

Some Thoughts on Judicial Transparency

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Gentlemen of the Jury (1861), John Morgan

Introduction

My dissertation examines the concept of political transparency. I am primarily interested in two broad questions. First is a question of intellectual history: How did this concept crystallize, and how did it take on such an important place in our thinking and speaking about democracy? Second is a question of normative theory and institutional design: Why, from within the framework of modern constitutional democracy, should we care about transparency in the first place, and what counts as sound transparency policy in particular institutional settings?

The research presented here forms a portion of my chapter on judicial institutions. I begin by evaluating the various grounds for transparency and secrecy in this context. I argue that there are strong justifications for various transparency practices, such as public proceedings and judicial opinion-writing, but also compelling reasons to protect certain limited forms of confidentiality. I attempt to bring these insights together in a general, rebuttable presumption in favor of judicial transparency.

The remainder of the chapter is devoted to analyzing examples. The presumption provides a starting point, but in each case I ask whether countervailing considerations might nevertheless justify particular non-transparent procedures or practices. The examples I consider in the chapter are: (1) civil and criminal trials, with special attention to the question whether trials should be televised; (2) litigation processes that occur before, after, or in lieu of trial, such as grand jury investigations and plea bargaining or settlement negotiations; (3) the deliberations of judges and juries; (4) the announcement of judicial decisions; and (5) the availability (or not) of case records and statistics.

While work on this chapter remains unfinished, I present here some tentative thoughts on a small sample of these examples. Questions and feedback are welcome.

Why Judicial Transparency? (I)

I argue in an earlier chapter that the most fundamental normative ground for political transparency is non-instrumental, and applies across the institutions of the democratic state. In brief, the idea here is that a certain minimum of transparency is partially constitutive of democracy. A completely opaque state would be one so radically withdrawn from the public that to conceive of such a government's conduct as expressing collective self-rule would be a farce. Insofar as we share a basic ethical commitment to democracy, some basic measure of political transparency is required.

Just how much is controversial. One common way of defining transparency's appropriate scope is the notion—characteristic of a world preoccupied with surveillance—that state institutions should ordinarily be subject to real-time observation by the public. By contrast, my dissertation argues that the baseline of minimally-required transparency is best defined not in terms of such surveillance, but in terms of what I call intelligibility. In short, the core principle here is that government practices and decisions should be rendered meaningfully legible or knowable, not merely disclosed or exposed to public view. Thus transparency as intelligibility requires habits of public explanation and norms of answerability in addition to the fact of public disclosure. Yet it does not require that all operations of state institutions be observable in real time (even if this might be justified on separate grounds in particular contexts). So my account is at once more demanding and less demanding than the fishbowl conception of transparency.

In the judicial context, transparency as intelligibility is nicely illustrated by the core practice of judicial opinion writing, whereby judgments rendered by courts are publicly explained and defended.

Why Judicial Transparency? (II)

Of course, transparency as intelligibility provides only a starting point. Again, it delineates what I take to be the minimum required of state institutions, on non-instrumental grounds, simply because the underlying commitments that make us democrats demand it. But there are several additional normative grounds for judicial transparency, in my view:

- i. **Transparency is partly constitutive of fairness in adjudication**
 - Instrumental version: holding trials in public increases the likelihood of accurate outcomes (Hale, Blackstone, Bentham)
 - Non-instrumental version: criminal prosecution is a calling to account publicly for wrongs of public significance (Farmer)
- ii. **Transparency expresses the ideal of equality under the law**
 - Parties to litigation (whether civil or criminal) enjoy robust procedural equality in the courtroom, despite sometimes vast inequalities of power. It is desirable to express this democratic ideal. (Resnik)
- iii. **Transparency (in some forms) may promote public confidence**
 - "Suspicion always attaches to mystery." (Bentham)
 - Mode is important. More publicity is not always better than less. Evidence is decidedly mixed on televising proceedings.
 - Confidence in juries may require secrecy of deliberations. (Sunderland)
- iv. **Transparency makes possible appropriate public accountability**
 - Publishing judicial decisions, conflicts of interest, caseload statistics, etc. promotes the right sort of judicial accountability. (Shetreet)
- v. **Transparency of decisions is necessary for notice and transparency of process may promote civic education**
 - Notice of "state of the law" requires public explanation of judgments (esp. in common law and arguably also in civil law systems). (Lasser)
 - Public procedures may promote civic education. (Bentham, Resnik)

Grounds for Opacity or Secrecy?

Notwithstanding these strong grounds for judicial transparency, I argue that there are some serious reasons to protect limited forms of opacity. For example, keeping the identity of jurors secret arguably is necessary to preserve impartiality. Opacity during deliberations (at least in real-time) is also essential to protect the deliberative freedom of judges and juries.

A Presumption in Favor of Judicial Transparency

The foregoing considerations lead me to endorse a general presumption in favor of transparency in the operation of judicial systems, a presumption that can be overcome only when opacity is necessary (i) to preserve the independence or impartiality of courts or juries, (ii) to safeguard their deliberative freedom, or (iii) to protect strong interests in personal privacy. This principle is not fully determinate, but it will provide some helpful initial guidance as we consider particular examples.

A Few Examples

- i. **Civil settlements**
 - Secrecy wholly at the discretion of the parties in most scenarios.
 - But at least some civil litigation concerns the public interest (e.g. claims against the government for negligence or for constitutional violations, claims against corporations for harmful business practices, etc.).
 - I argue that courts should have to consider public interest in access.
- ii. **Judicial deliberations**
 - Strictly confidential (e.g. judicial deliberations privilege).
 - I argue for long-delayed publication in the interests of historical understanding, and at least minimal retrospective accountability.
- iii. **Dissenting opinions**
 - Unpublished in some civil law nations (e.g. France, Italy, Netherlands).
 - I argue publication required by baseline of transparency as intelligibility.
- iv. **"Sealing" of case files**
 - In most U.S. jurisdictions, extremely permissive sealing.
 - Sometimes appropriate on privacy or other grounds.
 - But public interest in access should have to be weighed in the balance.

Conclusion

We have strong normative reasons for endorsing judicial transparency. After evaluating those reasons, I have argued that there should be a presumption in favor of practices that improve public access to information about, or promote public understanding of, the courts. However, there is a legitimate basis for limited forms of opacity when these are necessary to preserve independence in decision-making, deliberative freedom, or special interests in personal privacy. Current practice reveals many forms of unjustifiable secrecy in judicial institutions (e.g. excessive sealing of case records, near automatic secrecy in settlements, etc.) and at least two cases of (arguably) suboptimal 'transparency' (i.e. televised trials and eternal electronic criminal records).

References and Acknowledgements

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