

## ARTICLES

### The Transparency Tax

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*Transparency is critical to good governance, but it also imposes significant governance costs. Beyond a certain point, excess transparency acts as a kind of tax on the legal system. Others have noted the burdens of maximalist transparency policies on both budgets and regulatory efficiency, but they have largely ignored the deeper cost that transparency imposes: it constrains one's ability to support the law while telling a self-serving story about what that support means. Transparency's true tax on the law is the loss of expressive ambiguity.*

*In order to understand this tax, this Article develops a taxonomy of transparency types. Typically, transparency means something like openness. But openness about what—the law's obligations? The reasons for the obligations? The actors behind the law? And open to whom? These are different aspects of what we typically lump together and call "transparency," and they present different tradeoffs. With these tradeoffs in mind, we can begin to make more informed choices about how to draw the line between maximal and minimal transparency. Of particular note is the finding that we can demand maximal transparency about the*

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*law's obligations without incurring much of the transparency tax. This runs contrary to the soft law literature, which suggests that vagueness about obligation is less costly than the alternative. The Article concludes with a guide for thinking through future transparency tradeoffs.*

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## INTRODUCTION

Open government is good government,<sup>1</sup> and accordingly we celebrate when sunlight shines on places that were once dark.<sup>2</sup> We want to know not only what the law requires of us, but also how it was created—who met with whom, who said what, and why.<sup>3</sup> Transparency, it sometimes seems, is a thing we cannot have too much of.<sup>4</sup> Yet maximal transparency is not optimal; beyond some point, extra transparency comes at a cost.<sup>5</sup> Some of these costs are well known:

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1. As James Madison noted, “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both.” Letter from James Madison to W.T. Barry (Aug. 4, 1822) (on file with Library of Congress), [https://www.loc.gov/resource/mjm.20\\_0155\\_0159](https://www.loc.gov/resource/mjm.20_0155_0159) [<https://perma.cc/5ZBX-NZN4>]. This view is reflected more recently in *Citizens United v. FEC*, 558 U.S. 310, 371 (2010) (“[T]ransparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”); see also James R. Hollyer et al., *Democracy and Transparency*, 73 J. POL. 1191, 1192 (2011) (noting the consensus view that transparency is critical to good governance).

2. For example, President Obama campaigned on a promise of open government, and one of his first acts as President was to sign the Open Government Directive, which was welcomed for its candor. Sheryl Gay Stolberg, *On First Day, Obama Quickly Sets a New Tone*, N.Y. TIMES, Jan. 21, 2009, at A1. The language embracing open government is almost messianic, typically referring to light and sun. As Justice Brandeis famously wrote, “Sunlight is said to be the best of disinfectants.” LOUIS BRANDEIS, *What Publicity Can Do, in OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92, 92 (1914), <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v> [<https://perma.cc/F72W-NZ4Z>]. Indeed, one of the major open-government reforms passed in the twentieth century is called the Government in Sunshine Act. Pub. L. No. 94-409, 90 Stat. 1241 (1976).

3. Meeting logs are a typical open records request. See Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1407 (2016) (“A sampling of these request letters reveals a pattern of asking for all communications, including meetings, visitor logs, and appointments between the FTC and each individual or entity named.”).

4. The Obama Presidency took extraordinary steps to emphasize openness, in part due to its use of technology to make large datasets publicly available. See *Making Open and Machine Readable the New Default for Government Information*, Exec. Order No. 13642, 78 Fed. Reg. 28,111 (May 9, 2013) (instructing the Director of OMB to issue an open policy for government data). Yet the Obama administration was roundly criticized for not being open enough. See Alex Howard, *How Should History Measure the Obama Administration’s Record on Transparency?*, SUNLIGHT FOUND. BLOG (Sept. 2, 2016, 12:35 PM), <https://sunlightfoundation.com/2016/09/02/how-should-history-measure-the-obama-administrations-record-on-transparency/> [<https://perma.cc/LHY4-2FRS>].

5. The Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 (2012), recently saw its fiftieth anniversary, which prompted several critical appraisals of the open government act. See, e.g., David Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1156 (2017) (arguing that when holistically analyzing FOIA, the act “systematically skews the production of information toward commercial interests and facilitates powerful antiregulatory agendas”); Cass Sunstein, *Output Transparency v. Input Transparency* (May 25, 2017) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2826009](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2826009) [<https://perma.cc/GL3G-2JN9>] (arguing that the government should freely disclose “output” information, but should be guarded about disclosing “input” information); *Program: FOIA@50 Conference*, COLUMBIA JOURNALISM SCHOOL (June 2–4, 2016), <https://perma.cc/XQ8X-645C> (comparing different perspectives on FOIA and proposing how to improve FOIA and the future of open government).

sunshine laws can be enormously expensive to administer, requiring recording procedures, disclosure procedures, appeal procedures, and so on.<sup>6</sup> Transparency can also impair candor in decisionmaking.<sup>7</sup>

But even if these costs could somehow be wished away, a deeper cost would remain. Transparency's true toll is that it narrows the range of possible interpretations about what the law means.<sup>8</sup> Too much transparency reduces ambiguity about what values the law expresses, thereby reducing the size of the pool of potential supporters. Opacity, conversely, maximizes one's ability to support the law while posturing about what that support means.<sup>9</sup> Consider a few brief examples that illustrate the point.

Suppose that the President announces a policy that is obviously bad—a policy that reduces overall welfare, degrades the Union, and so on. One naturally hopes that the President changes course. But suppose that this President is especially sensitive to public opinion, and fears being criticized for changing his mind. Given these constraints, is it more likely that he reverses course in broad daylight, or after discussing the issue privately? For several reasons, it seems more likely that private meetings would be more productive. We should want the President to be able to characterize his meetings in a way that allows him to save face, all while doing the right thing; enough opacity of the right sort gives him wide latitude to characterize his private

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6. See, e.g., FREEDOM OF INFO. ACT FED. ADVISORY COMM., FINAL REPORT AND RECOMMENDATIONS (2016) (summarizing these significant costs associated with complying with the Freedom of Information Act); STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 114TH CONG., FOIA IS BROKEN (Comm. Print 2016) (summarizing the backlog of requests and the high costs of complying with the Freedom of Information Act); Zachary Pall, *The High Costs of Costs: Fees as Barriers to Access Within the United States and Canadian Freedom of Information Régimes*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 599, 629 (2009) (proposing a five-dollar charge for FOIA requests in order to compensate the government for the cost of production).

7. *United States v. Nixon*, 418 U.S. 683, 705 (1974) (“Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.”).

8. I refer here to the law's expressive capacity. Beyond imposing obligations, law may also make a statement about values. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996) (“In this article I explore the expressive function of law—the function of law in ‘making statements’ as opposed to controlling behavior directly.”). Scholars have explored law's expressive capacity in a number of areas. See, e.g., Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule*, 33 LOY. L.A. L. REV. 1309 (2000) (federalism); Yuval Feldman, *The Expressive Function of Trade Secret Law: Legality, Cost, Intrinsic Motivation, and Consensus*, 6 J. EMPIRICAL LEGAL STUD. 177 (2009) (trade secrets); Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 VAND. L. REV. 77 (2007) (public international law); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1 (2000) (constitutional law); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) (criminal law); Jenia Iontcheva Turner, *The Expressive Dimension of EU Criminal Law*, 60 AM. J. COMP. L. 555 (2012) (European Union law).

9. As we will see, this can happen through a number of distinct mechanisms. See *infra* Part III.

decisionmaking process and announce, perhaps selectively, whom he consulted. As James Madison said about the closed-door Constitutional Convention: “Had the members committed themselves publicly at first, they would have afterwards supposed consistency required them to maintain their ground, whereas by secret discussion no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth, and was open to the force of argument.”<sup>10</sup>

It is for precisely these reasons that the International Committee for the Red Cross (“ICRC”) meets with armed combatants behind closed doors.<sup>11</sup> If the ICRC hopes to convince an armed group to reduce civilian casualties, it may only be able to do so if it leaves the armed group enough room to manage the optics of its newfound compliance with international norms.<sup>12</sup> Perhaps the armed group agrees to improve targeting practices because it hopes to win the hearts and minds of the local population, and the ICRC has experts that could advise the rebel group on just that. But for the rebel group, it would be costly to appear to bow to international pressure. They hope to comply with humanitarian law without *appearing* to do so. So they publicly announce that the Red Cross is a wicked, Western organization with no local legitimacy. The Red Cross’s experts smile and say nothing, knowing that semitransparency is critical to their success at enforcing international law.<sup>13</sup>

Perhaps these examples are too exotic or *sui generis*, so consider a final example. The Supreme Court regularly settles hugely important legal debates by fiat—that is, by issuing summary orders that offer no justification and no vote tally.<sup>14</sup> Some, not surprisingly, find this troubling.<sup>15</sup> But there are good reasons why Justices might issue an

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10. Indeed, Madison suggests that the constitution would never have occurred had the debates been public. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 479 (Max Farrand ed., 1911).

11. Steven R. Ratner, *Behind the Flag of Dunant: Secrecy and the Compliance Mission of the International Committee of the Red Cross*, in TRANSPARENCY IN INTERNATIONAL LAW 297, 302–06 (Andrea Bianchi & Anne Peters eds., 2013) (describing the critical role that secrecy plays in the ICRC’s success gaining compliance with the laws of war in the absence of strong enforcement mechanisms).

12. *Id.*

13. *Id.*

14. A growing number of the Supreme Court’s orders arrive without any explanation or justification. See William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–4 (2015) (describing the Court’s use of orders and stays without opinions); see also Robert Barnes, *Supreme Court’s Actions Are Monumental, but the Why of Its Reasoning Often Missing*, WASH. POST (Oct. 12, 2014), [https://www.washingtonpost.com/politics/courts\\_law/supreme-courts-actions-are-monumental-but-the-why-of-its-reasoning-often-missing/2014/10/12/ca1ccc9c-4fca-11e4-8c24-487e92bc997b\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-courts-actions-are-monumental-but-the-why-of-its-reasoning-often-missing/2014/10/12/ca1ccc9c-4fca-11e4-8c24-487e92bc997b_story.html) [<https://perma.cc/R4QM-5NMT>].

15. Baude, *supra* note 14, at 26–27 (summarizing criticisms of the Court’s summary reversal practice—reversals without justifications—that go back half a century).

opinion without explaining the reasoning, not all of them nefarious. For example, suppose that two Justices can only agree to the proper resolution of a case if they do not articulate their reasons; they agree on the outcome, but on different grounds. Deciding the case by summary order allows them to strike an incompletely theorized agreement—they achieve the right outcome, but without saying why.<sup>16</sup> Incompletely theorized agreements are not possible in a totally transparent regime.

These are brief illustrations of a simple idea: there are times when optimal law and policy emerge in a less-than-fully-transparent regime. The assumption in these examples—an assumption that may or may not withstand closer examination—is that demanding more transparency impedes the optimal outcome. Beyond some point, then, extra transparency comes at a cost. The reader likely has many questions about these examples. *Are they really the same, or can they be distinguished? Even if transparency is harmful in these cherry-picked examples, is it harmful overall? Even if it is harmful in many scenarios, is it not worse to have too little transparency than too much?* And so on. The aim of this Article is to develop a framework for thinking about transparency that will help begin to answer these questions.

This task involves, first, drawing some distinctions between different kinds of transparency. In particular, the Article draws distinctions between four related but discrete concepts: (1) obligation transparency (what does the rule require?); (2) justification transparency (why this rule?); (3) publicity transparency (who knows about the rule?); and (4) attribution transparency (who is behind the rule?). Scholars often emphasize publicity, suggesting that transparency means something like “not secret”—that legal rules be known to the public, or at least that they be publicized, or at the very least that they be published.<sup>17</sup> Some go a step further to suggest that

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16. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995) (“[W]ell-functioning legal systems often tend to adopt a special strategy for producing agreement amidst pluralism. Participants in legal controversies try to produce incompletely theorized agreements on particular outcomes. They agree on the result and on relatively narrow or low-level explanations for it. They need not agree on fundamental principal.”). All incompletely theorized agreements feature some degree of opacity; not all opacity, however, is aimed at achieving an incompletely theorized agreement. The same is true for Rawls’ notion of overlapping consensus. See JOHN RAWLS, *POLITICAL LIBERALISM* 133–72 (expanded ed. 2005).

17. David Luban, *The Publicity Principle*, in *THE THEORY OF INSTITUTIONAL DESIGN* 154, 169–72 (Robert E. Goodin ed., 1996) (cataloging the distinctions between varying degrees of publicity); see also JEREMY BENTHAM, *POLITICAL TACTICS* 29–44 (Michael James et al. eds., 1999) (“[T]he grand security of securities is *publicity* . . . whatever is done by anybody, being done before the eyes of the universal public.”); LON L. FULLER, *THE MORALITY OF LAW* 49–51 (1969) (arguing that with few exceptions, law should be published). Luban interrogates Kant’s hypothetical publicity test, which goes as follows: “All actions relating to the right of other human beings are wrong if their maxim is incompatible with publicity.” IMMANUEL KANT, *PERPETUAL PEACE* 381 (1795), [http://lf-oll.s3.amazonaws.com/titles/357/0075\\_Bk.pdf](http://lf-oll.s3.amazonaws.com/titles/357/0075_Bk.pdf) [<https://perma.cc/T4FD-Z6NV>].

publicity transparency requires not only that the *rule* be public but also that its *reasons* be public.<sup>18</sup> Whether one agrees with this, it is worth noting first that the rule's obligations, its justification, its source, and its publicity are four descriptively distinct components of transparency.

These four elements of transparency are severable. There are times when the rule is unclear or obscured (incomplete obligation). Then there are times when the rule itself is clear and widely known, but the reason is obscured (incomplete justification). For example, if the law requires that, "all cars must stop at a stop sign," this rule may be motivated by concerns over safety, or it may be the work of the local small business lobby, which hopes to increase foot traffic. The reason behind the rule is obscured, even though the rule's obligations are not. It is incomplete to say the rule is "transparent" without capturing both of these meanings. We might also ask: "Transparent to whom?" The rule's obligations and justification may be clear as day, but only to some. When the Foreign Intelligence Surveillance Court holds a hearing on a request for a wiretap, for example, it does so behind closed doors.<sup>19</sup> But the participants are unlikely to say that it is transparent *to them*. The point is that transparency is something that can only be measured with a particular audience in mind (incomplete publicity). Then there are times when a rule emerges with clear and definite justification, and a large audience, but the source of the rule remains unclear (incomplete attribution). For example, when the Supreme Court denies a petition for certiorari, a regulatory act of some consequence, we rarely know how the individual Justices voted. It matters that the order comes from the Supreme Court, of course, but it also matters which Justices voted for or against granting the writ.

Within each type of transparency, we might make further distinctions. Consider attribution transparency. There is a meaningful difference between official attribution and unofficial attribution (such as a planted leak). There is a difference between deep attribution

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18. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 133 (rev. ed. 1999) (emphasizing the need for both public rules and public reasoning). Luban interprets Kant's publicity test to include both the rule and the reason as well, suggesting that the test requires rulemakers to ask: "Could I still get away with this if my action and my reason for doing it are known?" Luban, *supra* note 17, at 156.

19. 50 U.S.C. § 1805(a) (2012); see also ANDREW NOLAN & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R43362, REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: PROCEDURAL AND OPERATIONAL CHANGES 4 (2014):

In light of the sensitive nature of its docket, the FISA courts operate largely in secret and in a non-adversarial fashion. Court sessions are held behind closed doors, are generally held ex parte with the government as the only party presenting arguments to the court, and rarely are its opinions released.

(citations omitted).

(identifying an individual source) and shallow attribution (identifying an institutional source). And there is a difference between attribution about the source of the law and attribution about the target.

With these differences in transparency types in mind, we can begin to assess their relative costs and benefits. It may be possible that optimal policy involves maximal transparency of one sort or another, but not all four. That is, perhaps many of the benefits of openness can be achieved without all of the costs, by attempting to maximize one type of transparency over another. This Article undertakes this assessment with the benefit of a growing body of political science research about the benefits of opacity (or, conversely, the harms of transparency).<sup>20</sup> In particular, this literature has shown that agents perform better for their principals when some of their actions are conducted behind closed doors.<sup>21</sup> One potential explanation for this finding is that the agents need not posture for their principals and so they can make better decisions.<sup>22</sup> This Article provides another explanation: agents can strike deals that benefit the principal but which might be unsavory for the principal to admit to publicly.<sup>23</sup>

The focus of this Article is on assessing the expressive costs of demanding maximal transparency, costs that are often underappreciated. That does not mean, however, that those costs are not outweighed by many benefits of transparency—only that they merit consideration. This is not an argument that the U.S. government is currently too transparent or that, on balance, one ought to prefer opacity to transparency. Nor is it an argument against transparency-enhancing policies. Indeed, one of the Article's conclusions is that it may make sense to err on the side of demanding excess transparency, because without full information the harms of too little transparency may be greater than the harms of too much transparency.<sup>24</sup> We also

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20. See, e.g., David Stasavage, *Does Transparency Make a Difference?: The Example of the European Council of Ministers*, in *TRANSPARENCY: THE KEY TO BETTER GOVERNANCE?* 164, 166 (Christopher Hood & David Heald eds., 2006) [hereinafter Stasavage, *Does Transparency Make a Difference?*] (developing a model for thinking about the costs of transparency in international relations); David Stasavage, *Polarization and Publicity: Rethinking the Benefits of Deliberative Democracy*, 69 *J. POLITICS* 59, 60 (2007) [hereinafter Stasavage, *Polarization and Publicity*] (“Publicity of debate may prompt representatives to use their actions or statements as signals that they are being faithful to constituent interests.”). This literature largely cuts against the traditional findings, in political science and economics, that transparency makes agents perform better. See ARCHON FUNG ET AL., *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* (2008).

21. Andrea Prat, *The More Closely We Are Watched, The Better We Behave?*, in *TRANSPARENCY: THE KEY TO BETTER GOVERNANCE?*, *supra* note 20, at 101–02 (noting that despite the assumption in much of economics, agents perform better when transparency is reduced).

22. *Id.*

23. See *infra* Section III.B.

24. See *infra* Part V.



may get less transparency than we demand: history suggests that regulators are underincentivized to be transparent and so it may make sense to generally demand more transparency than one wants, even if that means that sometimes the result is too much transparency.

Assessing the costs of excess transparency is difficult because these costs are much less salient than the costs of too little transparency. An open records policy that leads rulemakers to privilege optics over substance is unlikely to generate any headlines; it may not even be noticeable. But when political leaders engage in self-dealing behind closed doors, the harm is tangible and the scandal makes for front page news. There is an asymmetry in the way we assess transparency—a sort of transparency loss aversion<sup>25</sup>—that leads us to fear the loss of transparency but not the costs of having it. This asymmetry is worth noting because it might suggest that we underinvestigate the costs of transparency policies.

This Article begins with descriptive claims. Part I shows that opacity is a regular and widely accepted feature of our current legal regime; we find opacity in legislation, adjudication, and enforcement. Part II provides a taxonomy of transparency types. In Part III, I argue that maximal transparency is not the same thing as optimal transparency. Welfare is often maximized by dialing down one of the dimensions of transparency. In Part IV, I explore some design implications. While regime designers tend to focus on modulating law's obligations—by softening its terms or enforcement mechanisms—they may be wiser instead to focus on other types of transparency. And finally, in Part V, I assess how and when regime designers might make better tradeoffs among different kinds of transparency types. This Part offers several distinctions that—regardless of the persuasiveness of my normative argument—ought to be relevant to any attempt to draw a sensible line between maximal and minimal transparency.

## I. TRANSPARENCY TODAY

We tend to draw a somewhat haphazard line between open government and closed government: we might demand that the Office

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25. See Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039, 1041 (1991) (describing how people tend to prefer avoiding a loss to an equivalent gain). Another way to describe this is that losses in transparency are more salient and therefore we focus on them, given the availability heuristic. Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, COGNITIVE PSYCHOL., Sept. 1973, at 207, 211–12.

of Legal Counsel release its legal opinions,<sup>26</sup> but allow our diplomats to negotiate behind closed doors.<sup>27</sup> Or we might rail against the secrecy of the Star Chamber,<sup>28</sup> but allow the Supreme Court to issue opinions that disclose neither their reasons nor their author.<sup>29</sup> Here are a few examples that illustrate the simple point that Americans already accept a great deal less than maximal transparency in our legal system, and we do so at every level of the regulatory process.

### A. Semitransparent Rulemaking

Until relatively recently, members of Congress voted on pending legislation by anonymous ballot.<sup>30</sup> Before 1970, the House of Representatives voted by unrecorded teller votes—the vote totals were recorded, but the individual votes were not. Committee voting was even less transparent: meetings were private; votes unrecorded; and even the fact of a vote could be kept a secret.<sup>31</sup>

This changed when the Legislative Reorganization Act of 1970 was passed.<sup>32</sup> That bill called for, among other things, amending the Rules of the House of Representatives to reflect the following change:

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26. Ryan Lizza, *The Lawyer and the Kill-List Memo*, NEW YORKER (May 22, 2014), <https://www.newyorker.com/news/daily-comment/the-lawyer-and-the-kill-list-memo> [https://perma.cc/P3KY-GN9Y] (describing the public campaign to release the Office of Legal Counsel memo authorizing the use of deadly force against an American armed combatant overseas); see also *N.Y. Times v. U.S. Dep't of Justice*, 752 F.3d 123, 144 (2d Cir. 2014) (dismissing a FOIA lawsuit to compel the publication of the memo).

27. The view that diplomacy necessitates something less than full transparency dates to the earliest days of the republic. Thomas Jefferson was a firm believer in secret diplomacy, often using private citizens to ferry messages that he feared might otherwise become public. STEPHEN F. KNOTT, *SECRET AND SANCTIONED: COVERT OPERATIONS AND THE AMERICAN PRESIDENCY* 80–82 (1996) (describing Jefferson's at times laborious efforts at secrecy). Thomas Jefferson also explicitly noted that not all government affairs ought to be public. Letter from Thomas Jefferson to George Hay (June 17, 1807), in 3 *THE WORKS OF THOMAS JEFFERSON* 529, 529 (Paul Leicester Ford ed., federal ed. 1904) (“All nations have found it necessary, that for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary only.”).

28. LORD DENNING, *LANDMARKS IN THE LAW* 61–62 (1984).

29. See Baude, *supra* note 14 (describing the Court's use of orders and stays without opinions).

30. See Paul J. Quirk & Joseph Hinchliffe, *The Rising Hegemony of Mass Opinion*, in *LOSS OF CONFIDENCE: POLITICS AND POLICY IN THE 1970S*, at 30–31 (David Brian Robertson ed., 1998) (noting that prior to the Legislative Reorganization Act of 1970, the House of Representatives voted primarily by unrecorded teller votes and held committee meetings outside of the public's eye).

31. *Id.*

32. Legislative Reorganization Act of 1970, Pub. L. No. 91-510, §§ 102–04, 111–17, 84 Stat. 1140, 1143–45, 1151–55 (1970). The bill was developed by the Joint Committee on the Organization of Congress and was part of an overall effort to modernize congressional procedures. *The Legislative Reorganization Act of 1970*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART &

The result of each rollcall vote in any meeting of any committee shall be made available by that committee for inspection by the public at reasonable times in the offices of that committee. Information so available for public inspection shall include a description of the amendment, motion, order, or other proposition and the name of each Member voting for and each Member voting against such amendment, motion, order, or proposition, and whether by proxy or in person, and the names of those Members present but not voting.<sup>33</sup>

Similar changes applied to the Senate.<sup>34</sup> Related changes included public notice of hearings,<sup>35</sup> open hearings,<sup>36</sup> and broadcasting of committee hearings.<sup>37</sup> This meant that a Senator could no longer vote for or against a new law without publicly expressing a commitment that might upset one constituent or another (thereby increasing the chances that special interests could monitor representatives' voting behaviors). As Senator Packwood put it:

When we're in the sunshine, as soon as we vote, every trade association in the country gets out their mailgrams and their phone calls in twelve hours, and complains about the members' votes. But when we're in the back room, the senators can vote their conscience. They vote for what they think is the good of the country. Then they can go out to the lobbyists and say: "God, I fought for you. I did everything I could. But Packwood just wouldn't give in, you know. It's so damn horrible."<sup>38</sup>

The Council of the European Union is even less transparent than the U.S. Congress. The Council's meeting minutes are sealed from the public, and the group often arrives at policy decisions by consensus, without revealing how each minister voted.<sup>39</sup> The Council's lack of transparency has been heavily criticized.<sup>40</sup> How can the citizens in home states monitor their agents in the Council if deliberations are kept secret and individual ministers do not have to put their names on Council policy?<sup>41</sup>

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ARCHIVES, <http://history.house.gov/Historical-Highlights/1951-2000/The-Legislative-Reorganization-Act-of-1970/> (last visited Oct. 16, 2017) [<https://perma.cc/AG6J-GCWV>].

33. § 104(b), 84 Stat. at 1145.

34. § 104(a), 84 Stat. at 1145.

35. § 111, 84 Stat. at 1151.

36. § 112, 84 Stat. at 1151.

37. § 115, 84 Stat. at 1153.

38. Luban, *supra* note 17, at 187 (citing JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM 260 (1987)).

39. See Stasavage, *Does Transparency Make a Difference?*, *supra* note 20, at 170–72. As I explain below, the European Central Bank has a similar policy to the Council. See *infra* note 134 and accompanying text.

40. See *UK Bid to End Secret EU Debates*, BBC NEWS (Sept. 6, 2005), <http://news.bbc.co.uk/2/hi/europe/4218776.stm> [<https://perma.cc/RZ7S-HMXC>] (“Critics have long complained that the Council’s practice of debating laws behind closed doors puts the EU on a par with the worst dictatorships.”).

41. Much of the literature on this problem focuses on the principal-agent problem associated with reduced transparency. See, e.g., Prat, *supra* note 21 (noting that despite the assumption in much of economics, agents perform better when transparency is reduced).

But despite its obvious costs, the closed-door consensus policy has also been defended by those who say it serves several useful functions. First, it may allow legislators to pursue policies that benefit the electorate, despite the political pressures of a special interest. Meeting privately, and shielding any individual legislator's vote by only issuing a group decision, may relieve some of the pressure to posture for certain constituents.<sup>42</sup> Second, these closed-door and group-vote rules could prevent legislators from posturing altogether, which may lead to better outcomes on balance.<sup>43</sup> Finally, shielding deliberations may allow legislators to form coalitions they otherwise might not form. For example, legislators from two rival political parties might be wary of publicly appearing to align on any issue, even on some unrelated matter where both sides could benefit. In this scenario, shielding the legislators behind the law could provide them with the cover needed to forge productive coalitions. The benefits of anonymity may be especially beneficial in the early stages of the law's development, when parties may have different reasons for supporting a bill or when coalitions are just being built.

### *B. Semitransparent Adjudication*

On February 9, 2016, the Supreme Court issued five identical orders blocking the implementation of President Obama's clean energy plan.<sup>44</sup> The rulings arrived without an explanation. The court simply stated that the stays had been granted "pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for writ of certiorari, if such writ is sought."<sup>45</sup> The public was left guessing about the reasons.<sup>46</sup>

This is not uncommon: an increasing number of the Supreme Court's orders and stays are not accompanied by a decision indicating

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42. Stasavage, *Does Transparency Make a Difference?*, *supra* note 20, at 166 ("[T]ransparency can also have costs involving increased incentives for representatives to posture and to ignore private beliefs about appropriate policies.").

43. *Id.* at 168–69 (describing the "political correctness effect" on representatives' voting behavior).

44. *West Virginia v. EPA*, 136 S. Ct. 1000 (2016); *Murray Energy Corp. v. EPA*, 136 S. Ct. 999 (2016); *Chamber of Commerce v. EPA*, 136 S. Ct. 999 (2016); *North Dakota v. EPA*, 136 S. Ct. 999 (2016); *Basin Elec. Power Coop. v. EPA*, 136 S. Ct. 998 (2016).

45. See sources cited *supra* note 44.

46. See Jonathan H. Adler, *Supreme Court Puts the Brakes on the EPA's Clean Power Plan*, WASH. POST (Feb. 9, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/> [<https://perma.cc/5BZP-LVGZ>] (suggesting several alternative reasons for why the stays were granted).

the reason for the Court's judgment.<sup>47</sup> Indeed, one recent study suggests that only three percent of all federal trial court decisions are explained in a published opinion.<sup>48</sup>

Without a statement of reasons, a court's ruling may at best signal an ambiguous message rather than a clear commitment to any particular principle. Suppose, for example, that the Court had resolved *Obergefell* without issuing an opinion. Would the case be celebrated as a commitment by the court to the principle of the fundamental value of marriage as it is today?<sup>49</sup> Perhaps. But it would also leave the door open to a number of competing interpretations. The Court's ruling without an opinion might be explained as a symbol of the Court's commitment to gay rights or, just as compellingly, as a statement by the Court about the Full Faith and Credit Clause. As Bobbitt and Calabresi note, when courts do not give reasons for their decisions, they leave more room for interpretation.<sup>50</sup>

This lack of reason-giving has been heavily criticized.<sup>51</sup> Reason-giving is traditionally thought to be a critically important component of a legitimate legal system,<sup>52</sup> and even to the liberal legal order.<sup>53</sup> But there are good reasons that a court might choose not to share its reasoning. Perhaps the best-known justification for not giving reasons is Sunstein's idea that by deciding the case but not expounding too

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47. See Baude, *supra* note 14, at 14 (“Not only are we often ignorant of the Justices’ reasoning, we often do not even know the votes of the orders with any certainty.”).

48. See David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 710 (2007) (noting that of 5,736 recorded judicial actions, only 178 had accompanying opinions).

49. See Editorial, *A Profound Ruling Delivers Justice on Gay Marriage*, N.Y. TIMES, June 27, 2015, at A20 (“The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.” (quoting Justice Kennedy)).

50. See GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 211 n.39 (1978):

When a court is working its way toward a new doctrine but does not yet know which of various competing principles will be appropriate, the opinion which does not stand for anything, if used sparingly, may be the least willful step the court can take. It may permit the court to test the water without imposing its will on later courts.;

see also Sunstein, *supra* note 16, at 1755:

Whenever a court offers reasons, there is a risk of future regret—not simply because the court may be confined in a subsequent case and thus have to avoid inconsistency, but because the reasons offered in case A may turn out, on reflection, to generate a standard, a principle, or a rule that collides with the court’s considered judgment about case B.

51. See Baude, *supra* note 14, at 9–10 (questioning the “consistency and transparency of the Court’s processes[.]” and stating that reform could add to the “substantive legitimacy” of certain decisions).

52. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19–20 (1959) (summarizing the importance of neutral and general reason-giving in the law).

53. See RAWLS, *supra* note 16, at 216–20 (arguing that citizens demand of each other a public reasoning of their decisions).

much on the principles that inform the court's reasoning, courts engender incompletely theorized agreements—agreements between people who can converge on the particular outcome of a case, but may disagree about their reasons why.<sup>54</sup>

Not giving reasons is far from the only way that courts are less than fully transparent. Courts also regularly issue per curiam opinions, which may be fully reasoned but which do not reveal the author of the opinion.<sup>55</sup> Anonymity in judicial decisionmaking has attracted far less scholarly attention than failures to give reasons, but it could conceivably be critiqued for the same reasons. Transparency advocates presumably want to know not only which court decided the case, but how each judge voted and why. Yet anonymity might enable judges—and other collective bodies—to regulate as a group, without putting their individual names on the line.<sup>56</sup> When the Ninth Circuit recently granted an injunction blocking the President's executive order barring immigrants from seven majority-Muslim countries, the court did so in a per curiam opinion.<sup>57</sup> One of the effects this had was to suggest to the public that the court spoke as one voice; the expressive impact of the court's ruling was different than if the court had issued an opinion signed by the individual judges.<sup>58</sup> It also shielded the judges from potential recrimination by the President.<sup>59</sup>

### C. Semitransparent Enforcement

In early 2016, when the Federal Bureau of Investigation (“FBI”) approached Apple for assistance in accessing the contents of a suspected terrorist's phone, the technology firm found itself in a bind.<sup>60</sup> Apple has

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54. See Sunstein, *supra* note 16, at 1735–36 (noting that this “agreement on relative particulars . . . is an important source of social stability and an important way for diverse people to demonstrate mutual respect”).

55. Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1198 (2012) (describing how the Court's use of per curiam opinions is an attempt to frame how an opinion is received).

56. See *id.* (arguing that per curiam opinions give judges some anonymity).

57. *Washington v. Trump*, No. 2:17-cv-00141, 2017 WL 469608, at \*1 (9th Cir. Feb. 4, 2017).

58. Stephen I. Vladeck, *President Trump Can Rant, Tweet, and Make Threats, but the Courts Are Immune to His Antics*, N.Y. DAILY NEWS (Feb. 9, 2017, 11:52 PM), <http://www.nydailynews.com/news/politics/courts-immune-president-trump-antics-article-1.2968936> [<https://perma.cc/LH9C-ECY5>] (arguing that the court's use of a per curiam opinion made it clear “that all that followed was spoken in one, collective voice”).

59. See *id.* (noting that the per curiam opinion not only allowed the judges to speak as one voice, but also “den[ie]d the President the opportunity to single them out individually”).

60. See Katie Benner & Nicole Perlroth, *How Tim Cook, in iPhone Battle, Became a Bulwark for Digital Privacy*, N.Y. TIMES, Feb. 19, 2016, at A1 (noting that Apple has had difficulty reconciling governmental requests for Apple product users' personal information and the users' right to privacy).

a long history of assisting law enforcement and generally takes great pains to comply with the law.<sup>61</sup> Yet Apple's customers are increasingly wary of government efforts to access their data.<sup>62</sup> So Apple asked the FBI to make its request under seal;<sup>63</sup> if the order were sealed, Apple could comply with its legal obligations without "making a statement" that might upset its customers.<sup>64</sup>

When Apple asked the FBI to make its request for assistance under seal, it was not asking for something unprecedented.<sup>65</sup> In fact, law enforcement agents regularly attempt to enforce the law quietly—thereby without forcing the subject of the enforcement action to signal a broader commitment to some principle associated with the law. In the wake of the September 11, 2001, terrorist attacks, the FBI increasingly relied on Patriot Act authority<sup>66</sup> to issue National Security Letters—orders that compelled the production of evidence but prevented the target from telling anyone about the order.<sup>67</sup> The use of National Security Letters is routine; one estimate puts their use at thirty thousand letters issued per year.<sup>68</sup> The secret law enforcement orders were considered critical to a number of counterterrorism operations because they enabled the FBI to enforce the law with regard to a particular target, without signaling to a wider community that target's cooperation with the government.<sup>69</sup> This decoupling of obligation and signal is common in civil actions, too. Settlement agreements are typically confidential because the parties may be willing to accept

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61. See Shane Harris, *Apple Unlocked iPhones for the Feds 70 Times Before*, DAILY BEAST (Feb. 17, 2016, 7:05 PM), <http://www.thedailybeast.com/articles/2016/02/17/apple-unlocked-iphones-for-the-feds-70-times-before.html> [<https://perma.cc/LJR7-7M48>] (noting that Apple "since 2012, had been providing its customers' information to the FBI and the NSA[,] and "has unlocked phones for authorities at least 70 times since 2008").

62. See Benner & Perlroth, *supra* note 60 (writing that the information Apple users store on devices has become increasingly personal).

63. *Id.* ("Apple had asked the F.B.I. to issue its application for the tool under seal. But the government made it public, prompting Mr. Cook to go into bunker mode to draft a response . . .").

64. This is Cass Sunstein's definition of legal expressivism. See Sunstein, *supra* note 8, at 2024 ("In this Article I explore the expressive function of law—the function of law in 'making statements' as opposed to controlling behavior directly.").

65. See Benner & Perlroth, *supra* note 60 (noting that Apple has worked with the FBI in the past).

66. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 119, 120 Stat. 192, 219 (2006).

67. See Barton Gellman, *The FBI's Secret Scrutiny*, WASH. POST (Nov. 6, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/05/AR2005110501366.html> [<https://perma.cc/ER3M-XWFB>] (noting that recipients of National Security Letters must provide specific personal information and are "permanently barred from disclosing the letters").

68. *Id.*

69. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS 48 (2007), <https://oig.justice.gov/special/s0703b/final.pdf> [<https://perma.cc/SKA5-3DDP>].

certain obligations—pay for the damage they caused, apologize to their victims—but without making a public statement and incurring broader reputational costs.<sup>70</sup>

## II. TRANSPARENCY TYPES

The examples above show that the legal system is far from maximally transparent. But more importantly, it is semitransparent in different ways. A legislature that does not record its votes may be public about the law's *obligations* and the *reasons* behind it, but not *attribute* the individual actors behind the law's passage. A court that issues a summary order may establish clear *obligations*, which can be *attributable* to the named judges behind the decision, but if the court does not issue an opinion it may be difficult to divine the *reason* for the obligation. National Security Letters and other forms of quiet enforcement may be transparent about the *obligation* imposed, the *reason* for it, and even *attribute* the source of the obligation, but only make this known to the recipient of the letter—not to the wider *public*.

This offers the beginnings of an analytic framework for parsing four different aspects of transparency. The law is maximally transparent when it is: (1) clearly defined; (2) clearly justified; (3) maximally public; and (4) specifically attributable. Transparency can be increased or decreased along each of these dimensions.

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70. See Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 878 (2007) ("Part of the liability (L) to defendants is reputational cost (L<sub>R</sub>), the cost of undesirable public knowledge of a verdict or settlement it pays."); see also Gregg Stevens & Lorin Subar, *Confidentiality in Settlement Agreements Is a Virtual Necessity*, GPSOLO, Nov.–Dec. 2012, [http://www.americanbar.org/publications/gp\\_solo/2012/november\\_december2012/privacyandconfidentiality/confidentiality\\_settlement\\_agreements\\_is\\_virtual\\_necessity.html](http://www.americanbar.org/publications/gp_solo/2012/november_december2012/privacyandconfidentiality/confidentiality_settlement_agreements_is_virtual_necessity.html) [<https://perma.cc/5WEJ-AUDV>] (providing several reasons litigants could prefer confidentiality agreements).



TABLE 1: TRANSPARENCY TYPES

|                      | More Transparent  | Less Transparent   |
|----------------------|---|--|
| <b>Obligation</b>    | Clear Rule<br><i>Rule is clear, specific, understandable</i>  | Unclear Rule<br><i>Rule is vague, ambiguous, or otherwise hard to interpret</i>  |
| <b>Justification</b> | Clear and Specific Reason<br><i>Statement is clear enough to suggest a particular principle or set of principles to which one is committing</i> | Unspecified Reason<br><i>Statement is so vague or ambiguous that it does not articulate a particular principle or set of principles to which one is committing</i> |
| <b>Publicity</b>     | Large Audience<br><i>Public statement: addressed to everyone, known to everyone</i>   | Small Audience<br><i>Private statement: tonal effects for in-group only</i>  |
| <b>Attribution</b>   | Attributable & Committed<br><i>Party's identity is known and their commitment to the principle being expressed is clear</i>                     | Anonymous and/or Uncommitted<br><i>Party's identity is obscured and/or they express no commitment to the principle being expressed</i>                             |

These four dimensions are illustrated in Table 1 above. Each of these variables represents a relative value that lies somewhere on a spectrum from open to closed.

This Part examines each of these dimensions in isolation, keeping in mind that each is a part of a whole. For example, while the level of law's publicity may have a direct effect on transparency, it is not the only variable at play; nonpublic statements may still be transparent, just as some public statements may be opaque. Rather, the point is that *if* the law is *otherwise* transparent—that is, it articulates a clear obligation and a commitment to a particular justifying principle on behalf of an identifiable actor—then one way to make it less transparent is to make it less public. The same is true for the other dimensions of transparency. Even if the law publicly articulates a clear principle, it will not be maximally transparent if it does not also communicate a commitment on behalf of someone or something. Finally, even if an agreement is public and conveys a commitment to a clear set of obligations, it will not be maximally transparent if it does not also articulate a commitment to clear and particular principles.

*A. Obligation (Transparency About What)*

One aspect of transparency is clarity about the rules and the obligations they impose. There are many ways that rulemakers can be more or less transparent about the obligation itself. The classic distinction between rules and standards is instructive. Suppose that the law relies on a broad standard like “drive safely.” This obligation is less transparent in a certain sense than a rule that requires drivers to “drive 55 miles per hour or below.” How is the driver to know in the first instance what, specifically, the law requires? On its face, the law is less than fully open about its strictures. Vagueness, then, is a means of being less open about what the law requires.<sup>71</sup>

Another way that law might be less than fully transparent about its obligations is if there is large gap between what the law says it requires, and how it is enforced on the streets. For example, a speed limit of 65 miles per hour that is not, in fact, ever enforced at that limit is not entirely transparent about what sorts of obligations it imposes on its subjects. The subject of the law does not know everything they might know about the law from its publication; more information is needed. Perhaps the actual obligation imposed by the law is to drive slower than 75 miles per hour; beyond that limit, a ticket will be issued. In this scenario, predictable enforcement of a speed limit that is different from the published limit suggests that the law is less than fully transparent about its obligations.

The law can also be less than fully transparent about its obligations if it is unevenly and erratically enforced. For example, most pedestrians would be surprised to receive a ticket for jaywalking—because although most people know that there are rules against jaywalking, they are so rarely enforced that the actual obligation seems to be different than what is written. Perhaps the obligation is only to avoid jaywalking on days that the police are ticketing people; perhaps not. But the law, on its face, tells its subjects little about its obligations.

Transparency of obligation, then, is about how completely and openly the law states its constraints—which may be a matter of specificity, determinacy, and clarity about enforcement. If the law is less than fully clear about those things, it is not maximally transparent as to its obligations. As the next Section shows, the law’s transparency of obligation is largely independent of how much it says about why it exists, who it is aimed at, and on whose behalf. Indeed, if the obligation

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71. Vagueness does not always mean that the law is unclear as to what it requires—sometimes the obligation really is vague, just as the law is. But very often, the *de jure* law is vague but its *de facto* enforcement is not.

is vague, then people may have *more* latitude to articulate their own reasons for complying because there may be a wider range of acceptable behavior—they might be able to find a suitable behavior that is compliant.

*B. Justification (Transparency About Why)*

Another way that the law can be more or less transparent is the extent to which it clearly explains what principle justifies its obligations. For example, when a court issues a summary order, it may produce a clear legal obligation—binding one party in litigation, resolving a case or controversy—but without any explanation of the reasons behind the decision. Sometimes, the justification is implied in the outcome, without much reasoning required. But other times, the principle that informs the rule is quite difficult to divine. To continue the example from above, when the Supreme Court invalidated the Environmental Protection Agency’s clean energy plan in 2016, it did so without explaining itself.<sup>72</sup> The outcome of the case was crystal clear, but the public was left guessing as to the Court’s justification.<sup>73</sup>

To be sure, being unclear about the principle to which one commits does not necessarily entail being unclear about the specific obligations imposed by that commitment, only the *reasons for or principles behind* the obligation.<sup>74</sup> Indeed, the law regularly imposes clear obligations while being unclear about the reason—often in order to maintain a political coalition forged out of an incompletely theorized agreement. Incompletely theorized agreements are forged when people converge on particulars, such as the outcome of a particular case, even if they disagree on first principles upon which the case should be decided.<sup>75</sup> For instance, twelve jurors may agree that a defendant should be sentenced to ten years in prison, even if they disagree about the purpose of criminal punishment. The jury, in underspecifying the purpose of its criminal sentences, declines to articulate a commitment to a particular principle—it is inexpressive—thereby enabling incompletely theorized agreements among those who support the punishment for different reasons.

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72. See *supra* note 44 and accompanying text.

73. *Id.*

74. See *supra* Section I.B.

75. Sunstein, *supra* note 16, at 1735–36.

*C. Publicity (Transparency to Whom)*

Reducing the audience size of a statement has a number of effects. Perhaps the most obvious of these is that fewer people hear the expression and therefore fewer people are affected by it. If a man speaks loudly in a crowded room, his statement reaches a greater number of people than if he had whispered it. But the whisper also alters the statement. If someone says, “I love you,” to a room full of colleagues, it has a different meaning than if the same person pulls someone aside to whisper that phrase. So private messages are not just heard by fewer people; they also have a different tone than public messages.<sup>76</sup> This is especially the case where public, large-audience messages are the norm and the private message stands out as special or distinct. Indeed, when it was revealed that the National Security Agency had access to a wide swath of internet communications data, there was outrage about the fact of the access, but perhaps even more outrage about the fact that it had been kept quiet.<sup>77</sup>

Courts regularly manage the expressive impact of a trial by reducing the size of its audience. Whether a court decides to broadcast a trial, for example, is known to have a considerable effect on how many people the trial reaches. Perhaps most famously, the O.J. Simpson trial captivated audiences for months, and at least part of the explanation for this was the presence of cameras in the courtroom, which caught and amplified the expressive effect of nearly every aspect of the trial.<sup>78</sup> In the international criminal context, a similar effect can be seen. The Special Court for Sierra Leone has been praised for its outreach efforts, which included ensuring that its trials were broadcast by television and radio in both Sierra Leone and neighboring Liberia.<sup>79</sup> While these large-volume approaches have certain benefits, there are also risks. When the Special Court for Sierra Leone, sitting in The Hague, issued live broadcasts of the trial of Charles Taylor, for example, it sparked

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76. See Tara L. Orchard & A. Daniel Yarmey, *The Effects of Whispers, Voice-Sample Duration, and Voice Distinctiveness on Criminal Speaker Identification*, 9 APPLIED COGNITIVE PSYCHOL. 249, 249 (1995) (noting the differences in tone in public versus private messages).

77. See Dan Seifert, *Secret Program Gives NSA, FBI Backdoor Access to Apple, Google, Facebook, Microsoft Data*, VERGE (June 6, 2013, 6:04 PM), <http://www.theverge.com/2013/6/6/4403868/nsa-fbi-mine-data-apple-google-facebook-microsoft-others-prism> [<https://perma.cc/F59K-7NWE>] (noting that the program, “in action since 2007[,]” was highly classified and “the only members of Congress that knew about PRISM’s existence were bound by oath not to speak of it publicly”).

78. See Christo Lassiter, *TV or not TV—That is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928, 930 (1996) (describing the O.J. Simpson trial as “perhaps the most watched event in history”).

79. See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 385 (4th ed. 2011) (“The Special Court for Sierra Leone showed itself to be more engaged with the local population from the outset of its work.”).

protests in Monrovia, Liberia.<sup>80</sup> Whatever one thinks about the merits of doing so, a small-audience approach, one that did not broadcast the trial on television, may have been less inflammatory.

Courts have other mechanisms for reducing publicity. When a court decides to hold some aspect of a trial *in camera*, it reduces the audience for those aspects of the trial. Criminal courts regularly hear testimony *in camera*, or otherwise obscured from the public, out of respect or concern for the witnesses, despite the considerable expressive power of witness testimony and the general desire to make trials as public as possible.<sup>81</sup> The Special Court for Sierra Leone, for example, has ruled that child witnesses always have the opportunity to testify *in camera*.<sup>82</sup> This rule is not motivated out of a concern for reducing the expressive content of this testimony—if anything, the court would likely prefer to broadcast this vivid and moving testimony far and wide. But the rule nonetheless reduces the expressive reach of this testimony.

To summarize, the mechanisms for reducing the publicity of legislation include: not publishing negotiations; having negotiations in secret; not revealing the identities of the members in a negotiation; not publishing the normative goals of the law, even if the law itself is made public; and more. Options for reducing the publicity of an adjudication include: *in camera* proceedings; closed courtrooms; media blackouts; managing outreach campaigns in a way that reveals the outcome of a trial, but not its jurisprudential goals; and more. Options for enforcement include: meetings in private—neither the fact that the meeting has occurred nor its contents are public; meetings in secret—the fact that the meeting occurs is public but its contents are not; and monitoring efforts in which the subjects are not named publicly.

Scholars have long documented the important effect that publicity can have on the law.<sup>83</sup> For example, scholars have examined how negotiating in secret can change the willingness of parties to

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80. See *Charles Taylor Verdict: As It Happened*, BBC NEWS (Apr. 26, 2012), <http://www.bbc.co.uk/news/world-africa-17852257> [<https://perma.cc/5YK6-WH2Y>] (“Eager youth who had gathered all morning to listen to a live broadcast of the trial became angry, saying Taylor had been cheated. They brandished placards, which read: ‘We love you Taylor, God willing you will come back,’ and ‘He’s not guilty.’”).

81. See Marie-Bénédicte Dembour & Emily Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT’L L. 151, 161 (2004) (noting that oral testimony by witnesses is often foregone in international criminal trials out of concern for witness safety).

82. See *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, ¶ 16 (Special Ct. for Sierra Leone July 5, 2004).

83. See generally Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885 (2006) (describing the tensions inherent in the concept of open government); Luban, *supra* note 17, at 154.

compromise or posture to constituents.<sup>84</sup> But publicity has largely been ignored as a component of the law's expressive—or, in this case, inexpressive—capacity. If an agreement is not public, or its enforcement is secret, it cannot express to a broad audience its underlying set of values or regulatory goals.

#### *D. Attribution (Transparency by Whom)*

What kind of statement the law makes also turns on who makes it. Just as a red shirt makes more of a statement in South Los Angeles than it might elsewhere, the law makes more or less of a statement depending on who we attribute the law to, or whether we attribute it to anyone at all. For example, the expressive impact of a criminal sanction meted out by the state is different from that meted out by a vigilante mob.<sup>85</sup> The link between identity and commitment is perhaps most explicit in public law, where a state formalizes its legal commitments by signing its name.<sup>86</sup> The very act of signing a treaty, for example, is considered a significant step by a nation toward adopting an agreement, despite the fact that signing treaties does not necessarily give them any legally binding effect in that state's domestic legal system.<sup>87</sup> Moreover, even when states comply with the norms in a treaty, and have passed domestic legislation suggesting that they support the values expressed by the treaty, treaty signing itself constitutes an important expression of consent to be bound.<sup>88</sup> In private arrangements, too, parties put a premium on putting their names and reputations on the line.

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84. See Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 583–85 (2005) (inferring that behavior and agreements change depending on how public they are). For a review of informal, tacit, and secret agreements, see Charles Lipson, *Why Are Some Agreements Informal?*, 45 INT'L ORG. 495, 495–507 (1991). Lipson notes that reduced publicity can reduce the risk of controversy. *Id.* at 500 (“[I]nformal agreements are generally less public and prominent, even when they are not secret . . . Informal agreements can escape the public controversies of a ratification debate.”).

85. For an account of the rituals undertaken by vigilante mobs in order to appear to have greater legitimacy—the sort associated with a legitimate criminal justice system—see CHRISTOPHER WALDREP, *THE MANY FACES OF JUDGE LYNCH: EXTRALEGAL VIOLENCE AND PUNISHMENT IN AMERICA* 68 (2002) (“Lynchers were no mob, ‘but emphatically *the people*,’ their defenders insisted.” (emphasis added)).

86. See Vienna Convention on the Law of Treaties, Preamble, May 23, 1969, 1155 U.N.T.S. 331, 332, *reprinted in* 8 I.L.M. 679 (entered into force Jan. 27, 1980) (noting the special role that treaties play in creating international law and binding states in a system of mutual consent).

87. See Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171, 173 (2003) (“As a matter of domestic law, many governments condition their acceptance of treaty obligations on the passage of implementing legislation.”).

88. In order to be bound by an international agreement, a state must do more than comply; the state must “express[ly] consent to be bound by a treaty.” *Fact Sheet #1: Understanding International Law*, UNITED NATIONS (2011), [https://treaties.un.org/doc/source/events/2011/press\\_kit/fact\\_sheet\\_1\\_english.pdf](https://treaties.un.org/doc/source/events/2011/press_kit/fact_sheet_1_english.pdf) [<https://perma.cc/EH57-B8JG>]. Signature is one way to do this.

The depth of any particular commitment also cannot be determined in a vacuum—it too depends on the identity of the person making the commitment.<sup>89</sup> The expressive nature of a particular commitment therefore depends on (a) the strength of the commitment and (b) the identity of the actor making the commitment.<sup>90</sup> For example, the idea of a people’s right to self-determination has different expressive content coming from a small country with no colonies than from a colonial power for whom such an expression would be politically costly.<sup>91</sup> Regulators can make the law less expressive by modulating these two features: shielding the identity of the speaker, and reducing the speaker’s commitment to the principle in question.

In fact, regulators often obscure the specific provenance of a regulatory law or policy.<sup>92</sup> This can be achieved by shielding the identities of regulators, or by bundling them into a group, allowing each to claim that their voice was not the voice expressed by the group.<sup>93</sup> Per curiam opinions are one example of this phenomenon. Group opinions, signed by the court as a whole, shield each individual judge from taking full ownership over the final expression; each judge can later say that they were outvoted by the group, that their individual voice was muted.<sup>94</sup> This sort of reticence may be strategically deployed in highly divisive cases—where the court is concerned with the political consequences of its ruling.<sup>95</sup> Or it may be done in cases where the judges

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See Vienna Convention on the Laws of Treaties, *supra* note 86, arts. 11–12, 1155 U.N.T.S. at 331; see also Goodman & Jinks, *supra* note 87, at 173 (noting that voluntary signature is one way a state becomes bound to a treaty).

89. See Raustiala, *supra* note 84, at 584 (“Depth clearly varies for each party to an agreement; what is deep for one state may be shallow for others.”).

90. See, e.g., Sunstein, *supra* note 8, at 2028 (“When the Court makes a decision, it is often taken to be speaking on behalf of the nation’s basic principles and commitments.”).

91. This is partly an explanation for why England notoriously opposed any mention in the Universal Declaration of Human Rights to people’s right to self-determination. ELIZABETH BORWARDT, A NEW DEAL FOR THE WORLD: AMERICA’S VISION FOR HUMAN RIGHTS 187–89 (2005).

92. This is a subject addressed in part by the clarity-of-responsibility literature. See, e.g., G. Bingham Powell, Jr. & Guy D. Whitten, *A Cross-National Analysis of Economic Voting: Taking Account of the Political Context*, 37 AM. J. POL. SCI. 391, 391 (1993) (describing how economic voting depends in part on the clarity of responsibility that voters can ascribe to policymakers).

93. Juries are one common example of a decentralized voice in governance. See CALABRESI & BOBBITT, *supra* note 50, at 57.

94. This is why some scholars have argued that per curiam opinions hinder judicial accountability. See Robbins, *supra* note 55, at 1212 (“[T]hose opinions that are issued per curiam cannot have an impact on the author’s public image because the author remains anonymous.”).

95. See *id.* at 1203 (“At times the per curiam has been a convenient tool for the Supreme Court in deciding controversial cases . . .”). It has also been argued that the per curiam opinion was deployed for just this reason in *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam). See Linda Krugman Ray, *The Road to Bush v. Gore: The History of the Supreme Court’s Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517, 569 (2000).

come from different cultures or even different jurisdictions and seek acceptance for their ruling among all relevant communities.

The European Court of Justice, for example, exclusively issues unanimous opinions.<sup>96</sup> The inability of judges to file individual dissents means that the court speaks with a different voice than if the court issued a series of different opinions.<sup>97</sup> As scholars have noted, “unanimous decisions have insulated individual judges from political pressure from their governments.”<sup>98</sup> Because it is impossible to identify whether a particular decision was the result of one judge’s efforts or another’s, none of the judges’ identities is tied particularly strongly to the court’s opinions.<sup>99</sup> The same dynamic can also be seen, albeit to a lesser degree, with the United Nations Human Rights Committee, which files opinions on a consensus format.<sup>100</sup> When the Committee issues an opinion, it does so as a group, speaking in the more removed and indistinct voice of the committee.<sup>101</sup>

Taking these different aspects of a speaker’s identity together suggests something like a spectrum, one that runs from one extreme, where an actor publicly commits to a principle, to the other extreme, where an actor rejects the principle. In the middle is an actor who expresses no commitment.

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96. There is an in-depth discussion of this practice in Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 326–27 (1997). See also PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES AND MATERIALS 95 (5th ed. 2011) (describing the opinions of the European Court of Justice).

97. Helfer & Slaughter, *supra* note 96, at 326–27 (noting that the unanimity rule “allows the Court to speak as the uniform and quasi-mystical ‘voice of the law’” (quoting Martin Shapiro, *Comparative Law and Politics*, 53 S. CAL. L. REV. 537, 538 (1980))).

98. *Id.* at 327 (citing DERRICK WYATT & ALAN DASHWOOD, EUROPEAN COMMUNITY LAW 109 (1993)).

99. Because of the court’s exclusive reliance on unanimous opinions, “it is impossible to accuse a judge of being insufficiently sensitive to national interests or of having ‘let his government down’, no one outside the Court can ever know whether he vigorously defended the position adopted by his own country or was in the forefront of those advocating a ‘Community solution.’” T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 59 (3d ed. 1994) (cited in Helfer & Slaughter, *supra* note 96, at 327).

100. Helfer & Slaughter, *supra* note 96, at 343; see also Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT’L L.J. 133, 135 (1993) (decrying the ambiguity of the European Court of Human Rights’ consensus method and concluding that “the failure to articulate with precision the scope and function of the consensus inquiry poses a potentially grave threat to the tribunals’ authority as the arbiters of European human rights”).

101. Helfer & Slaughter, *supra* note 96, at 343 (“The Committee then authors an opinion, ambiguously referred to in the Optional Protocol as the ‘views’ of the Committee.”).



TABLE 2: SPECTRUM OF COMMITMENTS

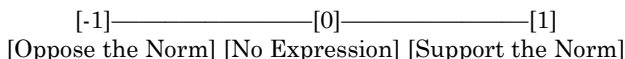


Table 2 models these various ways of modifying a speaker’s commitment to a particular principle. Position [0] occurs where the identity of the target of a legal expression is unknown, or where the identity of the source of a legal expression is unknown, making it hard to pin them to a particular commitment.<sup>102</sup> Position [-1] occurs where an actor explicitly opposes a particular commitment. If the actor is privately motivated to uphold the principle, positions [-1] and [0] both shield that private motivation from public view. While legal scholarship suggests that legal obligations are formed and fulfilled at position [1], this analysis suggests that in fact there is important regulatory activity that happens at position [0] and even at position [-1].

### III. THE TRANSPARENCY TAX

Transparency has costs, both obvious and nonobvious. It costs something just to announce that a meeting will be public, let alone to make accommodations for the public at that meeting.<sup>103</sup> But these costs are largely a matter of resource constraints; with enough resources, these costs wither. Yet there are other costs, which cannot simply be paid to go away. Principal among these is that transparency narrows the range of acceptable interpretations about what the law means.

The law imposes obligations—to do or not do something—but it also makes a statement about values, and in particular it makes a statement on behalf of someone.<sup>104</sup> In the regulatory context, this typically refers to the state of mind of regulators who seek to make a statement about the normative desirability of some set of actions. Anti-

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102. Many international agreements only concern the parties to the agreement. Here, the targets of the law are also the source of the law—the states that sign an international treaty, for example, are also the subjects of the legal regime created by the agreement. It is therefore useful to distinguish between reticence about the identity of the target of a particular norm and reticence about the identity of the source of a particular norm. For example, we may distinguish between hiding the identity of the state *proposing a treaty* from hiding the identity of a party against whom some provision of the treaty is being enforced.

103. In California, the state recently suspended a rule that required the posting of agendas of open-records meetings seventy-two hours in advance of the meeting, which was costing the state an estimated \$96 million to administer. Brian Joseph, *Cost to Post Public Meetings: \$96 Million?*, OC REGISTER (July 23, 2012), <http://www.oregister.com/taxdollars/strong-478849-http-href.html> [https://perma.cc/P5DB-UVQT].

104. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1506 (2000) (noting that the label “expressive” “refers to the ways that an action or a statement (or any other vehicle of expression) manifests a state of mind”).

smoking campaigns are a classic example. Regulations requiring tobacco companies to depict cancerous lungs on their cigarette packages express disapproval of smoking and thereby discourage it; while the regulation does not prohibit smoking, it expresses a strong statement of condemnation.<sup>105</sup> Expressive obligations publicly convey a commitment to a particular principle, the reason for the obligations being imposed. Expressive commitments are broadcast to a wide audience and can be seen as characteristic of the actor making the commitment. Something is expressive, in other words, if it makes a public statement of commitment to a particular value or regulatory goal.

This helps to explain why regulators spend a great deal of time trying to shape the expressive content of their actions. Judicial opinions, for example, may clarify the law's *obligations*, but they also frequently clarify the *reason* for the law. But courts do not always issue opinions, and even when they do they do not always explain their reasoning. This suggests that judges do not always seek to maximize expression. Sometimes they choose to be inexpressive.

There are a number of reasons why regulators might choose to make less rather than more of a statement. Expressive obligations can be reputationally costly to enter into or to enforce; they can inhibit incompletely theorized agreements; and they can be inflexible in uncertain or changing circumstances. Inexpressive obligations promise to alleviate these concerns. Specifically, semitransparency promises to buy regulators time, reduce conflict, manage reputational concerns, and give actors a measure of plausible deniability. What follows, then, is a catalogue of the way that transparency makes the law more expressive and therefore more costly.

### *A. Crowding Out Effects*

Clear expressions of commitment to a particular norm on behalf of a particular actor can crowd out alternative explanations for what the law means. For example, while many people agree that a criminal defendant should be punished for his crimes, they may disagree about the reason.<sup>106</sup> Some may think he deserves the punishment as a moral matter; some think his punishment is an important step for community healing; some think it is a deterrent to future criminals; and so on. If

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105. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1025–34 (1995) (explaining the effects of social disapproval on behavior).

106. *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Trial Judgment (Special Court for Sierra Leone Mar. 2, 2009).

the court expresses a public commitment to a singular sentencing goal, it threatens the viability of this rough coalition of support for the conviction.<sup>107</sup> Clarity about the purpose of sentencing could even provoke backlash. For example, imagine a criminal court issuing a sentence explaining that the defendant's actions violated community norms and were morally repugnant, and that the defendant therefore deserved moral condemnation.<sup>108</sup> Such language of moral righteousness could embolden and even entrench the defendant's partisans. Judges might fear that this could undermine their goal of conflict resolution.<sup>109</sup> There may still be good reasons for moral condemnation, but this at least suggests a plausible explanation for why judges might choose not to explain themselves fully.<sup>110</sup>

The above example shows crowding out effects when there is excess transparency about the reasons for the law. But crowding out effects also happen when there is excess transparency about who is behind the law. Suppose, for example, that legislators pass a bill that grants asylum to undocumented immigrant workers. The bill is made possible by a coalition of pro-business Republicans, who are responding to their constituents' desire for immigrant labor, and Democrats, who are responding to their constituents' demands for immigration reform.<sup>111</sup> Suppose also that in a politically divisive climate, it is costly

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107. The idea that political consensus is possible because of coalitions of overlapping consensus is famously captured by Rawls' concept of overlapping consensus. RAWLS, *supra* note 16, at 133–72; see also Sunstein, *supra* note 16, at 1735 n.8 (discussing the difference between overlapping consensus and incompletely theorized agreement).

108. This is precisely what concerns Dan Kahan about retributive punishments. Dan Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 422 (1999). This problem is perhaps especially stark in international criminal cases. In the so-called “CDF trial,” the Special Court for Sierra Leone described the court's sentencing goals as retributive, calling for “appropriate punishment which properly reflects the moral culpability of the offender.” Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment of the Sentencing of Monina Fofana and Allieu Kondewa, ¶ 27 (Special Court for Sierra Leone Oct. 9, 2007) (citing R. v. M., [1996] S.C.R. 500, ¶ 80 (Can.)). This is a common scholarly view. See Jens David Ohlin, *Towards a Unique Theory of International Criminal Sentencing*, in INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW 373, 387 (Goran Sluiter & Sergey Vasiliev eds., 2009) (suggesting that genocide and crimes against humanity are “moral catastrophes deserving of the highest condemnation we can muster”).

109. See Andrew K. Woods, *Moral Judgments & International Crimes: The Disutility of Desert*, 52 VA. J. INT'L L. 633, 670–71 (2012) (explaining that backlash from public opinion can undermine a judicial regime's legitimacy).

110. This contravenes the suggestion that international judges should more clearly articulate the reasons for their decisions. See Helfer & Slaughter, *supra* note 96, at 364 (explaining that international judges do not always articulate overarching methodology for balancing concerns). Kahan proposes that deterrence is unique among criminal law theories for its ability to mute cultural conflict. See Kahan, *supra* note 108, at 422 (explaining the problem that cultural conflict presents for expressive criminal sanctions).

111. This is hardly an exotic hypothetical. See George C. Edwards III, *Staying Private*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 275, 279–280 (Nate Persily ed., 2015) (describing how after failed public meetings, President Clinton met privately with Republicans in

for Republican and Democratic representatives to be seen collaborating with the enemy. In such a scenario, legislation may only be possible where there is imperfect attribution about who is behind the law. Maximal transparency—the kind that might reveal the political rivals who gave rise to the bill—would crowd out alternative explanations about where it came from.

One might resist this conclusion, since surely partisans will know what is really happening and see through the attempt to elide the reason for or source of the law. Perhaps. But plausible deniability is powerful. Semitransparency can give an actor enough plausible deniability needed to please two audiences at once. Consider the example of Facebook operating in repressive states. Human rights groups have been pressuring Facebook to abandon its “real name” policy—which prohibits user aliases—on the grounds that such policies are bad for human rights activists in repressive regimes.<sup>112</sup> Facebook has resisted these efforts, insisting it is a politically neutral platform for communication, rather than a human rights technology.<sup>113</sup> However, there is evidence that the firm has privately taken steps to create aliases for democracy activists in authoritarian states.<sup>114</sup> Such a situation may actually be optimal for activists: Facebook says they will not go out of their way to help human rights activists, thereby making it less likely that the online service will be blocked in repressive regimes, where the company can engage in foot-dragging and other steps to resist government requests for information that ultimately benefit activists.<sup>115</sup> Assuming that Facebook and related services would be kicked out of the repressive regime if they announced their

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Congress, which “made it easier for both sides to compromise,” giving Republicans the freedom to characterize the negotiations as a win on spending cuts, while Democrats could claim a victory on Medicare and other welfare programs).

112. See Letter from Ken Roth, Exec. Dir., Human Rights Watch, to Mr. Mark Zuckerberg, Chairman and CEO, Facebook, Regarding Human Rights Considerations Before Entering China Market (June 3, 2011), <https://www.hrw.org/news/2011/06/03/letter-mr-mark-zuckerberg-chairman-and-ceo-facebook-regarding-human-rights> [https://perma.cc/KNB4-GH53] (asking whether Facebook would alter its real name policy if the company were to enter China).

113. Verne G. Kopytoff, *Sites Like Twitter Absent from Free Speech Pact*, N.Y. TIMES, Mar. 6, 2011, at B4.

114. See Alexis Madrigal, *The Inside Story of How Facebook Responded to Tunisian Hacks*, ATLANTIC (Jan. 24, 2011), <http://www.theatlantic.com/technology/archive/2011/01/the-inside-story-of-how-facebook-responded-to-tunisian-hacks/70044/> [https://perma.cc/F9VK-8KZC] (explaining Facebook’s involvement with political protest pages in Tunisia).

115. There is some evidence that Facebook has at the least dragged its feet in shutting down anonymous accounts created by democracy activists in the Middle East—despite the company’s otherwise very swift removal of anonymous pages. See Mike Giglio, *ElShaheed: The Mysterious “Anonymous” Behind Egypt’s Revolt*, NEWSWEEK (Jan. 30, 2011, 6:45 PM), <http://www.newsweek.com/elshaheed-mysterious-anonymous-behind-egypts-revolt-66697> [https://perma.cc/4LPE-ZXJU] (discussing the anonymous Facebook page administrator ElShaheed).

commitment to helping human rights activists, those activists should prefer that Facebook be either inexpressive or hypocritical about human rights. Not only is Facebook better situated to provide services if they are in a country, but the aliases that activists seek are worth more if no one knows they are aliases. In this scenario, Facebook's reticence about online activism gives it a measure of plausible deniability to tell the repressive state that it is not directly inciting activism there.

One would think that the failure to openly commit to a set of norms is meaningless if everyone knows that the same commitment has been made privately. Yet in many areas of governance, there is a powerful distinction between what is publicly known but not admitted, and what is formally admitted.<sup>116</sup> Moreover, law and policy decisions implicitly acknowledge this distinction. For example, when National Security Agency whistleblower Edward Snowden released documents revealing that the United States had inserted surveillance devices inside foreign embassies, it sparked a diplomatic uproar.<sup>117</sup> But long before these revelations, it was well known that states bugged each other's embassies.<sup>118</sup> What explains the sudden uproar about a widely known phenomenon? One explanation is that with these revelations, the United States loses plausible deniability. This loss is enough to raise the profile of the issue, and to give groups an opportunity to express outrage, even though they were likely already aware of the practice.

### *B. Raising Reputational Costs*

Reputational sanctions are thought to be one of the core mechanisms through which expressive commitments work. Asking parties to make public commitments to clear norms—and naming and shaming them for violating those commitments—is premised on the

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116. See David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 564 (2013) (noting that “the lack of official acknowledgement is considered a key foreign policy advantage of planting information about the drone program” because it preserves plausible deniability about the program).

117. See Stephen Castle, *Report of U.S. Spying Angers European Allies*, N.Y. TIMES (June 30, 2013), <http://www.nytimes.com/2013/07/01/world/europe/europeans-angered-by-report-of-us-spying.html?mcubz=0> [<https://perma.cc/HXC8-U5UR>] (describing the effects of secret surveillance by the NSA).

118. See Richard Norton-Taylor, *Listen Carefully: Bugging Foreign Embassies is Nothing New*, GUARDIAN (July 3, 2013), <https://www.theguardian.com/world/2013/jul/03/bugging-foreign-embassies-nothing-new> [<https://perma.cc/52MT-GXGK>] (describing examples of spying at foreign embassies).

idea that high audience costs make for stronger commitments.<sup>119</sup> When audience costs for violating a commitment are significant, commitments are thought to be more credible because subjects face a penalty if they renege.<sup>120</sup> This suggests that expressive commitments are more credible the more powerful the audience is, and the more the commitment is seen as characteristic of the state, something for which they can be held accountable later.<sup>121</sup> Presumably, the more public the expression, the bigger the audience will be. Similarly, the clearer the expression, the clearer it is to identify a violation, and the stronger the commitment, the higher the cost for violating the commitment. Expressive agreements therefore have higher audience costs than their inexpressive alternatives in at least three ways.

Public commitments and high audience costs can be salutary once the agreement is formed. Moreover, a public commitment, even a disingenuous one, can benefit from what Elster calls the civilizing effect of hypocrisy.<sup>122</sup> But at the agreement formation stage, demanding an expression of public commitment may raise audience costs to the point that an actor will not sign on—an actor who might have otherwise committed. If the reputational costs are too high, or appear unmanageable to a potential signatory, they can impede agreement.

This may explain the goal of the broad yet vague commitment expressed by the UN's corporate norms initiative.<sup>123</sup> The nongovernmental organizations ("NGOs") taking part in that initiative are beholden to several constituencies—donors, the board, other NGOs—and cannot appear to make too many concessions to the desires of corporations. Demanding that they publicly commit to a set of principles that appear corporate-friendly, even if those principles constitute a reasonable compromise, might impose too high a

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119. See generally James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577, 585 (1994) (describing finding that indicates higher audience costs lead to democracies being less likely to "back down"). This idea enjoys some empirical support. See Michael Tomz, *Domestic Audience Costs in International Relations*, 61 INT'L ORG. 821, 821 (2007) (using public opinion surveys to show that domestic audiences care about their country's international reputation and therefore disapprove when a leader reneges on an international commitment).

120. Fearon, *supra* note 119, at 585 ("[W]hen large audience costs are generated by escalation, fewer escalatory steps are needed credibly to communicate one's preferences.").

121. See Jessica L. Weeks, *Autocratic Audience Costs: Regime Type and Signaling Resolve*, 62 INT'L ORG. 35, 35–36 (2008) (summarizing the widely held view that democracies have a signaling advantage over autocracies because of their accountability to the domestic electorate, and showing that autocracies are more beholden to a small but powerful domestic audience than previously thought).

122. See JON ELSTER, *ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS* 341 (1999) (explaining the benefits of any public commitment).

123. See *infra* note 178 and accompanying text.

reputational cost for the NGO. Likewise, directors of public corporations may want to commit to a set of norms—again, some reasonable compromise position—but they have their own reputational concerns. The corporate board or shareholders may punish a director who appears to make too many unnecessary concessions. If reputational costs for either group become too high, agreement will be difficult. Moreover, once agreement has been reached, a public commitment may make some officials reluctant to change course even in the face of changed circumstances, if doing so would incur audience costs.<sup>124</sup> This suggests that there are times when reputation can actually get in the way of legal compliance; in these times, regime designers may attempt to be inexpressive, if doing so reduces the reputational costs of compliance.

The concept of “face” is roughly the idea that social interactions can increase or decrease one’s standing in society.<sup>125</sup> For a party that wants to achieve a certain legal change, without appearing to do so because of the associated face costs, keeping some aspects of the lawmaking process private can allow for face-saving measures. For example, the parties developing legislation may be well served by keeping some aspects of the negotiations private, thereby allowing each party greater flexibility to frame the legislation in terms favorable to their own constituents. This could call for, among other things, an agreement to keep the legislative history classified for a set number of years after the law is enacted. While many legal institutions feature some form of secrecy, like the Minister’s Council of the European Central Bank, the legislative history is typically immediately published.<sup>126</sup> Face-saving measures are standard in negotiation training, but rarely considered in the context of lawmaking.<sup>127</sup>

Semitransparency, in other words, promises some relief from the reputational costs of more open regulatory action. Expressive

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124. See David Stasavage, *Open-Door or Closed-Door? Transparency in Domestic and International Bargaining*, 58 INT’L ORG. 667, 682–83 (2004) (citing Jon Elster’s work on deliberation in democracy).

125. Erving Goffman, *On Face-Work: An Analysis of Ritual Elements in Social Interaction*, 18 PSYCHIATRY 213, 213 (1955).

126. For example, the travaux préparatoires of the Rome Statute, the treaty that created the International Criminal Court, have been published online by the United Nations. *Rome Statute of the International Criminal Court*, UNITED NATIONS, <http://www.un.org/law/icc/index.html> (last updated Dec. 19, 2003) [<https://perma.cc/A4JV-KP4R>].

127. See, e.g., JOSEPH P. FOLGER ET AL., WORKING THROUGH CONFLICT: STRATEGIES FOR RELATIONSHIPS, GROUPS, AND ORGANIZATIONS 147 (5th ed. 2005) (giving a useful overview of the concept of positive and negative face in negotiations); Peter H. Huang & Christopher J. Anderson, *A Psychology of Emotional Legal Decision Making: Revulsion and Saving Face in Legal Theory and Practice*, 90 MINN. L. REV. 1045, 1060–65 (2004) (describing how theories of saving and losing face can inform analyses of the proper role of emotions in law); Roger J. Volkema, *The Mediator as Face Manager*, MEDIATION Q., Winter 1988, at 5 (describing how emphasis on dignity of the parties in negotiation—on face management—increases a third-party mediator’s effectiveness).

commitments can be reputationally costly because they are made to a large audience, and are seen as broadly characteristic of the actor making the expression, putting the actor's reputation on the line. Inexpressive strategies mitigate these concerns by modulating how specifically an actor commits to a particular principle, by reducing the size of the audience, and by reducing the extent to which the actor's identity is on the line—by making an expression as a group, say—or by offering some other form of anonymity. This is not to say that inexpressive strategies do not have their own costs as well. Being too inexpressive might raise a separate set of suspicions.<sup>128</sup> But since the general thrust of the transparency literature is on the costs of too little openness, what follows is an account of one set of costs associated with too much transparency.

Taking an actor's reputation out of the equation—presumably by reducing transparency—not only can make agreement more likely, but it can also enhance deliberations by reducing the chance that negotiators will posture. Political scientists have shown through real world examples and formal models how full transparency in deliberations can increase the chance that deliberators will posture to please their constituents, even when they know that doing so leads to the wrong outcome.<sup>129</sup>

Mitigating reputational costs is also crucial for the monitoring and enforcement of international law. One of the more plausible explanations for why an armed group would meet with the Red Cross in a secret meeting is the promise that upon leaving the meeting, the armed group can manage any reputational costs of meeting with the aid group. The armed group might say the meeting never took place, or they might say they took the meeting only to spit in the face of the imperialist pigs—both of which would give them cover to implement humanitarian principles without incurring reputational harm. The Red Cross has a long history of confidentiality, and this credibility breeds trust—a crucial determinant of the ICRC's success.<sup>130</sup> This may be true for other institutions seeking to manage reputational costs.

Reducing reputational costs by shielding the source of a particular regulatory policy can also allow actors to experiment with

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128. See LIN-MANUEL MIRANDA ET AL., *The Election of 1800, on HAMILTON: AN AMERICAN MUSICAL* (Atlantic 2016) (“Jefferson has beliefs, Burr has none.”).

129. See Andrea Prat, *The Wrong Kind of Transparency*, 95 AM. ECON. REV. 862, 869 (2005) (“[An] agent who knows that his action is observed has an incentive to behave in a conformist manner.”).

130. See Ratner, *supra* note 11, at 303 (“While confidentiality is often crucial for access, the parties may be more motivated to grant access due to trust in the even-handedness and experience of the ICRC.”).



novel regulatory arrangements. For example, the Chinese government is widely thought to be experimenting with free speech policy in Hong Kong.<sup>131</sup> This is a relatively costless way for Beijing to experiment with different approaches to free speech reform, a particularly sensitive topic. It allows the government to test new policies and, if they fail, Beijing can simply say that Hong Kong's free speech policies do not reflect formal state policy. If they succeed, Beijing can take credit for the reforms and apply them elsewhere.

Semitransparency can also sidestep controversy where an actor fully and publicly expressing commitment to some principle is controversial. Sometimes controversy springs as much from the person expressing a thing as from the thing itself. That is, the identity of the actor—state or organization—proposing or promoting a particular legal obligation may, in some cases, undermine its cause.

For example, even critics of the consensus requirement of the Human Rights Committee—which encourages the Committee to speak as a group, and which discourages the filing of individual dissents—acknowledge that the requirement has provided the court a measure of political stability.<sup>132</sup> Similarly, the Council of the European Union, which does not release meeting minutes, can insulate members from external political pressure that might arise from public knowledge of their individual support for Council policy.<sup>133</sup> The same rule is used by the Governing Council of the European Central Bank. It is critical in that context because the members of the bank's Governing Council are selected by their home states. While they are tasked with developing policies that would help the Eurozone as a whole, they have strong professional incentives to *appear* to privilege their home state.<sup>134</sup> Keeping meeting notes secret has been credited with a partial solution to this problem: if the Council issues a policy that is good for Europe but

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131. See Didi Kirsten Tatlow, *Fault Lines Laid Bare in Hong Kong*, N.Y. TIMES (Aug. 7, 2013), <http://www.nytimes.com/2013/08/08/world/asia/08iht-letter08.html?mcubz=0> [<https://perma.cc/PYP7-2A68>] (reporting on an incident of street shouting in Hong Kong).

132. See Helfer & Slaughter, *supra* note 96, at 361 (explaining that the adoption of the consensus requirement has made an important contribution to the Committee and its political consistency).

133. See Stasavage, *Does Transparency Make a Difference?*, *supra* note 20, at 3 (“[T]ransparency can also have costs involving increased incentives for representatives to posture and to ignore private beliefs about appropriate policies.”).

134. See Prat, *supra* note 21, at 100–01:

At this stage, they are still secret, and there is a strong rationale behind such a policy. If the discussions at meetings were public, it is feared that national members would have an incentive to pander to their home audiences by taking adversarial stances, which would make the decision-making process slow and cumbersome.

politically bad for one state, that state's representative on the Council can say, "I tried my best."<sup>135</sup>

There is experimental support for the idea that audiences will judge a particular policy proposal differently depending on who expresses it. For example, experiments have shown that when Americans thought an arms control treaty was proposed by President Reagan *or* by neutral analysts, they were much more likely to support it than when it was proposed by Soviet leader Mikhail Gorbachev.<sup>136</sup> Another study showed that Israeli Jews evaluated an actual Israeli-authored peace plan less favorably when they thought it was proposed by Palestinians rather than by its true authors.<sup>137</sup> This "reactive devaluation" is a well-documented phenomenon.<sup>138</sup> An inexpressive agreement design might minimize the voice behind a particular norm by obscuring the parentage of a proposed agreement or settlement. This would require devising a mechanism for shielding—to the extent possible—the identity of the party announcing or proposing an outcome that requires purchase from diverse stakeholders.

### *C. Reducing Flexibility*

Asking for a public expression of commitment to a singular principle may make it hard for actors to change course later, even where changing course is desirable. In areas where norms are evolving rapidly, for example, insisting on a public commitment to a crystallized norm could draw battle lines prematurely. For example, if the State Department asks an armed group like the Taliban to commit publicly to a singular set of norms, this could backfire, enhancing the Taliban's anti-Western credibility, and foreclosing a potentially useful dialogue. Such a dialogue could produce information about Taliban practices, and it preserves the option for later influence should the Taliban's willingness to comply with the law change. In these times, regulatory bodies may prefer to adopt vague norms to preserve flexibility in uncertain or fast-changing circumstances. This is precisely the benefit

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135. *Id.*

136. Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION 29–30 (Kenneth Arrow et al. eds., 1995).

137. Ifat Maoz et al., *Reactive Devaluation of an "Israeli" v. "Palestinian" Peace Proposal*, 46 J. CONFLICT RESOL. 515, 521–26 (2002).

138. Lee Ross & Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, in VALUES AND KNOWLEDGE 103, 126–27 (Edward S. Reed et al. eds., 1996) (summarizing the psychological literature describing reactive devaluation—the phenomenon by which "[t]he evaluation of specific package deals and compromises may *change* as a consequence of the knowledge that they actually have been put on the table, especially if they have been offered or proposed by one's adversary").

that the European Court of Human Rights is thought to enjoy by its slow, consensus-based approach to case law.<sup>139</sup>

Unclear expressions can preserve flexibility in agreement design. In the early stages of agreement formation, the terms, the membership, and other details are sometimes left undetermined.<sup>140</sup> This lack of specificity not only preserves flexibility about what is required by subjects of the regime, but it also preserves flexibility about what kind of statement the regime makes. For example, while consumers, oil companies, and environmentalists may agree that greenhouse gases are a pressing concern, and may even agree that it requires a global regulatory approach, they will not necessarily agree about the solution.<sup>141</sup> Reducing the specificity of the obligations required by a new regime promises to at least maintain the possibility of a mutually agreeable regulatory approach. It also avoids signaling an explicit regulatory goal that might dissuade would-be subjects from joining the regime. Insofar as these vague requirements do not make a statement about the goals of the regime, they are mechanisms for reducing the expressiveness of the regime. As this discussion suggests, increasing vagueness in legal expressions has some of the same qualities that make soft law more desirable than hard law, such as reducing contracting costs, reducing sovereignty costs, allowing actors to be more adaptable in uncertain conditions, and encouraging compromise.<sup>142</sup>

Semitransparency may allow actors to govern—by establishing a rule—but leaving some things unclear to be clarified later. This can be valuable when multiple communities' norms conflict but convergence is desirable. By not articulating a legal norm with such specificity to preclude one of several communities' norms, regulators may buy time during which the differences between communities can be mitigated. Vagueness about principles may buy time when parties need more of it to agree on shared norms—whether this agreement is achieved through

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139. See Helfer & Slaughter, *supra* note 96, at 317 (“The conjunction of the margin of appreciation doctrine and the consensus inquiry thus permits the ECHR to link its decisions to the pace of change of domestic law, acknowledging the political sovereignty of respondent states while legitimizing its own decisions against them.”).

140. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 433 (2000) (explaining that “writing complete contracts is extremely difficult” and costly and therefore states write incomplete contracts, delegating to others the task of completing them).

141. See, e.g., DAVID G. VICTOR, *THE COLLAPSE OF THE KYOTO PROTOCOL AND THE STRUGGLE TO SLOW GLOBAL WARMING* (2001) (explaining why the Kyoto Protocol was unlikely to effectively combat climate change).

142. See Abbott & Snidal, *supra* note 140, at 434–50 (summarizing the benefits of laws whose requirements are not clearly defined).

a social process, such as socialization or acculturation, through domestic political channels, or because of material changes over time.<sup>143</sup>

This may be especially true when a community's views on a particular topic are evolving over time.<sup>144</sup> By entering a new area of the law slowly—by not articulating norms, or by articulating them at a level of generality that is high enough so as not to offend key coalition factions—lawmakers may buy enough time to generate consensus.<sup>145</sup> As Calabresi and Bobbitt said about opinions that were so muddled they stood for nothing:

When a court is working its way toward a new doctrine but does not yet know which of various competing principles will be appropriate, the opinion which does not stand for anything, if used sparingly, may be the least willful step the court can take. It may permit the court to test the water without imposing its will on later courts.<sup>146</sup>

This is very explicitly the aim of the European Court of Human Rights' margin of appreciation doctrine, which seeks to give member states time to coalesce around a single norm. The Court acknowledges that the European states within its jurisdiction may approach novel questions of law differently; in these cases, the court occasionally applies a wide "margin of appreciation" and elects not to express an opinion on a particular matter.

The scope of the margin of appreciation afforded by the Court is inversely proportional to the amount of consensus among European states as to the practice in question: where there is little consensus among the states, the court is likely to afford a wide margin of appreciation, and where there is a high level of consensus among the states, the margin is reduced.<sup>147</sup> In *Frette v. France*, for example, the Court ruled that France was reasonably entitled to consider the interests of the child in rejecting a homosexual man's application for prior authorization to adopt a child, noting:

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143. For an overview of the mechanisms through which international law affects state behavior, see Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 630–56 (2004).

144. See Sunstein, *supra* note 16, at 1749 (“[I]ncompletely theorized agreements may be valuable when what is sought is moral evolution over time.”).

145. This may also explain the European Court of Human Rights' consensus method, which some criticize for its ambiguity. See Helfer, *supra* note 100, at 135 (decrying the ambiguity of the European Court of Human Rights' consensus method and concluding that the “failure to articulate with precision the scope and function of the consensus inquiry poses a potentially grave threat to the tribunals' authority as the arbiters of European human rights”).

146. CALABRESI & BOBBITT, *supra* note 50, at 211 n.39.

147. See Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL'Y 843, 851 (1999) (“In the jurisprudence of the ECHR, consensus is inversely related to the margins doctrine: the less the court is able to identify a European-wide consensus on the treatment of a particular issue, the wider the margins the court is prepared to grant to the national institutions.”); see also *Dickson v. United Kingdom*, 2007-V Eur. Ct. H.R. 128; *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) at 9–10 (1988).

Since the delicate issues raised in the case, therefore, touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State.<sup>148</sup>

The margin of appreciation doctrine has been praised for buying the court time when consensus is emerging or evolving.<sup>149</sup> As Neuman notes, “given the [Court’s] practice of an evolutive interpretation of human rights, a wide margin of appreciation for issues on which states are highly divergent allows the court to postpone a definitive response, and then to adopt a more progressive interpretation after substantial convergence has occurred.”<sup>150</sup>

#### *D. Reducing Healthy Hypocrisy*

One of the things that transparency seeks to eliminate is hypocrisy—saying one thing but doing another.<sup>151</sup> But there are times when the optimal regulation would require regulators to say one thing publicly and do another privately.<sup>152</sup> For instance, negotiators have long known of the “no negotiating with terrorists” paradox: security forces

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148. *Frette v. France*, 2002-I Eur. Ct. H.R. 369.

149. See Helfer, *supra* note 100, at 135 (noting that “[n]early all those offering commentary on the Court and Commission have viewed this evolutionary interpretation as beneficial to the development of Convention case law”). The margin of appreciation doctrine has also been critiqued as moral relativism. See Benvenisti, *supra* note 147, at 851–52 (noting that minority moral values, which are not reflected in national policies, are the “main losers” under the margin of appreciation doctrine).

150. Gerald L. Neuman, *Subsidiarity*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 376 (Dinah Shelton ed., 2013).

151. Hypocrisy is a pervasive phenomenon in public life, but it rarely features in discussions of public law, except in the form of blanket critiques. There is insufficient room for a full normative defense of hypocrisy here, but the key distinction is not one between hypocritical statements and honest ones, but instead between good and bad sorts of hypocrisy. For a discussion of useful (or normatively defensible) sorts of hypocrisy in regulation, see DAVID RUNCIMAN, POLITICAL HYPOCRISY: THE MASK OF POWER FROM HOBBS TO ORWELL AND BEYOND 7–11 (2008) (summarizing the treatment of hypocrisy by political theorists going back to Hobbes, and noting that the relevant question is not whether hypocrisy is acceptable, but instead teasing out the different sorts of hypocrisy so that one might “take a stand for or against one kind or another, not for or against hypocrisy itself”). It is worth noting that the “saying you don’t so that you can” phenomenon described here is the inverse of the hypocrisy that Judith Shklar found objectionable. See JUDITH SHKLAR, ORDINARY VICES 47 (1984) (hypocrisy is pretending that one’s “motives and intentions and character are irreproachable when [one] knows that they are blameworthy”).

152. Calabresi and Bobbitt call this subterfuge, which they suggest allows them to manage tragic choices. See CALABRESI & BOBBITT, *supra* note 50, at 57–58 (noting that by providing no reasons for its decisions, “a responsible agency . . . avoids, or at least mitigates, the conflict between the wish to recognize differences and the desire to affirm egalitarianism in all its forms”). The same concept appears in international law. See Benvenisti, *supra* note 147, at 852 (reviewing the European Court of Human Rights’ margin of appreciation doctrine and noting: “The consensus rationale, it is suggested, is but a convenient subterfuge for implementing the court’s hidden principled decisions”).

say they do not negotiate with terrorists, but most of them do.<sup>153</sup> This “acoustic separation” between what the public thinks the rule is and what the rule is in practice enables the dual benefit of deterring hostage-taking as a general matter while also allowing for behind-the-scenes negotiations to diffuse any particular hostage situation. It may even be the case that the no-negotiating with terrorists policy makes the negotiations easier to conduct, because hostage-takers will have no set expectations for the negotiation and may even feel fortunate that security forces have broken their policy to negotiate this one time.<sup>154</sup> Torture may be similar: the former director of the CIA has suggested that torture is not necessary to interrogations, but that having detainees believe that it is possible is what allows the CIA not to need it.<sup>155</sup>

This sort of hypocrisy raises a host of other concerns, but it is useful to illustrate an extreme example of how an actor can conceal their normative and legal commitments in order to take steps to fulfill them.<sup>156</sup> In some cases, actors say nothing, or even claim to reject a particular norm, in order to take steps to fulfill it. In addition to reducing the clarity and volume of an expression, then, an actor may seek to support a norm without publicly linking their identity to that support. International relations scholars have focused considerable attention on audience costs and the challenge of speaking to both international and domestic audiences.<sup>157</sup> However, these accounts focus largely on managing two audiences, rather than saying one thing to one in order to do the complete opposite for another, so they do not explicitly capture this phenomenon of “saying you don’t so that you can.”

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153. See Peter R. Neumann, *Negotiating with Terrorists*, FOREIGN AFF., Jan./Feb. 2007, at 128, 128 (“When it comes to negotiating with terrorists, there is a clear disconnect between what governments profess and what they actually do.”).

154. It may be the case that even though everyone knows that security forces negotiate with terrorists, all they need is plausible deniability to maintain this advantage. See *infra* Part IV for a discussion of plausible deniability.

155. General Michael Hayden, former Dir., CIA, Remarks at Duke Law Center’s LENS Conference (Apr. 13, 2012); see also Interview with General Michael Hayden, former Dir., CIA, in Stanford, Cal. (May 14, 2013).

156. Some of the concerns raised by hypocrisy—such as the lack of transparency—do overlap with concerns raised by other forms of reticence, which I explore *infra* Part V.

157. See, e.g., Andrew Moravcsik, *Integrating International and Domestic Theories of International Bargaining*, *Introduction* to DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS 3, 15–17 (Peter B. Evans et al. eds., 1993) (describing a Janus-faced executive who plays domestic and international audiences off of each other: “[D]omestic policies can be used to affect the outcomes of international bargaining, and . . . international moves may be solely aimed at achieving domestic goals”); Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988) (describing how diplomats must play a game where they send signals to both international and domestic audiences).

## IV. TAX-FREE TRANSPARENCY

The tax for maximalist transparency policies is a loss of expressive ambiguity; there is simply less flexibility to manage optics as transparency increases. But transparency is critical to good governance. Is there a way to ensure the benefits of transparency without paying the tax? This Part argues that there is: maximizing *obligation transparency* provides many transparency benefits without the tax; maximizing the other transparency types does not. That is because the clarity with which the law specifies its obligations has little independent effect on what sort of statement the law makes.

Suppose for a moment that the law operates on just two axes: legalistic and expressive. The legalistic dimension refers to what the law requires—its obligations, their specificity, and so on—while the expressive dimension refers to optics—the law’s ability to make a broader statement about some principle or regulatory goal. Often, the law is both highly legalistic and highly expressive. For example, when the Supreme Court struck down state laws that limited marriage licenses to heterosexual couples,<sup>158</sup> the Court was legalistic insofar as it imposed an obligation on the states,<sup>159</sup> and it was expressive insofar as it publicly and ceremoniously announced a commitment to marriage equality.<sup>160</sup> But the law is not always maximally legalistic and maximally expressive. On the legalistic axis, law’s obligations can be softened by making them less specific, less binding, and less reviewable. Indeed, there is a rich body of scholarship about soft law.<sup>161</sup> And on the expressive axis? This Article shows that while law has an expressive capacity, it has a corollary capacity for reticence. Indeed, regulators often elect to be reticent rather than expressive.

This has a number of implications for regime designers. The first is that law’s expressive and legalistic dimensions can be decoupled—that is, the law might be expressive but soft, or reticent but hard. Table 3 below outlines four possibilities, leading to a broader set of regulatory options than just the choice between hard or soft law.

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158. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

159. *See id.* at 2607–08 (noting that states must grant same-sex marriage licenses).

160. *See id.* at 2599–2601 (declaring the Court’s commitment to four principles underlying the fundamental right to marry).

161. *See* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 574 (2008) (“Soft law has taken the legal academy by storm.”). “Soft law” is in some ways an incoherent concept, but it generally refers to the idea that law is some combination of less specific and less binding. *See, e.g.*, Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 174 (2010) (describing the many definitions of soft law, but noting that the majority of them focus on rules that are nonbinding); Raustiala, *supra* note 84, at 582 (noting the incoherence in the term).

TABLE 3: HARD/SOFT V. EXPRESSIVE/INEXPRESSIVE

|      | Expressive  | Inexpressive  |
|------|---|---|
| Hard | <i>Clear and binding legal obligation that publicly conveys a clear commitment to a particular principle (e.g., anti-flag burning statute)</i>                            | <i>Clear and binding legal obligation that does not publicly convey a clear commitment to a particular principle (e.g., judicial stays)</i>                                   |
| Soft | <i>Unclear or nonbinding legal action that publicly conveys a clear commitment to a particular principle (e.g., anti-smoking campaigns, executive signing statements)</i> | <i>Unclear or nonbinding legal action that does not publicly convey a clear commitment to a particular principle (e.g., Kyoto Protocol and many international agreements)</i> |

Second, there are times when creating, adjudicating, and enforcing the law is less costly when it is done in an inexpressive fashion—that is, while maintaining some opacity about the law’s meaning.<sup>162</sup> Scholars widely assume that soft law is less costly to create and enforce than hard law.<sup>163</sup> But sometimes just the opposite is true: specific and legally binding rules can be less expressive and therefore less costly to accede to than a hortatory standard that imposes vague requirements but expresses a clear commitment to a costly principle.<sup>164</sup> An actor might find it easier to comply with a strictly binding requirement that does not communicate a willingness to compromise user privacy than to comply with a soft obligation that loudly expresses the firm’s willingness to work with the government. Optics matter, and sometimes they are the primary obstacle to adherence with the law. So while one might imagine that one reason soft law is less costly to implement than hard law is because it signals less of a firm commitment to some principle, this Part shows that is not the case. In fact, soft law often makes *more* of a statement than hard law. In other words, there is no direct relationship between obligation transparency and the other transparency types.

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162. See *infra* Section IV.B.

163. See, e.g., THOMAS C. SCHELLING, *ARMS AND INFLUENCE* 84 (1966) (“[V]ague demands, though hard to understand, can be less embarrassing to comply with.”); Abbott & Snidal, *supra* note 140, at 434–50 (describing the benefits of softer forms of legalization, including lower contracting costs); Gersen & Posner, *supra* note 161, at 594 (“The first advantage of soft laws is that they can sometimes accomplish what hard laws accomplish but at a lower cost.”).

164. For evidence that rules say less about their purpose, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1690 (1976). The idea that political compromise can be forged around specific rules that do not reveal their purpose comes from Sunstein.



*A. Tax-Free Obligation Transparency*

## 1. Nonbinding Obligations

There is no clear relationship between the softness of law and how much of a statement it makes. Some soft law makes quite a big statement. For example, the Universal Declaration of Human Rights is widely regarded as nonbinding, but when its norms are violated activists can build headline-grabbing social movements.<sup>165</sup> The Declaration asks states to ensure the human right to health, an obligation that is both vague and nonbinding: there is no consensus about what a state must do to fulfill the right, and the provision is widely regarded as soft law. But the obligation is expressive: it requires signatories to publicly commit to particular principles that have considerable meaning. Not all soft law is expressive. For example, when the Securities and Exchange Commission issues a no action letter, this is soft law that clarifies an actor's obligations, but it likely does not express a commitment to particular principles.<sup>166</sup>

This is not to say that the degree of an obligation's softness—whether something is binding or not—cannot affect its expressiveness. Sometimes the fact that an obligation is legally binding will express a stronger commitment to a given principle than if the same obligation were nonbinding.<sup>167</sup> This may be especially true where a binding agreement, such as a treaty, is more widely publicized than a nonbinding agreement.<sup>168</sup> But one could not predict whether a given obligation is reticent or not—whether it expresses a commitment to a clear principle—by asking whether the obligation is binding.

The conclusion that nonbinding rules can have specific and distinct expressive content confounds scholarship that suggests that reducing the binding nature of an agreement increases flexibility and

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165. See BORGWARDT, *supra* note 91, at 264 (noting that despite being “toothless—unenforceable in any court of law,” the Universal Declaration of Human Rights retains a “moral, cultural, and even political grip”).

166. See Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 945–46 (1998) (discussing the finality of no action letters).

167. See JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 98 (2005) (“A final reason to choose a treaty over a nonlegal agreement is to convey the seriousness of a state's commitment to the agreement.”).

168. See Michael Tomz, *Reputation and the Effect of International Law on Preferences and Beliefs* 1 (Feb. 11, 2008) (unpublished paper), <https://web.stanford.edu/~tomz/working/Tomz-IntlLaw-2008-02-11a.pdf> [<https://perma.cc/UBR2-ASJE>] (“By publicizing international commitments and embedding them in a legal framework, treaties raise the reputational ante, making it more costly to renege.”).

buy-in.<sup>169</sup> Soft law scholars suggest that reduced legality is less threatening and less likely to engender opposition than a harder, legally binding alternative.<sup>170</sup> This may be true all things being equal, but all things are rarely equal: for some agreements, parties will be much more concerned about the signal their commitment sends than about whether they are technically bound by the obligation. For example, states that oppose a right to freedom of speech are unlikely to adopt an agreement that expresses such a value, even if the agreement is nonbinding and nonspecific. Reticence, therefore, is not synonymous with softness. Rather, reticence suggests another distinct component of legal obligations that might inform both the design of agreements and compliance efforts.

This suggests that scholars may be paying comparatively too much attention to whether an agreement is legally binding and not enough attention to whether that agreement signals a commitment to a principle beyond whatever obligations it imposes. The expressiveness of both nonbinding norms and binding law can be modulated downward by reducing the clarity of the principle being expressed. Rather than “softening” law in order to increase buy-in, scholars and regulators could imagine ways to make law more taciturn; and rather than imagining law hardening over time, we can imagine law being more expressive—expressing more of a commitment, to a clear principle, and to a bigger audience.

## 2. Vague Obligations

One way to be reticent is to be vague about the principle to which one is committing.<sup>171</sup> But there is a crucial distinction between a vague obligation and articulating a vague *reason* for that obligation.<sup>172</sup> The following table illustrates the distinction between the clarity of an obligation and the clarity of the reason for the obligation. While legal scholars have largely focused on the former, reticence operates on the latter.

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169. See Abbott & Snidal, *supra* note 140, at 436–37 (noting that “[a]ccepting a binding legal obligation, especially when it entails delegating authority to a supranational body, is costly to states,” and that reduced legal obligation is another way to reduce those costs).

170. See *id.* at 434–35 (discussing how making nonbinding soft law allowed lowered contracting costs and enabled agreement in the ILO and the OECD).

171. See *supra* Section III.A.

172. There is a rich literature on ambiguity of legal obligations, but this literature has focused very little on the expressive impact of ambiguity. See, e.g., Ward Farnsworth et al., *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 1, 2–3 (2010) (surveying the literature on statutory ambiguity and noting that there is no consensus about whether ambiguity means “difficult to interpret” or “could be interpreted multiple ways”).

TABLE 4: CLARITY OF OBLIGATION V. CLARITY OF SIGNAL EXAMPLES

|                          | <b>Clear Signal</b>   | <b>Opaque Signal</b>                                       |
|--------------------------|---|--|
| <b>Clear Obligation</b>  | Sentencing Decisions (with reasons); Treaty Chapeaux          | Judicial Stays; Denials of Certiorari; Per Curiam Opinions |
| <b>Opaque Obligation</b> | Presidential Signing Statements; Sense of Congress Statements | Classified Office of Legal Counsel Opinions                |

It is not always the case that reduced clarity about legal obligations expresses less about the normative foundations of the law. The classic distinction between rules and standards suggests that standards are vaguer than rules as to what they require,<sup>173</sup> but knowing that something is a standard or a rule does not on its own tell us whether that rule or standard will express a commitment to a clear principle. For example, imagine a principle that holds that the wealthy should pay their fair share of taxes. Now imagine a legislator choosing between a specific rule (“those who make more than \$250,000 per year must pay forty percent of their income in taxes”) and a vague standard (“the wealthy must pay a substantial portion of their income in federal taxes”). The standard in this case is vaguer than the rule, but neither one is expressive of the fairness principle. We might have to dig a bit to find out the purpose. What does the legislative history say? Is the bill called the “Pay Your Fair Share” bill? Then we might know that the purpose is fairness. Without that insight, however, both the rule and the standard are ambiguous as to whether they reflect a concern for fairness, redistribution, a growing government deficit, and so on.

This complicates the story told by scholars who suggest that vague standards are more flexible—and easier to impose—than specific standards.<sup>174</sup> This flexibility is because “precision narrows the scope for

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173. See Kennedy, *supra* note 164, at 1687–1701 (detailing the various forms that rules can take). I recognize that there is a complex theoretical underpinning behind the distinction between principles, rules, and standards. For my purposes, I will say that a principle is the reason for the rule or standard (where rules and standards are more or less specific as to what they require).

174. See, e.g., Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG. 401, 404–08 (2000) (describing the reasons why regimes modulate the levels of precision, obligation, and delegation in a particular international legal agreement); see also Emilie M. Hafner-Burton et al., *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT’L L. 47, 72–82 (2012) (summarizing research into several aspects of the design of international agreements,

reasonable interpretation.”<sup>175</sup> The distinction between obligations and the reasons for those obligations suggests that this statement is incomplete. Precision narrows the scope of interpretation as to *what* is required by a particular obligation; but precision might also widen the scope of interpretation about *why* it is required.

Indeed, it may be that there are times when there is an inverse relationship between the specificity of the law and the values it expresses. While rules are clearer than standards as to their requirements, they can be less clear as to their underlying rationale. For example, a standard that requires drivers to “drive through intersections safely” reveals more about its purpose than a more precise rule requiring that “drivers must stop at stop signs.”<sup>176</sup> The standard is evidently motivated by a concern for safety; the rule could be motivated by other concerns, such as modulating the flow of traffic, encouraging foot traffic, or boosting shopping. The rule enables safety advocates and shop owners to forge an incompletely theorized agreement because it does not make a clear statement of its purpose; the standard may not generate the same agreement.

### 3. Narrow Obligations

Narrow obligations may say less than broad obligations simply by virtue of the fact that they do less. The agreement to ban child soldiers discussed above is an example of a narrower rule that says less than a broader, vaguer standard. Yet reducing the scope of an expression does not necessarily make it reticent. In fact, saying more can lead to an expression of commitment to ambiguous principles. Being ambiguous—giving too many reasons for doing something—is just as effective at masking the particular motivation as being vague, or not giving a clear enough reason to do something. In both cases, the expression is not particular.

Broad obligations can be expressive. The Universal Declaration of Human Rights is broad as to the issues it addresses, yet expressive

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including legalization, precision, delegation, and membership, and noting in particular the different treatments of agreement ambiguity).

175. Abbott et al., *supra* note 174, at 412.

176. The authors of the IO special issue on legalization also discuss an example using driving behavior: A precise rule is not necessarily more constraining than a more general one. Its actual impact on behavior depends on many factors, including subjective interpretation by the subjects of the rule. Thus, a rule saying “drive slowly” might yield slower driving than a rule prescribing a speed limit of 55 miles per hour if the drivers in question would normally drive 50 miles per hour and understand “slowly” to mean 10 miles per hour slower than normal. *Id.* at 412 n.26. The authors use this example to show that, as to what it requires, a rule is not necessarily more constraining than a flexible standard. *Id.*

of a clear commitment to a set of principles. But broad obligations can also be reticent. Consider the agreement that companies accede to when they adopt the UN's principles of corporate responsibility. The agreement is broad—touching on labor rights, human rights, and more—yet it imposes so few specific obligations and says less about its purpose than the predecessor corporate norms initiative. By leaving the determination of many of the details of the broad framework as well as the expressive content of membership unfinished, the UN Special Representative who created the framework was able to achieve consensus where previous efforts had failed.<sup>177</sup> In 2011, the Human Rights Council endorsed the framework.<sup>178</sup> Many of the groups that had previously opposed the effort—both corporate groups and human rights groups—now embrace the broad framework (albeit for different reasons).<sup>179</sup> This analysis suggests that breadth can affect expressiveness. Generally speaking, narrow agreements will express less than broad ones. But the breadth of an obligation—its operative scope—is not perfectly predictive of its expressive content.

### *B. Other Avenues for Avoiding the Tax*

Nearly any regulatory action is an opportunity to be more or less expressive. Regulators can modulate how expressive any given act is by doing or neglecting to do any of the following: publish best practices,<sup>180</sup> issue no action and interpretive letters,<sup>181</sup> criticize rule violators,<sup>182</sup> make statements in court,<sup>183</sup> and so on. Even the design choices that go into building a court, such as where it should be located, how open it should be, and whether trials will be publicly broadcast are

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177. See John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1, 1 n.2, 37 & nn.178–79 (2008) (discussing the UN Sub-Commission on the Promotion and Protection of Human Rights' proposal "set[ting] out sweeping human rights duties for corporations").

178. Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011).

179. See JOHN RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 105 (2013) (detailing the comments of various representatives' reactions to the Human Rights Council's Resolution).

180. See David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 295–96 (2006) (describing how publishing best practices is an alternative form of regulation to rules-based regulation).

181. See Nagy, *supra* note 166, at 929 (discussing the SEC's use of interpretive letters).

182. These may include NGOs reporting on a particular actor, as when Human Rights Watch issues a report criticizing a state or other actor for their human rights record on a particular subject. For an example, see HUMAN RIGHTS WATCH, LIKE A DEATH SENTENCE: ABUSES AGAINST PERSONS WITH MENTAL DISABILITIES IN GHANA 6–7 (2012), <https://www.hrw.org/sites/default/files/reports/ghana1012webwcover.pdf> [<https://perma.cc/ZVX7-CQQU>] (criticizing Ghana for its treatment of people with mental disabilities).

183. See Jason Mazzone, *When Courts Speak: Social Capital and Law's Expressive Function*, 49 SYRACUSE L. REV. 1039, 1039–44 (1999) (giving an overview of how courts express normative positions through judges' statements, witness testimony, and more).

opportunities for expression.<sup>184</sup> A fuller list of the mechanisms available to modulate regulatory expressions appears in the table below; this list is meant to be illustrative rather than comprehensive.

TABLE 5: EXAMPLES OF INSTITUTIONAL MECHANISMS FOR MANAGING EXPRESSION

| <u>Legislation</u>   | <u>Adjudication</u>  | <u>Enforcement</u>   |
|--|--|--|
| <ul style="list-style-type: none"> <li>- transparency of negotiations (content)</li> <li>- transparency of negotiations (parties' identities)</li> <li>- statements of intent</li> <li>- declarations</li> <li>- secret ballots</li> </ul> | <ul style="list-style-type: none"> <li>- court mission statements</li> <li>- victim impact statements</li> <li>- victim testimony</li> <li>- public outreach campaigns</li> <li>- public access to trials</li> <li>- public statements by judges</li> <li>- public statements by prosecution/defense</li> <li>- what remedies?</li> <li>- remedy explanations</li> </ul> | <ul style="list-style-type: none"> <li>- are monitoring efforts open to the public?</li> <li>- are shaming efforts conducted publicly?</li> <li>- are violators individually named?</li> <li>- compliance notices: public announcements by subjects insisting they are not bound, or emphasizing their support</li> <li>- enforcement directed at subject directly or through intermediary?</li> </ul> |

Scholars largely treat expression—and by implication, inexpression—as a byproduct of regulatory obligation, and as a result it is rarely considered an explicit element of regime design.<sup>185</sup> Yet as the list in Table 5 suggests, there are many policy levers for managing the extent to which a particular law or policy makes a public statement of commitment to a particular principle. These levers are available to regulators legislating, adjudicating, and enforcing the law. For example, the potential parties necessary to support a particular law may negotiate differently if their negotiations are—or will be—open to

184. Courts express themselves in several ways, including choices in the design of the openness of the court, so that a witness's testimony is broadcast throughout a country or heard only by the judge and counsel in camera. For a review of the decision to allow cameras into a criminal trial in Florida, see Joseph A. Boyd, Jr., *Cameras in Court: Estes v. Texas and Florida's One Year Pilot Program*, 32 U. MIAMI L. REV. 815, 819–21 (1978).

185. See, e.g., Geisinger & Stein, *supra* note 8, at 115 (failing to consider expression as an explicit element of regime design).

the public.<sup>186</sup> Adjudicatory bodies are similarly equipped with a range of options for managing the expressiveness of their actions. For example, a court must decide whether, in addition to arriving at a given outcome, its decisions should make a statement about deeper policy goals or justice values. If a criminal tribunal justifies its sentencing practices in a sentencing opinion, it can make a statement about the purpose of criminal punishment. The court can further amplify or change that statement through outreach efforts. Finally, efforts to monitor and enforce agreements can be more or less expressive. Enforcement bodies have a choice whether to make their monitoring efforts public; whether to identify the subjects of their investigations by name; and whether to criticize those subjects publicly. Each of these choices presents an opportunity for expressing one's commitment to a particular principle; conversely, each choice presents an opportunity for avoiding the transparency tax.

## V. TRANSPARENCY TRADEOFFS

The previous Part argued that much of the transparency tax can be avoided by privileging *transparency of obligation* over other transparency types. But there are other tradeoffs to keep in mind. This Part offers several key distinctions that may matter to designing sensible transparency policies.

### A. *Reasons to Pay the Tax*

Even though transparency imposes a tax on governance, there are times when it still makes sense to pay that tax. Sometimes we explicitly want the kind of expressive clarity that comes with maximalist transparency policies. Other times we simply cannot achieve the benefits of semitransparency without other countervailing costs, like self-dealing. As will become clear, I am not referring to the costs of being secretive or of hiding the law, which are well documented.<sup>187</sup> Rather, I am interested in the costs that occur precisely because regulators sought to avoid paying the tax—sought, in other words, to maximize expressive ambiguity.

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186. See Karin Aggestam, *Two-Track Diplomacy: Negotiations Between Israel and the PLO Through Open and Secret Channels*, in 3 DIPLOMACY 51 (Christer Jönsson & Richard Langhorne eds., 2004).

187. For a summary, see David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 278 (2010) (noting that state secrecy inhibits input, oversight, and criticism, and therefore often leads to lower-quality policies).

## 1. Opportunity Costs

The most obvious shortcoming of an inexpressive approach is the opportunity cost of not expressing something.<sup>188</sup> One of the central justifications for existing laws is that they express an important set of principles.<sup>189</sup> This expression is thought to affect international and domestic politics, and to put would-be norm violators on notice of basic community norms.<sup>190</sup> This may be lost under a less transparent approach.

One opportunity cost arises when actors miscalculate the actual costs that expression would produce and therefore needlessly opt for reticence. For example, developed states might propose an inexpressive approach to environmental standards if they think that this is the only way to get developing countries to accede—perhaps because the developing countries are wary of domestic political costs of appearing to bow to developed country interests, or appearing to sign on to a set of standards that could slow economic growth. But if this is wrong—a simple miscalculation either by the developing countries about their own domestic political costs, or by the developed countries in the first place—it may unnecessarily forgo the benefits of expression. In this scenario, reticence may operate like a kind of chilling effect: states needlessly adopt an inexpressive strategy simply out of fear of the costs of expression.

Still another possibility is that too much clarity about the law's meaning would result in backlash, which could have unintended, salutary consequences. To extend the hypothetical, imagine that the developed and developing countries agree to a set of highly expressive environmental standards, and that one developing state's expressive commitment to these standards produces enormous backlash in the domestic industrial sector. This backlash presents both an opportunity and an obstacle. Political scientists and legal academics have shown that political opportunity structures can be created when laws are seen

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188. To some, expressing moral norms is the very goal of justice, regardless of costs and benefits. Scholars are divided between those who see legal expressions as a means to a regulatory end, and those who see expressions as ends unto themselves. For a description of this divide, see Lewis A. Kornhauser, *No Best Answer?*, 146 U. PA. L. REV. 1599, 1624–25 (1998).

189. See Kwoka, *supra* note 3, at 1361 (arguing that the Freedom of Information Act was passed in order to increase government transparency).

190. See Mirjan R. Damaska, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 346–47 (2008) (arguing that the best justification for the international criminal system is its expressive function—its capacity to express the normative goals of international justice).



as controversial or unpopular.<sup>191</sup> Environmental groups that might previously have been unable to get any public attention or media coverage in their debate with industrial groups may enjoy new platforms for advocacy.<sup>192</sup> Expressive commitments also have the benefit of creating clubs—separating out the super committed parties from the less committed.<sup>193</sup> And controversial legal expressions can gain buy-in over time, giving them ex-post purchase.<sup>194</sup> These benefits are lost with a more cautious, inexpressive strategy.

These missed opportunities can offend constituencies as well. There is a growing interest in the relationship between the law and public opinion.<sup>195</sup> The previous Part outlined several reasons to think that reticence might enable actors to avoid saying something that might offend a particular constituent.<sup>196</sup> But even if reticence avoids a harmful outcome with one audience—domestic or international—it may produce harms with another audience. By not expressing certain norms, a regulator may lose legitimacy with some core constituency, even if reticence would achieve some short-term strategic goal or please another constituent. The Red Cross, for example, has been heavily criticized for its reluctance to reveal information about ongoing humanitarian abuses, let alone to condemn them, and may only be able to withstand this criticism because of its relatively unique and independent structure.<sup>197</sup> Membership organizations, like Amnesty International, may be more inclined to express moral outrage—a commitment to principle that will please funders—even where doing so

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191. See Ryan Goodman & Derek Jinks, *Incomplete Internalization and Compliance with Human Rights Law*, 19 EUR. J. INT'L L. 725, 734–37 (2008) (describing how international commitments can shape domestic political opportunities).

192. It is worth noting that these political opportunity structures do not have an obvious political valence. The same scenario could occur in the reverse, where the offended group is a member of civil society and the group enjoying a new political opportunity is an industry player, or even where the two groups are competing members of civil society or competing corporate interests.

193. See Abbott & Snidal, *supra* note 140, at 429 (“[S]tates should find hard law of special value when forming ‘clubs’ of sincerely committed states, like the EU and NATO. Here legalization functions as an *ex ante* sorting device . . .”).

194. See Tom Ginsburg, *The Clash of Commitments at the International Criminal Court*, 9 CHI. J. INT'L L. 499, 512–13 (2009) (applying David Law’s concept of judicial power to the International Criminal Court to support the idea that controversial opinions can, if they are compelled with, provide focal points that change expectations about the court’s power).

195. See, e.g., KATERINA LINOS, *THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY, AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES 2–5* (2013) (describing a theory of how domestic constituencies operating through domestic political channels play a key role in the spread of global norms).

196. See *supra* text accompanying note 120.

197. This was especially true in the aftermath of the Holocaust. See Irvin Molotsky, *Red Cross Admits Knowing of Holocaust During the War*, N.Y. TIMES (Dec. 19, 1996), <http://nyti.ms/10y6yEu> [<https://perma.cc/HBP2-2EHN>].

undermines some organizational goal.<sup>198</sup> Reticence can undermine credibility with constituents who expect a certain expression of loyalty to shared principles.<sup>199</sup>

## 2. Gaming

Semitransparency can also incentivize actors in harmful ways. This risk of gaming is not unique to reticence—gaming is a challenge for expressive strategies as well<sup>200</sup>—but it is a significant one. The strategies described above can help an actor to further some regulatory goal without publicly making a statement of principles; this is desirable where making such an expression would undermine or impede that regulatory goal. But there is a risk that actors will use reticence as an excuse to avoid ever making commitments to principle.

Consider, for example, an environmental initiative with corporate and NGO members trying to determine whether to allow “silent partners”—members of the initiative whose involvement is kept secret. In the best-case scenario, silent partnership would induce actors to join who might otherwise not join. For example, a corporate executive might seek to improve her company’s environmental practices but be fearful of a board that takes a skeptical view of environmentalism. But in the worst-case scenario, silent partnerships create a considerable moral hazard. A corporation could pose as a reformer for environmentalists—appeasing corporate antagonists for some period of time—without offending other constituents. They get the chance to *appear* to do something in private without actually doing anything, and without taking any public risks.

Moreover, what incentive would other companies have to join the initiative as named partners? All members might prefer to be silent, making only private, hard-to-verify commitments to reform. They could

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198. This would mirror the analysis of any principal-agent situation, where the agent’s deliberations are public. See Stasavage, *Polarization and Publicity*, *supra* note 20, at 60 (“Publicity of debate may prompt representatives to use their actions or statements as signals that they are being faithful to constituent interests.”).

199. Silence can lead to suspicion. See HONORÉ DE BALZAC, *PÈRE GORIOT* 22 (A.J. Krailsheimer trans., Oxford Univ. Press 1991) (1835) (“According to the logic of the empty-headed who disclose everything because they have nothing to say that matters, those who do not talk about their affairs must necessarily be doing badly.”).

200. See, e.g., Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935, 1941 (2002) (“When countries are rewarded for positions rather than effects—as they are when monitoring and enforcement of treaties are minimal and external pressure to conform to treaty norms is high—governments can take positions that they do not honor, and benefit from doing so.”). *But see* BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 59–67 (2009) (arguing that international treaties are expressive of state preferences, and are not just cheap talk).

implement only superficial changes and, in exchange, gain information from competitors and civil society critics. One of the benefits of the expressive approach is that public commitments encourage a wide audience to monitor an actor's fealty to the actor's word. Public commitments also happen to be sticky.<sup>201</sup> An inexpressive system may not allow the same public verification process, and the commitments may not stick.

To the extent that reticence means reducing transparency, it raises a host of related concerns.<sup>202</sup> In most of the examples above, the intentions of one or both parties were assumed to be consistent with regulatory goals. But surely there are times when a party's interests or intentions are not aligned with regulatory goals. Imagine a voluntary initiative launched by several little-known NGOs and a handful of large oil companies. Such an initiative could be a novel new reform initiative with great promise, or it could be a front for industry-wide collusion; how would anyone know? The initiative could simply declare that secrecy is necessary to achieve consensus on important and sensitive matters like environmental reforms and then, behind closed doors, each member organization could agree to serve each other's interests, whether or not those interests furthered the stated aims of the initiative.

### 3. Agency Costs

Transparency is one mechanism for enabling principals to monitor agents.<sup>203</sup> Because inexpressive actors are opaque about their goals, they present potential agency costs.<sup>204</sup> For example, when the President enacts secret policies, her constituents have a hard time

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201. See ROBERT CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 92–103 (1st ed. 1985) (summarizing research showing that people who commit and have their commitment publicized are more likely to keep their commitment, even after the publicity is over).

202. See, e.g., Andrea Bianchi, *On Power and Illusion: The Concept of Transparency in International Law*, in *TRANSPARENCY IN INTERNATIONAL LAW*, *supra* note 11, at 1; Jutta Brunnée & Ellen Hey, *Transparency and International Environmental Institutions*, in *TRANSPARENCY IN INTERNATIONAL LAW*, *supra* note 11, at 23; Luis Miguel Hinojosa Martínez, *Transparency in International Financial Institutions*, in *TRANSPARENCY IN INTERNATIONAL LAW*, *supra* note 11, at 77.

203. See Prat, *supra* note 129, at 862 (“There is a widespread perception, especially among economists, that agency relationships should be as transparent as possible.”); see also Luban, *supra* note 17, at 154 (cataloguing the many exceptions to the publicity principle).

204. See Jacques Crémer et al., *Language and the Theory of the Firm*, 122 Q.J. ECON. 373, 374 (2007) (explaining that agents that use vague language impose costs on the firm). For an overview of principal-agent problems, and an analytic framework for distinguishing different sorts of agency costs, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976).

evaluating those policies.<sup>205</sup> The risk of agency failure is especially prominent in the corporate world.<sup>206</sup> For example, say that environmentalists decide to allow an executive from a public corporation to quietly join their environmental initiative.<sup>207</sup> Even if this is not problematic from their perspective, it may still be problematic from the perspective of the board or the shareholders. Commitments made to the initiative may constitute material information that the executive should disclose to shareholders. And even if it does not fall under any particular disclosure rules, there are still good reasons for the shareholders to prefer the chance to be able to monitor their agent's actions in the corporation.<sup>208</sup>

### *B. Three Key Distinctions*

How one evaluates these costs may depend on a number of key distinctions. For example, it may matter who is being opaque and why. We might also think there is a meaningful difference between opacity at the agreement formation stage and at the enforcement or adjudication stage. Even if we welcome some opacity early on as negotiators are crafting a treaty—because, for example, it enables parties to forge an incompletely theorized agreement—we may not welcome it later, at the adjudication stage, if it means that a court will issue a sentence without full or clear justification. Or we might embrace judicial reticence in some cases—such as in the European Court of Justice, where the claims are inter-state—but not in others, like individual criminal trials, where the individual right to due process

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205. See Sidney A. Shapiro & Rena I. Steinzor, *The People's Agent: Executive Branch Secrecy and Accountability in the Age of Terror*, 69 LAW & CONTEMP. PROBS. 99, 100 (2006) (applying agency theory to evaluate the risks of rising executive branch secrecy as a result of counterterrorism policy).

206. See Prat, *supra* note 129, at 862 (stating that “violations to the transparency principle are so widespread . . . [in the corporate world] that some legal scholars argue secrecy is the norm rather than the exception in the relationship between shareholders and managers”).

207. This is a continuation of the earlier example. The environmentalists may only be interested in this scenario as a last resort—if silent or secret membership is the only way to induce the executive to join the initiative.

208. While managers are generally expected to share material information with shareholders, they are allowed to ask for nondisclosure agreements and in some cases to withhold confidential trade secrets or other information that would harm the company if leaked. See Cyril Moscow, *Director Confidentiality*, 74 LAW & CONTEMP. PROBS. 197, 201, 208 (2011) (noting that when “[f]aced with an inspection demand, corporations often seek to withhold some information as confidential or demand confidentiality agreements as a condition of inspection” and concluding that “[m]aterial information encompasses both proprietary information, such as trade secrets, and board information, such as the content of board discussions. As in most business situations, express contractual consent is the best solution to the problem of disclosure of information.”).

may trump any of the potential benefits of reticence.<sup>209</sup> This Section offers a first take on these distinctions—distinctions that will be critical to a fuller normative analysis of reticence.

### 1. Ex Ante v. Ex Post

Inexpressive lawmaking may be distinguished from inexpressive law enforcement, and the desirability of the former may be different from the latter. For example, we may have no problem with sealing the negotiating history surrounding a treaty for twenty years, if doing so is likely to make negotiations smoother and more likely to encourage buy in and broad agreement. But embracing reticence at that stage does not require us to embrace reticence in trials, if we think that reticence in that context would mean running roughshod over important principles of justice.

Note that one's preferences for or against reticence ex ante or ex post will not necessarily track one's ex ante or ex post preferences for other features of the law such as softness or vagueness. For example, scholarship on rules and standards focuses on how standards may be desirable at the agreement design stage, because they reduce contracting costs—because there is less work to be done in finding focal points of agreement—but that rules may be preferable at the law enforcement stage, where they are easier to administer than standards that require judgment and interpretation.<sup>210</sup> Reticence may track these preferences—reticence may reduce costs ex ante but not ex post, much like standards—but not necessarily. It is just as likely that these preferences will run the other way. Inexpressive lawmakers may prefer rules to standards ex ante if those rules provide for clear and mutually agreeable obligations but express little commitment to clear legal principles. Later, in the ex post law enforcement stage, inexpressive regulators may prefer standards to rules, if those standards create a wider range of acceptable behavior, thereby enabling some flexibility in enforcement and allowing for face-saving enforcement strategies. Prescriptive and normative analyses, therefore, must be attentive to this ex ante/ex post divide.

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209. Compare *supra* text accompanying notes 42–43 (describing the reticence of international criminal tribunals), with *supra* text accompanying note 88 (describing the reticence of the European Court of Justice).

210. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 568–71 (1992) (demonstrating that rules are more costly than standards to generate, but that standards are more costly to interpret and enforce).

## 2. Differently Situated Actors

How we feel about opacity in a given context may depend on who is withholding something and why. There is a meaningful difference between a technology company refusing to commit to free speech principles in order to deceive a repressive regime—and thereby ensure freedom of expression in that regime—and a judge declining to explain fully the reasons behind her sentencing decision in a criminal trial. For some, the meaningful distinction between these scenarios is the motivation of the actors. If the technology company's motivations are pure and the judge's motivations are impure, that will be enough for some to justify reticence in the former case but not the latter. For others, the difference will turn on the likely outcomes in each case—if reticence produces a good outcome in one scenario and not in the other, it will be worth it in that scenario but not the other.

It may also matter whether the inexpressive actor is a part of the legal regime or a subject of the regime. That is, we may find reticence acceptable when the person being inexpressive is a subject of the legal regime—such as an armed rebel group that meets with UN monitors to discuss its compliance with humanitarian law. But defending the rebel group's reticence in this context does not require a defense of reticence on behalf of the regulators. We might conclude that the UN monitors will be under a duty to publicly express condemnation of the rebel group, even if they secretly tell the rebel group that they understand the group's need to reject humanitarian principles even as they improve their humanitarian practices.

Finally, it may matter who is *not* being inexpressive. It may be the case that how one feels about an actor's reticence depends on whether others are inexpressive or expressive in the same scenario. For example, the ICRC may benefit from reticence precisely because they stand out as an inexpressive alternative in an otherwise expressive civil society. In this case, if their reticence is critical to their considerable success, we may be willing to accept some level of reticence for this considerable success. But in other scenarios, if all actors are being inexpressive and there is no expressive action, we may decide that actors have a responsibility to be expressive and that reticence is an abrogation of that responsibility.

## 3. Bright Lines

While for some the acceptability of opacity may depend on the actors and their motivations, for others it will only be acceptable as long as it does not run afoul of certain bright lines. For example, some may

feel that the demands of justice call for maximizing expression in individual criminal trials, where due process requires fully developed reasons for criminal sanctions, regardless of their costs or benefits. This is not an instrumental calculation, but a deontological one. Others may see transparency as simply too important a value—in absolute rather than relative terms—to balance against some prospective gains generated by a secret agreement or secret enforcement strategy.<sup>211</sup> These are not fully developed normative arguments against opacity. Instead, they are offered here to suggest that while this analysis largely focuses on costs and benefits, these are not the only concerns at stake.

### C. Making Sensible Tradeoffs

Can regulators know—with a sufficiently high level of confidence—whether to prefer more or less transparency in a given situation? In the absence of this certainty, it may make sense to identify tools to balance the need for transparency with the need for opacity. The crucial question may not be *whether* to be transparent or opaque, but rather *when and how* to be one or the other. We already live in a world of semitransparency. A court, for example, will issue a scathing and expressive opinion one day, and a less expressive, per curiam opinion the next—or the court may decline to reach the normative issues in the case at all.<sup>212</sup> What follows are several policies that promise to balance the interests of openness with the interests of opacity.

#### 1. Delayed Transparency

Transparency tradeoffs change over time. Secrecy is critical for sting operations, for example, which simply cannot work effectively if they are publicized in advance.<sup>213</sup> The same is true for peace negotiations and controversial legislation.<sup>214</sup> We moderate the harmful

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211. See, e.g., Kevin R. Davis, *Kantian “Publicity” and Political Justice*, 8 HIST. PHIL. Q. 409, 413 (1991) (“All actions relating to the right of other men are unjust if their maxim is not consistent with publicity.” (citing IMMANUEL KANT, ON HISTORY 129 (Lewis White Beck ed., Lewis White Beck et al. trans., Bobbs-Merrill Co. 1963) (1795))).

212. Consider the European Court of Human Rights. Commentators have suggested that the court sometimes fully explains itself—and each judge explains his or her reasoning—while other times the court operates by consensus, conveying little about the individual judges, and at still other times the court relies on the “margin of appreciation” doctrine to decline to rule on an issue at all. Helfer & Slaughter, *supra* note 96, at 317.

213. See Dennis F. Thompson, *Democratic Secrecy: The Dilemma of Accountability*, 114 POL. SCI. Q. 181, 182 (1999) (“[D]emocracy requires publicity, but some democratic policies require secrecy.”).

214. *Id.* (describing temporary secrecy in the production of the Dayton Accords, President Clinton’s health care bill, and President Kennedy’s nuclear negotiations with the Soviet Union:

effects of secrecy in these contexts by making it temporary.<sup>215</sup> Rather than face an absolute choice between total transparency and total secrecy, regulators instead choose to keep a policy secret for a limited period of time.<sup>216</sup> This practice of placing a sunset provision on a closed policy can also be stated the other way around, as placing a sunrise provision on the policy—a provision that makes a policy more transparent over time.

So in areas where some opacity is warranted—committee meetings, when the Justices deliberate, and so on—the harmful effects of that opacity might be mitigated with sunrise provisions that make meeting minutes public after some reasonable delay. This would allow regulators a measure of flexibility in negotiations, but also allow voters a measure of transparency and a vehicle for accountability.

One could imagine this being useful in private ordering as well. For example, a social norms initiative that is forged among unlikely allies—allies who might only sign on if they can remain anonymous—could slowly become more public over time as the strength of the initiative grows. A sunrise provision could minimize the twin harms of (a) expressing norms that might crowd out potential partners too soon and, conversely, (b) not expressing anything at all, discouraging people from joining the initiative in the first place. One option would be to make only vague expressions initially, above some minimum threshold that would incentivize parties to join the group, but below some maximum threshold beyond which parties cannot form incompletely theorized agreements. The group could then progressively become more public and more expressive as the strength of the initiative grows. This could mean increasing, over time, the public and expressive nature of group membership, membership commitments, group principles, and more. Such time-lapse exposure could offer the benefits of reticence in the early stages of norm and institutional development, without foreclosing the benefits of norm expression at a later point in time. It is worth noting that the same is true for rule enforcement and monitoring efforts: even if the norms and principles are stated publicly, the nature and scope, and even the existence, of enforcement measures could be kept private.

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“The most familiar examples are in foreign policy and law enforcement. If the Dayton negotiations on Bosnia had been open to the press and all the terms of the final agreement fully disclosed, the leaders would almost certainly not have been able to reach an agreement.”)

215. *Id.* at 184 (“The first way in which secrecy may be moderated involves its temporal dimension. We moderate the secrecy by making it temporary: lift the veil in time for citizens to judge the policy or process.”).

216. The Senate’s most recent attempt to reform the tax code featured a similar proposal. Bernie Becker, *Tax Writers Promise 50 Years of Secrecy for Senators’ Suggestions*, HILL (July 25, 2013), <http://goo.gl/gBQfCj> [<https://perma.cc/3QGN-WDTD>].



While scholars have paid considerable attention to sunset provisions in the law and other time-based rules like re-ratification requirements, they have paid scant attention to sunrise provisions.<sup>217</sup> Even if some regulation is initially devised in secret, it can be adopted with an implicit or explicit understanding that it will become increasingly public over time. This can be managed with a timetable for increasing publicity—further revealing the substantive obligations of the law, the delegation provisions, the monitoring and oversight provisions, the parties to the agreement, and so on.

## 2. Internal Checks

One mechanism to address both gaming and agency costs is to create systems for verifying private commitments through a trusted third party. In the national security context, for example, voters rely on inspectors general and other internal executive branch checks to ensure the proper balance between secrecy and accountability.<sup>218</sup> Voters rely on external checks as well. These checks promise to balance secrecy with accountability—albeit imperfectly—as when, for example, the executive meets with the intelligence committees or submits material to a judge *in camera*. A similar phenomenon exists in the corporate world, when shareholders rely on members of the board to monitor the corporation—including reviewing secret materials, such as trade secrets—while the shareholders themselves never have access to those secret materials.<sup>219</sup>

There are good reasons to worry that safeguards like these will be ineffectual, or worse. They could induce trust where it is not warranted and enable parties to deceive their agents further or engage in more deceptive gaming. How well this mechanism works is not clear.<sup>220</sup> But at the very least this approach promises to help regulators better balance the demands of expression and reticence.

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217. See Barbara Koremenos, *Contracting Around International Uncertainty*, 99 AM. POL. SCI. REV. 549, 549 (2005) (surveying a random sample of international agreements and finding a link between uncertainty and duration provisions, suggesting that states put finite durations on agreements to ensure flexibility in the face of uncertainty).

218. See JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 99–120 (2012) (reviewing the role of inspectors general and other internal accountability mechanisms within the executive branch); see also Pozen, *supra* note 116, at 45 (discussing scholarship about executive branch self-binding mechanisms).

219. See Prat, *supra* note 129, at 862 (noting that many scholars consider secrecy the norm between shareholders and managers in the corporate world).

220. See Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1028–29 (2013) (discussing the ways in which inspectors general oversee executive power and increase transparency of national security practices).

### 3. Acoustic Separation

Another way that legal regimes manage conflicting interests—including balancing the interests of transparency with the interests of secrecy—is by maintaining a wall of acoustic separation between different audiences.<sup>221</sup> For example, a judge might think that juries have the right to nullify a decision on any grounds—and the judge will enforce any decision handed down by the jury—but society is best off if this right is not explicitly communicated to the jury.<sup>222</sup> Or take Bentham’s famous example using the death penalty: Bentham argued that lawmakers might desire the death penalty’s strong deterrent effect but also find capital punishment morally repugnant.<sup>223</sup> In this case, lawmakers could say that they will hang criminals, but when someone is actually convicted they are told they must go into hiding and never tell anyone what has happened or they will be killed.<sup>224</sup>

Reticence can create situations of acoustic separation—when regulators are inexpressive, the public is not told what regulators think or know. Acoustic separation is defensible in a limited number of cases with certain conditions. The normative analysis of acoustic separation could therefore be useful for thinking about when reticence is acceptable. For example, Thompson argues that acoustic separation is only acceptable when it enhances policy, when citizens have an opportunity to evaluate that policy, and when it is publicly justified. This might suggest that secret deliberations, like those of the European Central Bank’s Governing Council, are acceptable if they meet these criteria, and perhaps reticence is unacceptable where it fails to do so.<sup>225</sup>

In situations of acoustic separation, regulators rely on informal means of conveying information through backchannels, such as leakers. This suggests that in some cases, the ideal balance between reticence and expression is informal expression and formal reticence. This can be managed by leaking or “winking” mechanisms where regulators refrain from expressing something publicly, but find a way to convey that information to a select few who can distribute it more broadly.

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221. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 634 (describing acoustic separation between the “public” and “officialdom”).

222. *Id.* at 635 n.21.

223. Thompson, *supra* note 213, at 186.

224. *Id.*

225. See Stasavage, *Polarization and Publicity*, *supra* note 20, at 59 (using principal-agent models to show that in some scenarios optimal decisionmaking occurs when deliberations are secret but outcomes are not).

## CONCLUSION

While transparency has well-known benefits, it also has significant costs. Specifically, transparency reduces ambiguity about what the law means—it reduces the range of values that the law might possibly express—alienating potential supporters. This is not to say that this cost is high enough to counsel against transparency on the whole, but it is a cost to consider. In considering these costs, it helps to note that transparency is not monolithic; rather, there are a number of different ways that the law can be more or less transparent. The law may impose clear obligations, but for unclear reasons; it may be open to some audiences, but not others; and it may emanate from an unknown source.

Not only are these types of transparency conceptually distinct, but they have different tradeoffs. Reductions in obligation transparency, for example, are more costly than reductions in attribution transparency or justification transparency. This suggests, contrary to established wisdom, that clear obligations can be less costly for parties to support than unclear “soft” obligations, as long as the clear obligations obscure the principle or actor behind them. It may very well be the case that the costs of too much transparency pale in comparison to the costs of insufficient transparency on the whole. But because the transparency tax has received so little attention, it is taken for granted that more transparency is always better. Sometimes, along certain dimensions of transparency, more is less and less is more.