2019

Transparency and Corruption: A General Analysis

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Recommended Citation
Available at: https://chicagounbound.uchicago.edu/uclf/vol2018/iss1/6
This essay makes two claims: transparency in government causes the very corruption it aims to prevent, and the problem is universal. Some scholars, mostly philosophers and social scientists, appreciate the first point, but it has not caught on in law. Legal debates—on campaign finance, for example—proceed almost universally on the assumption that transparency deters corruption. Few people seem to appreciate the second point. Scholars see the corruptive potential of transparency in specific settings, like open ballots. In fact, the problem is general. Efforts to dampen corruption with transparency usually threaten to promote it.

The occasion for this essay is a symposium on The Wire, a television show—and an arresting work of art and social commentary—about drugs, cops, and kids in Baltimore. The show depicts transparency’s double edge. In one sequence, detectives use campaign finance records to connect drug dealers to politicians. This represents transparency at its best, with police following a trail of money to uncover graft. In another sequence, Mayor Royce, under pressure from a chal-
lenger named Carcetti, demands an end to people “riding the middle.” Some contributors support Royce and (as a hedge) Carcetti too. Royce demands that they support him alone. If they keep riding the middle, and if he gets reelected, Royce threatens to cut them out of his next administration.5

This behavior is akin to extortion, with the mayor saying, “support only me or else.” How will Royce know who supported only him? He could ask his supporters if they acted loyally, or he could ask Carcetti to name his supporters. Of course, these strategies will fail. Supporters will lie and Carcetti will refuse. Royce will know who supported him because of campaign finance records. One tidy report, publicized in the name of good government, will sort the loyalists from the fence sitters. Foreseeing their unmasking, fence sitters will respond to the mayor’s extortion. Police use transparency to fight crime while the mayor uses transparency to commit it.

This story comes from television, but art imitates life. Real-world examples have the same flavor. Consider James Huffman. He unsuccessfully challenged an incumbent in a U.S. Senate race in 2010. According to Huffman, many people supported his candidacy but refused to contribute to his campaign. They feared that disclosure would reveal their identities to the incumbent, whom they expected to win and then punish them.6

Law and economics uncovers the driving logic: transaction costs. Like ordinary bargaining, corruption comes with costs. Bad actors have to connect with other would-be conspirators, negotiate deals, and see them through. Corruption is more likely to succeed as transaction costs decrease. Transparency lowers these transaction costs. Need a city councilman sympathetic to developers? Need to know the going rate for construction permits? Campaign finance records tell you who developers support and how much they give. Need to verify a representative’s vote before handing her a bag of cash? Check the voting records or attend the meeting. By lowering transaction costs, transparency greases the wheels of corruption. The logic extends far and wide, from campaign finance to FOIA. It reaches beyond corruption to black markets for drugs, child pornography, and other illicit products, as explained below.

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5 The Wire: Home Rooms (HBO television broadcast Sept. 24, 2006) (Season Four, Episode Three).

6 See James Huffman, How Donor Disclosure Hurts Democracy, WALL ST. J. (Apr. 11, 2011), https://www.wsj.com/articles/SB10001424052748704415104576250503491062220. For other examples, see infra Part II.
My claim is not that transparency only produces crime. The claim is that transparency both deters and produces crime. Whether the first or second effect dominates is an empirical question, and the answer must vary by time and place. Thus, it would be foolish to take a confident position on the effect of transparency in the abstract—and that is my point. Many judges, scholars, and advocates celebrate transparency’s crime-fighting potential without regard for its shadow. The legal profession prides itself on careful reasoning, but here it has fallen short. We should not abandon transparency, but we need alternative reasons to support it.

I. TRANSPARENCY AND TRANSACTION COSTS

A senator is willing to sell her vote on a lucrative defense contract, and a crooked CEO is willing to buy it. To strike a deal, they will have to exchange information, agree on a price, and follow through. Will they bargain successfully—will corruption take place—or will they walk away? To clarify unlawful bargaining, it will help to analyze lawful bargaining first.

Imagine two people, the owner of a used car and a buyer who covets it. The owner values the car at $5,000, and the buyer values it at $10,000. There is scope for a deal. A price of, say, $8,000 would make both parties better off. The buyer would pay only $8,000 for a car he values at $10,000, and the seller would receive $8,000 for a car she values at only $5,000. Will the deal take place? The answer depends on transaction costs. To strike a deal, the parties have to spend time and resources meeting, sharing information, haggling over the price, drafting a contract, and so on. Collectively these are transaction costs of bargaining. Sometimes transaction costs are so high that they overtake the benefit of the bargain. The buyer would not pay $8,000 to the seller and burn another $8,000 on transaction costs to own a car he values at only $10,000. This logic yields a proposition: bargaining is more likely to succeed as transaction costs decrease.

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7 To be clear, I use the term transparency to mean public disclosure of actions (or failures to act). I do not mean a requirement of reason giving. A reason-giving requirement can enhance transparency by demystifying a decision-making process, and it might reduce corruption. Reason giving is a separate and complicated topic. See, e.g., Micah Schwartzman, Judicial Sincerity, 94 VA. L. REV. 987 (2008) (summarizing the literature on reason giving by judges, the prudential arguments for and against it, and developing a normative argument for candor in reason giving).

8 The premise of the following example is based on one in ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 74–76 (6th ed. 2012).

9 This is an implication of the Coase Theorem. For an approachable discussion, see id. at 81–86. For the original work, see R.H. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1 (1960).
Scholars divide transaction costs into three categories: search costs, negotiation costs, and enforcement costs.\(^\text{10}\) Search costs refer to the costs of finding a trading partner. Suppose the car buyer does not know the seller. He must search for someone who owns the car he wants, perhaps by scanning Craigslist or posting flyers. Negotiation costs refer to haggling. The buyer and seller must agree on terms, including price, and this involves strategy and bluffing ("the engine is good," "I won't take less than $9,000"). Enforcement costs refer to the costs of seeing the deal through. This could include drafting and signing a contract, checking the car for damage before the exchange takes place, and so on. Decreasing these transaction costs facilitates bargaining.

Return to the senator and the CEO. Their would-be bargain mirrors the car sale. The senator prefers the money to her vote, and the CEO prefers the vote to his money, so there is room for a deal.\(^\text{11}\) However, to strike it they must overcome transaction costs. First, they must find each other (search costs). This step is dicey. If the CEO makes a corrupt proposal to the wrong senator, he could land in jail.\(^\text{12}\) Second, they must agree on terms (negotiation costs). What exactly will the senator do? Vote for the bill, urge her colleagues to vote for it, extoll the bill on the floor? And what will the CEO do in return? Make a campaign contribution, deliver a bag of cash, hire the senator's nephew? Finally, the senator and CEO must find a way to enforce their agreement (enforcement costs). Illegal contracts are void, so they must rely on trust. The senator must convince the CEO that if he pays today the senator will deliver the vote tomorrow. To strike a corrupt deal, the parties must overcome these transaction costs.

Many transaction costs have a common source: private information. One party has information the other party lacks. Private information frequently impedes bargaining. To illustrate, consider the problem of search costs. Politicians and business leaders mingle at a cocktail party. To secure his defense contract, the crooked CEO needs to identify a corruptible official. The senator is corruptible and keen to talk, but the CEO does not know this. Unsure of the senator’s principles, and wary of an attempted bribery charge, the CEO keeps his

\(^{10}\) See Cooter & Ulen, supra note 8, at 88.

\(^{11}\) Deals like this recur throughout The Wire. For example, in Season Five, Episode Ten, Mayor Carcetti’s assistant proposes to reward the acting police commissioner with a state-level position if the commissioner does not publicize information about an embarrassing police investigation. In the same episode we learn that the lawyer Maury Levy has paid an official to give him confidential court documents. The Wire: -30- (HBO television broadcast Mar. 9, 2008) (Season Five, Episode Ten).

\(^{12}\) Federal law criminalizes attempted bribery. See 18 U.S.C. § 201(b) (Supp. I 2012) (Penalizing anyone who "directly or indirectly, corruptly gives, offers or promises anything of value" to a public official with intent to influence an official act) (emphasis added).
mouth shut. The parties fail to connect; search costs are too high. Private information is the cause. The senator knows she is corruptible, but the CEO does not.

Consider negotiation costs. The senator and CEO found each other, and now they haggle. The senator will sell her vote for $50,000 or more, but the CEO does not know this. The CEO offers only $10,000. When the senator refuses, the CEO cannot tell if the refusal is sincere. Maybe the senator will never accept $10,000, in which case the CEO should raise his offer, or maybe the senator is bluffing and will eventually accept. The CEO assumes the senator is bluffing and sticks with $10,000. The senator walks away. Private information—the senator knew her reservation price, but the CEO did not—caused bargaining to fail.

Finally, consider enforcement costs. The senator agrees to support the bill tomorrow, and the CEO promises to pay her afterwards. Will the CEO keep his promise? A contract for corruption is unenforceable. Without a contract, the parties must rely on trust.

To summarize, private information raises transaction costs, impeding bargains. It follows that public information—meaning information the parties share—must lower transaction costs, facilitating bargains. Reconsider the scenarios above with public information. The senator and CEO know that the other is corruptible, making it easier to connect at the party. The CEO knows the senator will not accept less than $50,000. Thus, he does not insult her with an offer of $10,000, and she does not walk away. The senator knows the CEO will keep his promise and pay tomorrow, so she delivers the vote today.

How do these ideas connect to transparency in government? Transparency makes private information public. Transparency ensures that people know who attended the meeting, how they voted, who testified, what they said, and who contributed what to whom.

13 In Season Four, Episode Eleven, of The Wire, Stringer Bell learns just how important trust is. He paid Senator Clay Davis to bribe officials. In fact, Clay Davis “rainmade” him. As the lawyer Maury Levy explained, “A guy says if you pay him, he can make it rain. You pay him. If and when it rains, he takes the credit. If and when it doesn’t, he finds reasons for you to pay him more.” Bell trusted Davis to pay bribes, but Davis simply kept Bell’s money. The Wire: A New Day (HBO television broadcast Nov. 26, 2006) (Season Four, Episode Eleven).

14 Private information, which is also called asymmetric information, is a persistent source of market failure and a common justification for regulation. See e.g., BARAK ORRACH, REGULATION: WHY AND HOW THE STATE REGULATES 404 (2013). Market failure is tantamount to failed bargaining. See generally Coase, supra note 9.
This sunlight permits monitoring of public officials. Monitoring deters corruption just as patrol cars deter speeding. But sunlight does something else too. It lowers the transaction costs of corrupt bargaining.

II. LEGAL APPLICATIONS

I have explained the connection between transparency and corruption. The logic is general as befits a general problem. The following pages apply the logic to a host of transparency initiatives. In public voting, campaign finance, open meetings, and FOIA requests, transparency comes with a double edge. I conclude by analyzing additional and perhaps surprising topics like opioids, sex offender registries, and the “Mugshot Racket.” Transparency, it turns out, fuels more than corruption. It can fuel any crime that involves exchange.

A. Public Voting

Should voting for a representative happen privately or in public? This question preoccupied nineteenth-century Britain. Public voting was the common practice, and proponents claimed that it improved accountability. John Stuart Mill argued that voters had a “moral obligation to consider the interest of the public,” and voting “under the eye and criticism of the public” would make them take the obligation seriously. According to Mill, transparency causes voters to act public-mindedly, not selfishly. Whether this is the same as saying that transparency deters corruption depends on one’s definition of corruption. Regardless, the logic runs the same way: transparency discourages bad behavior by making people accountable.

Mill’s argument seems sound, but within a few years of making it Britain adopted the secret ballot. Why? Because vote buying was rampant. Crooked politicians offered voters money in exchange for their support. Voters who accepted could easily prove their faithfulness: the politicians could watch them cast their ballots. Knowing that they were watched encouraged voters to deliver their votes ex post,

15 See infra Part II.E.
16 See John Stuart Mill, Considerations on Representative Government 190 (1867) (“The question of greatest moment in regard to modes of voting is that of secrecy or publicity[.]”).
20 See id. at 74–83 (connecting the rise of the secret ballot in Britain to vote buying).
which encouraged politicians to buy them ex ante. Britain adopted the secret ballot to deter this corruption. The same reasoning led to adoption of the secret ballot in the United States.\footnote{See Hayward, supra note 17, at 50 (explaining that part of the impetus for the secret ballot in the United States was the “vote bribery facilitated by non-secret voting”). The secret ballot appeared to reduce vote buying. Without the promise of a payment, fewer people bothered to vote. See generally Jac C. Heckelman, The Effect of the Secret Ballot on Voter Turnout Rates, 82 Public Choice 107 (1995) (finding that the secret ballot decreased voter turnout by seven percentage points and attributing this to disruption in the market for votes).}

Open voting lowers the transaction costs of corrupt bargaining. Specifically, it simplifies enforcement by making otherwise private information—whether the voter voted as promised—public. Conversely, secret ballots raise the transaction costs of corrupt bargaining, which is why they were adopted. Jeremy Bentham put it like this: “Under the régime of secrecy, the [vote] buyer could have no sufficient security that the contract would be faithfully executed by the [vote] seller.”\footnote{Jeremy Bentham, Political Tactics 146 (Michael James et al. eds., 1999).}

The connection between open voting and corruption extends to representative bodies. In general, legislators vote publicly so voters can monitor their behavior.\footnote{Voting by legislators can be private, public, or “semi-public,” as when votes are cast by voice, outcomes are publicized, but the votes of individual legislators are not identified. For a discussion and historical example, see Jon Elster & Arnaud Le Pillouer, Semi-Public Voting in the Constituante, in Secrecy and Publicity in Votes and Debates (Jon Elster ed., 2015).} Transparency promotes accountability to the public, but it also lowers transaction costs of corrupt bargaining. Returning to an earlier example, the CEO is more likely to buy the senator’s vote if he can watch her cast it. As another example, consider the Club for Growth, a powerful interest group. In 2013, the Club warned that Senators’ votes on a health care program “will be listed on the group’s congressional scorecard” and anyone supporting the program “could be a target in future elections.”\footnote{Elise Viebeck, Club for Growth Issues Warning to Senate GOP, THE HILL (Sept. 24, 2013), http://thehill.com/policy/healthcare/324253-club-for-growth-warns-against-senate-procedural-vote [https://perma.cc/CJ96-4B24].}

One can conceptualize the Club’s warning as a corrupt offer: oppose the program for us, and in exchange we will not oppose you. Open voting allowed the Club to identify opponents of the program.

Bentham understood the downside of open voting by legislators. He offered a proposition: “Votes ought to be given secretly in all cases in which there is more to fear from the influence of particular wills, than to hope from the influence of public opinion.”\footnote{Bentham, supra note 22, at 145.} Translation: when transparency causes more bad behavior than it deters, vote in secret.

As the quotes by Mill and Bentham suggest, the observation that open voting can cause corruption is old.\footnote{Cf. Adrian Vermeule, Open-Secret Voting, in Secrecy and Publicity in Votes and Debates (Jon Elster ed., 2015).} However, the underlying log-
ic has not been generalized. The problem is not open voting; the problem is transparency.

B. Campaign Finance Disclosure

Most elections in the United States are privately funded. Individuals donate to candidates and committees like super PACs, and that money funds voter registration drives, yard signs, attack ads, and the like. Private funding risks corruption. Donors may demand favors for their support, and candidates may offer them. Various laws aim to mitigate this risk, but they have deficiencies. In recent years, disclosure has emerged as a popular alternative.

Disclosure laws require individuals and organizations to publicize their spending on politics. Federal law, for example, requires anyone contributing $200 or more to a campaign to provide information—name, address, the size and recipient of the contribution—that the Federal Election Commission collects and publicizes. As the Supreme Court stated, “disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes . . . .”

The light of disclosure surely deters corruption. Some corrupt deals get canceled because the parties fear detection. But for other parties, disclosure has the opposite effect: it promotes corrupt deals by

\[\text{DEBATES 215 (Jon Elster ed., 2015) (stating “the major costs and benefits of both open and secret voting are tolerably well understood” and then giving examples where open voting can deter or facilitate corruption).}\]

\[\text{27 See, e.g., Buckley v. Valeo, 424 U.S. 1, 26–27 (1976) (“[A] candidate lacking immense . . . wealth must depend on financial contributions. . . . To the extent that large contributions are given to secure a political quid pro quo . . . the integrity of our system of representative democracy is undermined.”); McCutcheon v. FEC, 134 S. Ct. 1434, 1460 (2014) (“[T]he risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself.”).}\]

\[\text{28 See, e.g., Buckley, 424 U.S. at 27–29 (upholding contribution limits on anti-corruption grounds); id. at 25–27, 47 (noting that contributions can cause corruption and stating that coordinated expenditures amount to “disguised contributions”); Michael D. Gilbert & Brian Barnes, \textit{The Coordination Fallacy}, 43 FLA. ST. U. L. REV. 399, 403–11 (2016) (reviewing law on coordinated expenditures).}\]

\[\text{29 See generally Michael D. Gilbert & Emily Reeder, \textit{Aggregate Corruption}, 104 KY. L.J. 651, 657–60 (2016) (showing that lawful contributions can cause corruption and critiquing the Supreme Court’s decision to invalidate aggregate contribution limits); Gilbert & Barnes, \textit{supra} note 28 (arguing that laws prohibiting coordinated expenditures cannot prevent much corruption).}\]

\[\text{30 52 U.S.C. § 30104(b) (describing information to be disclosed); id. at § 30112 (requiring the Federal Election Commission to publicize disclosure information). The FEC’s searchable database of disclosure information can be found here: https://classic.fec.gov/finance/disclosure/norindsea.shtml.}\]

\[\text{31 Buckley, 424 U.S. at 67.}\]
lowering the transaction costs of bargaining.\textsuperscript{32} Recall that transaction costs divide into three categories: search costs, negotiation costs, and enforcement costs. Disclosure lowers each one.

Start with search costs. Before corruption can take place, corrupt actors must find one another. Disclosure makes this easier. Suppose a real estate developer needs to buy a vote on the city council. Which councilmember should he approach? Probably he should start with someone sympathetic to his industry. Identifying a sympathetic councilmember is easy: he can consult disclosure records and see whom other developers support. (Open voting and public records offer alternatives. The developer can identify a suitable councilmember by checking voting records.)

Turning the scenario around, suppose a politician wants to extort someone for campaign contributions. Where should she start? Disclosure records seem promising. They tell her who is vulnerable, as a recent controversy illustrates. In 2010, Congresswoman Eleanor Holmes Norton called a lobbyist and left a message stating that she was “handling the largest economic development project in the United States” and that her “major work on the committee and subcommittee has been essentially in your sector.”\textsuperscript{33} Norton solicited that lobbyist because he had made contributions to other members of her committee, and Norton was “frankly surprised” that she had not received one herself.\textsuperscript{34} How did Norton know about the lobbyist’s giving? Disclosure records must have been her source.\textsuperscript{35}

Consider negotiation costs. Corrupt actors must settle on the terms of their deal including the price, where “price” might mean the size of the contribution an actor makes to secure a politician’s vote. Settling on the price may be difficult because the market for corruption is opaque. An Internet search shows the market value of a used

\textsuperscript{32} This point was developed in Gilbert & Aiken, supra note 1, at 153–59.
\textsuperscript{34} Id.
\textsuperscript{35} Norton might have learned about contributions to her Democratic colleagues through other channels. However, information about contributions to Republicans on her committee almost certainly came from disclosure records. For more evidence of politicians using disclosure records, consider the experience of a Washington lobbyist. After supporting a Democrat in an unsuccessful congressional campaign, the lobbyist received a call from the Republican winner demanding a contribution. The Republican wanted more than the lobbyist had contributed to the losing Democrat because “[t]he late train is a hell of a lot more expensive than the early train.” Richard S. Dunham et al., Shakedown on K Street, BLOOMBERG BUSINESSWEEK (Feb. 19, 2006), https://www.bloomberg.com/news/articles/2006-02-19/shakedown-on-k-street [https://perma.cc/79PX-L38H]. The Republican could not have verified the lobbyist’s original contribution without disclosure.
car with particular characteristics (make, model, age), which simplifies bargaining by narrowing the range of plausible prices. An Internet search for the value of a senator’s vote does not provide similar information—and may raise red flags. Disclosure offers an alternative. The records reveal how much others have given to politicians, providing a basis for negotiation. Consider Tom Delay, once a powerful member of Congress. Delay kept a book with detailed information on “Friendly” contributions to members of his party and “Unfriendly” contributions to his opponents, the latter of which he would not have known about without disclosure. He would show lobbyists requesting favors the book and where they stood. Delay’s book was like a crude menu with prices.

Finally, consider enforcement costs. Illegal contracts are void, so corrupt actors must rely on other methods to ensure that the other side follows through. Before the Senator delivers her vote, she wants to verify that the CEO contributed to the super PAC, funded the attack ad, or contributed to the campaign of the Senator’s ally. Rather than taking the CEO’s word for it, the Senator can consult disclosure records. Assembled under penalty of law, they provide a credible window on the CEO’s spending. Of course, the Senator does not need to verify if there is trust. Disclosure records can help the Senator and CEO establish trust. He can point to a long record of support for compliant politicians (“As you can see, I have contributed to politicians who support my industry for years”). The record makes his promises seem credible.

In sum, disclosure records lower all of the transaction costs of corrupt bargaining. This facilitates exactly those quid pro quos that disclosure aims to prevent. To see the logic more clearly, consider the opposite of disclosure: anonymity. Suppose politicians did not and could not know who gives what (if anything) to whom. Without this information, they would not know whom to approach with corrupt offers or how much money to demand. Most importantly, they could not verify that a corrupt actor had made a contribution or funded an ad as he promised. Unable to verify the quid, politicians are unlikely to deliver

36 See David Maraniss & Michael Weisskopf, Speaker and His Directors Make the Cash Flow Right, WASH. POST (Nov. 27, 1995).
37 See id.
38 See id. (“See, you’re in the book,” DeLay said to his visitor, leafing through the list. At first the lobbyist was not sure where his group stood, but DeLay helped clear up his confusion. By the time the lobbyist left the congressman’s office, he knew that to be a friend of the Republican leadership his group would have to give the party a lot more money.”).
39 This is an important point. Having “more-or-less neutral third parties like the FEC” compile the disclosure information and attaching penalties to violations of disclosure laws makes disclosure records credible in a way that politicians’ assurances are not. Michael D. Gilbert, Disclosure, Credibility, and Speech, 27 J.L. & Pol. 627, 630 (2012).
the quo. Anonymity stifles corruption. Conversely, disclosure promotes it.

To repeat, my claim is not that transparency only promotes corruption. My claim is that transparency has cross-cutting effects. Disclosure deters some corruption by exposing it and simultaneously encourages other corruption by lowering transaction costs. On balance, disclosure may reduce corruption by a lot or a little. Or it may increase corruption. We do not know.

C. Open Meetings, Open Courts

Many states and localities have laws requiring government officials to conduct their business in public. State legislators, city councils, school boards, utility commissions—bodies like these usually must open their doors while conducting hearings, taking testimony, and deliberating. Open meetings laws have many justifications, combating corruption among them. The logic takes the usual form: transparency discourages illicit deals by exposing them.

Scholars have criticized open meetings laws for chilling deliberation and compromise, discouraging careful analysis, promoting political posturing, and the like. To my knowledge, however, no one has argued that such laws can be self-defeating, but of course they can. Openness can cause the very corruption it aims to deter.

At this point the argument is easy to develop. Corrupt actors have to find each other and negotiate, and open meetings provide a mechanism. Anyone can sit in the audience, observe the officials, and note their interests, priorities, needs, and sympathies. More importantly, open meetings simplify enforcement. Private actors are reluctant to pay officials unless they can be confident of a favor in return. Open meetings let them verify favors. They can watch as officials raise their

40 See generally Ian Ayres & Jeremy Bulow, The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence, 50 STAN. L. REV. 837 (1998) (arguing that donor anonymity would decrease corruption); Bruce Ackerman & Ian Ayres, Voting with Dollars (2002) (same). The differences between the work by Ackerman, Ayres and Bulow and this section of the essay are described in Gilbert & Aiken, supra note 1, at 154–60.


pet concerns, lobby for action, support or oppose proposals, and so on. When regulators meet, industry sits in the front row.

If interest groups miss a meeting, other transparency measures compensate. The groups can read the transcript from the meeting or watch a rerun on CSPAN. A recent controversy illustrates. Members of Congress add “earmarks” to spending bills to draw federal money to their home districts. North Carolina’s delegation once secured $500,000 for a Teapot Museum. Earmarks can implicate corruption. One earmark brought hundreds of millions of dollars to Alaska, where politicians planned to spend it on bridges—including some that would increase the value of their personal property. In 2007, Democrats in Congress tried to discourage earmarking with transparency. Their effort backfired:

Far from causing embarrassment, the new transparency has raised the value of earmarks as a measure of members’ clout. Indeed, lawmakers have often competed to have their names attached to individual earmarks and rushed to put out press releases claiming credit for the money they bring home.

Transparency in earmarking, like coverage by CSPAN, lowered transaction costs by opening a window to the legislative process. Private actors could identify politicians prepared to insert earmarks (search costs), politicians could identify the kinds of earmarks they could wrestle from party leadership (negotiation costs), and they could

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44 The Wire illustrates a version of this in Season Three, Episode Five. Councilman Gray puts pressure on Commissioner Burrell during a public city council meeting. Councilman Carcetti, who is trying to curry favor with Burrell, puts an end to Gray’s questioning in a way that Burrell can observe. The Wire: Straight and True (HBO television broadcast Oct. 17, 2004) (Season Three, Episode Five).


48 Andrews & Pear, supra note 46.
showcase their successful earmarks to interest groups (enforcement costs).

Consider a different form of openness in government: public trials. The Sixth Amendment grants accused criminals a right to a public trial.\textsuperscript{49} Many other legal proceedings, and the records they produce, are public as well. Open courts have many virtues, one of which is deterring corruption through exposure.\textsuperscript{50} But open courts can also promote corruption. Suppose a crime boss strikes a deal with a witness: testify in favor of my accused lieutenant, and I will pay you. How can the boss ensure that the witness keeps her word? By watching her testify, of course. Knowing that she is watched encourages the witness to follow through, which encourages the crime boss to make the offer in the first instance.

Deals like that may be more common in civil proceedings. Deals in criminal proceedings probably look more like this: testify for me and be safe, or, testify against me and suffer the consequences. Criminals intimidate witnesses from the audience.\textsuperscript{51} Uncooperative witnesses may pay a price, as when a witness to murder in Alabama was gunned down minutes after his testimony.\textsuperscript{52} Foreseeing the consequence, witnesses accept the implicit offer and keep quiet. This problem has prompted lawmakers in Florida to push a bill that would shield the identities of witnesses in public records.\textsuperscript{53}

Deals among criminals and witnesses may not technically constitute corruption, but they violate law and harm society for the same reasons. Open courts promote such deals through the usual mechanism: lowering transaction costs.

\textsuperscript{49} See U.S. CONST. amend. VI.
\textsuperscript{50} See Akhil Reed Amar, Sixth Amendment First Principles, 84 GEO. L.J. 641, 677 (1996) (“In a case of malicious prosecution—say, trumped up charges against a vocal government opponent—a public trial can expose corruption for all to see.”).
\textsuperscript{51} This is depicted in \textit{The Wire}. In Season One, Episode One, drug dealers sit with other audience members in the courtroom as two witnesses testify about a murder. One witness testifies against the drug dealer on trial, and the other, who the dealers have paid, exonerates him. \textit{The Wire: The Target} (HBO television broadcast June 2, 2002) (Season One, Episode One).
\textsuperscript{52} See Carol Robinson, Witness Murder Outside Alabama Courthouse could have ‘Chilling’ Effect, AL.COM (Oct. 26, 2017), http://www.al.com/news/birmingham/index.ssf/2017/10/witness_murder_outside_courtho.html [https://perma.cc/TQ2R-HE2N] (reporting the “brazen shooting death of a man gunned down outside of a Montgomery courthouse minutes after he testified against a violent crime suspect”). The same phenomenon is depicted in Season One, Episode One, of \textit{The Wire}. A witness testifies against a drug dealer. The dealer’s associates watch from the audience. By the end of the episode the witness is dead. \textit{The Wire: The Target}, supra note 51 (Season One, Episode One).
D. Public Records and FOIA

Votes, campaign contributions, name of witnesses—information like this appears in public records, and it can facilitate corruption for the reasons discussed. Many other types of information appear in public records and raise the same problem. Property records, for example, indicate who owns what where. Often, they indicate what the property is worth. This information provides social benefits—homeowners, for example, can compare their property assessments to others and confirm that the tax authorities are treating them fairly. But property records can also facilitate extortion.

To see the logic, consider the Fetcher Bill Hypothesis.\textsuperscript{54} In brief, that hypothesis states that lawmakers seek wealthy interests, threaten them with wealth-destroying regulation, then drop their threats when the wealthy interests pay up.\textsuperscript{55} This is extortion at its finest. How do lawmakers identify wealthy interests to target? At the national or state level they can rely on common sense. General threats to banks, pharmaceuticals, or insurers will send wealthy interest groups scrambling.\textsuperscript{56} At the local level, where lawmaking authority is limited, general threats may not work. Lawmakers need to identify specific wealthy interests and target them. Property records can help: who owns the property next to the river, and what is it worth? In other words, how much would the owner pay us not to regulate it?\textsuperscript{57}

Apart from real property, public records include all kinds of information that could facilitate corruption: construction permits, liquor license applications, zoning requests, and the list goes on.

The records addressed so far are usually collected and publicized as a matter of course. Other records are collected on an ad hoc basis. Freedom of information laws, both federal and state, permit individuals to request particularized information from the government, which they can keep for themselves or publicize. Such laws have exposed bad behavior, like rampant corruption in the city of Bell, California.\textsuperscript{58}


\textsuperscript{55} See Lowery et al., supra note 54, at 369–72.

\textsuperscript{56} Id. at 370–71 (discussing how politicians identify targets for extortion).

\textsuperscript{57} For evidence of this kind of corruption, see, e.g., Jim Shay, Zoning Official Sentenced for Extorting Bribes, CTPost.com (Mar. 10, 2016), http://www.ctpost.com/local/article/Zoning-official-sentenced-for-extorting-bribes-6882233.php [https://perma.cc/P85F-F2S5] (reporting on a zoning official who identified inspection targets and then demanded payments to inspect favorably).

things considered, such laws might reduce corruption. But in some instances they can exacerbate it.

Who uses FOIA, the federal freedom of information law? In 2013, nearly 80 percent of FOIA requests were “commercial” in nature. Government contractors, lawyers, lobbyists—sophisticated actors like these collect and use information on “activities of regulators, competitors, customers, or markets.” Presumably most requestors use this information in law-abiding ways. But in some cases they might not. Information on the inner workings of government is like information gleaned from public votes, open meetings, and campaign finance records: it can lower the transaction costs of corrupt bargaining. To demonstrate, consider allegations against Tim Golden, a city councilman in Pekin, Illinois. Golden used a freedom of information law to get a park district’s reports on its compliance with the Americans with Disabilities Act. Golden allegedly studied the reports, identified instances of non-compliance, and demanded favors from the park district’s director in exchange for keeping quiet. Without FOIA, Pekin’s corrupt offer—favors for silence—would not have been possible.

E. Transparency and Other Crimes

Corruption involves bargaining, but so do drug deals, prostitution, and other crimes. The logic above applies to these settings. In a broad range of black markets, transparency can grease the wheels of illegal exchange. The following paragraphs demonstrate.

1. Tainted drugs

Thousands of people die every year from drug overdoses. In 2016, one particular drug, fentanyl, killed hundreds of residents of Baltimore. In some cases, people died from tainted drugs. They consumed

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62 See id.
63 See id.
64 See id.
fentanyl when they thought they were consuming less lethal drugs like cocaine or heroin. To mitigate the problem, the community introduced “Bad Batch Alert,” a text-messaging service. When drug overdoses spike in a particular neighborhood, users get a text warning them away. The city’s health commissioner supports the service, arguing, “The more information we can get out to the most people as fast as we can, the better.”

Bad Batch Alert discourages some drug transactions by exposing their harmfulness. But that same transparency comes with a cost. The former director of the Baltimore County Office of Substance Abuse pinpointed it: “An addict will spend all day searching for the best, most powerful dope on the street. That’s what they want, that’s what they’re looking for. Baltimore City is now saying, ‘We’ll tell you where it is.’” He called Bad Batch Alert a “pied piper of heroin.” I would characterize the service more simply: it lowers search costs.

2. Sex offender registries

Community notification laws require people convicted of child pornography crimes to provide information about themselves, including their home addresses, in public databases. The purpose of such laws is deterrence. Community members can keep an eye on the offender. If a sex crime happens near an offender’s home, investigators have a plausible place to start. As with other forms of transparency, offender registries aim to deter bad behavior by increasing the likelihood of getting caught. Unfortunately, those same registries can, at least in theory, do more harm than good. According to Professor J.J. Prescott,

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66 See id.
67 See id.
69 Dacey, supra note 68.
71 See id. (explaining the purpose of community notification).
Web registries may essentially provide a contact list for individuals who wish to learn more about child pornography. . . . More worryingly, a Web registry offers a shortlist of individuals potentially willing and able to supply child pornography directly and perhaps in person. . . . Counterintuitively, therefore, subjecting child pornography offenders to community notification requirements may enable rather than obstruct the growth and development of the illegal child pornography market.72

This a story about transaction costs.73 Consumers of child pornography need to connect with producers and distributors, and vice versa. Registries can make that easier.

3. Mugshot Racket

The state maintains arrest, booking, and other criminal information on just about everyone who interacts with the criminal justice system.74 In general, this information is accessible to the public, including on the Internet.75 In recent years, companies have begun scraping mugshots from states’ online databases.76 They post them on private websites and tag them, making the mugshots appear prominently in, for example, Google search results.77 Then the companies offer to remove the mugshots from their websites for a fee.78 This is the “Mugshot Racket,” and it looks suspiciously like extortion.79 The companies are offering people a deal that many cannot refuse: pay us, and

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72 Id. at 96.
73 Prescott puts it in exactly these terms. See id. (discussing potential criminals’ “transactions costs of figuring out how to enter the child pornography market”).
75 Id. at 207 (“An increasing number of states are making it easier for any person, for any purpose, to obtain anyone’s criminal record. A 2006 SEARCH (National Consortium for Criminal Justice Information and Statistics) survey found that twenty-five of thirty-four responding states made name-only searches of criminal history records available to the public. Fifteen states allowed searches by means of telephone, mail, or website queries, and ten states provided for searches of court records.”) (internal citations omitted).
76 Allen Rostron, The Mugshot Industry: Freedom of Speech, Rights of Publicity, and the Controversy Sparked by an Unusual New Type of Business, 90 WASH. U. L. REV. 1321, 1323 (2013) (“The companies that operate mugshot businesses ‘can use screen-scraping programs to expeditiously snag every new and old mug shot from a department’s system, and then post them to their own sites.’”) (internal citation omitted).
77 Id. at 1323–24.
78 Id. at 1324–25 (describing companies charging $399 to remove mugshots from company websites).
79 Michael Polatsek, Extortion Through the Public Record: Has the Internet Made Florida’s Sunshine Law Too Bright?, 66 FLA. L. REV. 913, 913 (2015) (“This scheme is known as the Mugshot Racket.”).
we will not embarrass you. This situation is roughly analogous to the one involving Congresswoman Norton, who apparently used campaign finance records to sing out a lobbyist and pressure him for a contribution. Is the Mugshot Racket illegal? People have sued,80 but the companies have a pretty good defense. The information on their sites is already publicly available; transparency laws enacted in the name of good government make it so. These companies are simply doing their part to disseminate it.81

III. IMPLICATIONS

The foregoing has implications for three overlapping audiences: scholars, policymakers, and lawyers. For scholars the contribution lies in the generality of the argument. The state cannot deter corruption without information—who gave what to whom and why. At the same time, bad actors cannot engage in corruption without information—who is buying, who is selling, and who can be trusted. Transparency supplies information to all players in the game. Thus, it has cross-cutting effects. Transparency deters some corrupt acts while promoting others, just as oxygen kills some bacteria while nourishing others. Like end points of a two-way street, sunlight and black markets are inextricably linked.

Scholars appreciate this point in the context of public voting for representatives. Since at least Bentham we have understood that open ballots lead to bought votes. What scholars do not seem to appreciate is that the logic operates across the board, from open meetings to open courthouses and earmarks. Publicity in these areas creates the same problem as publicity in voting, and for the same reason.

This generalization provides a new way to think about and study transparency. It connects things, like FOIA and drug markets, that otherwise seem disparate. It exposes contradictions in received wisdom. Why, for example, do many election law scholars accept the secret ballot while expressing unbridled support for campaign finance disclosure? The purest scholarship seeks truth, and finding truth requires resistance to dogma and group think.

Separate from scholarship, there are lessons here for policymakers. The obvious lesson is that more transparency can backfire. An in-


81 See Polatsek, supra note 79, at 918 (“Owners of these new mugshot websites claim that they provide a public service by facilitating the dissemination of publicly available information of interest to law-abiding members of society.”).
crease in transparency creates a marginal benefit by deterring some corruption and also a marginal cost by facilitating other corruption. Transparency laws should broaden until the marginal benefit just equals the marginal cost. The optimal degree of transparency might be achieved surprisingly quickly. A little sunlight might disinfect better than a lot.

This reasoning is general and insightful in the abstract. Of course, one might question its usefulness in practice. Often we cannot measure marginal benefits and costs, so we cannot tell when a transparency law is optimized. This is a meaningful limitation, but it does not doom this project any more than it dooms countless other theoretical works. We cannot measure a phenomenon without first identifying it. Identification often begins with a good theory. Furthermore, missing data does not absolve policymakers (including judges) from their responsibilities. Without data they rely on intuitions, and this project sharpens intuitions. To prove the point, consider some contemporary controversies. Should voters be permitted to post “ballot selfies”—pictures of themselves with their completed ballots—online? Should the White House release its visitor logs? To stop fake news, should Facebook tell users when a Russian network is behind a story? “Yes” is a common response. This analysis makes us think twice.

The lesson for policy runs deeper yet. Transparency deters corruption when it gives law enforcement new and useful information. Call this the “deterrence effect.” Transparency promotes corruption when it gives bad actors new and useful information. Call this the “abetting effect.” When both effects operate, transparency might help or hurt depending on the relative magnitudes. Sometimes, however, only one effect operates. Imagine a city run by a tight-knit political class of repeat players. Everybody knows everybody else, positions and priorities are clear, and trust levels are high. Meanwhile, law enforcers and lo-

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83 See, e.g., Julie Hirschfeld Davis, White House to Keep Its Visitor Logs Secret, N.Y. TIMES (Apr. 14, 2017), https://www.nytimes.com/2017/04/14/us/politics/visitor-log-white-house-trump.html (last visited Apr. 3, 2018) (“The White House announced Friday that it would cut off public access to visitor logs revealing who is entering the White House complex and which officials they are meeting, breaking with the Obama administration’s practice and returning a cloak of secrecy over the basic day-to-day workings of the government.”).

cal journalists are resource-poor. In this environment, additional transparency will have little or no abetting effect. Bad actors already have the information they need. Additional transparency will, however, have a deterrence effect. Here transparency can only decrease corruption. 85

The opposite scenario could arise. A city could feature sophisticated journalism and well-staffed enforcement agencies. Politics, however, might be messy, with unorganized parties, competitive elections, term limits, and so on. Additional transparency might have little or no deterrence effect but a meaningful abetting effect. Now transparency can only increase corruption. Reasoning like this provides intuitions about when more transparency is a good or bad idea. It replaces universal prescription with a sharper, contextual approach.

Finally, the analysis has implications for courts. Many cases in many areas involve objections to transparency. In politics, some litigants oppose mandatory disclosure of their contributions and expenditures. 86 Others oppose disclosure of their support for ballot initiatives. 87 Some accused criminals oppose journalists in the courtroom, and some officials oppose the public at their meetings. 88 Often courts uphold transparency laws, reasoning that they deter corruption or have similar salutary effects. 89 This project casts doubt on all of that logic. Courts cannot in good faith uphold laws on anti-corruption grounds if, in fact, those laws make corruption worse.

How to address this tension? Courts could change the terms of the debate. Instead of tying transparency to corruption, they could tie it to a different social value. What might that be? In campaign finance, courts justify some disclosure laws on the ground that they prevent the appearance of corruption. 90 I object to this approach because the

85 Cf. Gilbert & Aiken, supra note 1, at 158–60 (developing this logic for campaign finance disclosure); BENTHAM, supra note 22, at 148 (condemning “demi-publicity,” a state in which assembly members know each other’s votes but the public does not).
86 See, e.g., Buckley v. Valeo, 424 U.S. 1, 60–84 (1967) (analyzing challenges to disclosure of contributions and expenditures).
88 See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (rejecting a defendant’s effort to exclude media from a courtroom); State ex rel. Krueger v. Appleton Area Sch. Dist. Bd. of Educ., 898 N.W.2d 35 (Wis. 2017) (rejecting a school district’s argument that its committee’s meeting was not subject to the state’s open meetings law).
89 See, e.g., Buckley, 424 U.S. at 67–84 (upholding disclosure laws in part on anti-corruption grounds); Reed, 561 U.S. at 199 (holding that disclosure of signatures helps preserve “the integrity of the electoral process”).
90 See, e.g., Buckley, 424 U.S. at 67 (“disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity”) (emphasis added).
effects of disclosure on appearances are uncertain. Courts justify other disclosure laws on informational grounds. The claim is that disclosing who spends what provides valuable information to voters, regardless of whether corruption is involved. Again, I object. For reasons described elsewhere, disclosure might reduce voter information rather than enhance it. In a recent, valuable paper, Professor Kate Shaw suggests that disclosure laws could be justified by an “accountability” interest. I support her effort to reframe the debate but disagree with her language. It is hard to argue that transparency laws promote accountability to the public when they might produce corruption.

If we are serious about deterring corruption, then changing the terms of the debate will not work. Courts must confront the problem directly. They must reconsider the constitutionality of transparency laws, taking a hard look at their likely effects and invalidating laws that seem unlikely to achieve their corruption-fighting purpose. This is a tall order. Courts are not blind to appearances or immune to pressures. An effort to shroud the workings of government could prompt a damaging public backlash. No judicial opinion, however stirring, is likely to persuade the mass of citizens that opaque governance works best. Nevertheless, if deterring corruption is the goal, this is the only defensible approach.

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91 As a conceptual matter, there is disagreement about what constitutes corruption, let alone its appearance. See, e.g., Yasmin Dawood, Classifying Corruption, 9 DUKE J. CONST. L. & PUB. POLY 103 (2014) (discussing variants of corruption). As an empirical matter, one study found little connection between perceptions of corruption and campaign finance laws. See generally Nathaniel Persily & Kelli Lammie, Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law, 153 U. PA. L. REV. 119 (2004). Finally, the argument developed in Parts I and II, supra, creates a potential paradox: disclosure laws could improve the appearance of corruption while worsening the reality of corruption.


93 The argument runs as follows. If disclosure laws chill political speech as courts and most commentators assume, then an information tradeoff arises: voters gain information by learning the sources of some speech acts but simultaneously lose information because some speech acts that would be informative are chilled and thus never observed by voters. The net effect could be a reduction in voter information. See id. at 1862–70 (developing this logic).


95 Likewise, it is hard to argue that they promote accountability when they might reduce voter information. See generally Gilbert, supra note 92.

96 To illustrate, the state justifies some campaign finance disclosure laws on the ground that they deter quid pro quo corruption, and federal courts accept this justification despite First Amendment concerns. See, e.g., Buckley v. Valeo, 424 U.S. 1, 67–84 (finding the government’s interest in deterring corruption and its appearance sufficient to sustain disclosure laws challenged under the First Amendment). If a given disclosure law does not actually deter corruption, then the state’s interest weakens, and the constitutionality of the law becomes suspect.
The news is not all bad. Yes, transparency raises a tragic tradeoff, and that justifies heightened judicial review. But heightened review could force lawmakers to put more thought into their transparency initiatives, reasoning carefully instead of relying naively on the “sunlight as disinfectant” trope. This could reduce corruption. More importantly, acknowledging transparency’s limits could open new avenues for reform. In recent years, the Supreme Court has invalidated limits on money in politics, reasoning that disclosure laws provide sufficient protection against corruption. This is naive. Disclosure might create more corruption than it deters. As the legal and policy case for transparency weakens, the case for other corruption-fighting measures—caps on political spending, public financing of elections, and so on—grows stronger.

97 See Louis Dembitz Brandeis, Other People’s Money and How the Bankers Use It 92 (1914) (“Sunlight is said to be the best disinfectant; electric light the most effective policeman.”).

98 See McCutcheon v. FEC, 134 S. Ct. 1434, 1459 (invalidating aggregate contribution limits and stating, “disclosure of contributions minimizes the potential for abuse of the campaign finance system . . . [and] may also ‘deter actual corruption and avoid the appearance of corruption’”) (citations omitted); Citizens United v. FEC, 558 U.S. 310, 370 (2010) (invalidating bans on independent expenditures and stating, “prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable”).