TRANSPARENCY IN THREE DIMENSIONS[†]

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On November 11, 2010, at the University of Illinois College of Law, Professor Frederick Schauer of the University of Virginia delivered this lecture as part of the 2010 Baum Lecture Series. Professor Schauer discussed the challenges associated with the often-touted virtues of transparency in public decision making, offering a proposed framework for assessing the goals and principles associated with transparency, transparency's costs and benefits, and how transparency is related to other principles, including those of the First Amendment.

Professor Schauer begins by discussing the definition of transparency and how the degree of transparency is ultimately a function of three variables: the possessor of information, the information that is to be made transparent, and to whom access to information will be given. He then addresses the aims of transparency, in particular its regulatory, democracy enhancing, efficiency promoting, and epistemological goals. Professor Schauer notes how transparency is conservative, seeking to prevent the worst outcomes even at the occasional cost of foreclosing the best ones.

Being invited to the College of Law at the University of Illinois to deliver the David C. Baum Memorial Lecture on Civil Rights and Civil Liberties is an extraordinary honor. It is one for which I am and will always remain grateful, in part because the lecture series commemorates the life and accomplishments of a great teacher, fine scholar, and good man who is such an important part of the College of Law's history. I am also honored because I have been invited to join such a distinguished list of past Baum Lecturers, some of whom I am pleased to call my friends and others of whom have reputations to which I cannot even dream of aspiring.

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Many of the previous Baum Lectures, especially in the earlier years of the series, were focused on the accomplishments of particular people, especially those eminent Supreme Court Justices—Hugo Black,[1] Oliver Wendell Holmes,[2] Louis Brandeis,[3] Robert Jackson,[4] Felix Frankfurter,[5] William Douglas,[6] Thurgood Marshall,[7] and William Brennan[8]—whose work advanced the U.S. tradition of civil rights and civil liberties. Fortunately for me, however, this has not been an unbroken tradition,[9] because I wish to talk to you not about a person, but about an idea. And the idea I want to talk about is transparency.

Transparency, it appears these days, is everywhere; or at least talk of it is everywhere.[10] Indeed, not much more than a month ago, Professor Lawrence Solum of this faculty discussed the topic of transparency on his Legal Theory Blog precisely because he believed it to be a concept of which every first year law student ought to be aware.[11] Professor Solum

1. John P. Frank, *Hugo L. Black: Free Speech and the Declaration of Independence*, 1977 U. ILL. L.F. 577.

2. Grant Gilmore, *Some Reflections on Oliver Wendell Holmes, Jr.*, 2 GREEN BAG 2D 379 (1999).

3. Nathaniel L. Nathanson, *The Philosophy of Mr. Justice Brandeis and Civil Liberties Today*, 1979 U. ILL. L.F. 261.

4. Philip B. Kurland, *Justice Robert H. Jackson—Impact on Civil Rights and Civil Liberties*, 1977 U. ILL. L.F. 551.

5. William T. Coleman, Jr., *Mr. Justice Felix Frankfurter: Civil Libertarian As Lawyer and As Justice: Extent to Which Judicial Responsibilities Affected His Pre-Court Convictions*, *in* SIX JUSTICES ON CIVIL RIGHTS 85 (Ronald D. Rotunda ed., 1983).

6. Vern Countryman, *Justice Douglas and Freedom of Expression*, 1978 U. ILL. L.F. 301.

7. Mark V. Tushnet, *The Jurisprudence of Thurgood Marshall*, 1996 U. ILL. L. REV. 1129.

8. Abner J. Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of* Baker v. Carr, 1995 U. ILL. L. REV. 683.

9. "Fortunate" especially because the tradition, as exemplified by six of the eight previously cited Baum Lectures, has been marked by the practice of former law clerks writing admiringly about the Justices for whom they clerked. Not having been a law clerk, I am an unable to perform in such a role.

10. Among many prominent recent writings, see generally ARCHON FUNG ET AL., 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); Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351 (2011); Kenneth Feinberg, *Transparency and Civil Justice: The Internal 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. 671 (2010); Eugene R. Fidell, *Transparency, 2009*, 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. 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); 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).

11. Lawrence B. Solum, *Legal Theory Lexicon: Transparency*, LEGAL THEORY BLOG (Oct. 3, 2010, 11:00 AM), http://lsolum.typepad.com/legaltheory/2010/10/legal-theory-lexicon-transparency.html.

is correct—indeed, more correct than he would have been a decade ago. President Obama has explicitly promised more transparent government, and from the outset the Obama Administration issued directives aimed at implementing that promise.[12] Recent regulatory changes have responded to consumer advocates urging more transparency in mortgages, consumer financing, banking, and other financial transactions.[13] Shareholder advocates insist that corporations be more transparent about corporate governance and corporate decisions,[14] while at the same time the corporations themselves, as well as others, urge greater transparency as an alternative to allegedly more heavy-handed regulation.[15] Courts, which with open hearings, public access to records, and written statements of reasons are among the more transparent of decision-making institutions, are urged to become even more transparent.[16] Proponents of "open source" computer technology decry laws and contracts that exalt property over transparency.[17] And in numerous other aspects of law, disclosure is the touchstone, whether in the context of informed consent,[18]

12. Presidential Memorandum on Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009); Presidential Memorandum on Transparency and Government, 74 Fed. Reg. 4685 (Jan. 26, 2009); Memorandum from Peter R. Orszag, Dir., Office of Mgmt. and Budget, to the Heads of Exec. Dep'ts and Agencies (Dec. 8, 2009), http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf. The extent to which the Obama Administration has fulfilled this promise, however, remains a matter of continuing controversy. *See* NAT'L SECURITY ARCHIVE, SUNSHINE AND SHADOWS: THE CLEAR OBAMA MESSAGE FOR FREEDOM OF INFORMATION MEETS MIXED RESULTS (2010), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB308/index.htm. On transparency in government generally, see Elizabeth Garrett et al., *Constitutional Issues Raised by the Lobbying Disclosure Act*, *in* THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LOBBYING LAW AND PRACTICE 197 (William V. Luneburg et al., eds., 4th ed. 2009); TRANSPARENCY: THE KEY TO BETTER GOVERNANCE? (Christopher Hood & David Heald eds., 2006); Danielle Keats Citron, *Open Code Governance*, 2008 U. CHI. LEGAL F. 355.

13. *See* Diana Golobay, *Fed Publishes Wave of Rules for Mortgage Origination Transparency*, HOUSINGWIRE (Aug. 16, 2010, 12:01 PM), http://www.housingwire.com/2010/08/16/fed_publishes_wave_of_rules_for_mortgage_origination_transparency.

14. A balanced analysis of the issues, showing both the benefits and costs of transparency in corporate governance, is Benjamin E. Hermalin & Michael S. Weisbach, *Transparency and Corporate Governance* (Univ. of Cal. & Nat'l Bureau of Econ. Research, Working Paper No. W12875, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=958628.

15. *See, e.g.*, L. Gordon Crovitz, Op.-Ed., *Transparency is More Powerful Than Regulation*, WALL ST. J., Mar. 30, 2009, at A21; Richard H. Thaler & Cass R. Sunstein, Op.-Ed., *Disclosure is the Best Kind of Credit Regulation*, WALL ST. J., Aug. 13, 2008, at A17.

16. *See* LoPucki, *supra* note 10; *see also* Symposium, *Tradeoffs of Candor: Does Judicial Transparency Erode Legitimacy?*, 64 N.Y.U. ANN. SURV. AM. L. 443 (2009).

17. *See generally* John R. Ackermann, *Toward Open Source Hardware*, 34 U. DAYTON L. REV. 183 (2009); Katie Fortney, *Ending Copyright Claims in State Primary Legal Materials: Toward an Open Source Legal System*, 102 L. LIBR. J. 59 (2010); Michael J. Madison et al., *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010); Greg R. Vetter, *Open Source Licensing and Scattering Opportunism in Software Standards*, 48 B.C. L. REV. 225 (2007).

18. *See* Joseph Leghorn et al., *The First Amendment and FDA Restrictions on Off-Label Uses: The Call for a New Approach*, 63 FOOD & DRUG L.J. 391, 405–06 (2008); Richard S. Saver, *At the End of the Clinical Trial: Does Access to Investigational Technology End As Well?*, 31 W. NEW ENG. L. REV. 411, 447 (2009).

the regulation of securities,[19] or even in the *Miranda*[20] warnings that police give to those they interrogate. Moreover, even—or perhaps especially—in the international arena, human rights groups such as Transparency International,[21] the Open Society Foundations,[22] and others with somewhat less transparent names treat governmental transparency as one of their central goals.[23]

Transparency is not, of course, an unalloyed good, much of contemporary popular rhetoric notwithstanding.[24] Whenever someone asks a friend to keep a secret,[25] whenever a call is made for greater respect for privacy, whenever anonymity is valued,[26] and whenever the press insists on the confidentiality of its sources,[27] for example, such often appealing claims are in fact claims for less rather than more transparency. Secrecy, privacy, anonymity, and confidentiality also have their virtues, and we can all understand why transparency is a far more desirable attribute for sunroom windows than it is for bathroom doors. At times, it seems that transparency is a prime example of the old adage that where you stand depends on where you sit.

Although the virtues and vices of transparency are well worth analyzing and debating, and indeed have increasingly been the subject of

19. The conventional disclosure approach to securities regulation is described and challenged in Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139, 151 (2006).

20. Miranda v. Arizona, 384 U.S. 436 (1966).

21. *See* TRANSPARENCY INT'L, http://www.transparency.org (last visited May 16, 2011).

22. *See* OPEN SOCIETY FOUND., http://www.soros.org (last visited May 16, 2011).

23. *See, e.g.*, ARTICLE 19, CHANGING THE CLIMATE FOR FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION (2009), http://www.article19.org/pdfs/publications/changing-the-climate-for-freedom-of-expression-and-freedom-of-information.pdf; ARTICLE 19, THE LONDON DECLARATION FOR TRANSPARENCY, THE FREE FLOW OF INFORMATION AND DEVELOPMENT (2010), http://www.right2info-mdgs.org/wp-content/uploads/London-Declaration.pdf.

24. Indeed, skeptical analyses of the supposed virtues of transparency have been emerging more frequently. *See, e.g.*, Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011); Amitai Etzioni, *Is Transparency the Best Disinfectant?*, 18 J. POL. PHIL. 389 (2010); Florencia Marotta-Wurgler, *Does Disclosure Matter?* (NYU Law and Economics, Research Paper No. 10-54, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1713860.

25. The classic and still highly valuable treatment of secrets is SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION (1982). A more recent analysis, importantly distinguishing between known and unknown secrecy, is David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010).

26. *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* Nat'l Ass'n for the Advancement of Colored People v. Alabama, 357 U.S. 449 (1958) (finding First Amendment right to nondisclosure of organization membership lists); Chesa Boudin, Note, *Publius and the Petition:* Doe v. Reed *and the History of Anonymous Speech*, 120 YALE L.J. 2140 (2011).

27. *See* Branzburg v. Hayes, 408 U.S. 665 (1972) (rejecting the claim that reporter's privilege was guaranteed by First Amendment's Press Clause); *In re* Grand Jury Subpoena, 397 F.3d 964 (D.C. Cir. 2005) (same). Many states have enacted such a privilege by statute, see, for example, ARK. CODE ANN. § 16-85-510 (2005); NEB. REV. STAT. § 20-144 (2007), and the Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. § 2 (2007), is, at the time of this writing, pending in Congress, albeit with a decreasing likelihood of ultimate passage.

such analyses and debates in recent years,[28] my goal here is to step back from these debates and try to understand just what it is that transparency is supposed to bring, just how we are to evaluate the costs and benefits of transparency, and just how transparency fits within larger themes about the role of law in producing knowledge.

My aim on this occasion is thus to explain and explore three different aspects of the problem of transparency. The first relates to the multiple goals that transparency is thought to serve; the second concerns the peculiarly conservative, in the nonpolitical sense of that term, nature of transparency; and the third attempts to situate some of the discussion about transparency, including but not limited to my own on this occasion, within the more venerable traditions of freedom of speech and freedom of the press. But with respect to this last goal, I want to locate the subject of transparency within these larger themes not primarily to domesticate the topic of transparency, and thus make it part of a larger, older, and more familiar tradition. On the contrary, I want to suggest that, history and tradition notwithstanding, transparency may be the larger and more important topic, with the freedom of speech and press, or at least some aspects of it, being only a historically salient corner of a larger, more interesting, and more pervasive concern.

I. DEFINITIONAL PRELIMINARIES

Transparency is, of course, a metaphor, or perhaps it is better thought of as an analogy. In its principal usage, the word "transparent" is used to refer to a physical property. To be transparent, the *Oxford English Dictionary* tells us, is to have "the property of transmitting light, so as to render bodies lying beyond completely visible."[29] As used metaphorically, therefore, to be transparent is to have the capacity of being seen without distortion. Thus, for some fact, information, or process to be transparent is for it to be open and available for examination and scrutiny.

Transparency is thus best understood as a passive or a negative attribute. Transparency is about availability and accessibility, but these attributes of transparency are agnostic on the question of who might take advantage of that availability or accessibility and at what cost. In Isaiah Berlin's classic distinction between positive and negative liberty,[30] he argues that it is essential to distinguish liberty from the conditions for its exercise and thus to distinguish negative liberty from what he believes is misleadingly designated as "positive" liberty.[31] Thus, because transpar-

28. *See supra* note 10 for a sample of recent writings.

29. 2 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 3383 (1971).

30. *See* ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118 (1969).

31. An important analysis and response to Berlin is in LAWRENCE CROCKER, POSITIVE LIBERTY: AN ESSAY IN NORMATIVE POLITICAL PHILOSOPHY (1980).

ency is an attribute rather than an activity (like speaking or writing) or a power, it fits well within the negative liberty or negative freedom side of the now-familiar distinctions between positive and negative liberty, positive and negative freedom, and positive and negative rights.[32] Open meeting laws, for example, serve the goals of transparency by prohibiting certain governmental bodies from closing certain proceedings to interested spectators, but whether there are any such interested spectators is another question entirely.[33] The same can be said about laws and Supreme Court decisions requiring trials to be open to the public.[34] And so too with freedom of information laws,[35] which require the government to make available certain records and documents upon request from members of the public but do not require that anyone actually request them. A more positive conception of transparency might undergird efforts to make information easily usable rather than simply available—the difference between a requirement of publication and a requirement of access, for example—but most existing conceptions of transparency are far more about availability than about actual usability. Moreover, it would be almost inconceivable to imagine laws mandating how the information available through transparency is actually used or processed. As a result, transparency is usefully distinguished from knowledge because, although

32. On positive and negative rights, see, for example, Larry A. Alexander, *Constitutionalism*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 248, 255 (Martin P. Golding & William A. Edmundson eds., 2005); Sotirios A. Barber, *Welfare and the Instrumental Constitution*, 42 AM. J. JURIS. 159 (1997); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Albie Sachs, *Enforcement of Social and Economic Rights*, 22 AM. U. INT'L L. REV. 673 (2007); Ellen Wiles, *Aspirational Principles or Enforceable Rights?: The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT'L L. REV. 35 (2006). The longstanding U.S. resistance to recognizing positive rights in constitutional law is exemplified in, for example, DeShaney v. Winnebago Cnty. Dep't. of Soc. Servs., 489 U.S. 189 (1989); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

33. On open meeting laws generally, see the comprehensive and balanced treatment in Nicholas Johnson, *Open Meetings and Closed Minds: Another Road to the Mountaintop*, 53 DRAKE L. REV. 11 (2004). Also useful are, for example, John F. O'Connor & Michael J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to Email Correspondence*, 12 GEO. MASON L. REV. 719 (2004); 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). The issue is not new. *See* Note, *Open Meeting Statutes: The Press Fights for the "Right to Know*," 75 HARV. L. REV. 1199 (1962). And it is now pretty well settled that there is no general constitutional affirmative right of access to government meetings and proceedings, whether for the press or for the public at large. *See* Houchins v. KQED, Inc., 438 U.S. 1 (1978); Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Wash. Post Co., 417 U.S. 843 (1974); *cf.* Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n, 429 U.S. 167 (1976). For an argument to the contrary, see Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909 (2006).

34. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). For subsequent elaboration, see Press-Enter. Co. v. Superior Court, 478 U.S. 1 (1986); Press-Enter. Co. v. Superior Court, 464 U.S. 501 (1984); Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

35. Freedom of Information Act of 1986, 5 U.S.C. § 552 (2006). For a compilation of state freedom of information laws, see *State FOI Laws*, NAT'L FREEDOM INFO. COALITION, http://www.nfoic.org/state-foi-laws (last visited May 16, 2011).

transparency may foster an increase in knowledge, transparency is, at best, a facilitator of knowledge and should not be confused with knowledge itself.

Transparency may facilitate knowledge, but its actual capacity to do so depends on numerous factors, as well as simply on the degree of transparency. It is common for people to describe processes as either transparent or not, but transparency is in fact a variable. Ordinary language distinguishes between transparency and translucency, and thus recognizes partial transparency, but the latter term has yet to penetrate contemporary political or legal discourse. Nevertheless, the very fact that we distinguish transparency from translucency, or partial transparency, shows that it can, at times, be valuable to recognize varying degrees of transparency. Documents redacted on grounds of national security,[36] for example, are less than fully transparent but nor are they fully opaque. Although open meeting laws make the proceedings of city councils, boards of education, and administrative agencies open to the public, most such laws allow some discussions to take place behind closed doors, literally or figuratively, and there has consequently been a raft of litigation under such laws about which transactions and conversations qualify as meetings for purposes of open meeting laws, and which are subject to various exemptions and exceptions.[37] But the existence of such litigation should not detract from the larger phenomenon. An army of lawyers and legal scholars indeed make their living litigating or analyzing the exceptions to the Freedom of Information Act,[38] but it would still be hard to deny that the United States, after the passage of that Act, is a far different place than it was before it came into being.

In addition to there being degrees of transparency in terms of which records, proceedings, or data are available and which are not, the degree of transparency can also vary along the dimension of the size and identity of a permitted audience. Attendance at the faculty meetings of my own institution, for example, is limited to members of the faculty and is thus closed to students, alumni, nonfaculty members of the bar, and interested members of the general public. As a result, the proceedings lack transparency for some number of interested parties. Still, the fact that these proceedings are open to all faculty members, as opposed to some subset thereof, makes them more transparent than many conceivable alterna-

36. *See* Classified Information Procedures Act, Pub. L. No. 96-456, § 6(c), 94 Stat. 2025, 2027 (1980); Thomas Grexa, *Title VII Tenure Litigation in the Academy and Academic Freedom—A Current Appraisal*, 96 DICK. L. REV. 11, 32 n.168 (1991); Jonathan H. Marks, *9/11 + 3/11 + 7/7 = ?: What Counts in Counterterrorism*, 37 COLUM. HUM. RTS. L. REV. 559, 617 n.255 (2006).

37. *See, e.g.*, Stephen Schaeffer, Comment, *Sunshine in Cyberspace: Electronic Deliberation and the Reach of Open Meeting Laws*, 48 ST. LOUIS U. L.J. 755 (2004); Timothy P. Whelan, *New York's Open Meetings Law: Revision of the Political Caucus Exemption and Its Implications for Local Government*, 60 BROOK. L. REV. 1483 (1995).

38. *See, e.g.*, U.S. DEP'T OF JUST., FREEDOM OF INFORMATION ACT REFERENCE GUIDE (2010), *available at* http://www.justice.gov/oip/referenceguide.htm.

tives. Similarly, designated journalists, but not all citizens, are allowed to roam the halls of the White House and fly on military aircraft,[39] producing a situation that can be described most accurately, albeit loosely, as partial transparency. And, any time a document is available only to those with a so-called "need to know," we wind up with a situation somewhere between total transparency and total opacity.

In any discussion of transparency, therefore, it is vitally important to recognize that transparency is a three-part relationship, or, to put it differently, a relationship with three different variables. Any question about transparency will present, first, the question of which person or institution engages in proceedings or possesses documents or information; second, the question of which activities, proceedings, data, or documents are to be made transparent; and, third, what is the class of individuals or institutions that are entitled to access those activities, proceedings, data, or documents. Thus, without specifying who must make what available to whom, we are unlikely to be able to understand the form of transparency we are discussing.

II. THE AIMS OF TRANSPARENCY

Definitional preliminaries aside, we can now turn to the supposed virtues of transparency. Foremost among them, at least in much of contemporary discourse, is what is commonly described as "accountability." An institution's transparency to another institution, or an institution's transparency to the public, many argue, increases the accountability of the transparent institution.[40] But because the word "accountability" is sufficiently capacious to include the alleged virtues of allowing one institution to be controlled by another and also the alleged virtues of public participation for its own sake, I want to set aside the word "accountability" and instead distinguish between transparency as regulation and transparency as democracy or participation. More broadly, I want to distinguish among four values that transparency is thought to serve and thus to distinguish what I will label Transparency as Regulation, Transparency as Democracy, Transparency as Efficiency, and Transparency as Epistemology.

39. Of course there are important issues about who is included and who is excluded under any system of partial access, see Nation Magazine v. U.S. Dep't of Def., 762 F. Supp. 1558 (S.D.N.Y. 1991) (dismissing as moot a challenge to the Department of Defense's procedures and criteria for determining which journalists shall be members of wartime "press pools"); Frederick Schauer, Parsing the Pentagon Papers (May 1991) (unpublished research paper) (on file with the Joan Shorenstein Center, Harvard University, John F. Kennedy School of Government) (commenting on the foregoing), but such issues are not my principal concern here.

40. Indeed, using the words "transparent" (or "transparency") and "accountable" (or "accountability") in tandem is ubiquitous. *See, e.g.*, Blakely v. Washington, 542 U.S. 296, 316 (2004).

A. Transparency As Regulation

Focusing first on transparency as regulation, we can remind ourselves that "information is power," as the old saying goes,[41] and accordingly, one aspect of transparency is the claim that for one person or institution to have information about another is for the former to have power over the latter. How exactly this power is exercised will of course vary considerably with context. Consider blackmail, for example. The blackmailer has information—or knowledge—about the victim, and the blackmailer's power over the victim derives from the fact that there is information the victim wishes to keep secret. And thus, victims of blackmailer transparency—although obviously not facilitated by the victim and although almost certainly socially undesirable[42]—allows the blackmailer to control the victim, which is, after all, the whole point of blackmail in the first place. Blackmail may be socially undesirable, but it nevertheless provides a good example of the way in which possession of information about another typically facilitates power or control over another.

More relevant than blackmail to the general topic of transparency is the broad range of contexts in which the transparency of an institution is one way in which that institution can be controlled or regulated by another. Mandated corporate disclosure of numerous financial reports and transactions is an important dimension of corporate and securities regulation, premised on the assumption that a corporation whose finances, internal organization, and major contracts are accessible to the public and shareholders is a corporation constrained in its ability to engage in various investor-damaging practices.[43] Similarly, the transparency of mortality rates for hospitals is thought to foster superior medical

41. And the ubiquitous "information is power" derives from Francis Bacon's "knowledge is power," the common translation of *nam et ipsa scientia potestas est.* JOHN BARTLETT, FAMILIAR QUOTATIONS 111 (Christopher Morley & Louella D. Everett eds., 12th ed. 1950) (quoting FRANCIS BACON, *Haeresibus*, *in* MEDITACIONES SACRAE (1597)).

42. The use of "almost" in the text is deliberate, reflecting a longstanding debate over what about blackmail—the threat to disclose accurate information under circumstances in which the disclosure itself would otherwise be entirely lawful—justifies its criminalization at all. Among the more prominent entries in the debate are Ronald H. Coase, Lecture, *Blackmail*, 74 VA. L. REV. 655 (1988); Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983); Henry E. Smith, *The Harm in Blackmail*, 92 NW. U. L. REV. 861 (1998); Symposium, *Blackmail and Other Forms of Arm-Twisting*, 141 U. PA. L. REV. 1567 (1993). A valuable recent recapitulation and analysis is Ken Levy, *The Solution to the* Real *Blackmail Paradox: The Common Link Between Blackmail and Other Criminal Threats*, 39 CONN. L. REV. 1051 (2007).

43. *See* Allen Ferrell, *The Case for Mandatory Disclosure in Securities Regulation Around the World*, 2 BROOK. J. CORP. FIN. & COM. L. 81 (2007); Edward Rock, *Securities Regulation As Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure*, 23 CARDOZO L. REV. 675 (2002); Gary F. Goldring, Note, *Mandatory Disclosure of Corporate Projections and the Goals of Securities Regulation*, 81 COLUM. L. REV. 1525 (1981). For a skeptical view of the supposed advantages of disclosure in producing substantively desirable behavior, see Ripken, *supra* note 19. Different forms of skepticism are also found in Carol J. Simon, *The Effect of the 1933 Securities Act on Investor Information and the Performance of New Issues*, 79 AM. ECON. REV. 295 (1989).

care,[44] and the transparency of violence on college campuses is argued to increase campus concern for security and also to increase the ability of students and parents to make wise choices about where students should get their education.[45] And the transparency of restaurant hygiene inspections seemingly provides an incentive for restaurateurs to ensure that their establishments are healthy and safe.[46] In these and numerous other instances, disclosure and transparency are thought to be an important component of a broader regulatory strategy. Indeed, when Cass Sunstein and Richard Thaler wrote an article entitled "Disclosure Is the Best Kind of Credit Regulation"[47] and when Gordon Crovitz wrote in the *Wall Street Journal* that "Transparency Is More Powerful Than Regulation,"[48] they explicitly recognized that requiring regulated entities to make their activities open to those who seek to exercise control over those entities is itself a form of regulation, although it remains an open question whether transparency as regulation is better or worse, all things considered, than more direct forms of regulation.[49] Still, once we recognize that transparency can be a form of control, and therefore a form of regulation, we can see that in most discussions of transparency it is rarely a mistake to ask whether it is good that those who are expected or compelled to be transparent should or should not be subject to the control of those to whom they are expected to be transparent.

B. Transparency As Democracy

Although discussions of transparency as regulatory strategy are becoming increasingly common, there is a certain kind of control or regulation that dominates many discussions of transparency, and that is regulation of the government itself by the public or by its appointed (or self-appointed) representatives. For want of a better word, we can simply call public control of governors and government "democracy." And to the extent that transparency of governmental processes to the public is promoted as a way of facilitating public control of government and its

44. *See* Clark C. Havighurst, *Regulations of Health Facilities and Services by "Certificate of Need*," 59 VA. L. REV. 1143, 1163 n.76 (1973); Michael B. Rothberg et al., *Choosing the Best Hospital: The Limitations of Public Quality Reporting*, 27 HEALTH AFF. 1680 (2008); Clayton Christensen & Jason Hwang, *What Obama's Health Care Team Can Learn from Massachusetts*, HARV. BUS. REV. BLOG (Jan. 22, 2009, 5:23 PM), http://blogs.hbr.org/hbr/on-innovation/2009/01/what-obamas-health-care-team-c.html.

45. *See* Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2006); Oren R. Griffin, *Constructing a Legal and Managerial Paradigm Applicable to the Modern-Day Safety and Security Challenge at Colleges and Universities*, 54 ST. LOUIS U. L.J. 241 (2009).

46. *See generally* Ginger Zhe Jin & Phillip Leslie, *The Effect of Information on Product Quality: Evidence from Restaurant Hygiene Grade Cards*, 118 Q. J. ECON. 409 (2003).

47. Thaler & Sunstein, *supra* note 15.

48. Crovitz, *supra* note 15.

49. *See* Ripken, *supra* note 19.

decisions,[50] we can understand the principle as one of Transparency as Democracy. But transparency as a facilitator of democracy and as a vehicle for control of the governors by the governed has two importantly distinct dimensions. First, transparency can, it is said, reduce corruption, bribery, regulatory capture, and other forms of governmental misbehavior, and in that sense governmental transparency is simply a form of transparency as regulation.[51] Presumably this is what Justice Brandeis meant in famously proclaiming that sunlight was the best of disinfectants.[52] Still, democracy is not necessarily dependent on the view that the public is a superior decision maker to paid public officials.[53] The second dimension of Transparency as Democracy is thus public control not for the purpose of facilitating better decisions, but instead as the embodiment of public control as an end in itself. Democracy, after all, is not about the people necessarily being right, but about the right of the people to be wrong. From this perspective, open meeting laws, freedom of information laws, and many of the other devices of transparency are, to the perpetual annoyance of those whose activities and records are supposed to be transparent, hardly a reliable guarantor of wise decision making. These devices of disclosure and transparency are, however, a useful facilitator of public decision making, a public decision making that, sometimes for better and sometimes for worse, is an important component of democratic governance.

Thus, it is difficult to deny that transparent decisions are sometimes worse just because of their transparency. Justice Souter, who retired from the Supreme Court for reasons other than the looming prospect of televised Supreme Court arguments, nevertheless famously observed that "the day you see a [television] camera come into our courtroom, it's going to roll over my dead body."[54] For Justice Souter and many others, increased public involvement in, and inspection of, certain decision-making processes operates as a kind of Gresham's Law, or perhaps just

50. *See supra* note 12.

51. Indeed, the view that transparency is the best prevention for corruption is the guiding principle of Transparency International, *supra* note 21, and the impetus for Transparency International's widely used Corruption Perceptions Index. *See Corruption Perceptions Index 2010 Results*, TRANSPARENCY INT'L, http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results (last visited May 16, 2011).

52. "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." LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

53. For the contrast between epistemic and alternative justifications for democracy, see generally WILLIAM N. NELSON, ON JUSTIFYING DEMOCRACY (1980).

54. *On Cameras in Supreme Court, Souter Says, 'Over My Dead Body*,' N.Y. TIMES, Mar. 30, 1996, at 24 (quoting Justice Souter). On the issue generally, including the diverse views of the other Justices, see Robert L. Brown, *Just a Matter of Time? Video Cameras at the United States Supreme Court and the State Supreme Courts*, 9 J. APP. PRAC. & PROCESS 1 (2007).

populism in its pejorative sense,[55] creating a decision-making environment in which the lowest common denominator dimensions of widespread public involvement would cause bad arguments to drive out good ones.

C. Transparency As Efficiency and Transparency As Epistemology

The view that transparency facilitates suboptimal processes and suboptimal outcomes is both contestable and contextual, and those who recognize that open information is the key to efficient markets—those who argue for Transparency as Efficiency—are arguing that the free availability of information is precisely what makes markets operate effectively.[56] Indeed, the point is not exclusively about markets in the conventional sense. The familiar metaphor of the marketplace of ideas in free-speech theory[57] is a variant on the idea of Transparency as Efficiency that we might call Transparency as Epistemology—the view that the open availability of information will facilitate the identification of truth (and falsity) and consequently produce more knowledge and greater progress. John Milton thought this more or less to be the case in the seventeenth century,[58] John Stuart Mill thought this in the nineteenth century,[59] Oliver Wendell Holmes thought this in the early years of the twentieth century,[60] and much of the open-source community now thinks much the same thing.[61] The free availability of information inclines towards knowledge, it is said, even if it does not guarantee it, and thus the claim is that transparency is somewhere between a highly desirable and a necessary pathway on the road to truth.

55. Against the view that populism is just democracy when it produces outcomes with which some commentator using the term disagrees, see JOHN LUKACS, DEMOCRACY AND POPULISM: FEAR AND HATRED 5–8 (2005).

56. *See* ALLISON STANGER, ONE NATION UNDER CONTRACT: THE OUTSOURCING OF AMERICAN POWER AND THE FUTURE OF FOREIGN POLICY 178–79 (2009); Richard Dolinar & S. Luke Leininger, *Pay for Performance or Compliance? A Second Opinion on Medicare Reimbursement*, 3 IND. HEALTH L. REV. 397, 418–20 (2006).

57. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15–17 (1982); *see also* Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1, 2–3 (1996); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2–3; William P. Marshall, *In Defense of the Search for Truth As a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995).

58. "[W]ho ever knew Truth put to the worse in a free and open encounter?" MILTON'S AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING 45 (H.B. Cotterill ed., Macmillan 1959) (1644).

59. JOHN STUART MILL, ON LIBERTY 18–24 (David Spitz ed., W.W. Norton & Co. Inc. 1975) (1859).

60. "[T]he best test of truth is the power of [a proposition] to get itself accepted in the competition of the market . . . ." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 1–2, 4.

61. "Open source is a development method for software that harnesses the power of distributed peer review and transparency of process. The promise of open source is better quality, higher reliability, more flexibility, lower cost, and an end to predatory vendor lock-in." *Mission*, OPEN SOURCE INITIATIVE, http://www.opensource.org (last visited May 16, 2011).

As is increasingly recognized in the literature, however, some of these irreducibly empirical claims on behalf of transparency are either optimistic or overblown.[62] Some of these claims, in some contexts, may simply be flat out false. Just as the transparency of information about the U.S. birthplace of President Obama and the empirical folly of astrology have had little effect on the rate of acceptance of these propositions,[63] and just as Justice Souter worried that more sunlight in the Supreme Court would produce worse arguments and worse decisions,[64] so too are we now more skeptical of the correlation between openness and knowledge,[65] or between the availability of information and the quality of decisions that are made on the basis of it. For today I will leave these questions aside, because my goal, at least in this first part of this lecture, has simply been to distinguish among Transparency as Regulation, Transparency as Democracy, Transparency as Efficiency, and Transparency as Epistemology, with the reminder that we cannot hope to be able to evaluate transparency as a policy in this or that decision-making environment without first understanding just what advantages transparency is supposed to bring about.

III. THE CONSERVATISM OF TRANSPARENCY

Once we understand that one person's transparency is another's populism, and once we fully comprehend populism's ambiguous reputation, we have a serviceable foundation for thinking about transparency as a device of decision-making institutional design and a device whose advantages and disadvantages, vices and virtues, costs and benefits, can be evaluated with the tools of modern decision theory. Thus, for any decision-making task we can predict the possibility of two kinds of mistakes, one being the making of a bad decision and the other being the failure to make a good decision. Some will recognize this framework in terms of the statistician's distinction between Type I and Type II errors, while others are inclined to use the terminology of false positives and false negatives. Thus, if I stay in bed all day, I am unlikely to be hit by a car, but I am also unlikely to reap the benefits of interacting with others. As the law of preliminary injunctive relief—and more specifically the irreparable injury rule—tells us, a preliminary injunction proceeding can err in failing to award preliminary relief to a petitioner who is actually cor-

62. *See* Goldman & Cox, *supra* note 57, at 29–32; Ingber, *supra* note 57, at 16–49; Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 908–12 (2010); Frederick Schauer, *Is It Better to Be Safe Than Sorry?: Free Speech and the Precautionary Principle*, 36 PEPP. L. REV. 301, 308–12 (2009).

63. On the First Amendment and factual and scientific propositions generally, see Schauer, *Facts and the First Amendment*, *supra* note 62.

64. *See supra* note 54.

65. Or at least we should be.

rect (and will eventually prevail) on the merits but can also err in awarding preliminary relief to a petitioner whose underlying cause of action is unsound and will thus lose after a full hearing.[66] This analysis is often described in terms of a "balance of equities" or "balance of hardships,"[67] and the basic idea is that the analysis leading to the decision should balance the expected harms of mistaken action against the expected harms of mistaken inaction under the conditions of uncertainty that exist at the preliminary injunction stage and thus before there has been a full hearing and a complete opportunity to develop all of the relevant facts.

So too for transparency. Transparency International is an organization particularly focused on preventing corruption, and in their view, transparent governmental procedures—open meetings, freedom of information laws, freedom of the press, disclosure of the financial status of officials, and others—will make corruption, bribery, and the like more difficult. Put differently, the view is that transparency will make it harder for bad officials to engage in the rent-seeking activities we call corruption. As Jeremy Bentham put it generations ago, "the more strictly we are watched, the better we behave."[68]

But let us not forget Justice Souter's comment, or now-Secretary of State Clinton's efforts while First Lady to hold nonpublic health care negotiations among relevant stakeholders—the Task Force for National Health Care Reform—in the early 1990s.[69] Transparency may well prevent bad officials from engaging in corrupt or otherwise bad acts, but Justice Souter, Secretary Clinton, and countless others have also recognized that transparency can also make it more difficult for good officials to engage in good acts. Just ask any President, judge, or law school dean. If this conclusion is correct—that transparency is also often an impediment to wise decision making by wise decision makers[70]—then we can

66. *See* OWEN M. FISS, INJUNCTIONS 9 (1972); DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 8–11 (1991).

67. *See, e.g.*, Metro. Taxicab Bd. of Trade v. New York, 615 F.3d 152, 156 (2d Cir. 2010); Small v. Operative Plasterers' and Cement Masons' Int'l Ass'n Local 200, 611 F.3d 483, 489–90 (9th Cir. 2010); Hanselman v. Frank, 77 Mass. App. Ct. 1104 (Mass. App. Ct. 2010).

68. JEREMY BENTHAM, *Farming Defended*, *in* 1 WRITINGS ON THE POOR LAWS 276, 277 (Michael Quinn ed., Oxford University Press 2001) (1796).

69. *See* Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton, 813 F. Supp. 82 (D.D.C. 1993), *rev'd* 997 F.2d 898 (D.C. Cir. 1993) (addressing statutory and constitutional questions about whether the President's close advisors could be compelled by law to hood their deliberations in public). On the constitutional question, see Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 482–89 (1989) (Kennedy, J., concurring); Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Commission Act*, 104 YALE L.J. 51 (1994).

70. Why this is so is again a function of the question about the relationship between awareness and truth (or soundness). If the truth or soundness of a proposition has considerable explanatory power in determining which propositions will be accepted and which rejected by some population, then increasing awareness of true propositions and accurately described facts—the principal theoretical goal of a regime of transparency—will increase the degree of acceptance of those propositions and thus increase knowledge. But if, as seems increasingly and disturbingly apparent in many areas of public life, truth has but a limited causal connection with acceptance, then transparency may at times

understand again the two types of possible errors. One is the error and consequent harm that ensues from failing to prevent corrupt or otherwise misguided officials from engaging in corrupt or otherwise misguided official activities. The other is the error and consequent harm flowing from impeding noncorrupt and nonmisguided officials from engaging in what may turn out to be wise and potentially beneficial activities.

The design of any decision-making environment necessarily must come to a resolution of the comparative probability of harm—the expected harm—from these two kinds of errors. When Blackstone observed that "it is better that ten guilty persons escape, than that one innocent suffer,"[71] he was engaged in exactly this kind of analysis; and he was engaged in it long before Howard Raiffa,[72] perhaps most prominently, launched the era of modern decision theory.

If we apply these lessons from decision theory generally to the question of transparency more specifically, and if we assume that transparent and thus more open and thus more populist decision making is suboptimal for a large number of decisions that would be made by wise and well-meaning decision makers, we can see the inherent conservatism—in the nonpolitical sense of that term—of the call for transparency. The call for greater transparency can be understood as premised on the belief that failing to prevent corrupt or otherwise unwise decision makers from engaging in harmful decisions is a more serious error than is the error of preventing wise and noncorrupt decision makers from making the wise decisions they could more easily make in darkness than in sunlight. Thus, by seeking to prevent bad decisions even at the cost of preventing some good ones, transparency can be seen as committed to the belief that it is better to prevent some number of bad decisions even at the cost of preventing some good ones than it is to maximize the number of good decisions even at the cost of allowing more bad ones. By engaging in exactly that strategy—in cutting off both the left and right tails of the distribution—transparency can be understood as being a conservative approach to institutional design. In some times and places, such conservatism is well justified. If I were a Zimbabwean, I would worry considerably about bad decisions made outside of the gaze of the population and the international community, but I would not worry very much about preventing good decisions by the government of Robert Mugabe.

be counterproductive. It is a well-known adage among appellate lawyers that you should keep your client at home during an appellate argument precisely because the kinds of arguments that appeal to clients are unlikely to appeal to appellate judges. And insofar as transparency is this very problem, transparency may at times empower weak arguments and make advancing stronger arguments and sounder analyses more difficult.

71. 15 WILLIAM BLACKSTONE, COMMENTARIES *434. For recent and relevant analysis, see Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173 (1997).

72. HOWARD RAIFFA, DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICES UNDER UNCERTAINTY (1968); *see also* R. DUNCAN LUCE & HOWARD RAIFFA, GAMES AND DECISIONS: INTRODUCTION AND CRITICAL SURVEY (1957).

In this situation, transparency would likely prevent some bad decisions but not very many, if any, good ones. At other times and in other places, however, the conservatism of transparency may gain little but cost much. Justice Souter had a point, and although there might well be considerable public educational benefits to be gained from televising Supreme Court oral arguments which are largely orthogonal to my principal point here,[73] the Supreme Court—and certainly its conferences even if more debatably its oral arguments—seems an apt example, especially in a law school setting, of a proceeding in which the disadvantages of transparency might well overwhelm the benefits. Bentham's observation that "the more strictly we are watched, the better we behave" is correct only if we define better behavior as the absence of bad behavior rather than the presence of the best behavior. It is likely true that the more strictly we are watched, the less likely we are to behave badly. But it is also true that, at times, the more closely we are watched, the less likely we are to behave admirably.

IV. THE PERVASIVENESS OF TRANSPARENCY

For someone who spends part of his time as a student of free speech doctrine and theory, discussions of transparency have a special intrigue. In the artificial world of law schools which I inhabit, freedom of speech is a topic for courses and specialists in constitutional law, while freedom of information is for administrative law, questions about open source are for the intellectual property aficionados, open meeting laws are for those who concentrate on state and local government, and questions about mandatory disclosure are distributed among scholars who teach and write in the areas of securities regulation, health care, or consumer protection. And I am sure there are areas I have neglected to mention in which questions about disclosure and transparency also have a significant place. Yet for all of their divergence in law school curricula and legal scholarship, all of these topics are about openness, about the availability of and access to ideas and information, and especially, about the official impediments to the free use and transfer of such ideas and information. In that sense, it is odd that topics so plainly interrelated are so typically kept apart from each other.[74]

What is especially odd, however, is that this shared focus on information and openness across seemingly diverse areas seems so rarely recognized in my even smaller corner of the world—the world inhabited by

73. That is, there may be advantages to having the public learn about the Supreme Court, what it does and how it does it, even if this learning comes at the cost of a larger number of erroneous decisions.

74. Some of these typically diverse topics are usefully brought together in JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996).

all three of your Baum Lecturers this year[75]—the world of those of us who study freedom of speech and freedom of the press. In that little world—my little world—we worry incessantly about government restrictions on what speakers, writers, publishers, and broadcasters might want to say, but we rarely worry about the oddity of relying so much on what such individuals might happen to want to say, as opposed to the full range of policies that might foster more saying.[76] If the epistemic, informational, and democratic arguments for freedom of speech are sound, then the advantages to truth, understanding, and public decision making that free speech is thought to bring are advantages for which free speech is arguably, in some contexts, a necessary condition, but it is not even close to being a sufficient condition. Put differently, and more relevantly to my theme in this lecture, it is plausible to imagine, albeit hyperbolically, that far more information would be lost by repeal or substantial constriction of the Freedom of Information Act, all of the local, state, and federal sunshine laws, and all of the laws and Supreme Court decisions on open trials,[77] most of which are creatures of the 1960s and 1970s, then by repeal of the First Amendment itself. Less hyperbolically, the point is that the negative liberties protected by the First Amendment—the liberty to be free from state restriction—may be less important, or at least no more important, for fostering the values that lie behind the First Amendment than are a number of knowledge-fostering social conditions and public policies that are substantially beyond the power of negative liberties to affect. If we think, for example, that, following Mill, it is essential to challenge accepted ideas as a way of advancing knowledge or avoiding intellectual complacency, then it is important not only to protect the challengers, but to ensure that such challengers exist, even to the point of creating them—as the Catholic Church does with its devil's advocate—and thus, if necessary, to take affirmative steps to create those institutions to ensure that there actually will be challenges.[78] Similarly, if it is important to democracy that there be robust public debate on matters of public policy, then the various policies that would actually encourage or even create such debate may be no less important than the importance of not restricting those who happen by their own initiative to wind up being the debaters.

75. Lee C. Bollinger, *Baum Lecture 2010*, 2011 U. ILL. L. REV. 1011; Geoffrey R. Stone, *Baum Lecture 2011*, 2012 U. ILL L. REV. (forthcoming 2012).

76. For my own preliminary observations on the phenomenon, see generally Frederick Schauer, *Hohfeld's First Amendment*, 76 GEO. WASH. L. REV. 914 (2008). Earlier, the way in which the values underlying the First Amendment might argue for affirmative policies in addition to negative rights was explored in STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999).

77. *E.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).

78. And Mill recognized the point, even if those who follow and quote him rarely do. *See* Mill, *supra* note 59, at 42–43 (urging that even where views are taken as settled, and when no challenges to those views exist, various "contrivances" by way of challenge should be employed in order to ensure that "the intelligent and living apprehension of a truth" is not impeded).

To the same effect, therefore, if there are values in information about government and if there are values in checking government abuses,[79] then the various policies—*not* constitutional rights—embodied in freedom of information laws, open meeting laws, affirmative disclosure requirements, and much else may be as valuable a component of serving such goals as is the protection of those speakers or publishers who happen to want to criticize the government. In other words, free speech may be best understood as a component, and perhaps not the most important component, of a larger commitment to transparency.

I do not mean by the foregoing to backtrack on my earlier observations regarding thinking of transparency in decision-theoretic terms. Transparency need not be understood as a value necessarily to be maximized at the expense of other interests. And it certainly remains important to recognize the harms to good decisions that transparency, as a safeguard against bad decisions, may at times cause. Still, I do mean to suggest that, in important ways, the aspects of transparency that those of us who study free speech or constitutional law have relegated to the nether regions of administrative law, local government law, or simply to the realm of constitutionally and legally unconstrained public policy, may in fact be far more important to the purposes behind the First Amendment than is First Amendment doctrine itself.

In the final analysis, however, it is not my goal here to take a strong stand for or against more or less governmental transparency than we now have in the United States. Part of the reason for this ambivalence is the undeniably contextual and contingent nature of the value of transparency at all. And part of the reason is that my own intellectual style goes more in the direction of conceptual clarification, which I believe we have too little of, than in the direction of strong normative prescription, of which I believe we may well have too much. Thus, much of my justification for avoiding reaching strong conclusions about when and where we need more or less transparency in the United States—I have different views when it comes to North Korea, Zimbabwe, and even China—is also my belief that we cannot intelligently engage in those discussions unless we first clarify what we are talking about, what the stakes are, and

79. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521. Much of K.R. POPPER, 1 THE OPEN SOCIETY AND ITS ENEMIES (5th ed. 1966) similarly turns on relative importance of preventing bad governments from doing bad things, even at the expense of making it more difficult for good governments to do good things. Popper also says that the "traditional question of political theory, 'Who should rule?,'" should be "replaced by a completely different question such as, '*How can we organize our political institutions so that bad or incompetent rulers . . . cannot do too much damage?*'" KARL R. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 25 (3d ed. 1969).

just how we ought to engage in these discussions. If this lecture has helped in that direction, then I will have been successful, and I am grateful to the Baum family, to the College of Law, and to the audience today for giving me the opportunity to do just that.