The Mixed Blessings of Financial Transparency

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Introduction

Perhaps we should blame it on Brandeis. As is so often the case, the perfect turn of phrase often takes on a life of its own, rendering more difficult the likelihood of careful and balanced analysis of the topic to which the phrase, like a barnacle, has become attached. And thus when Justice Louis Brandeis famously observed in his pre-judicial career that "sunlight is . . . the best of disinfectants,"[1] he provided a slogan that has subsequently been deployed by countless advocates[2] in urging what appear to them to be the self-evident virtues of openness and full disclosure, and thus of transparency.[3]

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1. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914). Brandeis went on: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Id.*

2. Brandeis's phrase was also likely the inspiration for the contemporary designation of open-meeting laws as "sunshine" laws. *See generally* Daxton R. "Chip" Stewart, *Let the Sunshine In, or Else: An Examination of the "Teeth" of State and Federal Open Meetings and Open Records Laws*, 15 COMM. L. & POL'Y 265 (2010) (examining the scope and effectiveness of open meeting laws).

3. The more or less contemporary literature on transparency is vast, including, inter alia, ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY (2007); OPEN GOVERNMENT: COLLABORATION, TRANSPARENCY, AND PARTICIPATION IN PRACTICE (Daniel Lathrop & Laurel Ruma eds., 2010); Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924 (2009); Kenneth Feinberg, *Transparency and Civil Justice: The Internal*

This phenomenon of taking transparency about the operations and decisions of governmental and other influential institutions as an essentially unqualified good is nowhere more apparent than in many of the contemporary discussions of transparency in the financial services industry. The global financial crisis of 2007 produced the Troubled Asset Relief Program (TARP),[4] among a host of governmental financial relief efforts. In the wake of these efforts, concerns about the use, misuse, and non-use of TARP and other federal financial relief funds led to increasing calls in Congress,[5] by the TARP oversight panel chaired by now-Senator Elizabeth Warren,[6] by the Special Inspector General for TARP,[7] and by various interest groups[8] for increased transparency about the distribution and use of those funds. And these calls in turn led to a further insistence on greater transparency in the financial services industry more generally.[9]

Brandeis was not wrong. Transparency can indeed foster accountability and prevent the misuse of funds and the abuse of power. But once we realize

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and External Value of Sunlight, 58 DEPAUL L. REV. 473 (2009); Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 WASH. & LEE L. REV. 1239 (2008); Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617 (2010); Eugene R. Fidell, *Transparency*, 61 HASTINGS L.J. 457 (2009); William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. (SPECIAL ISSUE) 171 (2009); Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157 (2009); John H. Gomery, *Transparency and Access to Information*, 4 J. PARLIAMENTARY & POL. L. 5 (2010); Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011 (2008); Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481 (2009); Michael R. Siebecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-Based Discourse*, 87 WASH. U. L. REV. 115 (2009).

4. *See Troubled Asset Relief Program (TARP) Information*, BOARD GOVERNORS FED. RES. SYS., http://www.federalreserve.gov/bankinforeg/tarpinfo.htm (last visited Feb. 10, 2014).

5. *See* Heather West, *TARP Transparency Moves to the Senate*, CENTER FOR DEMOCRACY & TECH. (Dec. 3, 2009), https://www.cdt.org/blogs/heather-west/tarp-transparency-moves-senate.

6. *See* Damian Paletta & Michael R. Crittenden, *TARP Oversight Panel Urges Transparency, Accountability*, WALL ST. J., Jan. 10, 2009, http://www.online.wsj.com/news/articles/SB123151863031268319.

7. OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR THE TROUBLED ASSETS RELIEF PROGRAM, QUARTERLY REPORT TO CONGRESS: JULY 2010 at 10, 13, 24-26, 180-82 (2010) http://www.sigtarp.gov/Quarterly%20Reports/July2010_Quarterly_Report_to_Congress.pdf [hereinafter SIGTARP Report], which discusses the shortcomings of TARP's compliance program and calls for improved monitoring systems.

8. *See, e.g.*, Ciara Torres-Spelliscy, *Transparency for TARP*, BRENNAN CENTER FOR JUST. (Apr. 9, 2009), http://www.brennancenter.org/blog/transparency-tarp.

9. *See* Jacqueline Bell, *Inhofe Pushes for TARP Spending Transparency*, LAW360 (Apr. 23, 2009), http://www.law360.com/articles/98234/inhofe-pushes-for-TARP-spending-transparency; Brady Dennis, *Lawmakers Rebuke Treasury Department Over TARP Spending*, WASH. POST, July 21, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/21/AR2009072103561.html. On the broader concerns, see the history of the (ultimately not enacted) Financial Industry Transparency Act of 2010, H.R. 6038, 111th Cong. (2010), as described in *Financial Industry Transparency Act*, DATA TRANSPARENCY COALITION (Sept. 2013), http://www.datacoalition.org/issues/financial-industry-transparency-act.html. *See also Conference Announcement and Agenda: Disclosure, Transparency, and Financial Reporting in the Financial Services Industry*, FED. RES. BANK N.Y., (Sept. 20-21, 2012), http://www.newyorkfed.org/research/conference/2012/financial_services2012.html.

that in various other contexts we celebrate the lack of transparency under the rubrics of privacy, confidentiality, secrecy, and independence, among others, it becomes apparent that transparency, including transparency in and about the financial services industry, has its vices as well as its virtues. Indeed, the fact that the newspapers and other media that often call for greater transparency about government and corporate behavior, including TARP,[10] are the very same media that vigorously resist transparency in the name of journalist's privilege[11] should alert us to the complexities of the issue and to the risks of assuming too easily that more transparency is necessarily always for the good.

The tone of the previous paragraph notwithstanding, my goal in this paper is not to argue against transparency. It is, however, to suggest that transparency has costs as well as benefits, both generally and in the particular context of financial institutions such as commercial banks, insurance companies, investment banks, and brokerage houses. And in at least some financial domains, the costs of increased transparency may very well exceed the benefits.

I. The Contemporary Concerns–A Brief History

Transparency and financial regulation are both topics of longstanding interest, but the contemporary merger of the two topics is largely a product of the financial crisis of 2007-2008 and the subsequent governmental attempts to alleviate its consequences and prevent its recurrence.[12] Most prominent among these efforts was the Troubled Asset Relief Program, commonly known by the abbreviation TARP, but more commonly and more pejoratively referred to as the "bank bailout." The basic idea behind the program was for various arms of the federal government to purchase assets of and equity in banks and other financial institutions and also to provide federal loans to those institutions all on the theory that this infusion of money from the federal government would increase liquidity, especially bank liquidity. This liquidity would in turn enable the banks, arguably with less risk than would otherwise have been the case, to

10. *See* Bloomberg v. Bd. of Governors of the Fed. Reserve Sys., 601 F.3d 143 (2d Cir. 2010); Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys., 601 F.3d 158 (2d Cir. 2010).

11. *See* United States v. Sterling, 732 F.3d 292 (4th Cir. 2013); Cobin v. Hearst-Argyle Television, Inc., 561 F. Supp. 2d 546 (D.S.C. 2008); *In re* Application of Bloomberg L.P., No. 97-227, 1998 WL 42252 (E.D. Pa. Jan. 8, 1998).

12. Scholarship on financial transparency both predated and postdated the 2007-2008 financial crisis, but much of it has been focused more generally on the question of disclosure of information about securities to investors as well as disclosure of the terms of financial agreements to consumers. *See, e.g.*, Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139 (2006); L. Gordon Crovitz, *Transparency is More Powerful Than Regulation*, WALL ST. J., Mar. 30, 2009, at A21; Richard H. Thaler & Cass R. Sunstein, *Disclosure is the Best Kind of Credit Regulation*, WALL ST. J., Aug. 13, 2008, at A17; Diana Golobay, *Fed Publishes Wave of Rules for Mortgage Origination Transparency*, HOUSINGWIRE (Aug. 16, 2010, 1:01 PM), http://www.housingwire.com/articles/fed-publishes-wave-rules-mortgage-origination-transparency.

increase their loans for mortgages and small businesses, all of which would then proceed to stimulate the larger economy.

Transparency was hardly much of an issue with respect to the initial nature of TARP itself, which was widely and publicly discussed. But there subsequently emerged a range of worries about the lack of information regarding which funds were going to which banks.[13] More pervasive, however, and more vocally expressed, was a concern about the use of those funds by their financial institution recipients. The ubiquity of the "bank bailout" phrase notwithstanding, the point of TARP was to produce the financial liquidity that would in turn produce more loans and a stimulus to the economy.[14] But concerns about transparency surfaced once it became apparent that recipient banks had made far fewer loans than would have been expected on the basis of the funds they received. In particular, supporters of greater transparency argued that there was publicly available little information about whether the banks were actually using the funds in the way both Congress and the Bush and Obama administrations had intended. Those calling for more TARP transparency, therefore, were largely demanding information about the use of government funds by the recipients, specifically the extent to which government funds had actually wound up in the hands of home buyers, small businesses, and various other end users.[15]

At the same time as transparency concerns arose over TARP, another set of worries surfaced about the Federal Reserve's direct loans to various banks and other financial institutions. These loans considerably exceeded the entirety of TARP, yet their very existence was not immediately disclosed beyond the confines of the Federal Reserve and the recipients.[16] This non-disclosure by the Fed prompted a new set of transparency concerns, and thus it was the combination of undisclosed Federal Reserve loans to banks and undisclosed uses of TARP funds by the banks that has served to put the question of financial transparency so prominently on the public and policy agendas.

The transparency concerns just noted produced concrete effects. Spurred by a report from Neil Barofsky, Special Inspector General of TARP, and by

13. For a useful overview is Katalina Bianco, see *A Retrospective of the Troubled Asset Relief Program*, WOLTERS KLUWER L. & BUS., business.cch.com/bankingFinance/focus/News/TARPwhitepaper.pdf (last visited Aug. 11, 2014).

14. The basic idea and mechanism is simple, with the theory being that, with federal loans and federal purchase of bank equity, the banks would have more available cash with which to make loans to businesses, home buyers, and consumers. *See* BAIRD WEBEL, CONG. RESEARCH SERV., R41427, TROUBLED ASSET RELIEF PROGRAM (TARP): IMPLEMENTATION AND STATUS (2013), http://www.fas.org/sgp/crs/misc/R41427.pdf; *Troubled Asset Relief Program (TARP) Information*, BOARD GOVERNORS FED. RES. SYS., www.federalreserve.gov/bankinforeg/tarpinfo.htm (last visited Feb. 23, 2014). *See also Credit Market Programs*, U.S. DEP'T TREASURY, http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/credit-market-programs/Pages/default.aspx (last visited Feb. 23, 2014).

15. *See* Paletta & Crittenden, *supra* note 7; SIGTARP Report, *supra* note 8, at 6.

16. *See* Bob Ivry, Bradley Keoun & Phil Kurtz, *Secret Fed Loans Gave Banks $13 Billion Undisclosed to Congress*, BLOOMBERG MARKETS MAG., Nov. 27, 2011, www.bloomberg.com/news/2011-11-28/secret-fed-loans-undisclosed-to-Congress-gave-banks-13-billion-in-income.html.

comments from Elizabeth Warren, head of the Congressional Oversight Panel on the use of TARP funds, legislators introduced numerous bills in Congress to require disclosure of all of the information described above.[17] In the end, the collective concern about the transparency of TARP and Federal Reserve funds produced the transparency provisions in the Dodd-Frank Act,[18] a number of transparency requirements in various other federal statutes,[19] and, perhaps most influentially, a general environment of transparency agitation that now makes it far more difficult to keep from the public, the press, and from Congress much of the kind of financial information that had not been disclosed between 2007 and 2009.

II. The Case for Transparency

The October 2012 report of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) featured on its cover the Special Inspector's slogan: "Advancing Economic Stability Through Transparency, Coordinated Oversight, and Robust Enforcement."[20] Interestingly, but not surprisingly, the call for transparency is linked in this slogan with oversight and enforcement, thus making clear that transparency, like oversight and enforcement, was in this context understood as a strategy for preventing and punishing malfeasance.

In the context of the regulation of financial institutions, malfeasance can take many forms. When Brandeis first touted the disinfecting advantages of sunlight and thus of transparency, he was plainly talking about malfeasance in its most extreme and overt forms—bribery, stealing, the sale of public office and public licenses, and various other types of what was undeniably graft and corruption.[21] And if these are the kinds of wrongs we worry about, then the claim that transparency makes such activities more difficult is virtually self-evident. In most contexts, after all, illegality is substantially easier in secret than it is in public, and only under circumstances of severe law enforcement breakdown do we see a proliferation of open defiance of the law.

In many financial contexts, however, illegality is not the principal issue. Instead the concern is with actions that are legal but contrary to the purpose of the law. That the banks that received TARP funds devoted fewer of those funds to loans and more to their own financial stability and well-being might have been inconsistent with the chief goal of TARP, but the non-lending of TARP

17. *See* West, *supra* note 6 (describing congressional reactions to transparency concerns).

18. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. VII, 124 Stat. 1376 (2010) (codified at scattered sections of 7 U.S.C. and of 15 U.S.C.).

19. *E.g.*, Federal Funding Accountability and Transparency Act, Pub. L. No. 109-282, as amended by Pub. L. No. 110-252, §6202, 122 Stat. 2323 (2010) (codified at 31 U.S.C. 6101).

20. OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR THE TROUBLED ASSETS RELIEF PROGRAM, QUARTERLY REPORT TO CONGRESS: OCTOBER 2012 (2012), http://www.sigtarp.gov/Quarterly%20Reports/October_25_2012_Report_to_Congress.pdf.

21. *See* BRANDEIS, *supra* note 2, at 92.

funds was not illegal. And although major Federal Reserve loans to those same financial institutions involved massive expenditures of federal funds, neither making nor receiving those loans involved violations of the law.

Despite the fact that this second kind of financial transparency is not aimed primarily at curbing illegality, the effects are largely the same. For reasons that involve intricate and interrelated issues of policy, politics, psychology, and sociology, certain actions—even entirely legal ones—are easier to perform in secret than in public. Insofar as some of those lawful actions would ininvite criticism, disapproval, press attention, political attention, and perhaps even policy changes, transparency makes the disapproved activities more difficult to perform than would be the case were the gaze of public and press attention less focused. To put it more directly, even if a bit hyperbolically, transparency makes it harder for "bad" people to do "bad" things. "Bad" here may refer to activities that are genuinely and deeply wrong or simply to policies or practices that are in some milder way mistaken, but the basic idea is that transparency is, by and large, perceived to be a tool for the minimization of official error, a tool that is often effective in accomplishing *that* end.

III. But . . .

Although it seems difficult to argue with the proposition that minimizing the opportunities for malfeasance or official error is a good thing or to challenge the proposition that transparency will facilitate such minimization of malfeasance or error, the matter is not so simple. Once we realize that few of us wear transparent clothes, live in transparent houses, or have transparent bathroom doors, we can begin to glimpse the possibility that transparency is not necessarily something to be pursued at all times and in all contexts. More specifically, we can identify (at least) three values that are in some tension with the goals that transparency might foster, values that may at times be more important or more at risk than the benefits that increased transparency can bring.

A. Transparency versus Privacy

It is a source of some irony that the Louis Brandeis who in 1913 touted the virtues of transparency under the rubric of sunlight and openness[22] is the same Brandeis who twenty-three years earlier had launched the modern right to privacy.[23] The irony emerges from the fact that one of the most important dimensions of the multi-faceted contemporary right to privacy is a right *against* transparency. That aspect of privacy may be less obvious if we think of privacy in terms of a right of choice unimpeded by government restriction, as in the

22. *See* BRANDEIS, *supra* note 2.

23. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

contraception[24] and abortion[25] cases and their progeny,[26] and it may be less obvious if we have in mind the right against misappropriation of one's likeness,[27] the original idea about which Warren and Brandeis were writing in 1890. In such cases the right to privacy is not, or at least not directly, a right against disclosure or a right against transparency.[28] But the rubric of the "right to privacy" encompasses several different interests and several different rights,[29] and thus if we turn away from the Supreme Court's "right to privacy" jurisprudence and look at the modern tort of invasion of privacy, we can see that it is a tort whose essence is indeed a right against transparency. At the heart of this version of the right to privacy is the right to control the facts about one's own life and thus a right against the publication of essentially accurate but non-newsworthy information.[30] Insofar as the typical violation of this aspect of the right to privacy can be understood as the making transparent of that which the right-holder wishes to keep secret,[31] the claim of the right to privacy is at the same time a claim against transparency.

This way of understanding the right to privacy—as directly opposing an interest in transparency—is apparent once we realize that many of the complaints about the lack of TARP transparency were complaints about the non-disclosure or non-availability of information about the banks' use of TARP funds to make loans. Consider in this context the case of *McMullan v. Wohlgemuth*,[32] decided by the Supreme Court of Pennsylvania in 1973. There the court upheld, against a newspaper's First Amendment objection, a Pennsylvania statute that restricted the disclosure of the names of welfare recipients.[33] In upholding the statute and rejecting the First Amendment claim, the court concluded that the receipt of government funds was not a matter of public concern that would require the recipients to relinquish what would otherwise have been their

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24. Griswold v. Connecticut, 381 U.S. 479 (1965).

25. Roe v. Wade, 410 U.S. 113 (1973).

26. *E.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

27. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

28. It is worth mentioning, however, that disclosure—transparency in some sense—may well inhibit the exercise of a constitutional right. *See* Hodgson v. Minnesota, 497 U.S. 417 (1990) (invalidating a requirement of notice to both parents for an abortion for an unemancipated minor); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (invalidating compelled disclosure of organizational membership lists).

29. On the way in which the right to privacy is multi-faceted in just this way, see Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 43 n.70 (1986).

30. *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977); Samantha Barbas, *The* Sidis *Case and the Origins of Modern Privacy Law*, 36 COLUM. J.L. & ARTS 21, 24 (2012) (noting the tension between the public's desire for both privacy and disclosure of gossip).

31. On secrecy, with frequent references to the connections between secrecy and privacy, see generally SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION (1982).

32. 308 A.2d 888 (Pa. 1973).

33. *Id.* at 892; *see also* Mon Valley Unemployed Comm. v. Dep't of Pub. Welfare, 618 A.2d 1227, 1229 (Pa. Commw. Ct. 1992); Seth F. Kreimer, *The Right to Privacy in the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 77, 112 (1993) (noting the judicial approach of interpreting statutes "in light of the constitutional commitment to privacy").

right to privacy about precisely that information.[34] Indeed, when we think about *McMullan* in relation to information about wages of individual employees[35] or to criminal records,[36] it becomes clear that there are many issues in which a claim of transparency stands against the claims of informational privacy from those who do not wish their personal information to be quite so transparent.

Thus, whether the Supreme Court of Pennsylvania was right or wrong, it is hard to argue that its conclusion was irrational. At the very least, we understand the interests of those who would not want their welfare receipts, salaries, and much else disclosed. And we understand that those interests are not much, if at all, decreased by the fact that the funds those people receive are provided by the government. If that is the case, then we can see that the same concerns might relate to the direct or indirect recipients of TARP funds. Perhaps the argument seems attenuated if the question is whether Bank of America, Chase, or Wells Fargo can plausibly be equated with the welfare recipients in *McMullan*.[37] But if the concern is over what those institutions did with TARP funds that Congress and the President and the public intended to be loaned to bank customers, including to individuals seeking mortgages and to small businesses desiring loans, then the question seems far more reasonable: might a right of privacy on the part of bank customers provide some justification for allowing the banks and other recipients of TARP funds to refuse to disclose what they were doing with those funds? Some of this concern might be alleviated by the provision of aggregate and not individual data, but in at least some contexts even aggregate data might be sufficiently identifiable with individuals to raise the same concern.[38] If a bank is required to disclose the details of all loans it makes to businesses by type of business and location, for example, and if there are only two dry cleaners in a town, might the dry cleaning businesses have at least some interest in non-disclosure of the fact that they are loan recipients?

My goal here is not to answer this question, and certainly not to suggest that there might not be strong arguments militating in favor of disclosure. But once we frame the issue in this way, and thus once we see that increased transparency may implicate multiple interests cutting in different directions, we can

34. *See* McMullan, 308 A.2d at 894-95.

35. *See* Sapp Roofing Co. v. Sheet Workers Int'l Ass'n, Local Union No. 12, 713 A.2d 627 (Pa. 1998) (granting labor union access to wage information but not employees' personal information); *see also* Redding v. Jacobsen, 638 P.2d 503 (Utah 1981) (holding that there is no constitutional right to access personally identifiable salary information).

36. *See* New Bedford Standard-Times Publ'g Co. v. Clerk of Third Dist. Court of Bristol, 387 N.E.2d 110 (Mass. 1979) (upholding a statute that prohibited public access to criminal records).

37. Although perhaps not so after *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). If, as a matter of existing positive law, corporations have free speech rights more or less co-extensive with those of natural persons, then perhaps much the same might now apply to rights of privacy, at least informational privacy, as well.

38. *See* Harris *ex rel.* Harris v. Easton Publ'g Co., 483 A.2d 1377 (Pa. Super. 1984) (concluding that the absence of individual names does not necessarily obviate the concerns in *McMullan v. Wohlgemuth*).

see that the issue is far from clear-cut. There are many arguments in favor of transparency about the use of government funds, but there are arguments from and about privacy that might in some dimensions argue against transparency, especially in the context of how federal fund recipients use those funds, which is exactly the context in which the transparency concerns were initially raised.

B. Transparency versus Confidentiality

Evidentiary privileges are a well-entrenched feature of American law. Communications between lawyers and their clients,[39] between therapists and their patients,[40] between spouses,[41] and between clergy and their parishioners,[42] for example, are widely protected against disclosure, and so too, although less commonly, are communications between physicians and their patients.[43] In addition, as a matter of constitutional law, communications among certain high-ranking executive department officials are similarly privileged.[44] Journalists have long argued, as noted above,[45] that a similar privilege should also protect communications between journalists and their sources. And although claims that such a privilege is rooted in the First Amendment have never been authoritatively accepted,[46] it does exist as a matter of statute in more than forty states[47] and as a matter of internal practice in the U.S. Department of Justice.[48]

The basis for these various evidentiary privileges is well known. The privileges vary in content and focus, but all are based on the fundamental premise

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39. *See generally* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 308-395 (3d ed. 2003).

40. *E.g.*, Jaffee v. Redmond, 518 U.S. 1 (1996) (holding that federal law recognizes a privilege protecting communications between a psychotherapist and her patient and that notes taken by a social worker in the course of a counseling session were protected from compelled disclosure).

41. *E.g.*, *In re* Grand Jury Investigation (Hipes v. United States), 603 F.2d 786, 788-89 (9th Cir. 1979); Note, *Pillow Talk, Grimgribbers and Connubial Bliss: The Marital Communication Privilege*, 56 IND. L.J. 121 (1980).

42. *See* Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95 (1983).

43. *See, e.g.*, Oxford v. Hamilton, 763 S.W.2d 83, 84 (Ark. 1989) (discussing the privilege granted to confidential communications between doctors and patients); State v. More, 382 N.W.2d 718, 721 (Iowa Ct. App. 1985) (describing the essential elements of a privileged doctor-patient communication).

44. *See* Chi. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); *cf.* United States v. Nixon, 418 U.S. 683 (1974) (recognizing privilege but only a qualified one).

45. *See supra* note 12.

46. Branzburg v. Hayes, 408 U.S. 665, 708 (1972).

47. The status of state law reporters' privileges and the implications for a federal privilege are at the heart of *In re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), *reissued*, 438 F.3d 1141 (D.C. Cir. 2006).

48. Policy with Regard to the Issuance of Subpoenas to Members of the News Media, Subpoenas for Telephone Toll Records of Members of the News Media, and the Interrogation, Indictment, or Arrest of, Members of News Media, 28 C.F.R. § 50.10 (2012); *see* RonNell Andersen Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221 (2013); Erik Ugland, *The New Abridged Reporter's Privilege: Policies, Principles, and Pathological Perspectives*, 71 OHIO ST. L.J. 1, 10 (2010).

that certain things that are useful to have said are less likely to be said in the glare of Justice Brandeis's sunlight. The range of sins that would be admitted in the confessional booth is, we suppose, greater than the range that would be admitted in a crowd of friends, relatives, casual acquaintances, and perfect strangers. The same principle applies to feelings and problems that would be discussed with a psychiatrist, clinical psychologist, or other therapist. And the assumption underlying the privilege for journalists' discussions with their sources, as well as for the identity of those sources, is that personal safety, job security, risk of embarrassment, and much else will lead people in possession of confidential information to disclose it only under circumstances of anonymity.[49] In fact, many of the same considerations apply to the idea of the secret ballot and the First Amendment's protection of speaker anonymity,[50] a right that can be (but rarely is) described as a right against transparency.

It seems hard to deny that many of the same considerations would apply to discussions of financial matters by those inside various financial institutions. Not every proposed purchase, merger, acquisition, loan, or investment is finalized, and it is difficult to fathom how any commercial bank, investment bank, hedge fund, investment company, insurance company, or other financial institution could even operate without some degree of confidentiality for the discussions and negotiations that precede its final financial decisions. With respect to TARP specifically, should transparency extend to discussions within financial institutions of how much to lend and where to lend it, even if it would not extend to the identity of particular borrowers? If those discussions were transparent, Congress and the public could indeed have more input into the ultimate uses or non-uses of TARP funds, which is at the heart of the current concern. But that same opportunity for input might not only cause an inefficient failure of full consideration within the banks about how to spend their money; it might also produce the unintended and perverse consequence of making banks less rather than more likely to expend TARP or similar funds in the first place.

It is often a wise strategy to air the arguments against a proposed course of action before making a final decision about its desirability,[51] and we can understand, especially in the modern media environment, how a public or bank official would be reluctant to express doubts for fear that the extent of the doubts would be magnified. That this kind of exaggeration or distortion of otherwise valuable preliminary discussions seems likely and potentially harmful to good

49. Indeed, it is a source of some irony that many of the media organizations that often press (and sue) for greater transparency are ones that fight vigorously for the non-transparency of their own news-gathering practices.

50. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) (protecting the right to engage in anonymous political speech); Talley v. California, 362 U.S. 60 (1960) (same); *see also* NAACP v. Alabama, 357 U.S. 449 (1958) (finding a First Amendment right to non-disclosure of organization membership lists).

51. John Stuart Mill praised the Catholic Church's institution of the devil's advocate, a component of the procedure preliminary to canonization, on precisely such grounds. *See* JOHN STUART MILL, ON LIBERTY (4th ed. 1859).

decisions should not be understood as an argument for total secrecy with respect to large and publicly held financial institutions whose decisions have major public impact. It is to say, however, that increased transparency comes at a price and that in some contexts more transparency may also produce decisions of lesser quality as it becomes difficult to express doubts and evaluate competing arguments.

C. Transparency versus Independence

In much of the developing world, a major issue is corruption, and it is often argued, with much plausibility, that greater transparency is an effective tool in the battle against official corruption.[52] And because judicial corruption in particular is a matter of special concern in many or perhaps even most developing countries, it is often argued that requiring judges to be transparent about their financial assets and transactions, their business connections, and much else will be an effective tool in the battle against judicial corruption.[53]

Yet in many of these same countries, there is also a concern about judicial independence, with the fear being that judges may be excessively subject to political control by other officials and other branches of government.[54] This latter concern, however, can be seen to be in tension with the former, because many of the same tools that would be effective in the fight against corruption are tools that potentially diminish judicial independence.[55] The judge who must report all of his or her business dealings to an administrative agency, for example, is a judge less likely to be able to trade judicial decisions for personal financial gain but is also a judge less independent from that very agency. Conversely, the judge who need not report in any way to a non-judicial branch of government is a judge more able to engage in independent judicial judgment but is also a judge whose potential corruption is less likely to be exposed.

52. Indeed, the view that transparency is the best prevention for corruption is the guiding principle of Transparency International and the impetus for Transparency International's widely used Corruption Perceptions Index. *See Corruption Perceptions Index 2010*, TRANSPARENCY INT'L, http://www.transparency.org/cpi2010/results (last visited Feb. 23, 2014).

53. *See* Edgardo Buscaglia, *Judicial Corruption in Developing Countries: Its Causes and Economic Consequences*, UNITED NATIONS OFF. DRUG CONTROL & CRIME PREVENTION (2001), http://www.unodc.org/pdf/crime/gpacpubications/cicp14.pdf; *Fighting Judicial Corruption*, WORLD BANK, http://go.worldbank.org/E9HS218HH0 (last visited Feb. 23, 2014).

54. *See* Elizabeth Nielsen, *Hybrid International Criminal Tribunals, Political Interference, and Judicial Independence*, 15 UCLA J. INT'L L. & FOREIGN AFF. 289 (2010); *Judicial Independence Project 35034-012*, ASIAN DEV. BANK, www.adb.org/projects/35034-012/main (last visited Feb. 11, 2014); Lorne Neudorf, *Judicial Independence in the Developing World*, CAMBRIDGE U. UNITED NATIONS ASS'N, www.groupspaces.com/cuuna/pages/articles (last visited Feb. 11, 2014).

55. *Cf.* Symposium, *Tradeoffs of Candor: Does Judicial Transparency Erode Legitimacy?*, 64 N.Y.U. ANN. SURV. AM. L. 443 (2009) (recognizing and exploring tensions between judicial transparency and other values).

Transparency is thus a tool of accountability.[56] We desire transparency, it is said, in order that decision makers will be more accountable to the public, to the press, and to other decision makers.[57] But to be accountable to another institution, including the public, is to be more subject to control by that institution and thus less independent from that institution. In many contexts, therefore, we buy accountability through transparency at the price of independence.

Much of this tension was exhibited in the debates about TARP and in particular the debates about accountability to Congress. Not surprisingly, Congress desired more transparency about the use of TARP funds as a way of exercising greater control over the use of those funds. But such a strategy makes financial decisions less independent of the political considerations that obviously dominate legislative decision making. Indeed, this concern influenced the structure of the Federal Reserve. From its founding, the Federal Reserve was organized in a way that would ensure considerable independence from the political process. The theory was that decisions about interest rates, loan amounts, and the like should not be subject to popular (or populist) control. Imagine, for example, a public discussion about the very serious macroeconomic question of when inflation might be desirable.[58] But this independence comes at the cost of accountability, and thus we have observed the largely successful push for more transparency in the Federal Reserve in its dealings and in its decisions. The concrete consequences of that push include the issuance commencing in 1994 of Federal Reserve statements about rate changes and the issuance commencing in 1997 of public statements after all Federal Reserve policy meetings. But this accountability-fueled and largely successful movement for greater Federal Reserve transparency has also arguably made the Federal Reserve less independent and more political, a consequence with blessings that are at best mixed.

We value judicial independence in part because we think that judging, under any theory of law or any theory of judging, is something other than, and more than, responsiveness to short-term politics and short-term public opinion. Much of the same applies to the kinds of financial decisions that are made by the Federal Reserve, by the Treasury Department, and perhaps even in the boardrooms of large multi-national financial institutions. Transparency will increase public and press and political oversight over the decisions of these institutions, but the leaders of such institutions, unlike federal judges, are not protected by life tenure. A possible consequence of the greater oversight that transparency can bring, therefore, is not only greater accountability, but less independence, which is the other side of the accountability coin. If it is important that complex major macro-economic decisions with global and trillion-dollar consequences not be made at the ballot box or on the front pages of the tab-

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56. For an example of the conjunction of the words "transparent" (or "transparency") and "accountable" (or "accountability"), see, e.g., *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010).

57. *Id.*

58. *See The Perils of Falling Inflation*, ECONOMIST, Nov. 9-15, 2013, at 14.

loids, then it may be just as important that those decisions remain independent from the kind of pressure that excess transparency might very well bring.

The remedy for excess transparency is not, of course, insufficient transparency. Indeed, there is now a lively international debate on the topic, with the important work of the economist Petra Geraats at the forefront of the move to greater central bank and financial institution transparency,[59] supported by her research indicating that transparency is often correlated with, and often causes, increased economic performance. But her claims have at times been questioned,[60] or least narrowed to particular contexts, and thus it is important not to assume that transparency is necessarily for the better, even in the context of central banks and other financial institutions, but rather to recognize when and where this will be so and when and where it will not.

IV. The Decision Theory of Transparency

Once we understand that transparency has considerable benefits but may come at a considerable price, we can appreciate the virtues of analyzing the issues of transparency through the use of the familiar tools of decision theory.[61] More particularly, a decision to make some process or institution transparent, or more transparent, is a decision that will be made under conditions of uncertainty about the consequences of the increased transparency. And thus we can perceive a matrix of decisions and consequences, where the decisions are to increase or decrease transparency, and the consequences are favorable or unfavorable.

Typically, even if not necessarily, the benefits of transparency are largely negative, in the sense of preventing bad decisions as opposed to facilitating optimal ones. When Jeremy Bentham observed that "the more strictly we are watched, the better we behave,"[62] he was thinking primarily of eliminating bad behavior rather than fostering optimal or otherwise desirable behavior. Transparency makes malfeasance more difficult, exposes error, and in general is useful in guarding against disaster and mistake. But at the same time transparency may make it more difficult for competent and well-intentioned decision makers to make optimal decisions for many of the reasons described above. Thus it is a

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59. *See, e.g.*, Petra M. Geraats, *Trends in Monetary Policy Transparency*, 12 INT'L FIN. 235 (2009); Petra M. Geraats, *Central Bank Transparency*, 112 ECON. J. 532 (2002). An overview of the nature and influence of Geraats's work can be found in Simon Kennedy, *Central Bank Transparency Grows Under Geraats Pressure*, BLOOMBERG NEWS (Apr. 10, 2013), www.bloomberg.com/news/2013-04-10/central-bank-transparency-grows-under-geraats-pressure.html.

60. *See, e.g.*, Romain Baeriswyl, *Endogenous Central Bank Information and the Optimal Degree of Transparency*, 7 INT'L J. CENT. BANKING, June 2011, at 85, 96-98.

61. These now-commonplace approaches owe much of their origins to Raiffa. *See* HOWARD RAIFFA, DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICES UNDER UNCERTAINTY (McGraw-Hill, 2d ed. 1997) (1968). *See also* R. DUNCAN LUCE & HOWARD RAIFFA, GAMES AND DECISIONS: INTRODUCTION AND CRITICAL SURVEY (1957).

62. JEREMY BENTHAM, FARMING DEFENDED (1796), *reprinted in* 1 WRITINGS ON THE POOR LAWS 276, 277 (Michael Quinn ed., 2001).

mistake to think of good decision making solely in terms of minimizing errors. The best violinist is not necessarily the one who makes the fewest fingering mistakes, and the best quarterback is not necessary the one who throws the fewest number of interceptions or incomplete passes. Excess caution minimizes mistakes but also fails to maximize the number of truly good decisions. And thus if we think of facilitating bad decisions by bad decision makers as the Type I error, to use the language of the statisticians and the decision theorists, and if we think of impeding good decisions by good decision makers as the Type II error, we can then frame the issue in terms of deciding whether the expected losses of the Type I errors will be greater or lesser than the expected losses of the Type II errors. And consequently insofar as any decision can be expected to decrease the expected Type I losses at the expense of increasing the Type II losses, and vice versa, the question is one of assessing the consequences and frequency of the two types of error under a range of different decisions.

Accordingly, when the decision is about the appropriate level of transparency, we are interested in the extent to which the bad decisions prevented by more transparency will be greater in expected consequence than the good decisions impeded by that degree of transparency. Insofar as a TARP-like program whose financial distributions to banks and then from banks to their customers are transparent to Congress, to regulators, to the press, and to the public will be one whose non-distribution of funds will be more difficult, transparency will be beneficial, assuming the initial wisdom of the TARP idea in the first place. Transparency, though, may also be detrimental to the basic goals of a TARP-like program with financial distributions that become politicized by making their existence and amount known to Congress, to the press, and to the public. Those distributions may become influenced by the vagaries and irrationalities of politics and political opportunism.

Obviously the foregoing calculations[63] will vary from decision to decision, but there is value in recognizing that, in the context of complex financial decisions with elusive macro-economic effects, the expected costs of transparency may outweigh its expected benefits more often than is commonly appreciated. To the extent that the underlying economics of most public decisions are likely to be distorted by opportunistic politicians appealing to an economically unsophisticated public, the consequences of too much transparency should not be ignored.

63. I use the word "calculation" in the loose sense to refer to the weighing of advantages and disadvantages, costs and benefits, and risks and rewards, and not in the sense of necessarily engaging in a precise numerical calculation, whether that calculation be in terms of dollars, utils, or anything else.

V. Conclusion

Transparency is, ultimately, about who knows what about whom. When seen in this way, transparency seems much more mundane and much less the unqualified human good that it seemed to Justice Brandeis—or at least as it seems to those who delight in quoting Brandeis to suggest that strategies of non-transparency are the self-protective devices of those with something to hide.

Yet things are rarely this simple. It is almost undeniably true that non-transparency is valuable for those with something to hide and is thus to be questioned when there is reason to believe that what is being hidden would be better discussed and analyzed out in the open. But once we see that more transparency often comes at the price of frequently valuable privacy, confidentiality, and independence, we can understand that resistance to transparency, at least in some contexts, is not necessarily an indicator of official or professional nefariousness. On the contrary, resistance to calls for greater transparency may, at least on some occasions, be the strategy of those who seek to make the best possible decisions without the distortions of politics, populism,[64] and the sensationalism of a contemporary media and political environment in which "on the other hand" seems far too often to be perceived or seized upon as a fatal admission of weakness.

But this essay is not a brief against transparency. Brandeis may not have been totally correct, but neither was he totally wrong. The disinfecting powers of sunlight are real and considerable, and transparency is undoubtedly effective in lessening the incidence and consequences of official and institutional decisions—financial and otherwise—that reflect incompetence, malice, or incentives at odds with those of the public interest. Not all decisions are of this variety, however, and as a result it is best to think of transparency not as the panacea for all sorts of objectionable policies and decisions, but instead as a specialized tool that can do great good when it is used appropriately, but which may be counterproductive when it is used for the wrong job or when its costs go unappreciated.

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64. I take the word "populism" to refer to a form of appealing to the public that is not necessarily coextensive with democracy in the best sense. *See* JOHN LUKACS, DEMOCRACY AND POPULISM: FEAR AND HATRED 174-75, 185-86, 216 (2005) (arguing that democracy can devolve towards populism, that such populism can be a danger to democracy, and that such devolution will continue into the twenty-first century).