenberg and Robert Gebeloff, "Arbitration Everywhere, Stacking the Deck of Justice," *New York Times*, Oct. 31, 2015, accessed Jan. 1, 2017, <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>.

³ The summary is drawn from the plaintiffs' allegations in *Hallowich v. Range Resources Corp. et al.*, No. 2010 Civ. 3954 (Pa. Wash. County Ct. C.P. May 26, 2010). The relevant court documents have been posted at <https://stateimpact.npr.org/pennsylvania/2013/03/21/drilling-companies-agree-to-settle-fracking-contamination-case-for-750000/>.

⁴ Jim Efstathiou, Jr. and Mark Drajem, "Drillers Silence Fracking Claims With Sealed Settlements," *Bloomberg News*, June 6, 2013, accessed Jan. 1, 2017, <http://www.bloomberg.com/news/2013-06-06/drillers-silence-fracking-claims-with-sealed-settlements.html>.

so, and the court in turn agreed to keep the terms secret by “sealing” the entire case file, including the settlement agreement. From the public’s perspective, all that could be known was that the case had been voluntarily withdrawn by the plaintiffs.¹ None of the allegations, none of the evidence about what harms the drilling had caused, could be publicly disclosed.

It seems to me that by agreeing so readily to enforce settlement secrecy in cases such as this, courts adopt a deferential attitude that amounts to a failure to check corporate secrecy.² Industrial actors seal these cases systematically, in part to evade public redress for harms like the environmental dislocation caused by fracking. Yet here too a measure of transparency would place secrecy on firmer ethical ground. For example, a public database with general information about the number of suits, settlements, and harms alleged would facilitate public deliberation about the extent of these harms, while leaving unmolested a wide domain of associational secrecy for corporate entities. In the absence of such reporting, however, unjustifiable secrecy is likely to flourish.

¹ Don Hopey and David Templeton, “Washington County Family Settles Lawsuit over Marcellus Shale Drilling,” *Pittsburgh Post-Gazette*, Aug. 25, 2011, accessed Jan. 1, 2017, <http://www.post-gazette.com/local/washington/2011/08/25/Washington-County-family-settles-lawsuit-over-Marcellus-Shale-drilling/stories/201108250247>.

² David Luban, “Settlements and the Erosion of the Public Realm,” *Georgetown Law Journal* 83, no. 7 (1995): 2648–58; David S. Sanson, “The Pervasive Problem of Court-Sanctioned Secrecy and the Exigency of National Reform,” *Duke Law Journal* 53, no. 2 (2003): 807–32.

IRONIES OF OPENNESS:

WHY DISCLOSURE FAILS

[E]ven transparency is of no avail without eyes to look at it.

–Jeremy Bentham¹

Everyone sees how you appear, few touch what you are...

–Niccolò Machiavelli²

IMAGINE a state almost exactly like your own. Imagine a state distinct in this respect only: that here, in Knowland (as we might call it), official conduct is always open to public observation. Legislators and executives, judges and administrators, prosecutors and policymakers: all operate under robust conditions of what has come to be called transparency. Here the proverbially closed doors of politics are thrown open wide. In Knowland any person may cast an inquiring eye, with vision unrestricted, on the activities of public authorities. Direct observation is trivial, suppose; and reliable records are readily available. Neither secrecy nor obscurity can thwart political learning. To the people of Knowland, and to their associations and parties and pressure groups, officialdom is an open book. Not everything about the government is *known* here—not necessarily. But everything is *knowable*.

¹ Jeremy Bentham, *Panopticon; or, the Inspection-House*, in *The Works of Jeremy Bentham*, vol. 4, ed. John Bowring (Edinburgh: William Tait, 1843), 130.

² Niccolò Machiavelli, *The Prince*, trans. Harvey C. Mansfield, 2nd ed. (Chicago: University of Chicago Press, 1998), 71. Machiavelli's original reads, "Ognuno vede quello che tu pari, pochi sentono quello che tu se'..." See *De Principatibus: Testo Critico*, ed. Giorgio Inglese (Rome: Istituto Storico Italiano per il Medio Evo, 1994), 266. A more literal rendering is, "Everyone sees what you appear to be, few sense what you are..."

Consider what comes of this state of affairs. How does the transparency of Knowland affect its political situation? In what respect, if at all, does the government's self-disclosure facilitate official responsibility or reform? What actually is *done* with the unending stream of public information?

On one account of transparency's function, nothing need be done at all—not by civilians, anyway. The sheer fact of visibility is enough to secure some political benefit, since authorities will act *as if* under scrutiny, avoiding corruption, absenteeism, and other clear abuses of office. (Note the echo of Bentham's Panopticon.¹) Moreover, coordination between the state's several departments will become less awkward, less burdensome, as information flows freely across institutional boundaries. (And here the voice of administrative science.) Whether or not the public is engaged is immaterial on this view, because participation is essentially superfluous for the "theory of change" here invoked.² What matters is that officials are made to feel publicly self-conscious, and that intra-governmental friction is reduced.

If this line of thinking channels a rosy consequentialism in defense of transparency, another sees it at as the bedrock of democracy, yet conceived in the starkest, most simplifying terms. On this view, there is the voice of the people, the government it commands, and nothing else. Here the mediating institutions of representative government are either bypassed, or else refashioned as mirrors of mass opinion, like "smart" advertisements that rewrite themselves as they read viewers'

¹ This is, at any rate, the Foucauldian reading. See Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995), 200–9. Foucault writes that "the major effect of the Panopticon [is] to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power." It is worth noting, however, that Bentham himself cautioned against supposing that transparency can work automatically. In a passage that Foucault's followers would do well to revisit, Bentham explicitly denies that the interior sense of being watched can ever suffice on its own: "You will please to observe," he writes, "that though perhaps it is the most important point, that the persons to be inspected should always feel themselves as if under inspection, at least as standing a great chance of being so, yet it is not by any means the *only* one. . . . What is also of importance is, that for the greatest proportion of time possible, each man should actually *be* under inspection. This is material in *all* cases, that the inspector may have the satisfaction of knowing, that the discipline actually has the effect which it is designed to have . . ." *The Works of Jeremy Bentham*, vol. 4, 44.

² For a helpful discussion of transparency and theories of change, see Andrew Mayersohn, "Transparency Is Not the Government's Responsibility," *Boston Review Blog*, Jan. 23, 2014, accessed Jan. 1, 2017, <http://www.bostonreview.net/blog/andrew-mayersohn-government-transparency-accountability-citizenship>.

expressions.¹ Who needs a parliament, this theory asks, when the voice of a watchful people speaks loudly and in real time?² The public is attentive, reactive, and expressive in this story. And the “democratic wish” of a gapless correspondence between public opinion and official law or policy is apparently fulfilled.³ In Knowland, democracy is an endless stream of plebiscites, and government becomes pure responsiveness (or claims to be, at any rate).

The starting point of my attempt to reinvent transparency in this project has been the conviction that each of these accounts is misbegotten. Both retain undeniable appeal in the digital age.⁴ But neither captures the genuine sources of the transparency obligations common to liberal democracy. I have therefore attempted to trace a different path, building a principled case for both secrecy and transparency on the basis of what I have called the logic of self-government. Reasoning about consequences still has a place in this account. But the prospect of instrumental advantage is not what generates duties of transparency, or makes secrecy permissible, in the first place.

Knowland is a fiction—it is no land. Yet the forms of transparency it imagines are largely identical to those recommended, if perhaps in less radical form, by conventional transparency discourse. In this chapter I want to pivot back to reasoning about consequences in order to highlight the surprising pitfalls of those conventional forms. My purpose is not to undermine the case for openness, however. I want instead to complicate and ultimately to strength that case, by drawing attention to the difficulties with prevailing models—above all, the paradigm of mandated disclosure.

¹ Andrew McStay, “Now Advertising Billboards Can Read Your Emotions ... and That’s Just the Start,” *The Conversation*, Aug. 4, 2015, accessed Jan. 1, 2017, <http://theconversation.com/now-advertising-billboards-can-read-your-emotions-and-thats-just-the-start-45519>.

² The question is put with zeal by a technologist in Dave Eggers’s dystopian novel, *The Circle* (San Francisco: McSweeney’s Books, 2013), 391–92. “If we can know the will of the people at any time, without filter, without misinterpretation or bastardization, wouldn’t it eliminate much of Washington?”

³ Mark Fenster, “Seeing the State: Transparency as Metaphor,” *Administrative Law Review* 62, no. 3 (2010): 628–32.

⁴ See, e.g., Evgeny Morozov, *To Save Everything, Click Here: The Folly of Technological Solutionism* (New York: PublicAffairs, 2013), 63–99; David Runciman, “Rescuing Democracy in the Age of the Internet,” *Ethics & International Affairs* 29, no. 3 (2015): 331–44.

Under certain circumstances, I argue, disclosure practices can entrench the powerful, advantage special interests, generate distrust, and mislead the public about political reality. If this is correct, then as I explain in Chapter 5, transparency needs somehow to go beyond disclosure.

Warnings

Machiavelli and Bentham make an odd couple. The one is known chiefly as an adjective, shorthand for all the dark arts of dirty politicians; the other for his (in)famous Panopticon, an icon of radical openness and oversight. As symbols, they are nearly opposites. Yet as the epigraphs at the head of this chapter suggest, each recognized the complexity and contingency of what we now call political transparency. Bentham saw that disclosure is in vain without civic vigilance, Machiavelli that it is a ready instrument of the ruling few, who seek to manage appearances for political gain. Both warnings are apt for assessing transparency's possible consequences, and in the pages that follow they inspire my thinking about how it may occasionally go wrong.

To these I would add a further warning, focused on the sheer complexity of modern states. With all that public authorities do across a range of sometimes highly technical domains, there is simply too much to know. The volume alone of official disclosures far outstrips the conceivable mastery of any mind. And complexity means that even transparency will often remain opaque. As I argue below, this too contributes to the pitfalls of transparency. Simplistic approaches to disclosure may therefore produce perverse outcomes, including distrust, political withdrawal, and a kind of false knowledge which is worse than ignorance.

Disclosure as a Tool of the Mighty

“Secresy is an instrument of conspiracy,” writes Bentham; “it ought not, therefore, to be the system of a regular government.”¹ This has become something like the conventional wisdom in contemporary politics. It is bound up with the stigma against secrecy on which I have already had occasion to comment. Yet it mistakes a half-truth for the whole. Secrecy covers up villainy—and just as easily virtue. Transparency restrains the agent disclosed—and also empowers her.

Machiavelli draws attention to this Janus-faced quality of secrecy and transparency in the *Prince*. The typical assumption might suggest that rulers bent on domination should prefer to move covertly, and to shun the light. But in fact Machiavelli counsels princes to take great care of appearances, and large sections of the text are given over to discussions of effective self-disclosure. To spend too much time in the shadows would simply backfire, ceding to one’s adversaries the power to bring a secretive ruler into popular contempt. Rather, an effective prince is a constant presence, and “a great pretender and dissembler.”² He makes a display of “great enterprises,” and commands attention with such a succession of public gestures that “he has never allowed an interval between them for men to be able to work quietly against him.”³ In short, the prince is profoundly deceptive, but his deception rests at least as much on calculated self-exposure as it does on secrecy.

“Being Transparent” and Curating Appearances

Of course, it does not take a conniving prince to learn the lesson that appearances matter. Indeed the preoccupation with the subject has become politically mundane. “Appearances matter” could be the first maxim of democracy in the digital age, in which every word is liable to become a

¹ Jeremy Bentham, *Political Tactics*, ed. Michael James, Cyprian Blamires, and Catherine Pease-Watkin (Oxford: Clarendon Press, 1999), 39.

² Machiavelli, *The Prince*, 70.

³ *Ibid.*, 87–88.

soundbite, every photo an instant meme. Highly cognizant of this possibility, democratic political operatives fret about “optics” (as they call it) more than perhaps any other issue.¹

In suggesting that transparency can be a tool of the mighty, then, I do not mean to imply that openness ordinarily serves nefarious (and in that sense “Machiavellian”) ends. The purposes of a limelight-seeking politician may be quite pure, and publicly interested. My point, instead, is about control. When powerful political agents are left to control their own self-disclosure, what they choose to reveal will not always conduce to accountability or moral deliberation. Very often it will be calculated to assuage, or mollify, or distract. And that fact bears on the kinds of practices and institutions a liberal democracy needs to encourage a meaningful (and not merely apparent) discharge of the duty of transparency.²

Here we can recall Walter Lippmann’s anxieties about the transformation of “publicity” into “public relations” (and finally into propaganda) in the early decades of the 20th century.³ Lippmann’s recourse to technocracy was a rash response, in my view, but his worry was hardly misplaced. Allowing politicians alone to curate their appearances should raise the same concerns

¹ See, e.g., Josh King, *Off Script: An Advance Man’s Guide to White House Stagecraft, Campaign Spectacle, and Political Suicide* (New York: St. Martin’s Press, 2016).

² As every half-savvy politician knows, conspicuous displays of transparency are typically seen as signs of good will or integrity, and are rewarded accordingly. See John Ferejohn, “Accountability and Authority: Toward a Theory of Political Accountability,” in *Democracy, Accountability, and Representation*, ed. Adam Przeworski, Susan C. Stokes, and Bernard Manin (New York: Cambridge University Press, 1999), 140–41. Greg Michener notes, for example, that “[t]he mere fact of having enacted [a freedom of information] law makes leaders look good and international actors feel pleased—largely irrespective of the legal quality of what was passed.” “FOI Laws Around the World,” *Journal of Democracy* 22, no. 2 (2011): 147. That is one reason why the word “transparency” is so often on the lips of the powerful. If, however, such measures in fact do little or nothing to promote our understanding of these officials’ activities, then they cannot warrant much credit. Despite transparency’s folk status as an unalloyed political good, these details matter to the value of any particular measure. Indeed, that we should be considerably more judicious (and in general stingier) than we have been, as citizens, in approbation for transparency, is one practical lesson of my intervention here.

³ Walter Lippmann, *Public Opinion* (New York: Harcourt, Brace & Co., 1922).

now, among us. If the powers of disclosure are not at all dispersed, we invite the powerful to set their own scenes, and to craft narratives that may well prove tendentious.¹

Take for example the recent episode involving Donald Trump’s negotiation to save 1,100 (or was it 800?) manufacturing jobs at an air conditioner manufacturing plant in Indiana. While the actual terms of the agreement between the plant owner, Carrier, and the state Economic Development Corporation have remained sealed, Trump managed to take credit for saving hundreds of jobs, and for brokering a deal to avoid yet more dreaded outsourcing—all without a word about the costs to the state in terms of lost tax revenue, or about the hundreds of other jobs Carrier apparently still plans to relocate abroad. As a feat of political optics, it was for Trump a massive success. But can we say that he discharged his duty of transparency? It seems plain that he did not.

As a rule, it is not enough to demand that politicians should “be transparent.” That demand summons up notions of personal authenticity that may distract from the real prize of a substantive, public account-giving.² In other words, it forgets that politicians can go through the *rituals* of transparency while revealing nothing of real import. Again Trump is a master here, renowned for “telling it like it is” (a euphemism, it now seems, for so much course and callous prattling), and for his constant appearances on camera—yet almost never under circumstances in which the questions might prove truly probing or persistent. And again Trump’s aping of transparency did the trick. A simulacrum sufficed, as one poll revealed toward the end of the election: “Regardless of how you

¹ Nadia Urbinati, *Democracy Disfigured: Opinion, Truth, and the People* (Cambridge, MA: Harvard University Press, 2014), 174, 209–10.

² “Both popular and academic discourse lauds this personal transparency, encouraging people to not just *appear* in public, but to authentically *be* who they *really* are,” writes Elizabeth Markovits. Authenticity is “the demand for *public transparency* of one’s inner motives.” *The Politics of Sincerity: Plato, Frank Speech, and Democratic Judgment* (University Park, PA: Penn State University Press, 2008), 172, 181.

intend to vote,” asked Quinnipiac, “who do you think is more transparent: Hillary Clinton or Donald Trump?” Fifty-four percent pointed to the man who would be president.¹

The political scientist Kristin Lord offers an example of power-entrenching transparency at a few levels up.² If disclosure can serve the interests of the individual politician, so too it can powerfully equip states writ large. In Singapore, Lord finds that practices of information disclosure and high access to information technology is combined with a subtle grip on the channels of communication, and a weakening of the link between information and the pathways of political change. In this way, conventional forms of transparency reinforce the government’s control, illustrating that disclosure and democracy “need not necessarily go hand in hand.”³

One final variation on the theme. Even in societies in which the government exerts no such control over the media, selective disclosure routinely allows public authorities to influence popular opinion, and to shape narratives to their own liking. “Plants” often do the trick. In his wonderful study of executive branch leaking, David Pozen defines a plant as any “‘authorized’ disclosur[e] designed to advance administration interests and goals.”⁴ He explains that in the U.S., planting is now among the White House’s primary tools for “framing its activities” and “controlling the political agenda,” particularly in the domains of national security and foreign affairs. They permit the government to impart information about executive branch policies without officially acknowledging those policies and thereby inviting unwanted forms of accountability or constraint.⁵ In the drone

¹ Quinnipiac University, “By Huge Margin, Americans Say Clinton Is More Qualified, Quinnipiac University National Poll Finds, Except For Honesty, She Tops Trump On Key Qualities,” Sept. 15, 2016, accessed Jan. 1, 2017, https://poll.qu.edu/images/polling/us/us09152016_Uqvh48k.pdf/.

² Kristin M. Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy, or Peace* (Albany: State University of New York Press, 2006), 91–114.

³ *Ibid.*, 101.

⁴ David E. Pozen, “The Leaky Leviathan: Why the Government Condemns and Condone Unauthorized Disclosures of Information,” *Harvard Law Review* 127, no. 2 (2013): 512–635.

⁵ *Ibid.*, 559–60.

context, for example, Jameel Jaffer argues that precisely this technique of selectively disclosing classified material has allowed officials to build support for the program while downplaying civilian casualties and other evidence that might give life to public misgivings.¹

Again the lesson of these examples is not that secrecy is always preferable, but that concentrating control over disclosure in official hands is a course full of danger. There is, however, an alternative lesson that might be gleaned from this discussion, which I want briefly to address and put to rest. Some readers may be tempted by the thought that the best response to the pitfalls of selective disclosure is disclosure in full—total transparency.

Too Much Information

In the last two chapters I advanced a principled argument against maximizing transparency. The logic of representation permits, sometimes even requires, practices of official concealment. And the logic of liberty prevents the extension of transparency requirements to most aspects of citizens' association and expression, as well as to our formal participation in the voting booth and the jury room. But there are also contingent, pragmatic reasons for thinking that total transparency will fail. Too much weighs against the idea that full disclosure will eliminate the power of curating appearances and controlling narratives.²

For one thing, the massive volume of disclosures might depress attention, or simply distract from the few points of evidence that really matter. This is the point of the proverbial “data dump,” which hides the crucial facts in plain sight. Consider, for example, a large public repository of

¹ Jameel Jaffer, “Introduction,” in *The Drone Memos: Targeted Killing, Secrecy, and the Law*, ed. Jameel Jaffer (New York: The New Press, 2016), 26.

² Stéphanie Novak makes the related point that when multi-member panels are keen to disguise their internal disagreements, forcing disclosure of votes may actually contribute to a false impression of unanimity. “How Publicity Creates Opacity: What Happens When EU Ministers Vote Publicly,” in *Secrecy and Publicity in Votes and Debates*, ed. Jon Elster (New York: Cambridge University Press, 2015), 152–64. See also Pasquale Pasquino, “*E pluribus unum*: Disclosed

government information like the *Federal Register*. On the average day in 2016, this “daily journal” published several hundred pages of text related to the executive branch and administrative agencies in the United States (excluding the massive security bureaucracy whose material is so often classified)—and the next day, and the day after that, it published several hundred more. Obviously the *Federal Register* is meant as a reference, not a journal to be read sequentially, or in full. And with search technology and a functional division of labor whereby particular associations and journalists monitor the issues that matter to them most, it can be a useful resource. Nevertheless, at the level of wide public notice it is largely ignored. Few would think to peruse a stream of disclosures so voluminous.

Even if attention is not altogether suppressed, officials can still exert control by taking advantage of variations in issue salience. While the constant stream of disclosures exuded from government information bureaus, leaders would still have opportunities to seize the public narrative by the use of grand (or base) gestures, by playing up the issues or details that they wished to receive notice, and by leaving all else unmentioned—perhaps even by failing to acknowledge it. For these reasons, it seems to me that the best response to manipulations of transparency by the mighty is not to demand maximum exposure, but to limit their control over the disclosures they are obliged to make, an approach I elaborate in Chapter 5.

Disclosure as a Boon to Special Interests

In policymaking contexts we catch sight of a second possible pitfall of disclosure. Although transparency is ordinarily supposed to promote accountability, and in that sense to deepen the relationship between representatives and the people, it can sometimes end by further advantaging

and Undisclosed Votes in Constitutional/Supreme Courts,” in *Secrecy and Publicity in Votes and Debates*, ed. Jon Elster (New York: Cambridge University Press, 2015), 196–208.

the advantaged few. Adrian Vermeule describes an instance of this phenomenon in his account of the federal government's budget process.¹ In the earliest stages, congressional leaders and the president each develop detailed proposals, which form the basis for subsequent negotiations. Vermeule argues that disclosure of these opening offers should be delayed, in part to allow the initial proposals to take shape unfettered by the influence of a thousand special interests, whose fate depends on the allocation of government spending.² The trouble, Vermeule explains, is that the general public interest has no such intensive advocate to counterbalance the pressures brought to bear by the parade of special requesters. Too much transparency therefore renders policymakers accountable to the wrong parties, to narrow interests instead of the public generally.³

The concern may be even greater in administrative agencies. There, policy work is restricted to a particular, often technical field, which is generally less salient to the public than is policymaking in Congress, particularly when it sets to work on a budget for the entire nation. By contrast, among representatives of narrow industry interests, attention to agency work is particularly intense.⁴ Trucking firms naturally devote significant resources to attempting to influence the decision-making of the National Highway Traffic Safety Administration, as pharmaceutical firms do to influence the Food and Drug Administration, and so on. In these settings, transparency at the earliest stages of policymaking may help to equalize formal *opportunities* for influence, giving the public a window into the agency's pipeline. But as a functional matter, its effect may easily be reversed. That is, such disclosures might give stakeholders who have the most to lose—regulated industries, generally—

¹ Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (New York: Oxford University Press, 2007), 197–201.

² *Ibid.*, 205–09.

³ Francis Fukuyama makes essentially the same argument in *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (New York: Farrar, Straus and Giroux, 2014), 534.

⁴ Thomas T. Holyoke, *Interest Groups and Lobbying: Pursuing Political Interests in America* (Boulder, CO: Westview Press, 2014).

further avenues of influence that they might have lacked, had agency plans been withheld from them until fully formed, and published for notice and comment.¹

In effect, this worry about transparency arises from the reality of discrepancies of time and attention—that most precious political resource—as between the public and the most powerful private interests.

Paying Attention

As citizens, we pay attention only sporadically. Constant's remark about modern liberty is right: we care about more than self-government.² We care about our diverse "projects"—our relationships, our art, our business, our baseball. This means that the supply of political attention is always limited. Of course we deputize intermediaries—or rather, they deputize themselves, claiming to represent our interests. The Natural Resources Defense Council keeps watch over polluters, and monitors the agencies charged with environmental protection; the National Rifle Association polices what it takes to be an appropriately capacious Second Amendment; and so on. Even with these interest groups at work, however, the reality of inattention can shift the likely effects of disclosure.

Bentham, and John Stuart Mill after him, believed that publicity worked by way of inducing shame.³ The anticipation of public attention meant that no public actor would want to be seen to do wrong, and would constrain his behavior accordingly. In Mill's words, he would avoid behavior

¹ Ibid., 169–81.

² Benjamin Constant, "The Liberty of the Ancients Compared with That of the Moderns," in *Political Writings*, ed. Biancamaria Fontana (New York: Cambridge University Press, 1988), 309–28. "The exercise of political rights ... offers us but a part of the pleasures that the ancients found in it, while at the same time the progress of civilization, the commercial tendency of the age, the communication amongst peoples, have infinitely multiplied and varied the means of personal happiness." Ibid., 316.

³ Bentham, *Political Tactics*, 37, 149; John Stuart Mill, *Considerations on Representative Government*, 2nd ed. (London: Parker, Son, and Bourn, 1861), 207.

“which can by no possibility be plausibly defended.”¹ Yet even assuming that constraint is real, at best we might suppose it deters criminality and extreme venality, but not much else. Apparently “decent” explanations can be proffered for all sorts of decisions. Lawmakers can and do point to the existence of fraud to cast a color of decency over their efforts to cut nutritional assistance, and to let the most destitute of their constituents go hungry.

Ignoring for the sake of argument the phenomenon of shamelessness, the bridle of shame is a limited-purpose instrument. Even under its influence, policymakers are left with a great deal of leeway in which to decide. And to the extent that oversight can influence such decision-making, it matters greatly who is doing the watching, and who can wield carrots and sticks. If the public watches only intermittently, and the concrete sanctions at its disposal are limited to a single all-things-considered vote, once every electoral cycle, then ordinary citizens will not be best positioned to translate transparency into influence. Rather, that capacity would seem most likely to reside with private interests who can pay *for* attention, in a more concerted or consistent way.

Paying for Attention

Regulated industries have a vested interest in policies that could impact their business models. As such, the prudent course for such industries is to procure the services of professional lobbyists, who can monitor the actions of the appropriate regulators, and cultivate relationships in order to promote outcomes in keeping with their clients’ business aims. It is on K Street, in short, that inequalities of attention and access manifest most starkly.²

Of course, we do well to recognize that such lobbying might in principle produce results whether or not agencies take their early policy deliberations public. Once the relevant relationships

¹ Mill, *Considerations on Representative Government*, 207.

² Holyoke, *Interest Groups and Lobbying*, 22–32.

are formed, and the proverbial door begins to revolve, lobbyists will presumably have special opportunities to influence outcomes either way, opportunities unavailable to civil society groups and concerned citizens. Nevertheless, it is certainly conceivable that transparency would tend to smooth the way. At the very least, it would decrease the cost to regulated industries of learning agencies' future plans.

Imagine those plans are adverse to the interests of a given industry, say the fossil fuel industry. Suppose the Environmental Protection Agency is in the midst of internal deliberations to impose tough new emissions standards on automobiles. Immediately publishing such talks—complete with the changes of course and admissions of uncertainty they are bound to include—would likely aid regulated industries, both in their initial obstructions, and in subsequent (post-adoption) efforts to undermine unwanted rules. The transcripts of agency deliberation would provide useful fodder for these efforts. Whether by delegitimizing the proposed rules in the public sphere, by lobbying legislators to overrule them, or by challenging agency procedures in court, such industries would surely make hay of deliberative records—and especially of any hesitation or vacillation they might memorialize.

Whether secrecy might prevent such influence remains an open question, however. I briefly explore that issue in the next chapter. By way of preview, my conclusion will be that special interests are likely to wield disproportionate influence whether agency discussions are open or closed. As such, the connections between agencies and regulated industries (and their personnel) must be regulated directly, if at all. And in the meantime, forms of special access should be disclosed in accordance with the logic of equality.

Disclosure as a Driver of Distrust

One of the earliest and most commonly repeated arguments for transparency centers on political trust. Act in the open, and the people will have scant cause for suspicion. Bentham himself extends this promise to the would-be constitutional designers and legislators for whom he initially drafted *Political Tactics*. There he launches his defense of publicity by calling it “the fittest law for securing the public confidence.”¹ Nevertheless, several critics have shown in recent years that the relationship between transparency and trust is anything but reliably monotonic.²

In fact, this would have come as no surprise to the likes of Bentham, who understood well that openness cuts both ways, and in particular that it tends to depress confidence when it uncovers corruption or neglect.³ Still this body of criticism has made important contributions. Pierre Rosanvallon underscores the historical correspondence between the transparency movement of the last two decades and the rise of chronic distrust of government.⁴ And Onora O’Neill argues that too much transparency generally makes it harder, not easier, to determine when we are being deceived, a determination essential to the growth of trusting relations.⁵ Meanwhile, empirical studies have also found evidence of an inverse relationship (under some conditions) between transparency and public confidence in government.⁶

¹ Bentham, *Political Tactics*, 29.

² See, e.g., Maria Cucciniello, Gregory A. Porumbescu, and Stephan Grimmeliikhuijsen, “25 Years of Transparency Research: Evidence and Future Directions,” *Public Administration Review* 77, no. 1 (2017): 32–44.

³ See Jonathan R. Bruno, “Vigilance and Confidence: Jeremy Bentham, Publicity, and the Dialectic of Political Trust and Distrust” *American Political Science Review* (forthcoming). Several years ago, a wise essay warned the civic technology movement, which did so much to promote the ideal of transparency, of the same point: “the progressive impulse for transparency ... may well produce conservative or even reactionary effects of delegitimizing government activity quite broadly as public disclosure feeds more and more stories of government waste, corruption, and failure.” Archon Fung and David Weil, “Open Government and Open Society,” in *Open Government: Collaboration, Transparency, and Participation in Practice*, ed. Daniel Lathrop and Laurel Ruma (Sebastopol, CA: O’Reilly Media, Inc., 2010), 107.

⁴ Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (New York: Cambridge University Press, 2008), 46–48.

⁵ Onora O’Neill, *A Question of Trust: The BBC Reith Lectures 2002* (New York: Cambridge University Press, 2002), 73–74.

⁶ See, e.g., Stephan Grimmeliikhuijsen et al., “The Effect of Transparency on Trust in Government: A Cross-National Comparative Experiment,” *Public Administration Review* 73, no. 4 (2013): 575–86.

Congress offers one example. Scholars of legislative politics have plausibly argued that the advent of congressional television contributed (alongside other factors) to the decline of trust in the House and Senate, which remains today at historic lows. Norm Ornstein and Amy Schenkenberg have claimed, for instance, that video broadcasting floor sessions “added to the negative perceptions” of Congress, conveying an image of the institution as either bewildering or obnoxious.¹ The sight of near-empty chambers and the sounds of ideological discord, another scholar suggests, tend to invite not confidence but disgust.² According to John Hibbing, the root of the problem, at least in the U.S. case, is that “the public does not like to witness conflict, debate, deliberation, compromise, or any of the other features that are central to meaningful legislative activity.”³ Instead we prefer “stealth democracy,” wherein the messiness of politics unfolds behind the scenes, and legislative sausage-making is easily kept out of sight.⁴

None of this constitutes an argument against transparency, or even against congressional television, on balance. But it does suggest the possibility that in politics disclosure may prove dispiriting to the watchful public. Here, I want to spend just a moment discussing two scenarios in which this could be so.⁵ First, transparency might reveal such a complex web of institutions and officials that it alienates the people from their representatives. And second, transparency could bring

¹ Norman J. Ornstein and Amy L. Schenkenberg, “Congress Bashing: External Pressures for Reform and the Future of the Institution,” in *Remaking Congress: Change and Stability in the 1990s*, ed. James A. Thurber and Roger H. Davidson (Washington, D.C.: Congressional Quarterly, 1995), 126.

² Gerhard Loewenberg, *On Legislatures: The Puzzle of Representation* (Boulder, CO: Paradigm Publishers, 2011), 97.

³ John R. Hibbing, “Appreciating Congress,” in *Congress and the Decline of Public Trust*, ed. Joseph Cooper (Boulder, CO: Westview Press, 1999), 53.

⁴ John R. Hibbing and Elizabeth Theiss-Morse, *Stealth Democracy: Americans’ Beliefs about How Government Should Work* (New York: Cambridge University Press, 2002).

⁵ For an excellent recent overview of such causal mechanisms, see Jenny de Fine Licht and Daniel Naurin, “Open Decision-Making Procedures and Public Legitimacy,” in *Secrecy and Publicity in Votes and Debates*, ed. Jon Elster (New York: Cambridge University Press, 2015), 131–51.

to light such a succession of government failures that again it tends to depress citizens' confidence, or even fosters a kind of withdrawal.

Complexity and Alienation

Earlier I noted the enormous complexity of modern government, particularly in the regulatory domain. To understand the adequacy of an agency's oversight of nuclear power, for instance, it would be necessary to comprehend the particular risks associated with operating fission reactors. To understand how benefits and burdens are allocated through the tax code, it would be necessary to gain a global view of tax law and to monitor the rate at which different credits and deductions are actually claimed. These examples are barely the tip of the iceberg. Inevitably, government disclosure reveals a staggering complexity.

The rhetoric of transparency suggests that to generate political understanding all it takes is the will to remove whatever obstacles prevent some process from being seen. But this is false. Make government visible and you will be faced with an object that remains basically incomprehensible.¹ As I stress in the next chapter, disclosure is never enough. What it reveals is rarely clear. It reveals a cipher, something opaque, something in need of interpretation.

Given this reality of the complexity of government, it is not hard to imagine a disclosure strategy's exacerbating, rather than allaying, distrust. In this connection I would highlight Pierre Rosanvallon's concept of "proximity," and its importance in the maintenance of democratic legitimacy. Government should feel near and accessible, Rosanvallon argues, lest it becomes an object from which citizens are fundamentally alienated.² Precisely that sort of alienation is what I imagine "naked" disclosure might produce.

¹ Mark Fenster, "The Opacity of Transparency," *Iowa Law Review* 91, no. 3 (2006): 914–36.

² Pierre Rosanvallon, *Democratic Legitimacy*:

In reality, of course, we have various interpreters at the ready, including the press and practitioners of “Big Data,” who use narratives or analytical tools to try to make sense of raw disclosure. But that is precisely the point: their work is necessary. In its absence, the subtle message of so many disclosures will be that government is something foreign and distant, something beyond grasp, over which ordinary citizens cannot hope to exercise control. Reducing this sense of distance, and promoting a genuine understanding of the matters that occupy public officials, would take real communication.¹ It points to the limits of simple disclosure, and to the need for transparency to embrace forms of explanation and engagement we too often imagine it can do without.

Corruption, Failure, and the Loss of Political Faith

“You can’t be crooked in the light,” Wilson said.² If only it were so simple. The much more challenging reality is that in politics, corruption and wrongdoing come to pass in spite of representatives’ awareness that their works may be divulged. Sometimes crookedness is precisely what transparency reveals. And particularly in an age in which media outlets traffic in outrage, and the frames of fraud and scandal predominate, it is easy to see how we find ourselves gripped by the conviction that government can do no right.¹

Disclosure may compound such distrust even when hard evidence of venality is lacking. Larry Lessig makes this point in his discussion of campaign finance disclosure. What raw disclosure will tend to reveal (absent additional context), Lessig argues, is correlation—that a legislator who tends to vote in favor of business interests receives large donations from business interests. But it

Impartiality, Reflexivity, Proximity, trans. Arthur Goldhammer (Princeton: Princeton University Press, 2011), 210.

¹ Onora O’Neill, “Ethics for Communication?” *European Journal of Philosophy* 17, no. 2 (2009): 167–80.

² Wilson, *The New Freedom*, 116.

will be impossible to determine whether anything like *quid pro quo* explains this correspondence, “whether any particular contribution or contributions brought about a particular vote, or was inspired by a particular vote.” In the face of such indeterminacy, Lessig writes, “the assumptions of our political culture” will fill in the blank. And that means we will take such disclosure as “proof” of the conventional wisdom that legislators are corrupted by money. “What we believe will be confirmed, again and again.” If our background assumptions suggest grounds for distrust, then sometimes disclosure will only reinforce that distrust.

The political scientists Monika Bauhr and Marcia Grimes document an even more radical sort of distrust in their study of transparency initiatives in chronically corrupt states.² Contrary to the logic which associates transparency with public confidence, this study finds that revelations of corruption will tend to generate a mobilizing indignation only if sanctions (or some other concrete means of redress) are available. In their absence, transparency apparently deepens the conviction that government is irredeemable, and precipitates a growth in apathy—indeed a complete withdrawal from politics.

Lastly, distrust may arise when transparency reveals not corruption, but simply the failure to produce desirable outcomes. Governments fail to regulate the financial industry. They fail to prevent economic calamity. They fail to bring citizens deprived of dignified work back into the labor force. Transparency may shed light on what officials are doing, but if this sense of chronic injustice persists, then trust will likely remain elusive.³ Pope Francis captured this impression when he spoke of ours as “a world which—while calling for participation, solidarity and transparency in public

¹ Bernard Williams, “Truth, Politics, and Self-Deception,” in *In the Beginning Was the Deed: Realism and Moralism in Political Argument*, ed. Geoffrey Hawthorn (Princeton: Princeton University Press, 2007), 163; Fung and Weil, “Open Government and Open Society,” 107.

² Monika Bauhr and Marcia Grimes, “Indignation or Resignation: The Implications of Transparency for Societal Accountability,” *Governance* 27, no. 2 (2014): 291–320.

³ Judith N. Shklar, *The Faces of Injustice* (New Haven: Yale University Press, 1990), 112.

administration—often consigns the fate of entire peoples to the grasp of small but powerful groups.”¹ If such a consignment is what citizens see when they look to surrounding social conditions, then attitudes of confidence in the established ways of politics can hardly be forthcoming. Surely the recent surge of populism in the United States and Europe, if it teaches us anything, should teach us that.

Disclosure and the Difficulty of Knowledge

When interpreted as a practice of bare disclosure, I have been arguing, transparency can lead to some unexpected consequences. At least in some circumstances, it can entrench the power of the mighty, it can make policymaking vulnerable to the influence of special interests, and it can stoke the flames of political distrust. These are not *reliable* consequences, to be sure. But disclosure is not immune to them, either. And even that modest lesson should invite reconsideration of the transparency practices we choose to endorse. Accordingly, the pitfalls of disclosure discussed here motivate an account—developed in the next chapter—of tactics which might supplement visibility and information-sharing. They offer some hope, I shall argue, of avoiding these ironies of openness.

Yet there remains one final difficulty to discuss. Perhaps the most basic weakness of disclosure is its tendency to (re)produce complexity. Earlier, I argued that when openness does little more than convey the complexity of modern government, it can reinforce a sense of distance and civic helplessness, and attitudes of instinctive suspicion in turn. But there is another, simpler possibility. Besides conveying a sense of government’s complexity, disclosure sometimes leaves us latching on to the “wrong” things, so that we are left with a positive *mis*understanding of the ways in which power is being exercised. In other words, disclosure subjects us to the bias of salience.

¹ Pope Francis, “Ceremony Commemorating the 50th Anniversary of the Institution of the Synod of Bishops,” Oct. 17, 2015, accessed Jan. 1, 2017, http://w2.vatican.va/content/francesco/en/speeches/2015/october/documents/papa-francesco_20151017_50-anniversario-sinodo.html.

Part of the problem is the sheer volume of material. For when there is too much to know, we may simply cease trying to understand, and instead focus on whatever seems obvious to us. But this means that the gap between surface and depth effectively collapses. We imagine institutions as they appear, and lose sight of the possibility that they may function differently in practice than they do in theory.¹ This is another kind of salience bias, and it too can yield miscomprehension.

None of this means we would necessarily be better off without disclosure. Quite the contrary. It seems obvious, for example, that it is better to have a resource like the *Federal Register* than not to have it. But the prospect of misunderstanding discussed here should underscore the difficulty of political knowledge.

Citizenship Without Omniscience

If one thing is clear, it is that the answer to this challenge cannot involve asking citizens to know it all. Democracy does not demand omniscience, and any theory that suggests otherwise is exaggerating the epistemic requirements of self-government. It would be foolish to imagine we might all, individually, assimilate the glut of information that our public authorities daily disclose. Our “cognitive bandwidth” is simply too limited.²

The obvious alternative is to imagine some sort of sharing of responsibilities, or what Eric Beerbohm calls a “division of democratic labor.” Here we give up on the notion that every individual citizen should aspire to a complete acquaintance with the conduct of our public affairs. Instead, we aim “to divvy up labor with our other citizens and public officials.”³ We learn what we

¹ As noted in the previous chapter, this creates an opening for what Dennis Thompson calls “institutional hypocrisy,” whereby public officials deceive us about their fundamental purposes of their office. See “Hypocrisy and Democracy,” in *Liberalism without Illusions: Essays on Liberal Theory and the Political Vision of Judith N. Shklar*, ed. Bernard Yack (Chicago: University of Chicago Press, 1996), 173–90.

² Eric Beerbohm, *In Our Name: The Ethics of Democracy* (Princeton: Princeton University Press, 2012), 167.

³ Ibid.

can, we learn about what matters most to us—and then we communicatively share the fruits of this learning with others. At the same time, we rely on fellow citizens and representatives to share with us the lessons they have gleaned from the attention they themselves devote to public life.

Such an approach is consonant with the idea of a “deliberative system,” in which citizens, associations, and representatives engage together in a dynamic public sphere.¹ On this model, there are multiple, overlapping spaces of deliberation. Some citizens pay attention to this, others develop expertise in that, and the lessons learned are then deliberatively exchanged. The result is that it is possible for us, collectively and without civic omniscience, to question representatives’ work and to reflect on the facts about inequality and infringements of basic liberties.

This seems an attractive way forward, but it does not mean that developing political knowledge will be trivial. Such knowledge will always require some measure of rational engagement from citizens generally. And it will still require practices of interpretation and criticism. Before moving on to consider such practices in Chapter 5, let me spell out in just a bit more detail how disclosure can lead us astray when such attention and engagement is lacking.

What Transparency Teaches

In general, what transparency teaches if we fail to bring our critical faculties to bear, and if we lack access to narratives that give a glimpse of the “big picture,” is whatever sits on the surface, whatever happens to be most salient. This is hardly encouraging to the account of transparency I defended in Chapter 2. If transparency should enable us to assess representatives’ performance, and to evaluate the justification for inequalities and infringements of liberty, then salience bias is

¹ Jane Mansbridge et al., “A Systemic Approach to Deliberative Democracy,” in *Deliberative Systems: Deliberative Democracy at the Large Scale*, ed. John Parkinson and Jane Mansbridge (New York: Cambridge University Press, 2012), 1–26.

concerning. After all, what is salient may be little more than a distraction. (Think of the revelation of politicians' sex lives.¹)

Salience bias also means that we will be much more likely to notice acts of government than omissions. Yet omissions are ready instruments for carrying out policies of great significance, and for distributing public benefits and burdens. Omissions can kill. Likewise the “invisible” policies that Suzanne Mettler describes in *The Submerged State*. Massive programs that favor the (relatively) wealthy, like the home mortgage interest deduction, for example, are carried out through tax law, so that their wider significance is lost. The “hallmark” of such policies, Mettler writes, “is the way they obscure government’s role from the view of the general public, including those who number among their beneficiaries. Even when people stare directly at these policies, many perceive only a freely functioning market system at work.”²

More troubling still, salience bias may dull our sensitivity to precisely the sorts of liberty and equality concerns that transparency aims to bring within our moral deliberation. For instance, with formal equality of opportunity in market societies so “transparent” (in the traditional sense of plain or obvious), we may be more likely to overlook the reality of market-driven inequality.³ In the criminal context, meanwhile, the sensational nature of the crimes of a few convicted persons might lead us to ignore altogether questions about the conditions of imprisonment.

Lastly, the reality of salience means that without some critical interpretive practice, we will often be taken in by the surface, and miss the depth. Here Michael Glennon’s work on national security is illustrative. Cleverly repurposing Walter Bagehot’s distinction between “dignified” and

¹ Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Harvard University Press, 1996), 123–24.

² Suzanne Mettler, *The Submerged State: How Invisible Government Policies Undermine American Democracy* (Chicago: University of Chicago Press, 2011), 5.

³ Ian Shapiro, *The State of Democratic Theory* (Princeton: Princeton University Press, 2003), 121–22.

“efficient” institutions, Glennon lays bare the reality of “double government” in the U.S. national security state.¹ His analysis shows that constitutional appearances of separated powers and checks and balances mask a deeper reality: that “even the President now exercises little substantive control over the overall direction of U.S. national security policy.”² In fact, that policy is set largely behind the scenes, and largely unbeknownst to the public, by a network of senior government officials in a panoply of security and defense agencies. The most fascinating implication of Glennon’s account is that garden-variety disclosure practices actually underwrite the illusion of accountability and constitutional control, by creating the appearance of oversight where it is in fact toothless, and thereby obscuring the deeper reality about how power is exercised in this domain.

* * *

Although this chapter has been devoted to exploring the pitfalls of disclosure, my purpose here is not to argue against transparency in government, or to suggest that secrecy is always preferable. (To be sure, secrecy has pitfalls of its own.) Rather, the idea has been to underscore the necessity of getting beyond disclosure in our understanding of what duties of transparency require. In the next and final chapter, I propose a series of supplementary practices that I believe offer some promise of avoiding the difficulties discussed above.

¹ Michael J. Glennon, *National Security and Double Government* (New York: Oxford University Press, 2015), 5–7.

² *Ibid.*, 7.

THE STRUGGLE FOR INFORMATION—AND ITS LIMITS

THE ironies of openness are such that mandating disclosure often falls short. On its own, disclosure is constantly liable to the manipulations of the powerful; it can grease the wheels of influence of private interests on public policy; it can intensify distrust. And with civic attention scarce and complexity aplenty, disclosure may actually obscure how representatives exercise power.

How might these pitfalls be avoided? I begin this chapter by proposing an adversarial model of transparency, inspired by the procedures of common law courts. If we cannot simply trust representatives faithfully to discharge their duties of transparency, the best response lies in decreasing their control over information by dispersing the power to get answers. In other words, we should subject representatives to a struggle for information. This strategy has its limits, however. For one thing, the formal procedures I imagine cannot work in all contexts. And while representatives should not have monopolies on the power to conceal or disclose, they must not be denied control altogether. The idea behind adversarial transparency is just to subject representatives to claims of disclosure pursued by independent actors. Sometimes those efforts will prevail, but sometimes the representative will succeed in maintaining secrecy

Next I turn to the problem of outsized influence by private interests. The question arises whether secrecy can help to insulate policymakers from the pressures such groups bring to bear. I imagine scenarios in which that effect might be expected. But in the end most influence can adapt to either secrecy or transparency. To the extent it calls for regulation, then, such influence needs to be regulated directly.

Finally, I consider the question how best to promote public understanding, along with the sort of moral deliberation that transparency is supposed to make possible, on my account. Here I focus on practices of interpretation and social criticism. These disciplines can make the complex manageable, and confront us with realities we would rather not acknowledge. They offer the prospect of a richer sort of transparency than bare disclosure involves. But their capacity to alleviate distrust remains a function of what transparency reveals.

Ministries of Truth

In the totalitarian abyss of George Orwell's *1984*, the state claims a monopoly on both the control and interpretation of information. It purports to dictate what is and what is not, and brooks no opposition, no competing understandings. The "Ministry of Truth" is simply authoritative.¹ Fearful of the abuses of such propaganda, contemporary transparency advocates sometimes present their claim for raw, unmediated data as opposed to the practice of self-explanation by governments. The insinuation seems to be that if the state is involved in framing and shaping its own narrative, then we are simply too vulnerable to misrepresentation. Better to demand of government "just the facts," and to leave interpretation to the rest of us.

It seems to me the choice is not exclusive. Representatives *should* be in the business of explaining themselves, I argued in Chapter 2. Governments, and also private political actors who incur duties of transparency, may certainly advance their own narratives, and in that way attempt to shape public opinion. But so too should other, independent parties—journalists, scholars, critics, activists, and so forth. Whether the task is getting access to information or trying to make sense of it, power should not be concentrated in the hands of a few.

¹ George Orwell, *1984* (New York: Signet, 1950), 4.

Confronting Official Secrets

If the power to control disclosure is concentrated wholly in the hands of those who incur duties of transparency, then meaningful transparency will not always materialize. Secrets will be kept when they ought to be divulged. Selective disclosures will cast a veneer of righteousness over the acts of the responsible parties. No imputation of nefarious motives is required for this observation—only the assumption that, all else being equal, political actors will prefer to avoid the pressures of oversight, and the discomfort of having to answer for their conduct (to say nothing of the direct costs of disclosure).¹

The best response to this reality is not, I think, to strip agents of all influence over the circumstances of their own exposure. (Nor would that be possible, consistent with principles of liberal democracy.) But the power to control those circumstances should at least be shared. Independent political actors should be equipped, under certain conditions, to force disclosure, and to question the responsible parties publicly.

Adversarial Transparency

To generate transparency, scholars and policymakers have frequently turned to freedom of information (FOI) laws.² Generally speaking, such laws impose on covered agencies an obligation to release official documents upon request by any person. Several categories of records are typically exempted, however. And although most FOI laws formally empower document requesters to sue

¹ Officials' candid acknowledgement that it is often a distraction to comply with disclosure rules—or, as one ex-staffer put it, “a tedious and unrewarding interruption to one’s ‘real’ work and a terrible time suck”—helps to explain the preference. Andrew McGill, “Why FOIA Is Broken, From a Government Worker’s Perspective,” *The Atlantic: Notes* (blog), July 6, 2016, accessed Jan. 1, 2017, <http://www.theatlantic.com/notes/2016/07/why-the-freedom-of-information-act-is-broken-from-a-government-employees-perspective/490181/>.

² Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, 2nd ed. (Paris: UNESCO, 2008). See also John M. Ackerman and Irma E. Sandoval-Ballesteros, “The Global Explosion of Freedom of Information Laws,” *Administrative Law Review* 58, no. 1 (2006): 85–130; Laura Neuman and Richard Calland, “Making the Law Work: The Challenges of Implementation,” in *The Right to Know: Transparency for an Open World*, ed. Ann Florini (New York: Columbia University Press, 2007), 179–213.

when government agencies wrongly withhold information, they leave effective power over what will be released, and what remain hidden, in the hands of the officials whose agencies are concerned.¹

Voluntary compliance by public authorities with such rules of disclosure would simplify matters, but it can hardly be assumed. Control of information—control of the circumstances under which information will be concealed or revealed—is itself a form of power.² Attempts to force disclosure are therefore non-neutral in their effects, and typically advantage some political actors while disadvantaging others. They produce political “winners” and “losers.”³ And the latter, unsurprisingly, are often inclined to resist—or else, following Machiavelli, to make a show of “being transparent” while in fact avoiding disclosure of whatever would harm their political interests if widely known.

From the citizen’s perspective, then, getting to the facts about the exercise of public authority will often require meeting and overcoming official resistance. “In the relations of individuals to institutions,” writes Pierre Rosanvallon, “the struggle to obtain information has always been decisive.”⁴ FOI laws are aids in that struggle (assuming they are not mere window-dressing), but cannot be alternatives to it.

Given the temptation officials face to make a shield of secrecy,⁵ I want to suggest that the transparency practices we most urgently require have an *adversarial* character. They facilitate the extraction of information from the powerful even against their wishes. If officials otherwise retain full discretion to determine (i) whether a record of any particular conduct should be created, (ii) how

¹ See, e.g., Margaret B. Kwoka, “Deferring to Secrecy,” *Boston College Law Review* 54, no. 1(2013): 185–242.

² Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (New York: Vintage, 1989), 19.

³ Daniel Berliner’s research on the conditions under which FOI laws are most likely to be adopted bears this out. See “The Political Origins of Transparency,” *Journal of Politics* 76, no. 2 (2014): 479–91.

⁴ Pierre Rosanvallon, *Le Bon Gouvernement* (Paris: Seuil, 2015), 242 [translation mine].

⁵ See, e.g., Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age* (New York: Cambridge University Press, 2006).

it should be stored, and (iii) whether it should be released, adversarial practices challenge these powers.

Consider an example. In contemporary debates about police abuse of force, significant reformist energies have been channeled into the project of requiring police to wear body cameras. These devices seem helpful because we assume they can be relied upon to record events fully and impartially. But as some communities are already learning, body camera protocols are highly manipulable. Front-line officers can typically control whether a camera is functioning at any given moment, whether its view is unobstructed, whether it happens to be in need of repair. And because the footage is held in police custody, unflattering scenes can always be deleted, or allowed to be lost in a department's massive digital haystack. Finally, the rules for public disclosure of body camera recordings are hazy. What's clear is that departments acting as custodians of those files have considerable discretion in deciding whether they should be released in any given case.

Fortunately, there exists a similar form of transparency untouched by these disadvantages, one that denies police such discretion over the video record. I am referring to the cameras attached to mobile phones, sitting in the pockets of thousands of individuals who encounter police (or witness police encounters) every day. Although amateur recordings are not always created—hence the allure of ceaselessly-rolling body cameras—the smartphone phenomenon gives ordinary citizens some power to determine whether and when a record will be made, or stored, or disseminated. Though hardly a silver bullet for addressing the fraught issues of racial disparity in police use of force, this does represent a kind of power shift.

In emphasizing this issue of custody and control of the evidence of official conduct, I make common cause with the political theorist Jeffrey Green. In *The Eyes of the People*, Green identifies and defends a “principle of candor,” according to which political leaders should “not be in control of the

conditions of their [own] publicity.”¹ More than a standard of frank speech, candor here takes on a specialized meaning, referring to the susceptibility of elites to public appearances that are unscripted, unrehearsed, and unmanaged by “public relations” teams. Candor aims at what Green calls “eventfulness.” It involves forcing rulers to appear on the public stage in circumstances they might otherwise wish to avoid—circumstances that are spontaneous, unpredictable, politically risky, and not orchestrated “from above.”²

I confess skepticism about Green’s broader plebiscitarian model of “ocular democracy,”³ and about any conception of transparency that gives priority to specifically visual modes of exposure. Nevertheless, the idea of candor speaks directly to the Machiavellian lesson I mentioned in the last chapter. Elites are accustomed to cultivating appearances on their own terms, for their own political purposes. Green and I are agreed that permitting them to do so exposes citizens to political peril. The difference comes, I think, in characterizing the nature of the risk. What Green sees jeopardized is the people’s capacity to learn from looking, to make spectatorship a source of power. What I see threatened is the people’s capacity to learn (by whatever means) the facts about officials’ use of authority—facts that are too easily disguised and repackaged if disclosure can only be triggered with official permission.

To challenge leaders’ capacity to curate the public record, liberal democrats need a repertoire of practices enabling citizens (or their representatives) to extract and circulate information. Such practices are hardly unknown to contemporary politics. They are, however, almost too familiar, and too disjointed, for their collective significance to be recognized. Here, I want to conceptualize such transparency practices (as I think they might fairly be called) with recourse to an analogy. With some

¹ Jeffrey Edward Green, *The Eyes of the People: Democracy in an Age of Spectatorship* (New York: Oxford University Press, 2010), 183.

² *Ibid.*, 19–23.

³ *Ibid.*, 3–31.

trepidation, I would liken the practice of transparency to litigation in common law courts, and specifically to the procedural model that Robert Kagan labels “adversarial legalism.”¹

What would it mean for transparency to enable the extraction of information managed and manipulated by officialdom? Litigation practices in the common law tradition are adapted to similar ends, with two elements being especially germane: (i) discovery and (ii) direct and cross-examination. These adversarial procedures are designed to bring to light evidence that one or more disputants would prefer to leave in the shadows.

Discovery and Examination

“Discovery” generally refers to an early phase of litigation.² After a suit is filed but before the parties meet at trial, they engage in an extended period of evidence-gathering, which typically involves investigation and interrogation, demands for documents, and the interviews under oath known as depositions. This is discovery. The process is so pivotal that many cases never proceed beyond the discovery phase.³ Having seen the available evidence, and having perhaps tested its admissibility in pretrial arguments before a judge, many litigants choose to negotiate a settlement rather than undergo a costly trial of uncertain outcome.

What gives discovery its teeth is judicial enforcement. Parties and witnesses have a legal obligation to cooperate, to respond truthfully to requests for records, and to answer questions honestly—all on pain of punishment (including, in most jurisdictions, jailing for “contempt of

¹ Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, MA: Harvard University Press, 2001).

² For a helpful discussion of the unique status of pre-trial discovery in U.S. law, see Joachim Zekoll, “Comparative Civil Procedure,” in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (New York: Oxford University Press, 2006), 1334–35. English law has shifted toward a more restrictive, judge-managed process of evidence gathering. *Ibid.*, 1330.

³ *Ibid.*, 1335.

court”).¹ The process is remarkably effective. Indeed, it has been argued that discovery is *too* effective, giving license to aggressive plaintiffs on proverbial “fishing expeditions.”² What bears underscoring for our purposes is that discovery is oriented to producing as much potentially relevant evidence as possible. It does so by consistently empowering those who seek new information, and by constraining those who would prefer to bury such information, and to remain silent in the face of interrogation.

Direct and cross “examination” is the practice of questioning witnesses at trial, again under oath.³ This is the stuff of drama, and it is probably what most of us associate with courtrooms and trials. Like discovery, examination works by giving questioners the upper hand. Whereas witnesses may wish to avoid acknowledging some damning fact, or to avoid responding directly to some difficult query, the rules of examination leave them little choice.⁴ Refusal to answer is a punishable offense (contempt of court). Likewise lying (perjury). And changing the subject is impossible: witnesses are not at liberty to speak except in response to the questions put to them.

In effect, examination creates a discursive situation in which the target of questioning is radically constricted. That is the point I most wish to emphasize. There is no further room for maneuver, and all that remains is to answer directly. Every attempt at evasion, distraction, or manipulation is bound to fail—assuming a reasonably competent questioner. Every attempt at deception or misrepresentation is liable to unmasking, as the witness faces impeachment with his

¹ For the rule governing such sanctions in U.S. civil litigation, see Fed. R. Civ. P. 37. See also Amy R. Mashburn, “Making Civility Democratic,” *Houston Law Review* 47, no. 5 (2011): 1155.

² Kagan, *Adversarial Legalism*, 100–4; John H. Langbein, “The German Advantage in Civil Procedure,” *University of Chicago Law Review* 52, no. 4 (1985): 823–66; W. Bradley Wendel, “Rediscovering Discovery Ethics,” *Marquette Law Review* 79, no. 4 (1996): 895–948. For the history of such debates, see Stephen N. Subrin, “Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules,” *Boston College Law Review* 39, no. 3 (1998): 691–746.

³ Robert P. Burns, *The Death of the American Trial* (Chicago: University of Chicago Press, 2009), 9–20.

⁴ In the U.S., the constitutional right against self-incrimination—“pleading the Fifth”—is an exception. See Katharine B. Hazlett, “The Nineteenth Century Origins of the Fifth Amendment Privilege against Self-Incrimination,” *American Journal of Legal History* 42, no. 3 (1998): 235–60.

own prior acts or statements. Like discovery, examination is a powerful means of surfacing relevant evidence, in spite of witness resistance. There are methods of avoiding the witness stand, of course. But once occupied, that stand becomes a space of constraint, a space in which secrecy, stonewalling, obfuscation, and deception become not altogether impossible, but much more difficult (and dangerous) to orchestrate.

Before going on, let me try to dispel a possible misunderstanding of my purpose here. I do not mean to argue that transparency should always (or usually) take the form of a legal procedure. Nor that trials should be the regular means of managing relations between officials and the public. The most productive way of getting at the facts is *not* to place public authorities on trial, in courts of law, as a matter of routine.¹ I want to take discovery and examination as models for adaptation, not as methods applicable directly to politics. In other words, I am proposing discovery and examination as spurs to our political imagination. How, in democratic politics, can we recreate their way of shedding light on relevant facts, despite the determination of officials (and other parties on whom the facts might reflect poorly) to prevent disclosure? That is my question. Transparency is most valuable when it allows us to overcome such resistance, and discovery and examination are illustrations to help us understand what this overcoming might involve.

A pair of examples should help to illustrate how these practices—often undertaken in tandem—can serve the cause of public understanding. Consider discovery practices first. Here the best illustration comes in the form of open-ended, independent investigations. Such investigations need not be entrusted to any single authority. Indeed, to concentrate the powers of inquiry in that way would be to invite abuse. Rather, they might be undertaken by inspectors-general, government ombudsmen, legislators, or other officials. Investigative authority might even be vested in panels of

¹ Not, at any rate, without a credible allegation of lawbreaking. For a more optimistic view of the democratic potential of (political) trials, see John P. McCormick, *Machiavellian Democracy* (New York: Cambridge University Press, 2011), 114–38.

citizen auditors.¹ The key point, for my purposes, is that such investigations entail powers of discovery. They authorize investigators to demand documents and information, to observe the target institutions at work, and to interview their staffs. And they oblige the investigated institutions to comply.

Whoever leads a given inquiry, the question of scope is critical. Public investigations are commonly triggered by revelations of official malfeasance or incompetence. Paradoxically, however, they may teach us more outside those occasions. When undertaken at regular intervals and without cause, investigations allow for the study of government power without the narrowly retrospective frames associated with political scandal—“How could such-and-such have occurred?” In effect, these more open-ended investigations scrutinize public agencies writ large, assessing how they function in a range of different circumstances.

The contrast between scandal-driven and open-ended investigations is exemplified by a recent case concerning veterans’ health care in the United States. One of many individuals affected by mismanagement at the agency in question was a U.S. Army retiree named Barry Coates. Like some eight million other veterans, Coates received health care through the Veterans Health Administration, a branch of the U.S. Department of Veterans Affairs (VA). In late 2010, he sought help for severe abdominal pain and abnormal bleeding. After an initial appointment, however, disorganization and substandard care prevented his receiving a recommended colonoscopy until over a year later. One terrible Friday, late in 2011, Coates finally underwent the procedure. It revealed a baseball-sized tumor: stage four colon cancer. The disease would ultimately claim his life.²

¹ Richard Mulgan, *Making Open Government Work* (New York: Palgrave Macmillan, 2014), 135–57; Larry Diamond, *The Spirit of Democracy: The Struggle to Build Free Societies throughout the World* (New York: Henry Holt, 2008), 300, 306.

² Coates died on January 23, 2016. Scott Bronstein et al., “Barry Coates Dead; Veteran Was at Heart of VA Scandal,” *CNN.com*, Jan. 27, 2016, accessed Jan. 1, 2017, <http://www.cnn.com/2016/01/27/us/barry-coates-dead/>.

In the final years of his illness, Coates testified publicly about the problems he encountered at the VA. Profiled in a report on delays in care published in early 2014, he later shared his experience directly with legislators in a House oversight hearing.¹ As it happened, his case was not unique. Intense scrutiny of the VA during this period produced several explosive revelations. Among them was a report that VA officials in Phoenix, Arizona, kept patients on a secret waiting list for months at a time, intentionally concealing delays in care—like the delay that made Coates’s cancer so deadly—from administrative leaders and oversight officials in Washington.² Outraged by these revelations, Congress demanded swift, visible punishment. Several investigations were launched. Top VA officials, including the director in Phoenix and eventually the head of the entire Department, were terminated (or forced to resign). Reform legislation providing some \$16 billion in funding was enacted. And before long, the matter receded from public consciousness.

On the surface, the official response to the VA scandal was a success. After initial indications of wrongdoing, multiple investigations revealed that administrative leaders had acted improperly, and that system-wide failures had left many veterans without adequate care. The accountability ritual played out routinely: top VA officials were publicly lambasted, legislators demanded that heads should roll, and soon the Department head became the scapegoat of choice. His departure was widely reported in the press, and brought the whole story—mismanagement, revelation, punishment—to a close.

¹ Scott Bronstein, Nelli Black, and Drew Griffin, “Veterans Dying Because of Health Care Delays,” *CNN.com*, Jan. 30, 2014, accessed Jan. 1, 2017, <http://www.cnn.com/2014/01/30/health/veterans-dying-health-care-delays/>; *A Continued Assessment of Delays in VA Medical Care and Preventable Veterans Deaths: Hearing Before the Comm. on Veterans Affairs*, 113th Cong. 4 (April 9, 2014) (statement of Barry Coates), <https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg87677/pdf/CHRG-113hhrg87677.pdf>.

² Scott Bronstein and Drew Griffin, “A Fatal Wait: Veterans Languish and Die on a VA Hospital’s Secret List,” *CNN.com*, April 23, 2014, accessed Jan. 1, 2017, <http://www.cnn.com/2014/04/23/health/veterans-dying-health-care-delays/>.

Yet today, several years on from that resignation, severe delays in care and routine misreporting of wait times persist.¹ In the public’s perception, meanwhile, the issues at the VA have already been addressed. This suggests that scandal-driven investigation may have been less fruitful than it first appeared to be. Here, such investigation fueled a public “blame game,” in which condemnation and outrage ultimately produced a conspicuous change at the agency’s head.² This change allowed oversight officials to satisfy the demand that they do *something* about the administrative pathologies plaguing the VA. But this very response contributed to a false impression that the VA’s problems could be solved by the appointment of a new Secretary of Veterans Affairs. In fact, they went much deeper, and were much less easily addressed. The predictable uses made of scandal-driven investigation thus abetted a public *mis*understanding—a confusion of symbol and structure in government, of the agency’s public face with its underlying operational practices.

Not all scrutiny of the VA was driven by headlines, however. Before, during, and after the 2014 scandal’s unfolding, a different sort of oversight—in this case by the Government Accountability Office (GAO)—offered a wider, deeper perspective on the VA’s conduct. Although the GAO’s assessments are often requested by congressional committees, they are relatively open-ended, and are not necessarily driven by prior revelations of wrongdoing.³ In contrast to the relatively narrow, retrospective investigations carried out in the wake of the VA scandal, the GAO’s general investigations have taken up a wide variety of issues, and together paint a much fuller picture of how the VA works (and how it does not).

¹ U.S. Government Accountability Office, *VA Health Care: Actions Needed to Improve Newly Enrolled Veterans’ Access to Primary Care*, March 18, 2016, <http://gao.gov/products/GAO-16-328>.

² Christopher Hood, *The Blame Game: Spin, Bureaucracy, and Self-Preservation in Government* (Princeton: Princeton University Press, 2011).

³ See, e.g., Paul L. Posner and Robert Schwartz, “Accountability Institutions and Information in the Policy-Making Process,” in *Accountable Governance: Problems and Promises*, ed. Melvin J. Dubnick and H. George Frederickson (Armonk, NY: M. E. Sharpe, 2011), 133–40.

From these investigations one learns, for example, that the Veterans Health Administration outsources some care to ordinary community medical providers; that claims submitted by these providers often arrive on paper, and sit for weeks before scanning and adjudication by VA staff, causing lengthy payment delays; and that the VA has failed adequately to monitor its own claim processing system.¹ One learns that the VA’s internal systems for analyzing “adverse events” (including medical errors) at its hospitals seem to be faltering, with formal analyses becoming less frequent even as adverse events increase in number.² One learns that appointment delays have impacted not only primary care, but also speciality referrals and mental health care.³ Finally, one learns that the VA’s outsourcing of care to community providers accounts for most of a \$3 billion funding gap projected for a recent fiscal year; and that the VA’s budget process is highly vulnerable to the uncertainties of cost estimation.⁴

None of these conclusions could have been drawn without the investigators’ use of discovery practices—without their ability to extract information, to shake free documentary evidence, and to observe the relevant officials in action. Obviously the investigative model cannot be replicated in all contexts of government. But it nicely captures the way in which the power over concealment and disclosure can be dispersed.

The second example I want to mention concerns what I have called “examination.” Here questioners can effectively demand answers from government officials, confront their testimony

¹ U.S. Government Accountability Office, *Veterans’ Health Care: Proper Plan Needed to Modernize System for Paying Community Providers*, May 11, 2016, <http://gao.gov/products/GAO-16-353>.

² U.S. Government Accountability Office, *VA Health Care: Actions Needed to Assess Decrease in Root Cause Analyses of Adverse Events*, July 29, 2015, <http://gao.gov/products/GAO-15-643>.

³ U.S. Government Accountability Office, *VA Health Care: Management and Oversight of Consult Process Need Improvement to Help Ensure Veterans Receive Timely Outpatient Specialty Care*, Sept. 30, 2014, <http://gao.gov/products/GAO-14-808>; U.S. Government Accountability Office, *VA Mental Health: Clearer Guidance on Access Policies and Wait-Time Data Needed*, Oct. 28, 2015, <http://www.gao.gov/products/GAO-16-24>.

⁴ U.S. Government Accountability Office, *VA’s Health Care Budget: In Response to a Projected Funding Gap in Fiscal Year 2015, VA Has Made Efforts to Better Manage Future Budgets*, June 3, 2016, <http://gao.gov/products/GAO-16-584>.

with contrary evidence, and reject irrelevances and evasions. In this way examination becomes a powerful tool for learning about representatives' exercise of authority. When practiced skillfully, it cuts through obfuscation like almost nothing else can do. The following exchange from the journalist Laura Sullivan's interview of Roy Wright, director of the U.S. National Flood Insurance Program (NFIP), is illustrative. Here Sullivan is asking about potential fraud by private insurance companies, which provide government-subsidized coverage to homeowners under the program. In the case in question, there was evidence of claims adjusters having manipulated reports of property damage in flooded homes to reduce the insurers' liability:

LS: What do you think was happening with these examples of forged signatures, and not just changed conclusions but changed observations [in the property damage reports]?

RW: Of all issues in front of me, I find these engineering reports to be the most maddening. Many of them were done right. But I've seen reports where they took pictures of damage, they described the damage, and when you get to the conclusion on page 32, they said there was no damage. That's shoddy, sloppy work.

LS: Is it sloppy work, or is it fraud?

RW: You know, so the questions of fraud I need to leave to the legal investigators' side to play out. I look forward to what the states' attorney generals can bring to me.

LS: This was happening across multiple engineering companies, represented by multiple insurance companies. How was this happening across so many different platforms if it was just shoddy work?

RW: So—and this is a piece that I'm here to fix. There is no incentive in this program to do anything other than pay for everything covered under the policy.

...

LS: Do you think you're paying the insurance companies too much?

RW: You know, there's a cost to running a business, and we are a private-public partnership that is there. But the costs are one of those things that I'm examining.

LS: What kind of a profit do you think they're making?

RW: I've never looked at the book of business to understand their profits.

LS: That's a big statement for somebody that is giving insurance companies—

RW: So in every instance—

LS: —more than in excess of a billion dollars a year, to not know what their profit structure would be on that.

RW: Yeah, so flood is one of the perils that these companies run. So you'd need to go specifically to the companies to understand those numbers.¹

Sullivan's questioning accomplishes two things. First, it demonstrates that NFIP officials are less than vigilant in policing abuse by the insurance companies. These firms are compensated by the NFIP for administering homeowners' flood insurance policies—a form of coverage so costly to provide, historically, that private insurers had largely opted out of that business before the NFIP was established in 1968. Under the program, the U.S. government pays for all approved claims, bearing the full risk of hurricanes and other major flood events. Hence Wright's assertion that “[t]here is no incentive in this program to do anything other than pay for everything covered under the policy.”

But Sullivan's questioning casts doubt on that idea. This is her second contribution in the quoted exchange. She demonstrates that NFIP has failed to monitor its partner insurance firms' profits on their compensation under the program. If, as Sullivan's evidence suggests, the program is so enriching to private insurers that they fear Congress will cease funding it—as Congress has threatened intermittently to do—then the firms do have an incentive to minimize the burdens of the NFIP on the public fisc, including by systematically shortchanging policy-holders after disaster strikes.

Note that the effectiveness of Sullivan's examination here rests at least in part on the discursive power she wields. She interjects and persists when Wright attempts to skirt the question of possible fraud by the insurers. She challenges his claim that they have no reason to minimize

¹ PBS Frontline, *Business of Disaster*, transcript, accessed Jan. 1, 2017, <http://www.pbs.org/wgbh/frontline/film/business-of-disaster/transcript/>.

payments to policy-holders, citing powerful contrary evidence and compelling Wright to address the question of insurer profits.

Of course, while traditional interviews of this sort constitute a valuable forum for examination, they also rely on the voluntary cooperation of agency officials. Needless to say, such cooperation is not always forthcoming. Administrators may simply decline to speak to the press—as the head of the U.S. Federal Emergency Management Agency (FEMA) declined to be interviewed by Sullivan for her investigation of abuse by flood insurers. Or they may direct questions to spokespersons lacking direct knowledge of the matters at hand, and who are motivated above all to protect their organizations’ (and their colleagues’) reputations—as did the private insurers in Sullivan’s story, who sent an industry representative to deflect any evidence of wrongdoing.

Formal examination therefore fills an important gap. The formality of a legislative oversight hearing, for example, or of questioning by a government auditor, may impose on targeted officials a legal obligation to answer—less readily sidestepped than a journalist’s interview request. In any case, practices that give questioners the discursive upper hand, and succeed in putting representatives “on the spot,” can be powerful instruments of transparency. They allow us to challenge official reticence and to cut through official obfuscation.

Examination and discovery are powerful disciplines of adversarial transparency. Yet they also have obvious limits. As formal, rule-bound practices, they will not be practicable in all contexts. And even where they can be applied, they call for supplementation. In the examples I have just discussed, the struggle for information was in fact married with another practice I take to be crucial to transparency—namely, interpretation. Before turning to such practices, however, and to the idea of making sense of disclosure, let me address another of the pitfalls catalogued in the last chapter.

Can Secrecy Stop Special Interests?

Regulators and lawmakers often move discreetly when planning novel action. Their reasons for doing so are not difficult to conceive. Privacy affords greater freedom to maneuver, more opportunities to manufacture support, and a better chance of safeguarding nascent proposals, which are inevitably vulnerable to attack. What is less obvious is whether such secrecy might also forestall the influence of special interest groups. In Chapter 4, I suggested that transparency in the early stages of policymaking could perversely facilitate such influence. Will secrecy then stop it?

Vermeule's proposal to conceal the early stages of the federal budget process suggested that it can.¹ But notice the crucial assumption in that account. In order for the strategy to bear fruit, secrecy must be ironclad. There can be no "offline" conversation between the proposal-writers and the representatives of industry. Nor indeed may policymakers feel the subtle blandishments of the revolving door, whereby the prospect of lucrative employment in the future quietly affects the shape of policy in the present. If these influences are felt, then secrecy too may have the effect of a surrender to special interests.

Varieties of Capture

Again, confidentiality is not necessarily preferable to transparency for purposes of regulating the pressures policymakers face. Rather than insulating agencies from industry influence, it might in practice increase their vulnerability to it, by removing the inhibitions against cozying up to regulated entities. In conditions of high visibility, frequent consultation of such entities, and deference toward their concerns, might raise eyebrows. Without the risk of public disapproval, however, administrators could find themselves transformed: the very secrecy of the regulatory process could imperil their independence and create temptations to carry water for the subjects of their regulatory

¹ Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (New York: Oxford University Press, 2007), 197–201.

oversight. On this scenario, opacity would facilitate the exertion of private influence upon public administration—facilitate, in a word, the “capture” of regulators by the regulated.¹

Given that possibility, I am inclined to argue that neither secrecy nor transparency is up to the task of blocking private influence. The likely effects of openness (relative to those of confidentiality) are simply too uncertain. And special interests are simply too resilient, too fluid, to be foiled by such modest methods. Instead, if we hope to limit the influence of special interest groups on policymaking, I see no alternative to direct regulation—to rules that would prohibit communication between policymakers and regulated entities, severely restrict the revolving door, and so forth.

The more sensible thing to ask of disclosure, in my view, is that it should render the circumstances of unequal influence publicly knowable, in accordance with the logic of equality. This should include making clear (if only after the fact) the frequency and type of contacts between private interests and policymakers, as well as reporting the passage of personnel from regulatory roles into regulated industries, and vice versa.²

Because capture comes in yet more subtle varieties, even more might be required to shed the requisite light on inequalities of influence. Consider, for instance, James Kwak’s concept of “cultural capture.” Here regulators are more likely to produce policy favorable to regulated industries insofar as (1) they identify as part of the same social group, (2) they run in the same social networks, and (3) they perceive the regulated industries (or their advocates) as having some status worthy of deference,

¹ For discussion of regulatory capture, see Paul J. Quirk, *Industry Influence in Federal Regulatory Agencies* (Princeton: Princeton University Press, 1981), 4; Daniel Carpenter, “Detecting and Measuring Capture,” in *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, ed. Daniel Carpenter and David A. Moss (New York: Cambridge University Press, 2014), 57–68.

² See, e.g., Scott Higham et al., “Drug Industry Hired Dozens of Officials from the DEA as the Agency Tried to Curb Opioid Abuse,” *Washington Post*, Dec. 22, 2016, accessed Jan. 1, 2017, https://www.washingtonpost.com/investigations/key-officials-switch-sides-from-dea-to-pharmaceutical-industry/2016/12/22/55d2e938-c07b-11e6-b527-949c5893595e_story.html.

like advanced degrees in engineering or economics.¹ Another example is so-called “information capture,” whereby regulators come to depend on industries for an understanding of their operations.² The circumstances of these potential compromises of regulatory independence should also see the light of day. For that to happen, however, bare disclosure is likely not enough. Rendering these subtle influence intelligible presumably requires the kind of interpretive exercise in which Kwak and other such scholars are engaged.

Enforcement and Trust

If secrecy is not a reliable means of stopping special interests from exerting policy influence, it might nonetheless prove valuable in enforcing already-existing regulations against them. Consider agencies’ refusal to divulge the details of upcoming enforcement actions. Here the aim is to maintain some element of surprise, to prevent regulated entities from evading agencies’ oversight (and with it responsibility for non-compliance).

Take an example from the sphere of financial regulation. Since the 2008 financial crisis, several central banks, including the U.S. Federal Reserve and the Bank of England, have subjected major private lenders to “stress tests,” regular reviews designed to gauge the lenders’ stability, liquidity, and resilience to market shocks. The ex ante secrecy of these reviews—especially of the mathematical models they employ—is controversial. Lenders call it unfair, because it obscures the central banks’ standards of evaluation; while critics of the financial services industry say it conceals the undue leniency of government oversight.³

¹ James Kwak, “Cultural Capture and the Financial Crisis,” in *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, ed. Daniel Carpenter and David A. Moss (New York: Cambridge University Press, 2014), 71–98.

² Wendy E. Wagner, “Administrative Law, Filter Failure, and Information Capture,” *Duke Law Journal* 59, no. 7 (2010): 1321–1432.

³ See, e.g., Tom Braithwaite, “Smoke and Errors—Fed Transparency and Bank Supervision,” *Financial Times*, Nov. 17, 2014, accessed Jan. 1, 2017, <https://www.ft.com/content/75eda45e-6e63-11e4-bffb-00144feabdc0>.

To reconcile secrecy and transparency here, the strategies of generalization, audience-tailoring, and delay mentioned in Chapter 3 are likely to be useful. Concealing stress test models serves an important purpose—namely, to ward off strategic action by lenders, preventing their reshuffling assets or boosting capital in advance to ensure high performance. Once a stress test is performed, however, the danger of such gamesmanship recedes (provided testing models evolve sufficiently from one iteration to the next). Transparency then becomes unobjectionable. And indeed, the practice of both the Fed and the Bank of England has been to publish significant guidance in advance, plus additional test details along with the final results.

Not every detail need be disclosed, however. The finest specifications of the stress test models—supposing these remain unchanged from year to year—might legitimately remain confidential.¹ But then some provision should be made for non-public disclosure, as described in Chapter 3. And even these finer points should be subject to transparency once they are superseded. In any case, no detail should be concealed that is strictly necessary to evaluate the stringency of official oversight of the big banks, and therefore the performance and integrity of the representatives involved.

My hunch is that this sphere (of necessarily-public information) excludes at least some of the minutiae of stress test models. But to the extent that is wrong, a real dilemma persists, and citizens may have to choose between protecting against the macroeconomic risks of big bank adventurism, and preserving access to the most fully elaborated records of agency oversight. In such cases, the secrecy dilemma effectively comes down to a question of trust—or rather, a question of the relative trustworthiness of government regulators and the entities they monitor.

¹ Victoria McGrane, “Fed Stands Firm Against Revealing Bank Stress-Test Model,” *Wall Street Journal: Real Time Economics* (blog), June 24, 2015, accessed Jan. 1, 2017, <http://blogs.wsj.com/economics/2015/06/24/fed-stands-firm-against-revealing-bank-stress-test-model/>.

Interpretation, Acknowledgment, and Trust

In the last chapter I identified two additional respects in which disclosure can fall short: it can generate public misunderstanding, and it can inflame political distrust. To avoid these pitfalls would depend upon answering the following questions. First, what kinds of practices would limit the likelihood of misunderstandings about representation, liberty, and equality? And second, under what conditions (if any) would transparency tend to dissipate, rather than to fuel, the crisis of civic confidence?

In reflecting on these questions, we confront again the limits of what I have called the struggle for information. Dispersing power over disclosure can certainly help to prevent those misunderstandings whose source lies in selective publication: if the responsible agent has only presented one side of the story, then releasing contrary evidence will tend to shed more light on the facts. But more often than not, our failures of comprehension have to do with the complexity of what has already been revealed, with our cognitive limits, and with the endless human capacity for self-deception, particularly in the face of what threatens our moral security. In such cases, what is needful is not more information, but the ability to make sense of it, and (in morally weighty matters) the courage to confront it.

Making Sense of Disclosure

“To see what is in front of one’s nose needs a constant struggle.”¹ Orwell’s observation is especially relevant to this inquiry. Political transparency is sometimes presented as a *via negativa*—only remove what obstructs the public’s vision and all will be seen, all understood.¹ How rarely are matters so simple. In truth, transparency often breaks down not before but after the point of

¹ George Orwell, “In Front of Your Nose,” in *The Collected Essays, Journalism and Letters of George Orwell*, vol. 4, ed. Sonia Orwell and Ian Angus (New York: Harcourt Brace, 1968), 125.

disclosure. That is, the failure of public understanding can be traced at least as often to the challenges of “uptake” as to the problem of secrecy. As Onora O’Neill has observed, “[t]he activity by which information is made transparent places it in the public domain, but does not guarantee that anybody will find it, understand it or grasp its relevance.”²

Consider the various difficulties we might encounter. Public disclosures might be unintelligible, or their significance unclear. Or the more conspicuous aspects of state action may distract from what is in fact more significant, though “submerged” in the background.³ Alternatively, the sheer volume of disclosed material could simply crush us. Indeed, purely instrumental accounts of transparency typically founder on the complexity, obscurity, or quantity of records daily published by government agencies. It is said to yield accountability, but one could be forgiven for imagining that the more common fruits of disclosure are bewilderment, overload, and resignation to the opacity of state power.⁴

How can we respond to such formidable barriers to knowledge in politics? One familiar approach is to put officialdom on the hook. Thus, I argued in Chapter 2 that duties of transparency typically require the responsible agents to disclose their conduct, and also to render it “legible” or

¹ See, e.g., Andrew J. Taylor, *Congress: A Performance Appraisal* (Boulder, CO: Westview Press, 2013), 67–69.

² Onora O’Neill, “Ethics for Communication?” *European Journal of Philosophy* 17, no. 2 (2009):173.

³ In *The Submerged State: How Invisible Government Policies Undermine American Democracy* (Chicago: University of Chicago Press, 2011), Suzanne Mettler describes an array of public policies adopted and implemented by the U.S. government but widely misunderstood, because the government’s role is systematically obscured. “The ‘submerged state’ includes a conglomeration of federal policies that function by providing incentives, subsidies, or payments to private organizations or households to encourage or reimburse them for conducting activities deemed to serve a public purpose.” *Ibid.*, 4. Examples include farm subsidies, the Earned Income Tax Credit, and the Home Mortgage Interest Tax Deduction. Mettler’s work offers a powerful demonstration of the inadequacy of disclosure. She calls for a sustained program of political communication to improve public understanding of the policies that comprise the submerged state, and for policies (re)designed “to make government’s role more obvious.” *Ibid.*, 48–68, 110–23.

⁴ Monika Bauhr and Marcia Grimes, “Indignation or Resignation: The Implications of Transparency for Societal Accountability,” *Governance* 27, no. 2 (2014): 291–320; Onora O’Neill, *A Question of Trust: The BBC Reith Lectures 2002* (New York: Cambridge University Press, 2002), 65–70. On information overload in politics more generally, see Arthur Lupia, *Uninformed: Why People Know So Little about Politics and What We Can Do about It* (New York: Oxford University Press, 2016), 177–80.

intelligible.¹ Representatives are bound to communicate publicly in explanation of their final decisions and completed performance. Agents who infringe basic liberties, or enjoy special access or influence or unequal wealth, likewise have a duty to make these facts knowable. Nevertheless, it would be a mistake to place too much confidence in these actors. Although we sometimes need conscientious insiders to help explain, officials themselves also have an interest in keeping their intentions vague. Experience suggests that many will fail in their duties of clarification.²

The task of interpretation must fall equally to individuals and groups lacking any official mandate. This means political parties, scholars, and the press, for example. At their best, journalists do contribute meaningfully to public understanding of the use of power in our societies. Yet “media decadence” remains a perennial challenge; it would be difficult to deny that the interpretive frames and the preoccupations of contemporary news distract more than they enlighten.³ Politics are generally served up as soap opera, while “very little of the world under consideration, our present world, is in fact being responsibly addressed.”⁴ For my part, I share Marilynne Robinson’s sense that “[t]ransparency would begin with a press that could restrain itself from sensationalizing sensationalism, from giving center stage to ‘politicians’ who make a sideshow of our public life.”⁵ In other words, a press that is more than a scheme for maximizing viewership (and profits).⁶ Good

¹ Rosanvallon, *Le Bon Gouvernement*, 215–52.

² Bok, *Secrets*, 177. See also Greg Michener, “FOI Laws Around the World,” *Journal of Democracy* 22 (2011): 146–47, 151–54.

³ John Keane, *Democracy and Media Decadence* (New York: Cambridge University Press, 2013), 118–90.

⁴ Bernard Williams, “Truth, Politics, and Self-Deception,” in *In the Beginning Was the Deed: Realism and Moralism in Political Argument*, ed. Geoffrey Hawthorn (Princeton: Princeton University Press, 2007), 163.

⁵ Tim Teeman, “Marilynne Robinson on the Day President Obama Interviewed Her,” *The Daily Beast*, Oct. 20, 2015, accessed Jan. 1, 2017, <http://www.thedailybeast.com/articles/2015/10/20/marilynne-robinson-on-the-day-president-obama-interviewed-her.html>.

⁶ The problem may be less severe, or at least takes on a different complexion, in polities with strong publicly-funded media. See James Curran, *Media and Democracy* (New York: Routledge, 2011), 119–20; Jürgen Habermas, “Media, Markets and Consumers: The Quality Press as the Backbone of the Political Public Sphere,” in *Europe: The Faltering Project* (Malden, MA: Polity Press, 2009), 131–37.

journalism remains near the apex of our hierarchy of needs: it is among the transparency practices on which our capacity for political learning most crucially depends.¹

Associations and political parties too can serve as interpreters of events. Nancy Rosenblum rightly underscores their role in “creating the content, [and] drawing the lines of division” of our political landscape.² Though commonly portrayed as enemies of the truth, since they traffic in ideology, parties develop stories that can help us to make sense of the political world.³ They have their tendentious pieties, to be sure. But when they distill masses of information into comprehensible narratives, and when these narratives clash in the public sphere, parties facilitate our assessment of the uses of power.

Indeed, any narrative that attempts to make sense of diffuse facts about our political life, whether spun by party or pundit, official or advocacy group, will sometimes share these qualities. It will occlude certain details while accentuating others. It will confront us with evidence about how power is being exercised, evidence that might otherwise have escaped our notice. It will teach what may or may not prove to be true (or truly significant under the circumstances). Despite this uncertainty as between any given narrative’s promoting or impeding public understanding, the clash of narratives remains essential to our ability to apprehend political reality.⁴

¹ Needless to say, this assumes a set of traditional liberal policies on which a robust press depends, including freedom of speech, prohibitions on censorship, and relatively circumscribed libel laws. See, e.g., Lee C. Bollinger, *Uninhibited, Robust, and Wide-Open: A Free Press for a New Century* (New York: Oxford University Press, 2010).

² Nancy L. Rosenblum, *On the Side of the Angles: An Appreciation of Parties and Partisanship* (Princeton: Princeton University Press, 2008), 21.

³ “Parties do not add up to a comprehensive, philosophically defensible whole. They are not complements whose antagonism is dependably countervailing, much less progressive. But parties *do* draw politically relevant lines of division, reject elements of the others’ accounts of projects and promises, and accept regulated rivalry as the form in which they are played out. ... It is enough that party antagonism focuses attention on problems; information and interpretations are brought out; stakes are delineated; points of conflict and commonality are located; the range of possibilities winnowed.” *Ibid.*, 159–60.

⁴ This is another insight, incidentally, of the legal tradition I mentioned earlier, in which a trial is almost by definition a “clash of competing narratives.” Burns, *The Death of the American Trial*, 8–39.

In the end, the goals of transparency are best served by building interpretation into every citizen's civic repertoire. This is partly what Rosanvallon means when he characterizes government transparency as *une transparence de capacitation*—a form of empowerment or capacity-building that allows us to investigate politicians' integrity or corruption.¹ In these as in other transparency practices there should be a division of labor. But no demos can wholly outsource this work. A meaningfully transparent politics requires some minimum of cognitive engagement from citizens generally.

Here Jeremy Waldron's account suggests an objection. If Waldron is right to "locate transparency ... at the foundation of our conceptions of democracy and democratic accountability," then it may seem perverse to shift the responsibility for securing it to the people generally. Rather, "agent accountability ... puts the onus of generating that transparency and the conveying of the information that accountability requires *on the persons being held accountable*."² To say that transparency requires a degree of civic attention and interest might be right as a matter of practice, but normatively speaking it perversely misassigns responsibility for producing public understanding of official conduct. If a gap in knowledge about such conduct persists, that is neither "a brute matter of fact," Waldron writes, nor a product of the people's lack of vigilance or intelligence, but "the consequence of something comparable to malfeasance in office, corruption, or electoral fraud"—in short, a dereliction of duty on the part of the ruling few.³

The general thrust of the complaint is no doubt correct. To say that representatives owe a duty of transparency to the people, and that this duty embraces not merely disclosure but

¹ Rosanvallon, *Le Bon Gouvernement*, 366–67. Compare the argument that transparency should "strengthen civic competence." Albert Meijer, Paul 't Hart, and Ben Worthy, "Assessing Government Transparency: An Interpretive Framework," *Administration & Society* (published electronically August 19, 2015): 6, doi:10.1177/0095399715598341.

² Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Cambridge, MA: Harvard University Press, 2016), 194.

³ *Ibid.*, 172–73, 191.

communication and explanation, is exactly right. That is just what I argued about the logic of representation in Chapter 2. But the choice here is not a binary one, and to obligate officials is not necessarily to absolve the public in whose name they work. The duties of transparency binding on representatives can (and in my view do) coexist with our modest responsibility as citizens to learn what we can, and to try, with the help of these different interpretive insights, to make honest sense of our political world.

Criticism and the Ethics of Democracy

If our sense-making demands a degree of engagement in the public sphere, not even that much will suffice to move us from transparency to reform. Another obstacle stands in the way of such democratic improvement—namely, our tendencies to self-deception, and self-serving insouciance.¹ Human beings have a remarkable capacity to avoid truths that threaten our sense of moral or material security. Alasdair Roberts notes, for example, that popular toleration of government secrecy is in part an attempt to avoid dirty hands.² So too the failure to see what hides in plain sight, including large-scale injustices channeled through social institutions that conceal their defects and disarm our reforming intuitions.³ Non-acknowledgment facilitates the same sort of evasion, because “[i]f something is not acknowledged, then even if it is universally known, it can be left out of consideration in the collective social process.”⁴

¹ An interesting case is the common misapprehension, in market societies, of the distribution of wealth (and of our place in it). Ian Shapiro, *The State of Democratic Theory* (Princeton: Princeton University Press, 2003), 121–24. See also Williams, “Truth, Politics, and Self-Deception.”

² Alasdair Roberts, “Open Secrets and Dirty Hands,” in *The Secrets of Law*, ed. Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (Stanford: Stanford University Press, 2012), 25–45. See also Dennis F. Thompson, *Political Ethics and Public Office* (Cambridge, MA: Harvard University Press, 1987), 23.

³ Eric Beerbohm, *In Our Name: The Ethics of Democracy* (Princeton: Princeton University Press, 2012), 4.

⁴ Thomas Nagel, *Concealment and Exposure: And Other Essays* (New York: Oxford University Press, 2002), 11.

The best strategy for addressing these obstacles to our grappling honestly with what transparency teaches is the practice of social criticism. The characters we call social critics do not simply read the political world; they offer judgments accordingly. They recall us to forgotten values, while battling against the myths we make into little mental prisons. As Michael Walzer writes, social critics are like prophets who seek to draw the attention of their peers to truths that are misunderstood or ignored.¹ They seek “to penetrate the social masquerade and see the moral ugliness underneath,” and to communicate their findings to their own benighted communities.² Whenever our tendency to ignore inconvenient facts is manifest, then, the work of social criticism is needed. If it succeeds, it makes the scales fall from our eyes.

In his study of targeted killings by drone, Hugh Gusterson writes of the way in which the absence of deaths among those who fly, from control rooms situated thousands of miles from the field of hostilities, keeps the entire enterprise off the public agenda. Drones enable “casualty-free, and therefore debate-free, intervention,” he observes.³ Here is an example of a space ripe for social criticism. The notion that our representatives might be in the business of dispensing death, and yet do so without debate, should be startling. Transparency, on my account, is supposed to bring such infringements of liberty within the ambit of our moral deliberation. But if we allow ourselves simply to look away, to pretend they do not exist, then we illustrate in yet another way transparency’s limits for democratic life.

Overcoming Distrust?

¹ Michael Walzer, *Interpretation and Social Criticism* (Cambridge, MA: Harvard University Press, 1987), 39, 69–94.

² Michael Walzer, *The Company of Critics: Social Criticism and Political Commitment in the Twentieth Century* (New York: Basic Books, 1988), 20. For a sharp critique of Walzer’s emphasis on “shared understandings” and the idea of the critic’s “connectedness,” see Brooke A. Ackerly, *Political Theory and Feminist Social Criticism* (New York: Cambridge University Press, 2000), 90–94.

³ Hugh Gusterson, *Drone: Remote Control Warfare* (Cambridge, MA: MIT Press, 2016), 149.

Imagine a state of affairs in which the practices I have recommended in this chapter flourish. Adversarial tactics allow independent parties to confront unjustified secrecy. A diverse group of individuals and associations takes care to interpret public information in a rich public sphere. Social critics confront us with the injustice to which we have become oblivious. Would this be enough to overcome distrust?

In many cases it would not.¹ The effect of such transparency might rather be to deepen the conviction that our leaders are feckless, or that they (and we) are complicit in injustice. There may be significant cause, in other words, for the denial of political confidence. Yet perhaps this is not such a problem for liberal democracy. In some abstract sense, we might suppose, trust would be preferable to distrust in our political relations; at any rate, it would be a good thing if we did not feel compelled to distrust. But as Onora O’Neill rightly emphasizes, trust in this sphere should be ventured only in those authorities or institutions that prove themselves worthy of it.² And to the extent that transparency reveals they are not, then distrust is precisely the right response.

In such circumstances, in which we have evidence of corruption, neglect, incompetence, or injustice, there will be a strong impulse to demand even more transparency. The answer, we will be tempted to think, is yet better monitoring, yet stronger oversight. One important lesson, however, of my non-instrumental case for transparency, is that reform is elusive, and always requires political labor. Disclosure and explanation of the relevant facts—these are sound imperatives. But they will never in themselves bring about the changes that an ethical democracy would require.

¹ See, e.g., Jenny de Fine Licht and Daniel Naurin, “Open Decision-Making Procedures and Public Legitimacy,” in *Secrecy and Publicity in Votes and Debates*, ed. Jon Elster (New York: Cambridge University Press, 2015), 138–46.

² O’Neill, *A Question of Trust*, 3–17.

CONCLUSION

IN the last ten days of January, 2015, volunteers and officials in cities across the United States attempted to count their homeless co-residents. This most recent “point-in-time count” identified some 564,708 individuals without a place to call their own.¹ Whether living in temporary shelters, transitional housing, or on the streets, these individuals face deprivation of the gravest kind. They know economic hardship, isolation, neglect. The cruel reality of distributive injustice is their reality.

For decades a small cadre of policymakers and activists has sought to alleviate the harms the homeless endure, even as the survival tactics of the latter have been subject to increasingly draconian regulation.² Despite some normal fluctuation, however, the incidence of homelessness remains high. This presents a puzzle for the more simplistic accounts of transparency’s potential to drive change. Here is a social phenomenon that unfolds right before our eyes, particularly in urban centers. Yet for the most part, it seems we refuse to see, or to act on what we see. In spite of some fairly obvious forms of possible remedial action—including the creation of more permanent supportive housing—the collective will to pursue them has never really materialized.³

Homelessness is a particularly salient example of a more general phenomenon that goes to the heart of transparency’s limits. Visibility without vigilance, without civic intelligence and a commitment to justice, is perfectly compatible with human privation in its severest forms. The trouble with a “politics of sight,” as Timothy Pachirat shows in another context, is that human

¹ National Alliance to End Homelessness, *The State of Homelessness in America 2016*, April 6, 2016, <http://www.endhomelessness.org/library/entry/SOH2016>.

² See, e.g., Leonard C. Feldman, *Citizens Without Shelter: Homelessness, Democracy, and Political Exclusion* (Ithaca, NY: Cornell University Press, 2004), 27–56.

³ David Wagner and Jennifer Barton Gilman, *Confronting Homelessness: Poverty, Politics, and the Failure of Social Policy* (Boulder, CO: Lynne Rienner Publishers, 2012).

beings go to extraordinary lengths to screen out what we wish not to see.¹ Not only secrecy, then, but ordinary forms of nonacknowledgment serve as instruments of moral and political avoidance for us. Homelessness is but one case in point. Here the basic facts are transparent, as is the inadequacy of the official response. What is missing is not more disclosure, but attentiveness and public commitment—which are of course far scarcer resources.

This example certainly highlights the limitations of transparency as an instrument of reform. And it underscores how the rhetoric of transparency traced in Chapter 1 promises more than actual disclosure can deliver in practice. Nevertheless, the most basic lesson of my dissertation has been that transparency can be otherwise valued. In Chapter 2, I made the case that duties of transparency are best grounded not in their instrumental benefits, but in the normative logic of self-government.

Reframing transparency in this way leads to the recognition that, in spite of its normative importance, more openness is not always better. Indeed, sometimes it is secrecy that liberal democracy seems to underwrite. Thus, in Chapter 3, I argued that practices of concealment can find their support in the same logics of representation, liberty, and equality that also give rise to duties of transparency. And I went on to describe how secrecy and transparency can be made to fit together, not without tensions, but nevertheless as a kind of coherent democratic dyad, giving expression to liberal democracy's surprising normative logic.

One advantage of this approach is that it allows us to reckon with the pitfalls of disclosure in practice, without worrying that we will end up destroying the ethical case for transparency. In Chapter 4, then, I offered a brief survey of those potential pitfalls. And in Chapter 5, I proposed a series of measures that offer some hope of avoiding them. I concluded nonetheless that democratic transparency can leave us distrustful of our representatives, and daunted by the tasks of reform. And

¹ Timothy Pachirat, *Every Twelve Seconds: Industrialized Slaughter and the Politics of Sight* (New Haven, CT: Yale University Press, 2011), 233–56.

that is just as it should be; for what we need, in the end, is to start looking beyond disclosure, and back to democracy.

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