Secrecy and Transparency in Political Philosophy

1. Introduction

      Political philosophers are spending less time thinking about abstract theories of justice and more time contemplating institutions (e.g., Waldron 2013). Much of this energy is directed toward how voting should proceed in a democratic society. Some argue that the informed should have a greater say than the uninformed when it comes to selecting representatives (e.g., Brennan 2016). Others propose that we do away with voting altogether, and select representatives by lottery (e.g., Guerrero 2014). These are important debates that receive much attention. There are other institutions and institutional innovations, though, that receive far too little attention from political philosophers. Political institutions can be transparent or secret. If they are transparent, then we have access to information about how agents act within them. A transparent legislature, for example, will allow us to observe lawmakers in action: their deliberation over bills and amendments, procedural maneuvers, how they cast votes on legislation, and so on. A secret legislature makes hidden these things. Of course, institutions are neither fully transparent nor fully secret, but will often involve some mixture of the two.

      The presence and extent of transparency has tremendous impact on how political institutions function. It is thus unsurprising that economists, political scientists, and scholars of public administration have spent a great deal of time analyzing this concept. Though some work has been done on transparency by political philosophers, it does not receive the full attention it deserves. This is all the more disappointing once we realize that transparency has normative, not only consequential, significance. There are moral reasons to insist on transparent government (and perhaps moral reasons to insist on secret government as well), and philosophers are uniquely suited to articulate and examine these arguments.

      The purpose of this article is to offer a brief overview of what political philosophers have thus far had to say about transparency as it pertains to political institutions and especially legislative bodies.[1] In doing so, I hope to accomplish two things. First, I hope to connect

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[1] One area of the literature I am unable to cover in depth due to space constraints is transparency and secrecy as they relate to executive agencies. Key contributions here include Sagar (2007); Sagar (2013). Guerrero (2018) explores transparency as it relates to military secrets in particular. Also relevant is the idea of judicial transparency (e.g.,

philosophical questions about transparency with work in political science and economics. Political philosophers have much to learn from the social sciences, especially as they continue shifting their focus to institutional theorizing. And second, I hope to highlight areas where more work needs to be done. As we shall see, philosophical work on transparency is in its early stages. There are more questions than answers, and I will highlight what I think the most important questions are.

2. Transparency and Accountability

Jeremy Bentham paid more attention to transparency than any other philosopher. On his view, transparency was essential for accountable government.[2] "Without publicity," Bentham tells us, "all other checks are fruitless: in comparison of publicity, all other checks are of small account" (Bentham 1843: 494). As he writes in another place: "without publicity, no good is permanent; under the auspices of publicity, no evil can continue" (Bentham 1999: 37). The relationship between transparency and accountability is simple, according to Bentham's understanding. In democratic governments, public officials require the assent of the people to maintain positions of power. The people will not tolerate public officials who abuse their office. Knowing this, public officials will not abuse their office if they believe there is a reasonable chance they might get caught. Transparency, though, increases the likelihood of wrongdoers getting caught. If sunlight is cast on their every move, then malfeasance will be sniffed out; this incentivizes public officials to not engage in wrongdoing.[3]

John Stuart Mill was also a champion of transparency, particularly in *Considerations on Representative Government*. Similar to Bentham's reasoning, Mill argued that "unbounded publicity" coupled with "an ever present newspaper press" will "give the representative assurance that his every act will be immediately known, discussed and judged by his constituents, and that he is always either gaining or losing ground in their estimation" (Mill 2015: 323). This constant fear of monitoring is what keeps politicians in line. Bernard Williams

publishing justifications for decisions, open court proceedings, etc.). For analysis in a comparative context, see Lasser (2009).

[2] For an overview of Bentham on transparency see Postema (2014; 2018); Bruno (2017).

[3] Of course, the people are not the only ones who hold public officials accountable in a democracy. There are also independent regulators, audit institutions, journalists, and more. For an overview of the different accountability mechanisms used to check public officials in a democratic society, see Bovens *et al* (2016: Part V).

is another philosopher who notes the relationship between transparency and accountable government. He writes: "precisely because of their peculiar powers and opportunities, governments are disposed to commit illegitimate actions… It is in citizens' interests that these be checked. They cannot be checked without true information" (Williams 1996: 607; Williams 2002: 207).

The relationship between transparency and accountable government is not as simple as Bentham and Mill presume. In fact, transparency can make government *less* accountable. There are several mechanisms through which this might happen. One is psychological. Treating someone as a criminal may actually induce them to act like a criminal. Likewise, treating a politician as hopelessly corrupt may actually induce them to act corruptly. One way of treating politicians as corrupt, though, is by placing more and more accountability mechanisms (such as increased transparency) on their conduct. More generally, too many accountability mechanisms can "crowd out" virtue (Frey 1997; O'Neill 2002: ch. 3-4; Mansbridge 2014: 55-58). As Jane Mansbridge articulates it: "where the elected representatives are in general competent, honest, and well aligned with their constituents, each increase in efforts to produce transparency above an important minimum can create costs in efficiency and motivation" (Mansbridge 2009: 385-386).

There are other ways transparency can reduce accountability. Andrea Prat (2005) develops a model where too much transparency in a principal-agent relationship leads to reduced performance on the part of the agent. The basic idea is that too much transparency can lead the agent to conform too closely to the principal's preconceptions of how she should be doing her job, thus preventing the agent from doing her job in the most effective way she knows how. The result is that the principal's interests are not as well served as they would be if the principal could *not* observe the agent's performance. A bit less abstractly: if you hire a contractor to do some work in your home, then constantly looking over their shoulder may lead them to do a worse job, because they will do what *you* think should be done, not what *actually* should be done. This is especially problematic in politics. Voters elect politicians to produce certain outcomes. Voters also have views about what kinds of policies will bring these outcomes about. But the voters may be wrong about what policies will produce the desired outcomes. This incentivizes politicians to do exactly the wrong thing.

Consider an example. Voters might want increased GDP, and believe that more stringent immigration restrictions are the best way to get there. As it turns out, though, relaxing immigration restrictions is what will boost GDP (Clemens 2011). The politician is caught in a pickle. Do they support the undesired policy that will produce the desired outcome, or the desired policy that will produce the undesired outcome? The latter phenomenon is called *pandering*, and is a big problem (Maskin and Tirole 2004). In a less transparent regime where persons do not know what policies their representatives support, and can only observe a rise or fall in GDP, the dilemma is avoided. More generally, "while transparency on consequences is beneficial, transparency on action can have detrimental effects" (Prat 2005: 863). In this way, less transparency can produce more accountable government.[4]

The relationship between accountability and transparency is thus quite complicated, and work in the social sciences can offer great insight. But there is also much work for philosophers to do on this topic as well. A cursory reading of the literature suggests that there is much conceptual confusion. First off, it is not always clear what "accountability" means; one gets the sense that the term is being deployed in inconsistent ways. Beyond this, it is not fully clear how different senses of accountability and different accountability mechanisms relate to different theories of representation. Competing philosophical theories demand different things of representatives, and surely how we think about accountability depends on the theory of representation we adopt. All these issues need to be sorted out before we draw any firm conclusions concerning the relationship between transparency and accountable government.

3. Transparency and Voting

Bentham and Mill agreed on the importance of transparency for accountable government. They disagreed, however, on whether transparency should also be applied to voting in democratic elections. At a time when all voting was done publicly, Bentham was a fierce agitator for the secret ballot (which was adopted in England in 1872). Bentham's argument for the secret ballot appealed to the improper influence that occurred under transparent voting. When voting in public, citizens would often be pressured by their employers or landlords to vote in a way

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[4] For more formal work exploring this dynamic, see Fox (2007); Fox and Van Weelden (2012).

contrary to their interests. The secret ballot was necessary, argued Bentham, "for *securing freedom*, and *preventing spuriousness* of suffrage; and also the security it gives against all seductive influence operating *from without*, whether as terrorism or bribery" (Bentham 1977: 65). The general idea is that elections are supposed to register the true preferences of citizens. Because of this, citizens must be shielded from powerful interests; this allows them to freely reveal their preferences.

Mill disagreed. Transparency was not only needed for good government, it was also needed for good elections. The problem with the secret ballot is that "the immediate interpretation which [the voter] is almost sure to put upon secret voting, is that he is not bound to give his vote with any reference to those who are not allowed to know how he gives it" (Mill 2015: 308). In other words, the secret ballot encourages selfishness. This is problematic, because the voter is under "an absolute moral obligation to consider the interest of the public, not his private advantage, and give his vote to the best of his judgment, exactly as he would be bound to do if he were the sole voter, and the election depended on him" (Mill 2015: 309). In contrast to the secret ballot, transparent voting encourages such public spiritedness, according to Mill. Under a transparent voting regime, the voter must now think "what he shall say if called to account for his actions," which forces him to discount his own selfish interests, and weigh more heavily the interests of the public (Mill 2015: 313).

A small literature has followed Bentham and Mill, but contributors often (though not always) reiterate the same points as the early utilitarians. Geoffrey Brennan and Philip Pettit argue in defense of transparent voting. As a first premise, voters are "to focus on their perception of the public good, and to evaluate alternative policies/candidates/parties according to which best promotes that public good" (Brennan and Pettit 1990: 316). Transparent voting encourages this, the authors argue, as transparency ensures that persons must be able to defend how they vote to other citizens, and it is hard to defend a vote grounded in selfishness.

Other defenses of transparent voting go beyond Mill's argument. Daniel Sturgis (2005) argues first, that the right to privacy as traditionally construed does not cover the act of voting, and second, that transparency and accountability are important democratic values that should extend to the act of voting. Bart Engelen and Thomas R.V. Nys (2013) believe that transparent voting will increase deliberation. Finally, Eric Beerbohm argues that transparent voting allows

citizens to address those who have wronged them: "when a majority of citizens directly enacts legislation that humiliates members of the population, a private ballot makes interpersonal moral complaint impossible" (Beerbohm 2012: 258).

Contemporary defenses of the secret ballot are less frequent, perhaps because that is our current institutional status quo. Bernard Manin argues that transparent voting will allow persons to be controlled by their social environment, increase the importance of private rewards in elections, and increase the influence of the rich and powerful (Manin 2015: 209). These concerns seem to be in line with Bentham's central argument, that transparent voting will lead to undue influence in elections. In a forthcoming book, James Johnson and Susan Orr (2020) emphasize similar points, and even go so far to propose that voting must *always* be secret, which would have the implication of eliminating mail-in ballots (spouses and other family members can look at one another's votes), along with other tools that make voting more convenient.

There is a bevy of empirical work on secret and transparent voting. Some of this work tries to explain why democracies that used transparent voting eventually switched to the secret ballot (e.g., Mares 2015; Przeworski 2015; Aidt and Jensen 2017). Other work notes the effect the secret ballot has on voter turnout; when it is adopted, less people vote (e.g., Heckelman 1995; 2000). Relevant for the philosophical debate is whether the secret ballot reduced undue influence of the kind Bentham was concerned with. Adam Przeworski shows that the secret ballot was "enormously" impactful for the reelection of incumbents: "Incumbents won 92 percent of the 449 elections in which voting was public and 76 percent of the 1,937 in which it was secret" (Przeworski 2015: 104). This fact, though, does not immediately support Bentham's thesis, for it is unclear what the precise relationship between incumbent support and undue influence is. Didi Kuo and Jan Teorell (2017) have more direct evidence that the secret ballot reduced vote-buying and voter intimidation. Finally, it is worth noting that many scholars show that, though the secret ballot reduced some kinds of undue influence, it led to new kinds of undue electoral interference (e.g., Nichter 2008; Kam 2017; Kuo and Teorell 2017). Thus, it is unclear whether the secret ballot remedies Bentham's concerns, or simply manifests them in a new light.

The discourse over transparent versus secret voting raises important philosophical questions that have received insufficient attention. Two stand out. First, Bentham's concern with undue voter influence seems reasonable, but it is far too vague. Citizens influence one another's

political views all the time – indeed, that is the point of deliberation – and there is nothing wrong with this. So one question is: when is voter influence permissible? When is it impermissible? There are easy cases – corporations shouldn't influence how their employees vote – but there may be harder ones. Answering this may help us better interpret just how damning the empirical results examined above are, and under what circumstances transparent voting is to be preferred over the secret ballot. Second, it is plausible that many of the arguments for transparent and secret voting in elections also apply to voting in legislatures among representatives. Does transparent voting in a legislature also lead to undue influence? If it does, should our representatives vote by secret ballot? Most democracies employ transparent voting in legislatures but secret voting in elections; why the asymmetry? To my knowledge, there is no contemporary work yet on these questions.[5]

4. Transparency and Democratic Deliberation

Democracy must include deliberation, and deliberation can occur behind open or closed doors. Currently, debate in most legislatures is open to the public, but things were not always like this (e.g., Pole 1983: ch. 4; Rundquist 1995). Political philosophers have spent a good deal of time thinking about whether deliberation should be transparent or secret. Jon Elster and Simone Chambers have made the biggest contributions to this literature. Both scholars point out the benefits and drawbacks that accrue to both transparent and secret discourse.

Let us start with the benefits of transparent deliberation. Elster notes that, when deliberation occurs in public, politicians are incentivized to offer impartial arguments in defense of their positions through what he calls the *civilizing force of hypocrisy* (Elster 1995: 250). The basic idea is that "in political debate it is pragmatically impossible to argue that a given solution should be chosen just because it is good for oneself. By the very act of engaging in public debate… one has ruled out the possibility of invoking such reasons" (Elster 1997: 12).

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[5] I examine these issues in Kogelmann (forthcoming: ch. 2). Bentham does discuss this, and thinks that there is some reason for a legislature to vote secretly if they are beholden to a powerful monarch. This is discussed briefly in Elster (2013: 168-170). Vermeule (2015) defends a system where a body first votes on a proposition openly, and then votes on this same proposition secretly. However, Vermeule thinks this system should mainly be used by administrative agencies, expert advisory bodies, and courts, but not by legislatures (Vermeule 2015: 225). Moreover, he thinks this system should be used in an advisory capacity, not to produce binding decisions (Vermeule 2015: 226).

Transparency, in other words, forces the arguer to rely on impartial, rather than self-interested, reasons. This is desirable, for "argument – especially in a public setting – will prevent the strong from using their bargaining power to the hilt… On the average, this will yield more equitable outcomes" (Elster 1995: 250).

On the flipside, transparent debate harbors significant shortcomings. Indeed, though some of our actual public discourse sees the use of impartial reasoning, much of it is far less laudable. This is especially true of politics in the United States, where campaign and election events are filled with chants of "lock her up" and "send her back." Chambers calls this form of discourse *plebiscitory reason*, and describes it as follows: "Speakers still appeal to what they think are common or public values, but with a twist: under the 'glare' of publicity these arguments may become shallow, poorly reasoned, or appeal to the worst that we have in common" (Chambers 2004: 393).[6] So though transparent deliberation can sometimes raise the standards of discourse by encouraging political actors to rely on impartial considerations, it can at other times devolve into sophistry and demagoguery. Transparency gives politicians an audience, and audiences lead to grandstanding. In line with this thesis, David Stasavage (2007) develops a model showing transparency's influence on polarization.

What happens when deliberation occurs in secret? Once again, we face trade-offs. A desirable feature of secret debate is that it can raise the quality of discourse. When behind closed doors, debaters can change their minds and compromise without being dubbed a "flip-flopper." Secret debate is also likely to calm partisan sentiment, and allow for persons to explore new ideas without fear of their words one day being weaponized against them. Elster makes the case for secret deliberation's benefits by comparing the United States' Constitutional Convention (which occurred behind closed doors) to France's Assemblée Constituante (which was open to the public). He writes: "Many of the debates at the Federal Convention were indeed of high quality: remarkably free from cant and remarkably grounded in rational argument. By contrast, the discussions of the *Assemblée Constituante* were heavily tainted with rhetoric, demagoguery, and overbidding" (Elster 1995: 251).

Secret deliberation also harbors significant drawbacks. Instead of relying on impartial arguments, debate behind closed doors will often result in self-interested bargaining. With the

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[6] Related to plebiscitory reason is the idea of *moral grandstanding*. For discussion, see Tosi and Warmke (2020).

civilizing force of hypocrisy no longer in play, deliberators can get right down to brass tacks. As Elster phrases it: "Whereas bargaining in public over the public interest is almost an oxymoron, there is less opprobrium attached to interest-based bargaining behind closed doors" (Elster 2013: 230). The fact that the façade of impartiality is dropped when deliberation is held in secret can have far-reaching implications on the policies ultimately selected.

There exists excellent empirical analysis of transparency's effects on deliberation. The Federal Open Market Committee (FOMC) deliberates in secret. Prior to 1993, the FOMC would release the votes of committee members and summary minutes after each meeting. But under pressure from Congress, the FOMC agreed to begin releasing full transcripts of their meetings under a five-year delay. Along with the decision to publish transcripts at a five-year delay, the FOMC also decided to retroactively publish transcripts dating back to 1976. This is important, because prior to 1993 deliberators in the FOMC did *not* think the recordings of their deliberation would ever see the light of day. After 1993 deliberators *did* know that what they say would eventually be publicized. We thus have a natural experiment allowing us to examine whether increased transparency has any effect on the content of deliberation. It does. Economists Ellen E. Meade and David Stasavage find that participants are "significantly less likely to express verbal dissents on policy decisions since 1993" (Meade and Stasavage 2008: 698).[7]

Meade and Stasavage find that increased transparency has a stultifying effect on deliberation. However, it is not fully clear how their finding – that participants are less likely to express dissent – fits in with the theoretical predictions made by Elster and Chambers. What this really calls for is a more careful enumeration of the benefits and drawbacks of transparent versus secret deliberation, one that works more closely alongside existing social science work. Transparency clearly does influence the quality of discourse, but more work needs to be done getting precise on what these exact effects are.

What to do in the face of both benefits and drawbacks associated with transparent and secret deliberation? Some view this problem as intractable, holding that "the net impact of the choice of one or the other mode of decision making on the quality of the decision seems,

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[7] For further economic analysis of this transition, see Meade and Stasavage (2006); Schonhardt-Bailey (2013); Hansen *et al* (2018). The negative effects of transparency on the FOMC are theoretically generalized and laboratory tested in Fehrler and Hughes (2018).

therefore, to be indeterminate" (Elster 2014: 165). Amy Gutmann and Dennis Thompson argue that secret deliberation is a reasonable institutional tool, so long as there is public debate about its use both before and after it is deployed (Gutmann and Thompson 1996: 115). Chambers argues that secret deliberation should be used in some cases, but only if we ensure that the deliberative body reflects the diversity of the wider public (Chambers 2004: 408). There are other proposals as well (e.g., Karpowitz and Raphael 2016). In general, this is a fecund area of philosophical research. Theorizing hybridized institutional structures that can attain the benefits of secret and transparent discourse, while avoiding their drawbacks, is a worthy pursuit.[8]

5. Transparency and Democracy

      Many perceive a close relationship between democracy and transparency. The *Washington Post* has adopted "Democracy Dies in Darkness" as its official slogan. But even so, it is surprisingly hard to articulate why democratic governments must also be transparent ones. Not only this, but sometimes democratic governments need to deploy secrecy, such as clandestine law enforcement or military operations that cannot succeed if they are publicly known. Are democratic governments prohibited from carrying out these sorts of activities? Or, does the principle articulating democracy's close relationship to transparency allow for some instances of secrecy?

      Jeremy Waldron takes a stab at the relationship between democracy and transparency. Key, according to Waldron, is to properly understand the relationship between citizens and their government in a democratic society. Waldron argues that we should understand this relationship in terms of what he calls *agent accountability*, which he defines as follows:

> In this conception, "accountability" denotes the duty owed by an agent to his principal, whereby the principal may demand from the agent an account of the work that the agent has been doing in the principal's name or on the principal's behalf, enabling the principal if she sees fit to sanction or replace the agent to terminate the agency relationship. My relation to my realtor is of this character: he makes certain arrangements for the purchase of a house on my behalf; he may even have a power of attorney to act in my name. But I

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[8] I offer such an account in Kogelmann (forthcoming: ch. 3).

am entitled to insist that he give me a full account of what he has done and what he is doing, and if I judge it adversely I may dispense with his services (Waldron 2016: 168).

Waldron asserts that it is best to understand the relationship between government and citizens in a democratic society as one of agent accountability. Understanding democracy in terms of agent accountability leads to transparency's importance. He writes: "If the rulers are truly the agents of the people, then they have a responsibility (owed to the people) to give the people the information that is required concerning what they have been doing. Accountability, in other words, provides a premise for a normative requirement of open and transparent government" (Waldron 2016: 173).[9]

Many will find agent accountability compelling, and the conclusions that follow congenial. One issue, though, is that Waldron never provides a clear argument concerning *why* we should understand the relationship between citizens and their government in terms of his agent accountability model.[10] There are, of course, other ways of conceptualizing this relationship. Many political thinkers of the past considered government to be a trust; why not understand it as a blind trust? For Waldron's defense of democratic transparency to convince, we need a compelling argument for why we should understand citizen-government relations in terms of his specific definition of agent accountability. I doubt that such a conclusion falls out of a conceptual analysis of the meaning of democracy.

Dennis Thompson also sees a close connection between democracy and transparency, but of a different kind than Waldron. As a basic normative requirement, laws in a democratic society must be consented to by the majority for them to be legitimate. Consent, though, is not possible without transparency, for "the policies and processes of government must be public in order to secure the consent of the governed" (Thompson 1999: 182). The idea here is that for persons to consent to a policy, they must know about it first; hence, consent requires transparent

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[9] For a similar argument, see Williams (1996: 608; 2002: 210-213)

[10] Note, I am not denying that the relationship between voters and their representatives is a principal-agent relationship. Rather, I am questioning whether we should conceive of this principal-agent relationship in the way Waldron suggests. Within democratic theory, there are many ways of understanding the relationship between voters and their representatives (e.g., Mansbridge 2003; Rehfeld 2009; Mansbridge 2011), all of which are consistent with the basic idea that voters are principals and representatives their agents. In fact, some ways of understanding the voter-representative relationship suggest that too much transparency may hinder optimal functioning of the relationship (e.g., Mansbridge 2009: 385-386).

government. Since legitimacy requires consent, it follows that legitimacy requires transparency. If a democracy is to be legitimate, then it must be transparent.

Thompson struggles with this conclusion, because "some policies and processes, if they were made public, could not be carried out as effectively or at all" (Thompson 1999: 182). In response, he tries to reconcile democracy's need for secrecy with its demand that laws be consented to by the majority. His solution requires that, if secrecy is to be deployed, then *this* fact must be transparent, and consented to by the governed. For example, suppose a democratic government wanted to engage in a secret military mission. If it's secret, the majority cannot consent, so the mission is illegitimate. But, if the mission were publicized to attain consent, it would no longer be effective. The solution, Thompson argues, is to achieve consent over a broad policy that says the military is (under certain conditions) allowed to engage in secret missions. If this broad policy is consented to, then the consent carries down to the actual mission itself, resolving the dilemma. As Thompson puts it: "First-order secrecy (in a process or about a policy) requires second-order publicity (about the decision to make the process or policy secret)" (Thompson 1999: 185).

Dorota Mokrosinska thinks Thompson's solution is unnecessarily complicated. Second-order transparency is not needed to legitimize first-order secrecy, and, more generally, it is far easier to justify democratic secrecy than most realize. Mokrosinska's main criticism is that Thompson misunderstands the nature of political authority. Political authority "is traditionally defined as possession of a right to rule in a content-independent way, namely, a right to create new, and to cancel existing, obligations of others without regard to the content of the actions they require or proscribe" (Mokrosinska 2019: 3).

Key here is the content independence. If an entity has political authority, then its commands are binding, regardless the content of these commands. This fact, though, means that consent of the majority is not necessary for legitimate state action: "in light of this understanding of state authority, the link between citizens' knowledge of state action and their authorization of state action is less tight than commonly presupposed" (Mokrosinska 2019: 6). But if knowledge of state action is not necessary, then Thompson's presumption of transparency, and his requirement of second-order transparency whenever secrecy is used, falls apart. In sum:

"secrecy, under certain conditions, may be a legitimate exercise of democratic governance, not a justifiable suspension of it" (Mokrosinska 2019: 3).[11]

6. Conclusion

The study of transparency is a fecund area of research for social and political philosophers. Transparency effects how we hold politicians accountable, how we vote, how we deliberate with one another, and how our democracy functions. Paying attention to work in economics, political science, and public administration, political philosophers can expand the purview of current institutional theorizing by thinking about the benefits and drawbacks associated with increased transparency in government. More theorizing is certainly needed. Our political institutions do not work as well as they ought to, and increased transparency or secrecy may allow them to work better.

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[11] For other philosophical work on the relationship between democracy and transparency (which I lack the space to carefully discuss), see Emerson (1976); Cliffe *et al* (2000: ch. 2); Birkinshaw (2006); Edyvane (2015); Mokrosinska (2018; 2020).

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