



Heald, D. (2022) The uses and abuses of transparency. In: Alloa, E. (ed.) *This Obscure Thing Called Transparency. Politics and Aesthetics of a Contemporary Metaphor*. Leuven University Press: Leuven, pp. 37-66. ISBN 9789461664464 (doi: [10.2307/j.ctv26dhjc9.5](https://doi.org/10.2307/j.ctv26dhjc9.5))

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# The Uses and Abuses of Transparency

David Heald

## INTRODUCTION

The title of this chapter opens up a wide canvas on the burgeoning literature on transparency theory and practice, though scope and coverage are necessarily constrained by the limited space available. Notwithstanding what in the late 2010s can feel like an anti-transparency backlash in parts of academia and from certain leading democratic politicians, the author sustains his cautious support for generic transparency (and strong advocacy of fiscal transparency) which was developed in the 2000s when transparency came on to the public policy agenda, sometimes as a panacea.

Meanings and motivations are so diverse, that adopting an unqualified position of being ‘in favor of’ or ‘against’ transparency should be regarded as invalid. In this chapter, ‘uses and abuses’ is shorthand for the effects of transparency being contingent, particularly on what transparency is interpreted as meaning, and on the power context in which it is introduced or imposed.

The intellectual ancestry of transparency is long-standing, indeed some argue that it dates back to Plato,<sup>1</sup> but the contemporary literature<sup>2</sup> has emphasized the seminal contribution of the English utilitarian philosopher Jeremy Bentham, who used the term ‘publicity’ to capture much of what is now generally understood as transparency. As well as promoting good governance and accountability, the imagery of the panopticon indicates that surveillance (generally a threatening word) and transparency (generally carrying positive connotations) are closely related.

Two troublesome questions arise:

- 1) Should the domain of transparency be restricted on normative grounds?

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<sup>1</sup> Raphael Woolf, “Plato and the Norms of Thought,” *Mind* 122 (485) (2013), 171-216.

<sup>2</sup> Christopher Hood, “Transparency in Historical Perspective,” in *Transparency: The Key to Better Governance?*, ed. Christopher Hood & David Heald, Proceedings of the British Academy 135, Oxford: Oxford University Press, 2006, 1-23.

Emmanuel Alloa, *The Limits of Transparency: Thinker’s Programme – 2017*, Brussels: Royal Flemish Academy of Belgium for Science and the Arts, 2017, mimeo.

Emmanuel Alloa, “Transparency: A Magic Concept of Modernity,” in *Transparency, Society and Subjectivity: Critical Perspectives*, ed. Emmanuel Alloa & Dieter Thomä, London: Palgrave Macmillan, 2018, 21-55.

Sandrine Baume & Yannis Papadopoulos, “Transparency: from Bentham’s Inventory of Virtuous Effects to Contemporary Evidence-based Scepticism,” *Critical Review of International Social and Political Philosophy* 21 (2) (2018), 169-192.

2) Does transparency affect behavior in ways that suggest that its domain should be restricted on pragmatic grounds?

Distinguishing these questions is useful, though in practice they may be intertwined.

Transparency may conflict with other values, especially when – as argued by Heald<sup>3</sup> – it is treated as an instrumental value (a means to other objectives) rather than as an intrinsic one. This suggests trade-offs have to be made, and in terms of (1), there will be trade-offs with anonymity, confidentiality, privacy, and security.

The lines between private and public domains vary across societies and across time, and examples of this abound in relation to both persons and organizations. On the normative question, certain aspects of human life might be defined as private matters (e.g. sexual orientation, religious affiliation, medical history, income and wealth) and illegitimate targets for public perusal, but in some societies the state or organized religion might seek to assert control over them. Thus homosexuals can be jailed; heretics can be burned; insurance companies can refuse service; and taxation authorities can reveal personal data elsewhere considered ‘private’. Contested values figure prominently behind such examples.

On the positive question (2), transparency can change the behavior of persons and/or organizations, and indeed, that is often the explicit intention of transparency reforms. ‘Better accounting’ would, according to the United Kingdom (UK) Treasury in the 1990s, lead to more transparency and improved public sector performance. The Non-Governmental Organizations that pioneered corruption perception indexes (Transparency International) and the Open Budget Index (International Budget Partnership) have seen transparency as a route to tackling corruption. Christine Lagarde,<sup>4</sup> Managing Director of the International Monetary Fund (IMF), voiced this forcefully at the then UK Prime Minister David Cameron’s Anti-Corruption Summit in London in May 2016. If corruption is corrosive of economic growth, the changed incentives once transparency is introduced might have the intended effect of reducing

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<sup>3</sup> David Heald, “Transparency as an instrumental value,” in *Transparency: The Key to Better Governance?*, 59-73.

<sup>4</sup> Christine Lagarde, Streamed from Anti-Corruption Summit, London, 12 May 2016. Retrieved from: <https://www.youtube.com/watch?v=Zsla0NoYXoM> (starts at 3 hours 15 minutes).

corruption. Alternatively, corruption might take more sophisticated forms, or encourage mimicry by those who have become aware of corruption opportunities.<sup>5</sup> Manipulating incentives to produce ‘good’ behavior is usually more difficult than it sounds, especially through second-round effects.

### **ANALYTICS OF TRANSPARENCY**

Heald<sup>6</sup> has emphasized that transparency must be disaggregated for analytical purposes,<sup>7</sup> distinguishing between ‘directions’ (Figure 1) and ‘varieties’ (Figure 2). Transparency has four directions: vertical (upwards-downwards) and horizontal (inwards-outwards). This categorization is analytical and not intended to have normative significance. ‘Fully symmetric transparency’ takes place when all four directions simultaneously occur. Complete absence of transparency (‘fully symmetric non-transparency’) occurs when none of the directions are present. Whether either is desirable, or some alternative combinations are ‘better’, is partly a normative question and partly an empirical matter.

Upwards transparency relates to the accountability demanded and surveillance exercised by those hierarchically above. This can be conceptualized in principal-agent terms, with successive tiers in organizations and through the governor-governed relationships of state-citizen in political life.<sup>8</sup>

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<sup>5</sup> Notwithstanding the prominence that transparency is given in international efforts to reduce corruption, transparency alone is unlikely to be a sufficient remedy: Catherina Lindstedt & Daniel Naurin, “Transparency Is Not Enough: Making Transparency Effective in Reducing Corruption,” *International Political Science Review* 31 (3) (2010), 301-322.

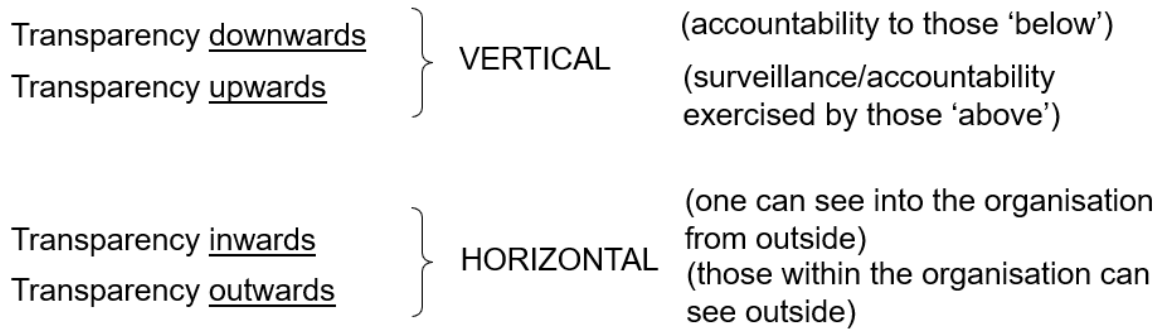
<sup>6</sup> David Heald, “Varieties of Transparency,” in *Transparency: The Key to Better Governance?*, 25-43.

David Heald, “Why is Transparency about Public Expenditure So Elusive?,” *International Review of Administrative Sciences* 79 (1) (2012), 30-49.

<sup>7</sup> Although their decomposition differs from that of Heald, this approach is also adopted by Jens Forssbäck & Lars Oxelheim, “The Multifaceted Concept of Transparency,” in *The Oxford Handbook of Economic and Institutional Transparency*, ed. Jens Forssbäck & Lars Oxelheim, Oxford: Oxford University Press, 2015, 3-30.

<sup>8</sup> Some might object to this directional labelling, with upwards transparency meaning that the governor (political authority) can watch the governed (citizen). Which is ‘upwards’ and which is ‘downwards’ does not affect the substantive points.

### Figure 1: Directions of Transparency<sup>9</sup>



Complex changes in business organization and processes have the potential for increasing surveillance of employees and sub-contracting organizations. On the one hand, industrial sites with physically monitorable mass employment have mostly disappeared, but, on the other hand, digital technologies (Global Positioning System, Closed-Circuit Television [CCTV], facial recognition technology, computer-use tracking, and email monitoring) have the potential to be used as disciplinary technologies that are more efficient and intrusive than traditional methods such as management accounting.<sup>10</sup>

Availability may prompt use, and what organizational superiors conceptualize as transparency may be perceived as hostile surveillance by those subjected to it. Prat<sup>11</sup> has warned that the intensification of watching does not necessarily produce 'better' performance, even when it secures (apparent) conformity to what is expected. It can be efficiency-reducing when subordinates have better information than superiors or when non-programmable creativity is required. The East German Stasi ran a surveillance state but had limited analytical processing capacity; that now exists for authoritarian states and global business corporations.

Downwards transparency allows the governed to monitor their governors, constituting a core component of democratic accountability. In a representative democracy, the Legislature holds the Executive to account, a task that requires Executive action to be

<sup>9</sup> Heald, "Why is Transparency about Public Expenditure so Elusive?," 33.

<sup>10</sup> Trevor Hopper & Peter Armstrong, "Cost Accounting, Controlling Labour and the Rise of Conglomerates," *Accounting, Organizations and Society* 16 (5-6) (1991), 405-438.

<sup>11</sup> Andrea Prat, "The More Closely We Are Watched, The Better We Behave?," in *Transparency: The Key to Better Governance?*, 91-103.

transparent. Exactly what should be transparent is controversial in democracies, with Executives often resisting further disclosure. In authoritarian states, downwards transparency is usually denied, whether because of conviction (protecting religious authority) or protection of power (facilitating corrupt use of state resources).

Turning to horizontal transparency, inwards transparency allows those located outside to view inside, the metaphor of glass often being used. Freedom of Information (FOI) laws<sup>12</sup> have spread from innovators such as Sweden and the United States across most democracies, providing access to information that otherwise would only reach the public domain much later, when documents are de-classified and released. Private businesses are outside the scope of FOI laws, potentially putting governments at a disadvantage when there are strong inter-linkages with the private sector, for example through public procurement.

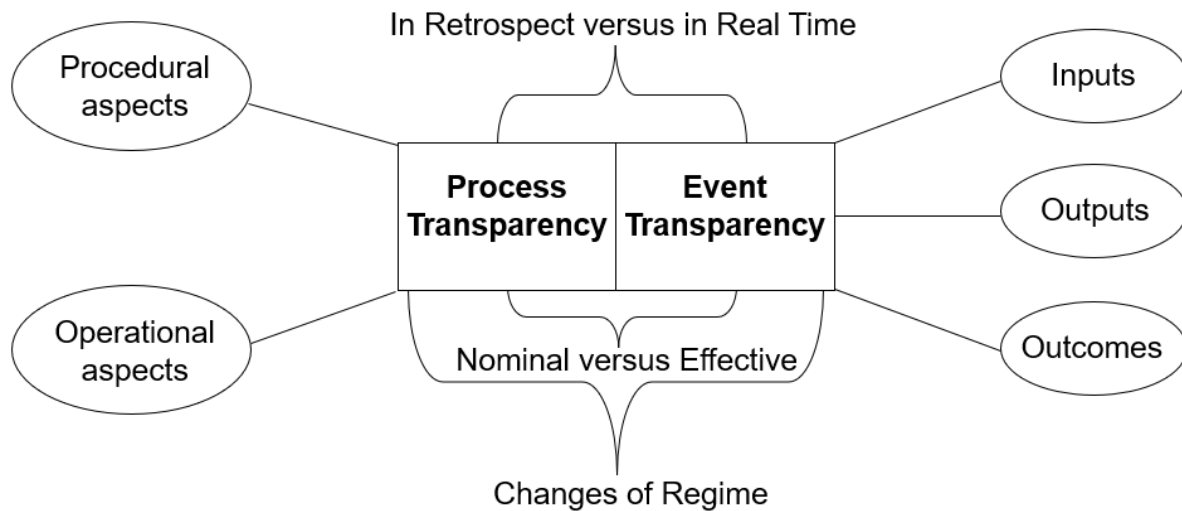
Outwards transparency allows those inside the organization to see outside and therefore navigate their external environment. Although vitally important for government, business and citizens, this does not attract the same level of public controversy.

**Event versus Process** is the central distinction. Event transparency is where there is reporting of ‘results’, for example private company financial results or the performance of government health services. Event transparency may relate to inputs, outputs and/or outcomes. It will follow reporting procedures and timetables established in advance, though some might be *ad hoc* after particular crises.

In contrast, process transparency probes deeply into an organization, with a further distinction being made between ‘procedural aspects’ and ‘operational aspects’. In the context of governments, good governance in democratic countries requires transparency about procedures. UK universities provide a procedural example in the regulations in place concerning examinations and marking, about which extensive documentation is now provided on university websites.

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<sup>12</sup> Ben Worthy, *The Politics of Freedom of Information: How and Why Governments Pass Laws that Threaten Their Power*, Manchester: Manchester University Press, 2017.

**Figure 2: Varieties of Transparency<sup>13</sup>**

Operational aspects are illustrated by the marks awarded to scripts by individual markers and the resolution of differences under the authority of an examination board. Student identities are suppressed and exam marks and degree classifications processed anonymously. Student marks are no longer disclosed to other students, procedures supported in law by developments such as the General Data Protection Regulation.<sup>14</sup> Transparency about operational aspects might alter marker behavior in ways that could be regarded as dysfunctional. Some universities have destroyed examination papers soon after the examination board, in order to frustrate FOI requests, while others now return marked scripts to students. Markers facing FOI requests or automatic disclosure may alter the form of assessment to make marking more mechanical and/or try to limit variation between markers by other means, some of which will be educationally undesirable. Moreover, UK universities are currently under political and media pressure with regard to upwards grading drift: the proportion of first-class degrees has doubled in the last ten years.<sup>15</sup> Transparency may have contributed to this upwards drift.

<sup>13</sup> Heald, "Why is Transparency about Public Expenditure so Elusive?," 34.

<sup>14</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) OJ L 119, 4.5.2016, 1–88

<sup>15</sup> Andrew Gunn & Priya Kapade, "Are too many graduates getting good degrees?," *The Conversation*, 2018. Retrieved from: <http://theconversation.com/are-too-many-graduates-getting-good-degrees-91181>

Governments need decision-making space before making decisions that will have to be publicly defended. Exposing ‘too much’ of inner workings can be problematic: abandoning previously held views may lead to media ridicule when the final collective decision is made; dissenting views may not be heard, and radical policy change may become more difficult to accomplish. Another risk associated with too much process transparency is that the volume of material overwhelms the intended user. Indeed, overload might become an Executive strategy to disable transparency laws and regulations.

There are two lines of argument that would urge constraints on transparency. The first concerns projected differences in the quality of debate when conducted ‘in open air’ rather than ‘behind closed doors’. Chambers<sup>16</sup> provides a number of examples where decision-making out of the public glare would be beneficial: these include juries, caucus meetings, peace negotiations, and hiring committees. In venues that are open, participants will use public-interest sounding arguments but in reality say what their constituents wish to hear. Self-seeking motivations will not be expressed. The consequence will be divergence between what is said and the underlying dispute, and a hardening of positions from which retreat becomes difficult without seeming to betray constituents. In venues that are closed, positions can be more flexible because participants do not have to play to their constituents, the pursuit of sectional interest is understood, and there is more possibility of finding a mutually beneficial resolution. However, as this agreement has been reached behind closed doors, achieving legitimacy then requires some kind of public ratification procedure. Chambers’s examples involve protection of the operational aspects of process transparency, while insisting on event transparency once decisions have been reached.

The second line of argument is different—namely, that there are circumstances in which ignorance has a positive value, thereby challenging event transparency (which emphasises the dissemination of knowledge) as well as process transparency. Moore

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<sup>16</sup> Simone Chambers, “Behind Closed Doors: Publicity, Secrecy and the Quality of Deliberation,” *Journal of Political Philosophy* 12 (4) (2004), 389-410.



and Tumin<sup>17</sup> identify the social functions of ignorance: as preservative of privileged position; as reinforcement of traditional values; as preservative of fair competition; as preservative of stereotypes; and as incentive appropriate to that social context. In some societies the imperfect dissemination of existing knowledge might be a pillar upholding social order, the removal of which would have unpredictable effects.

**Nominal versus Effective** is the next pair indicated in Figure 2 and expanded upon in Figure 3. Nominal transparency denotes (apparent) compliance with relevant laws, regulations and standards, without reaching the audience because of obstacles to understanding. Effective transparency requires that there be an audience capable of accessing, understanding, and using the information.<sup>18</sup>

Various indices report that transparency is improving over time. Caution is required however, as is the case with all improving scores on quantitative performance assessment systems, since those subjected to transparency requirements learn what is required, and become more skilled at reporting in approved ways. Moreover, the temptation to score more highly by modifying behavior and through false reporting can be strong, especially when there are high-powered incentives to perform.

In Figure 3, nominal and effective transparency are indistinguishable when rising from  $t_0$  to  $t_2$ , but they then diverge. Nominal transparency (dashed line) continues upwards to reach  $T_3^N$ . Effective transparency (dotted line) reaches a maximum between  $t_2$  and  $t_3$ , then falls to  $T_3^E$ . This results in a transparency illusion, measured by the vertical distance between  $T_3^E$  and  $T_3^N$ . UK fiscal reporting provides an example of transparency illusion. By international standards the UK scores highly on fiscal transparency, as evidenced by the International Budget Partnership<sup>19</sup> and the IMF.<sup>20</sup> However, there has been an irresistible urge on the part of the UK Treasury to keep Public-Private

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<sup>17</sup> Wilbert Moore & Melvin Tumin, "Some Social Functions of Ignorance," *American Sociological Review* 14 (6) (1949), 787–795.

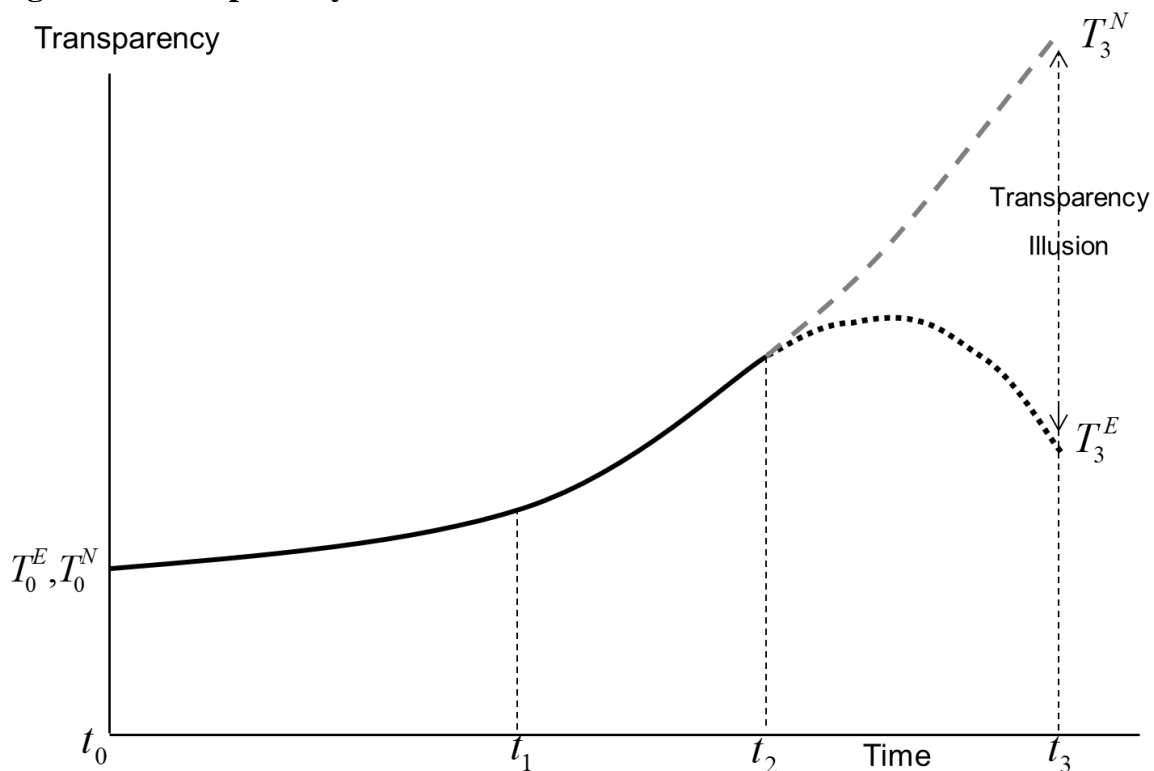
<sup>18</sup> David Heald, *Surmounting Obstacles to Fiscal Transparency*, Washington DC: Global Initiative for Fiscal Transparency, 2015. Retrieved from: [http://www.fiscaltransparency.net/eng/resource\\_open\\_public.php?IdToOpen=20150702107](http://www.fiscaltransparency.net/eng/resource_open_public.php?IdToOpen=20150702107)

<sup>19</sup> International Budget Partnership, *The Open Budget Index 2017*, Washington DC: 2017. Retrieved from: <https://www.internationalbudget.org/open-budget-survey/open-budget-index-rankings/>.

<sup>20</sup> International Monetary Fund, *United Kingdom: Fiscal Transparency Evaluation*, IMF Country Report No. 16/351, Washington DC: International Monetary Fund, 2016.

Partnerships (PPP) off-balance sheet.<sup>21</sup> For more than 25 years the UK Treasury has denied this motivation, and stated that the rationale for PPPs is that they bring higher Value-for-Money than conventional procurement. Remarkably, John Manzoni, the Chief Executive of the UK Civil Service, told a House of Commons Committee on 9 May 2018 that the key motivation was to keep liabilities off-balance sheet, contrary to continuing official doctrine.<sup>22</sup>

**Figure 3: Transparency Illusion**<sup>23</sup>



**Transparency in retrospect versus transparency in real time**, illustrated by the procedures of financial reporting, are distinguished in Figure 4. After the operating period  $t_0t_1$ , there follows a reporting lag (accounts being prepared), followed by an accountability window (when the organization engages with its stakeholders on these

<sup>21</sup> Ron Hodges & Howard Mellett, "The UK Private Finance Initiative: An Accounting Retrospective," *British Accounting Review* 44 (4) (2012), 235-247. Almost all UK PPPs are now on balance sheet in financial reporting documents (such as the Whole-of-Government Accounts) but many are still outside budgeting totals and deficit figures prepared based on European System of Accounts 2010.

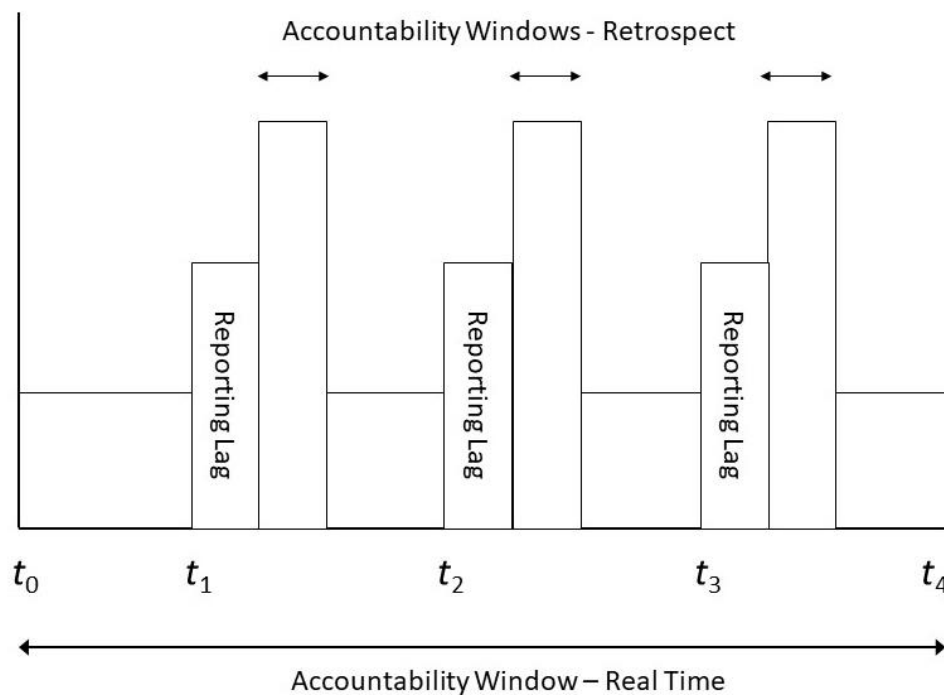
<sup>22</sup> Public Administration and Constitutional Affairs Committee, *After Carillion: Public Sector Outsourcing and Contracting*, Seventh Report of Session 2017-19, HC 748, para. 40.

<sup>23</sup> David Heald, "Fiscal Transparency: Concepts, Measurement and UK Practice," *Public Administration* 81 (4) (2003), 723-759.

results). For the remaining part of  $t_1t_2$ , the organization can concentrate on operational matters. Then, successively at  $t_2$  and  $t_3$ , the sequence of reporting lag and accountability window is repeated. This arrangement exemplifies ‘transparency in retrospect’. An example from the corporate sector is provided by the tight rules in place concerning the release of market-sensitive information ahead of earnings or takeover announcements, breaching of which can bring criminal prosecution for insider trading.

The alternative, namely ‘transparency in real time’, involves the accountability window always being open. The intuition is that transparency in real time is more disruptive of operational activities (requiring diversion of resources) and more likely to provoke manipulative behavior (such as window dressing) by the reporting agent. Although presenting financial reports for a period of one year is relatively arbitrary, more frequent reporting is not necessarily beneficial. An example is that mandatory quarterly financial reporting by listed companies was abolished in the UK following a government-commissioned review, which concluded that it encouraged short-termism.<sup>24</sup>

**Figure 4: Transparency in Retrospect and in Real Time<sup>25</sup>**



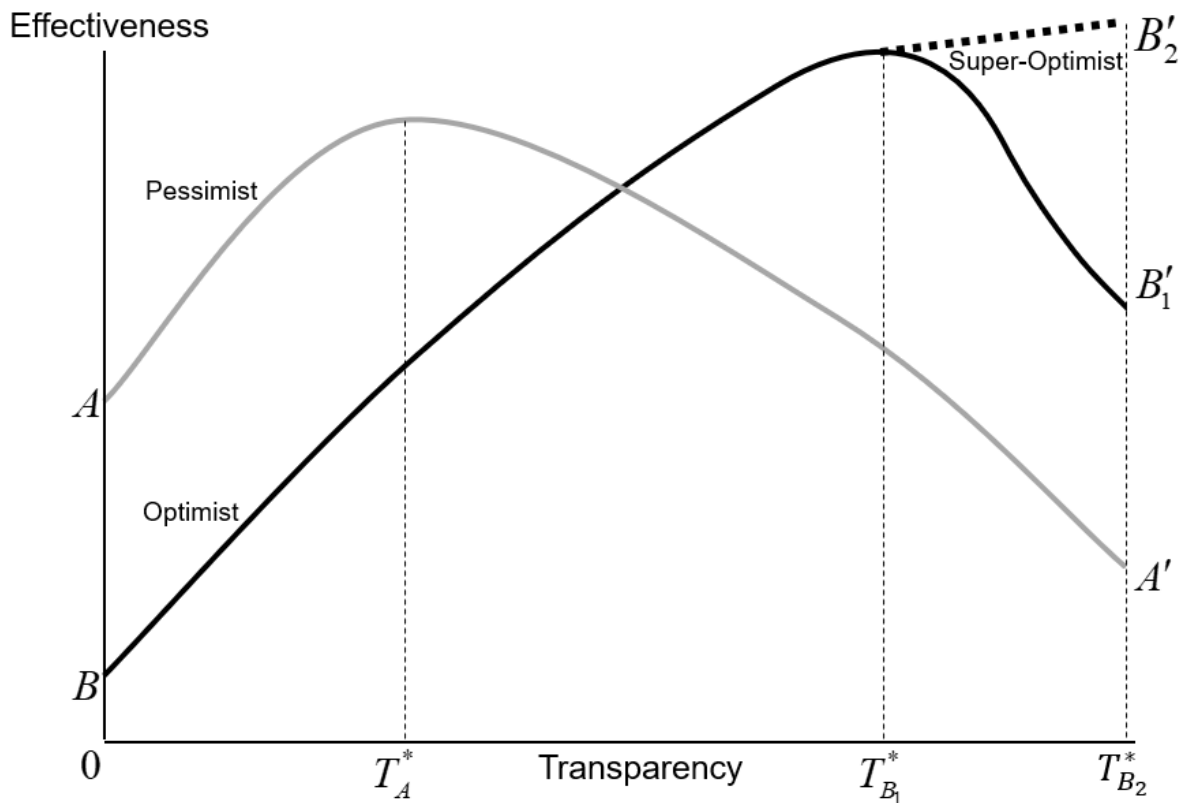
<sup>24</sup> John Kay, *The Kay Review of UK Equity Markets and Long-term Decision Making: Final Report*, London: Department for Business, Innovation and Skills, 2012.

<sup>25</sup> Heald, “Why is Transparency about Public Expenditure so Elusive?,” 35.

**Changes in transparency regime** are the fourth variety in Figure 2 to be analyzed. There are two issues. First, the timing of transparency regime changes can be threatening to actors who have built up legitimate expectations. Timing of changes can be opportunistic on the part of those in control. Second, there is the question of whether a regime change applies retrospectively or only to the future. Suppose that, in Figure 4, a regime change is announced at  $t_3$ , moving from transparency in retrospect to transparency in real time. Policy actors are told of this change and might adjust their behavior in period  $t_3t_4$  and beyond. Additionally, suppose that it is announced at  $t_3$  that transparency in real time will be applied retrospectively, in the sense that actions and documents previously believed to be confidential are now in the public domain. Retrospection is more threatening to those subjected to it because it means that legitimate expectations are dashed.

To complete the analytics of transparency, the multi-faceted character of transparency, as established by Figures 1 and 2, is temporarily set aside. The representation in Figure 5 assumes that transparency is unidimensional or, if multidimensional, that it can be measured by a well-behaved index. From left to right, the horizontal axis measures transparency, with zero transparency at the origin. The vertical axis is labeled 'effectiveness', but other expected benefits of transparency could be plotted instead. The Optimist believes that, at zero transparency, government effectiveness is low, denoted by  $B$ . Increasing transparency brings continuous increases in effectiveness, up to a maximum at  $T_{B_1}^*$ , representing gains from exposure to sunlight. Effectiveness then reduces to  $B_1'$  as a result of dysfunctional effects from over-exposure. The Super-Optimist denies that these dysfunctional effects exceed the gains from more sunlight, leading to the dotted line reaching  $B_2'$ .

**Figure 5: Contrasting Views of the Benefits of Transparency<sup>26</sup>**



In contrast, the Pessimist believes that effectiveness at zero transparency is quite high at A, while accepting that some transparency will generate gains in effectiveness, but only up to a maximum at  $T_A^*$ . Beyond that, more transparency reduces effectiveness, so that full transparency ( $A'$ ) records lower effectiveness than zero transparency (A).

These specific results reflect the assumptions made by the author. Some authoritarian states would deny any gains from transparency, so there would be no upward-sloping segment of the line  $AA'$ . Nevertheless, what Figure 5 makes explicit is that there will be different assumptions about (a) effectiveness at zero transparency, and (b) how effectiveness responds to successive increments in transparency. Figure 5 suggests that there could be an optimal level of transparency above zero transparency and below full transparency, the location of the maximum being politically contested.

<sup>26</sup> Heald, "Fiscal Transparency: Concepts, Measurement and UK Practice," 723-759.

Prat<sup>27</sup> has rightly cautioned that there are ‘wrong kinds’ of transparency in terms of the behavioral responses of affected actors that will influence whether outcomes are those that are intended by the designers of the transparency framework.<sup>28</sup>

### **USES AND ABUSES OF TRANSPARENCY**

The analytical framework will now be used to address this book’s theme of ‘the limits of transparency’. It is difficult to avoid the persuasive use of language, and the term ‘uses and abuses’ is a loaded expression. What some see as uses, others might see as abuses, depending on, *inter alia*, values and policy preferences. Increases in transparency are valued not only by actors for procedural merits but also because this is expected to produce effects that are favored.

Putting the focus on directions of transparency highlights the fact that there are complex issues of power relationships at play. Upwards transparency allows governors to monitor the governed, whereas downwards transparency exposes the actions of governors to the gaze of the governed. Constraints on information availability and processing capacity hitherto limited the viability of top-down control, thereby giving some space to those being monitored, but relatively recent technological developments have changed the situation.

There is potential for enhanced transparency to facilitate tighter top-down control. Whether this is desirable depends not only on normative judgements as to whether it is acceptable (state or religious policing of sexual relationships, for example) but also on the assessments of behavioral responses (more social damage is done by preventive action than by the prohibited act). A complicating factor is that knowledge that surveillance is now feasible might well encourage its use, without due consideration being given to the possible repercussions.

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<sup>27</sup> Andrea Prat, “The Wrong Kind of Transparency,” *American Economic Review* 95 (3) (2005), 862-877.

<sup>28</sup> When investors entrust their savings to an investment fund there are strong arguments that they should know where their savings are invested. However, if a fund that is open-ended (i.e. investment can be redeemed at any time) invests for superior returns in some illiquid assets, it is vulnerable to simultaneous redemption requests and might have to close temporarily. If transparency is in real time, third-party investors can ‘short’ the shares in the portfolio (i.e. borrow shares, sell them, and then buy shares in the same company at a lower price before the return date for the borrowed shares), thereby intensifying the liquidity and solvency problems of the investment fund.

Upwards transparency is often associated with accountability relationships, especially when these are understood in principal-agent terms. When it is not just a matter of raw power, the question of legitimacy arises.<sup>29</sup> In the fiscal sphere, external fiscal surveillance is justifiable because of spillovers from one country to another; this is the basis on which national governments must have constitutional or administrative mechanisms to prevent fiscal deficits and debts incurred by sub-national governments from destabilizing the whole. In the context of the eurozone, 19 independent countries share a currency, with the result that the fiscal positions of each country have to be monitored by the European Commission and the European Central Bank, with corrective actions enforced by punishments. Notwithstanding the design faults of the eurozone and the European Union's (EU) mishandling of the Greek fiscal crisis, fiscal surveillance and external imposition are unavoidable consequences of currency union. If such surveillance is judged intolerable, then a country should not be in the currency union.

From some quarters, fiscal transparency and surveillance have been denounced as components of neoliberal attacks on the welfare state. Although some proponents of fiscal surveillance might well be neoliberals, the interests most threatened by fiscal unsustainability are those of supporters of a continuing welfare state at times of fiscal difficulty.<sup>30</sup> A serious threat to the welfare state comes from governments that ignore risks to future sustainability, for example by implementing large tax cuts, in the expectation that fiscal crises will later force a drastic reduction of what the state does.

Whereas certain fiscal data must be submitted to European institutions, that might be on the basis of confidential returns (which is to some extent the case), rather than of making data transparent to a wider public through publication. Downwards transparency (from governor to governed) is a prerequisite for the construction of democratic legitimacy. That wider public needs help in understanding data that can be complex and technical: downwards transparency requires an external audience to which

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<sup>29</sup> Albert Meijer, "Transparency," in *The Oxford Handbook of Public Accountability*, ed. Mark Bovens, Robert Goodin & Thomas Schillemans, Oxford: Oxford University Press, 2014, 507-524.

<sup>30</sup> David Heald, "Strengthening Fiscal Transparency," in *The International Handbook of Public Financial Management*, ed. Richard Allan, Richard Hemming & Barry Potter, New York: Palgrave Macmillan, 2013, 711-741.

data can not only be made available but also rendered intelligible. This imposes a heavy responsibility on governments to report honestly, and not engage in data manipulation or misleading presentation.

Moreover, the relationship between governments and the traditional print and broadcasting media have become more problematic, with adverse implications for downwards transparency. Stiglitz<sup>31</sup> noted the often manipulative relationship between politicians and journalists. The media have always been important intermediaries who disseminate and interpret government information, but that constructive role is now diminished. Such activities are time-consuming and the pressure for banner headlines has increased willingness to attack governments or spread government messages, and to solicit or absorb government information that has been leaked or stolen. It is rarely the disciplined release of government information that is disruptive of procedures or operations, but rather the unprincipled or manipulative release.<sup>32</sup> The discipline that generally applies to private sector financial information is often lacking, as is the understanding of how important this is to the securing of effective transparency.

Public reporting of standardized data makes it possible for inwards transparency to exist, as well as contributing to both upwards and downwards transparency. Standardized data also enable governments and organizations to benchmark their own position against those of comparable others (outwards transparency).<sup>33</sup>

The normative question of the legitimacy of transparency demands should not be evaded. For brevity, the discussion here focuses on whether the target of transparency demands is government, business, or individuals. In the background, however, there

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<sup>31</sup> Joseph Stiglitz, "On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life," in *Globalizing Rights: The Oxford Amnesty Lectures 1999*, ed. Matthew Gibney, Oxford: Oxford University Press, 2003, 115-156.

<sup>32</sup> This includes government manipulation of the news agenda ahead of fiscal statements and the premature release by others of the reports of parliamentary committees and of regulatory bodies. Such hijacking of the news agenda can bury the actual report or facilitate counterattack, as when the UK Electoral Commission reported on breaches of spending limits during the UK's 2016 Brexit referendum.

<sup>33</sup> In the 2000s, there was extensive forgiveness of the debt of poor countries. However, there is now international concern that many of the beneficiary countries, particularly in Africa, are again building up unsustainable debt, often in foreign currency. Much of this is thought to be loans from China to off-budget government entities, which are not being reported in official statistics.



will be contested expectations about how making transparent what was not previously transparent might change behavior and outcomes.

Without some degree of transparency about government action, democratic accountability cannot exist. Nevertheless, legacy and expectations differ across countries that would be classified as democratic. Returning to Figure 2, the distinction between event (where information on inputs, outputs, and outcomes can be regularly published) and process (where the distinction is between procedural aspects and operational aspects) is vital. Publication on events might cause political embarrassment (spending might be too low, outputs declining, and outcomes below aspiration) but the stimulative effects of disclosure would be positive. On process, setting out procedures and decision rules means that the public and interested users know the rules and regulations being followed. The technologically-driven possibility of putting such materials on government websites, at minimal marginal cost, has reduced the compliance costs of such procedural transparency. However, there are many countries under authoritarian rule where citizens' claims for transparent government information are denied, and the above arguments carry no weight.

It is when it comes to the operational aspects of process transparency that difficulties arise in democratic countries, in terms of both weighing confidentiality/privacy against transparency and of considering behavioral effects. Growing demands for transparency have coincided with demands for privacy, in the context of the digital revolution. There are three main arguments used against such transparency. First, governments need decision-making space before committing themselves to policy statements and implementation. Without such space, decision-making might be worse because, *inter alia*, participants know that they are being watched and play to the audience. Changing position in response to argument and fresh evidence becomes more costly, as this is likely to be publicly ridiculed as 'U-turn' or hypocrisy. These are the concerns that led to rules on Cabinet secrecy for 30 years, though it should be noted that some UK Cabinets have notoriously leaked immediately after meetings. The contention is that transparency leads to poorer decision-making, in part because of reluctance to commit arguments in recordable form and in part because business is conducted outside of

formal meetings ('sofa government' being a criticism of the 1997-2010 UK Labour Government). Effective transparency is more likely to result from the disciplined release of information after careful deliberation, rather than from manipulative leaking by participants or from hacking of government systems.

The second argument is that citizens and businesses provide a great deal of confidential information to governments and have legitimate expectations that it will be protected. On the normative side, citizens provide government agencies with demographic, residential, religious affiliation, health, and income information, on the basis that this will only be used for approved purposes. Significant social and technological developments interact: the OECD reports declining trust in government;<sup>34</sup> fear of terrorist attacks and assassination is high; and digitization has made it possible to connect data that were previously separately held, thereby securing citizen profiles for commercial, governmental, and political use. Under such circumstances, the balance to be struck between transparency and confidentiality/privacy may change.

On the behavioral side, the above considerations may lead citizens to be less cooperative with governments. Citizens might not respond to government surveys, leading to non-response bias, as has long occurred at the top of the income distribution on household expenditure surveys. If it is expected that reported data might be linked together, there might be more false reporting. Public sector professionals in health and education might be denied sensitive personal information with which they are not trusted or over which it is thought that they will not retain control. The Norwegian Prime Minister's pride<sup>35</sup> that in Norway anyone's tax return can be accessed (subject to them being informed who is seeking access) is context-dependent: in some countries this would be useful information for potential blackmailers or kidnappers. A paradox of individual behavior in the digital age is that willingness to surrender private information in exchange for free access to private commercial services co-exists with resentment at the intrusiveness of public authorities. Theft of public data and uploading to the web

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<sup>34</sup> OECD, *Trust and Public Policy: How Better Governance Can Help Rebuild Public Trust*, Paris: OECD, 2017.

<sup>35</sup> Erna Solberg, Streamed from Anti-Corruption Summit, London, 12 May 2016. Retrieved from: <https://www.youtube.com/watch?v=Zsla0NoYXoM> (starts at 3 hours 17 minutes). Although a taxpayer would know who had sought access, re-publication could make the taxpayer information more widely available.

might initially seem unobjectionable when the targets are elected politicians abusing expenses systems or tax-avoiding corporations, yet such actions might have far-reaching consequences.

The above discussion has related to the civilian activities of the state, not its diplomatic, military, or security apparatus. The growth of terrorism and deterioration in the climate of international relations have drawn more resources into this sector, as well as reinforcing arguments for state secrecy. The result of these threats is that democratic populations seem to have become more tolerant of state secrecy and surveillance when a security justification can be attached. Such contexts are not the focus of this chapter, though the famous dictum of Woodrow Wilson is pertinent: “Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind, but diplomacy shall proceed always frankly and in the public view.”<sup>36</sup>

The third argument is that the rich and powerful are better equipped to lobby. Pozen<sup>37</sup> contends that transparency has drifted ideologically from being associated with progressive causes to being associated with neoliberalism and surveillance. He documents the motivations of the Progressive era (1890-1920) and the Great Society era (1960s and 1970s) when the United States pioneered transparency measures that later spread internationally. The objectives of Louis Brandeis<sup>38</sup> were to tame corporate power, not government power; similarly, the open government reformers of the 1960s and 1970s aimed to make government more effective and society more equitable. In neither period was transparency seen just as technocratic; rather, it was a political project from the left of the US political spectrum.

Pozen’s thesis is that the transparency project in the United States is now associated with right-wing objectives such as reducing the size of the state and resisting egalitarianism. He presents the analogy of the jurisprudence of government actions having to be ‘color-blind’: originally serving the progressive cause of civic equality in a society segmented by race, but later used as an obstacle to positive discrimination

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<sup>36</sup> Colonel House, *Interpretation of President Wilson's Fourteen Points*, 1918. Retrieved from: <https://www.mtholyoke.edu/acad/intrel/doc31.htm>

<sup>37</sup> David Pozen, “Transparency’s Ideological Drift,” *Yale Law Journal* 128 (2018) 1-66.

<sup>38</sup> Paul Freund, *The Supreme Court of the United States: Its Business, Purposes and Performance*, Gloucester MA: Peter Smith, 1972.

measures aimed at addressing systemic inequalities. He claims that transparency reforms such as FOI and open meetings have had the opposite effects to those intended:<sup>39</sup> rather than open up government and enable more effective government action, they have strengthened business interests and well-financed right-wing lobbies that have the resources to make use of such facilities. In his view, transparency has been used to disable state regulation and spread the political message of government incompetence, while corporate power has gone unchallenged. An argument influential with conservative judges is that transparency can substitute for substantive government regulation.

Pozen contemplates reversing the landmark measures of 1970s' liberal reformers because the effects have been the reverse of those expected. It is unclear whether this pessimistic message is a particular US phenomenon, or whether the United States is ahead in time of developments facing other countries. In the context of the EU, the argument could not seriously be made that transparency has rolled back substantive regulation as opposed to being one of its tools.

Regarding private businesses, there are several reasons why transparency demands are less far-reaching than those made on governments. First, unlike governments, private businesses are not usually funded from taxation and do not spend 'public money'. In those cases where they do, accountability for the use of resources will require transparency closer to that required of governments.<sup>40</sup> Second, commercial confidentiality is an important feature of a competitive market economy, both domestically and internationally, as in the case of protecting intellectual property rights within statutory frameworks harmonized through international treaties and agreements.

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<sup>39</sup> A similar argument that open meetings have led to the US Congress being dominated by well-financed lobby groups that frustrate government initiatives is made by Brent Ranalli, James D'Angelo & David King, *The Sunshine Reforms and the Transformation of Congressional Lobbying*, Cambridge MA: Congressional Research Institute, 2018. Retrieved from:

<http://www.congressionalresearch.org/Ranalli2018SunshineReformsAndTransformationOfLobbying.html>

<sup>40</sup> This is particularly controversial when governments outsource public services or make use of PPPs because the veil of commercial confidentiality comes down.

Much information is collected by government agencies on the basis of statistical confidentiality.<sup>41</sup> Maintaining this is essential for ensuring confidence in public statistics, as otherwise undertakings would be broken and business compliance with statistical requests could fall precipitously. One constraint is that statistical confidentiality prohibits the accidental identification of respondents when there are few observations in a particular category. The reliability of official statistics derives from integrity in data handling and sensitivity to the concerns of data suppliers. Leaks that dump processed or unprocessed government data into the public domain might bring media headlines in which ‘transparency’ figures prominently, but they are likely to damage effective transparency.<sup>42</sup>

Notwithstanding these differences between government and business, the information disclosures required of business have been expanding. Large firms benefit from limited liability status, thereby protecting the other assets of owners: mandatory general-purpose financial reporting on internationally harmonized accounting standards is a counterpart of this legal privilege. The annual reports of listed companies used to focus almost entirely on financial results. Reporting obligations now include, *inter alia*, environmental impact, governance arrangements, information on equalities, and executive pay. Such information is released periodically, in a disciplined format, which distinguishes such reporting from whistleblowing, leaking, and data theft. However, the availability of such public information is threatened by listed firms ‘going private’, to take advantage of lower disclosure obligations and perhaps less regulatory enforcement.

It is when it comes to individuals that the clash between transparency and confidentiality/ privacy becomes acute. Demanding transparency from others is more agreeable than having demands placed on oneself. Although countries differ, there is a perception that OECD governments are trusted less now than in the past, both in terms of being competent and of conducting their operations in a fair-minded way.

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<sup>41</sup> Dennis Trewin (chair), *Managing Statistical Confidentiality & Microdata Access: Principles and Guidelines of Good Practice*, New York and Geneva: United Nations Economic Commission for Europe and Conference of European Statisticians, 2007.

<sup>42</sup> Sometimes leaked information can shift the terms of political debate, as for example the Westminster expenses scandal, the Panama Papers on offshore finance, and the Luxembourg Leaks on complicity in corporate tax avoidance. However, such reliance is symptomatic of unhealthy political life.

Individuals' relationships with their governments have become more fractious, for example in relation to immigration control and more integrated tax and benefit administrations. Governments collect information for different purposes and now have greater capacity to link such databases, for example, for purposes of fraud prevention. Some citizen attitudes are puzzling, as in the acceptance of widespread CCTV coverage of everyday life in the UK alongside the likelihood of renewed opposition to identity cards should they be proposed after Brexit. Ironically, driving licenses, national insurance numbers, and residential addresses for debit/credit cards are frequently required in everyday life, mobile phones track movements, and much personal information is voluntarily disclosed via social media sites such as Facebook.

There is a distinction between (a) dislike of providing information to government because one considers that it is none of government's business, and (b) fear of harm following from such data being used against that person's interests. The former might apply to one's age, gender, ethnicity, religious affiliation, sexual orientation, marital/partnership status, income, and wealth. Paradoxically, without data on most of these characteristics, governments cannot plan public services or guard against discrimination on irrelevant grounds. The latter might include cases where individuals wish to hide illicit activities, but there are also fears that information passing into the wrong hands could lead to stigma, blackmail, or extortion.

The threats to individuals have increased because (a) technologies have made watching by governments, businesses, and third parties much cheaper, and (b) pieces of information can be connected and stored for ever, so that population profiling is more efficient and individuals can no longer be sure of having escaped from past indiscretions or misjudgments. Unsurprisingly, transparency regime changes that apply retrospectively are disconcerting and may prompt generalized suspicion of government. A substantive risk is more false reporting, out of fears that personal information will later be disclosed or stolen.

Most public policies require data at an aggregated level, thereby not posing a threat to the privacy of individuals. The privacy of personal data is held to be very important, as in the case of medical records and income tax data in most countries, with some

protection through international treaties such as the European Convention on Human Rights. A difficulty arises when a person is elected to public office or wields public power. There is here a public interest in knowing that such a person does not have medical conditions that render them unsuitable for that role and that their personal and family finances are not surreptitiously benefiting from their position. Such is the level of corruption in many countries, that legitimacy is weakened by actual and/or alleged illegal activities. The presumption should be in favor of transparency (i.e. differential requirements for disclosure), but care is required not to disincentivize taking on such roles by exposing the person and their family to risks from hostile watchers.

The UK criminal justice system illustrates the tensions surrounding transparency as it affects individuals. Transparency of judicial process is an important element of the rule of law. Industrialized democracies embrace the principle of ‘open justice’, which means that charges against individuals are public information and judicial proceedings are conducted in public. However, certain legal argument might be heard in private, with the jury excluded; the jury is not told of previous convictions of the defendant; the jury is prohibited from reading about the case on social media; and reporting restrictions can be applied when there are connected cases. The intention of such restrictions is that the jury’s verdict should depend exclusively on what is heard in court. At the end of the case, these restrictions are usually removed. In rape cases, the identity of the complainant is protected, whereas that of the defendant is not.<sup>43</sup> The balances that are struck are contentious, but these reflect genuine dilemmas. Criminal proceedings in those countries that do not meet such standards generate international alarm: for example, defendants not knowing the charges or not being allowed independent representation; implausibly high conviction rates; civilians being tried before military courts; and a lack of separation of the Judiciary from the Executive.

## CONCLUSION

The normative dimension (what kind of society is desired) and the positive dimension (what behavioral consequences are expected from particular transparency

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<sup>43</sup> From 1976 to 1988, the identity of the defendant in a rape case in England was similarly protected. One reason for this being changed is that publicity about one allegation often leads to further incidents being reported to the police.

configurations) are intermingled in much public debate about transparency. Organizations claim to be transparent, rather than opaque, and there are often political or commercial motivations lurking behind transparency claims. The analytics of transparency have demonstrated both the benefits of transparency and the existence of normative and pragmatic justifications for constraining its domain and operation.

The glass metaphor is evocative and the significance of transparency in government architecture has been extensively discussed.<sup>44</sup> The metaphor provides a beginning for analysis but should not be taken too literally: Marnix Van Esbroeck's splendid photograph through the transparent roof of the Flemish Parliament should not obscure the hidden complexities of Flemish politics.<sup>45</sup> The analytical framework and illustrative examples given here make it clear that transparency is a complex phenomenon that operates in a societal context.

Doubts about transparency are connected to the economic, social, and political disruptions after the 2008 global financial crisis. Stark<sup>46</sup> advocated heterarchy<sup>47</sup> as a form of empowerment made possible by technological and organizational disruption, which would distribute power more widely. Yet the mechanisms that he analyzed can also be used to re-centralize power, for example, by exposing citizens and employees to greater competitive pressures alongside diminished state protection.

This is a disruptive epoch: the damaging legacies of the 2008 global financial crisis and its fiscal repercussions remain acutely felt through austerity of unprecedented duration; democratic elections are producing results that would not have previously been expected in the post-1945 world; technological disruption of product and labor markets is widespread; and the once confident and regularly expanding EU confronts Brexit,

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<sup>44</sup> For example, by Deborah Barnstone who compares three successive German parliamentary buildings, in *The Transparent State: Architecture and Politics in Postwar Germany*, Abingdon: Routledge, 2005.

<sup>45</sup> This photograph was used as the cover for *Transparency: The Key to Better Governance?*, 2006, ed. Christopher Hood and David Heald, the question mark in the title being significant. The edited book's fly cover notes that "The suspended auditorium, with a convex glass roof, is said to symbolize the Parliament's transparency to its people". Unknown to the editors at that time, this photograph had previously formed the cover of Marnix Van Esbroeck and Martine Goossens, *Het Vlaams Parlement*, Tiel: Lannoo, 1996.

<sup>46</sup> David Stark, "Heterarchy: The Organization of Dissonance," in *The Sense of Dissonance: Accounts of Worth in Economic Life*, Princeton NJ: Princeton University Press, 2009, 1-34.

<sup>47</sup> Heterarchy is the opposite of hierarchy. It values lateral relations through sharing ideas with others through the mechanism of interdisciplinary teams. Heterarchy is claimed to be a new, emerging form of organizational arrangement for making responsive decisions in a volatile and competitive environment.



unbalanced growth within the eurozone, immigration crises, threats to the rule of law in some Member States, and geopolitical threats. It was widely expected that the collapse of the Soviet Union and the expanded domain of market capitalism would reinforce democratization, but authoritarian rulers are now portrayed as strong while democratic leaders look weak and indecisive. In this sobering context, some see transparency as part of the political problem, rather than as the solution.

The combination of naïve advocacy of transparency by some of its supporters and the way in which it has been cynically adopted as a branding accessory by governments, businesses, and interest groups, have contributed to this perception. Transparency has become a prominent example of what Pollitt and Hupe label a ‘magic concept’.<sup>48</sup> These share the characteristics of ‘broadness’, ‘normative attractiveness’, ‘implication of consensus’, and ‘global marketability’. Pollitt and Hupe examine three such concepts prominent in public administration literature and practice: governance, accountability (within which they subsume transparency), and networks. They observe that some magic concepts become fashionable in academia and practice, seeming then irresistible, but later fade away when supplanted by other magic concepts. A shortcoming of magic concepts is that they are usually too imprecise to provide “much of a guide to action”.<sup>49</sup> To be operationally useful, transparency must be tightly specified and decomposed into elements. This is the purpose of the analytics of transparency, expressed in terms of directions and varieties.

Presentation as panacea and superficial adoption make transparency vulnerable to critique, as does its linkage to (what some see as hostile) surveillance. Critics as well as advocates are tempted to overstate their case, and not consider the trade-offs and balancing that operational systems for transparency must resolve. One response to critiques of transparency is to ask for specific examples of where transparency should be rolled back, and on what criteria those choices are based.

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<sup>48</sup> Christopher Pollitt & Peter Hupe, “Talking About Government: The Role of Magic Concepts,” *Public Management Review* 13 (5) (2011), 641-658.

<sup>49</sup> Pollitt & Hupe, “Talking about Government,” 649.

Hard selling and insincere professions of transparency might have been expected to eventually produce a backlash. Moreover, Fenster<sup>50</sup> makes the point that governments are so large, complex, and amorphous that neither complete secrecy nor complete transparency are credible. Too many people know or can find out about internal government data for the former to hold. Frustrating the latter, insiders will have incentives to conceal, and there will not always be audiences capable of comprehending information that is made available. Designing workable frameworks for transparency and facilitating navigation around them will usually be difficult.

Applying the theoretical framework makes it clear that emphasis on upwards transparency in an uncertain age is a key driver of the disenchantment with transparency exhibited in some chapters in this book. The potentially threatening directions of transparency are mainly upwards and inwards in character, the digital revolution tightening the linkage between them. This is particularly the case when public sector organizations face a combination of tighter centralized control (sometimes exercised through market-type mechanisms) and constrained resources. Simultaneously, the mechanisms of downwards accountability to citizens and wider stakeholders weaken, as does outwards transparency. Paradoxically, generalized complaints about transparency might weaken them further, as these two directions of transparency potentially challenge centralized power.

A credible defense of transparency would work carefully through the varieties of transparency, being clear about what is valued and what is either marginal or potentially damaging. Event transparency and the procedural dimension of process transparency are the gains that matter most in a democratic society. Where to draw lines on the operational aspects of process transparency is more difficult. Deterioration in the environments in which governments have to operate might lead to tighter secrecy around certain government activities, such as the security functions of the state in the context of terrorism and cyber warfare, and the business activities of the state when they come into direct competition with the private sector or involve extensive delegation of

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<sup>50</sup> Mark Fenster, "Transparency in Search of a Theory," *European Journal of Social Theory* 18 (2) (2015), 150-167.

public tasks to the private sector. Moreover, technological developments expose those who hold public office or conduct public business to threats that were less menacing in previous decades.

For democratic politicians to claim more decision-making space there must be a *quid pro quo*. Specifically, the transparency illusion has to be curtailed. Taken overall, the quality of fiscal data now available is unprecedentedly good for most EU economies, reflecting work on updating national accounts' standards<sup>51</sup> and the spreading of government financial reporting on a harmonized basis.<sup>52</sup> This technical accomplishment has not been matched by increases in public understanding, while the gaming of standards by governments, for example, in relation to off-balance sheet finance, breeds public cynicism. Taking the UK as an example, the reputational damage, as manifested in media coverage of PPPs, has vastly exceeded the numerical gains from misrepresentation. There is no evidence of learning from this experience. The European Commission's 'Juncker Plan' for investment in infrastructure<sup>53</sup> is designed around off-balance sheet techniques at a time when enforcement of EU budgetary rules has predictably led to investment squeezes. Moreover, the condition of the eurozone might have been different had Italy's fiscal manipulations<sup>54</sup> to join the euro in 1999 not been tolerated.

What is striking are revelations about just how non-transparent government, business and other organizations were able to be in the past, as evidenced by legacy exposures of the indefensible treatment of certain Caribbean immigrants to the UK, Volkswagen's emissions scandal, and sexual abuse claims made against broadcasters, churches, and international charities. Too much transparency was certainly not the problem. Rather, insiders suppressed their knowledge, whether out of fear of hierarchical superiors, loyalty to organizations to which they were committed, or indifference to misconduct

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<sup>51</sup> Eurostat, *European System of Accounts: ESA 2010*. Luxembourg: Eurostat for the European Commission, 2013.

<sup>52</sup> Timothy Irwin, "Dispelling Fiscal Illusions: How Much Progress Have Governments Made in Getting Assets and Liabilities on Balance Sheet?," *Public Money & Management* 36 (3) (2016), 219-226.

<sup>53</sup> European Commission, Investment Plan for Europe: the Juncker Plan, undated. Retrieved from [https://ec.europa.eu/commission/priorities/jobs-growth-and-investment/investment-plan-europe-juncker-plan\\_en](https://ec.europa.eu/commission/priorities/jobs-growth-and-investment/investment-plan-europe-juncker-plan_en).

<sup>54</sup> Francesco Forte, "The Maastricht 'Excessive Deficit' Rules and Creative Accounting," in *Rules and Reason: Perspectives on Constitutional Political Economy*, ed. Ram Mudambi, Pietro Navarra & Giuseppe Sobbrino, Cambridge: Cambridge University Press, 2001, 258-288.

and crimes. The hardening shells of pressurized organizations are a much more significant problem than too much transparency, though that transparency must be well-designed.

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