

Secret Law and the Value of Publicity*

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Abstract. Revelations in the United States of secret legal opinions by the Department of Justice, dramatically altering the conventional interpretations of laws governing torture, interrogation, and surveillance, have made the issue of “secret law” newly prominent. The dangers of secret law from the perspective of democratic accountability are clear, and need no elaboration. But distaste for secret law goes beyond questions of democracy. Since Plato, and continuing through such non-democratic thinkers as Bodin and Hobbes, secret law has been seen as a mark of tyranny, inconsistent with the notion of law itself. This raises both theoretical and practical questions. The theoretical questions involve the consistency of secret law with positivist legal theory. In principle, while a legal system as a whole could not be secret, publicity need not be part of the validity criteria for particular laws. The practical questions arise from the fact that secret laws, and secret governmental operations, are a common and often well-accepted aspect of governmental power. This paper argues that the flaw of secret law goes beyond accountability and beyond efficiency to the role that law plays, and can only play, in situating subjects’ understanding of themselves in relation to the state. Secret law, as such, is inconsistent with this fundamental claim of the law to orient us in moral and political space, and undermines the claim to legitimacy of the state’s rulers.

1. Secrecy and Torture

One might have thought that news out of Washington had lost its capacity to shock long ago. But revelations of further, still secret, memoranda by the Office of Legal Counsel justifying torturous interrogation methods made headlines.¹ A range of CIA “enhanced interrogation techniques,” including

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¹ S. Shane, D. Johnston, and J. Risen. Secret U.S. Endorsement of Harsh Interrogations, *New York Times*, 4 October 2007.

waterboarding, sleep deprivation, and induced hypothermia, would be considered consistent with US prohibitions on both torture and “cruel, inhuman, or degrading” treatment, even when combined, and notwithstanding the fact that these techniques have long been considered torture and as such, serious criminal violations under both international and domestic law when practiced by U.S. or other nationals (Wallach 2007).

This may sound like old news, given the infamous Yoo-Bybee “Torture memo” of August 2002, which sought to provide leeway for the administration’s deployments of harsh interrogatory techniques. The Office of Legal Counsel (OLC) initially withdrew the memorandum, because its analysis was deemed unnecessary (and inadequate) (Goldsmith 2007). Congress also acted, to pass the Detainee Treatment Act which prohibited cruel, inhuman, and degrading treatment, as well as torture. The same prohibitions were re-enacted in the Military Commissions Act of 2006, with the important proviso that the President alone was given the authority to interpret the scope of the prohibitions.

The startling news, however, was that these public legislative and administrative changes were meaningless: The OLC had secretly issued two new opinions justifying the deployment of the very techniques thought to have been made clearly illegal. The secret memoranda argue that even these harsh interrogation practices fail to “shock the conscience” and thus violate the U.S. understanding of the prohibition of cruel, inhuman, and degrading treatment, when they are performed in order to extract what is believed to be lifesaving intelligence. This conclusion itself presumably rests on the ground that, if sufficient numbers of lives are or may be in the balance, the “conscience” might allow, indeed require, virtually any interrogation technique.

There are so many things troubling about these revelations that it is hard to know where to start, not least among which is the discovery of the strength of the Bush Administration’s insistence on using these techniques in the face of international condemnation and congressional prohibition. The legal effect of the OLC opinions means that they serve as amendments to the scope of congressionally-defined law, for purposes of executive enforcement. As binding limits on prosecution, they define the contours of the criminal law they purport to interpret, and so make new law, regardless of congressional intent. Moreover, because the effect of the OLC opinions is to limit, rather than expand, the possibilities of prosecution, there is no prospect of a judicial appeal of these opinions. There is no one, save the executive branch itself, to challenge the opinions, and thus they will stand until a new administration’s appointees withdraw them.²

² Even then, the withdrawn memoranda may continue to serve as elements of a Due Process-based advice of counsel defense to any criminal prosecution—a “golden shield,” as Jack Goldsmith described the memoranda (Goldsmith 2007, 144, 162). Note added in March

We are used to secrecy in government. Secrecy, in the form of confidentiality, protects privacy; secrecy, in the form of anonymity, can protect the candor and integrity of review processes; and secrecy about enforcement practices, as in tax, lets us partially relax into the belief that we are not simply suckers, while those who know the rules of the game can avoid taxes at will. But secret laws, or secret amendments, are nonetheless chilling, for they strike at the foundation of law itself, and of the government's right to rule. Even Draco, author of the infamously punitive laws of Athens, saw fit to publish his laws. Louis XVI, at the height of his absolutist power, also scrupled on this point: For the king's words to be law, they must be written and public.³ When the U.S. government falls short of this standard, it has fallen very far indeed.

Perhaps condemnation of secret law seems too easy, because it is morally and politically overdetermined after two centuries of the rhetoric and developing practice of liberalism and democratic self-government. The contemporary keystone value of "transparency" makes any alternative hard to digest, and may prompt an overreaction to the excesses of a particular set of politics. Immanuel Kant declared that a principle of "publicity" served as a "transcendental" standard of justice for all legal regimes: "All actions affecting the rights of other human beings are wrong if their maxim is not compatible with their being made public" (Kant 1991, 126). Moreover, policies implicating a range of values make it hard to single out the destructiveness of a particular one. Nonetheless, it can be worthwhile to tease apart the problems with secret law, not just so we can understand our objections, but because by doing so, we may reveal something about the nature of law and its moral and political qualities.

I want to probe two problems, one theoretical, the other practical. The theoretical question involves the consistency of secret law with positivist legal theory. Legal positivists hold (with varying specific elaborations) that law's validity rests on social not moral facts—that the mark of legality is conferred, at root, by criteria no more morally robust than the contingent values and practices of the frequently morally-wanting individuals to whom they belong. On a positivist conception of law, a value of *publicity*, which insists on the non-secrecy of law, could as a contingent matter count among the validity criteria of a legal system. Stronger yet, a positivist could claim, at the retail level, that a given law must be promulgated to its direct addressee, as a conceptual condition of its being the sort of norm or command we call a law. Indeed, a positivist could hold that publicity may be a necessary condition of a legal system as a whole,

2009: In January, Steven Bradbury, head of the OLC, announced the formal repudiation of a number of these memoranda. However, the withdrawn memoranda may still serve as elements of a Due Process-based advice-of-counsel defense to any criminal prosecution.

³ For an account of the struggles within absolutist theory to work out an account of the King's public, legal voice, see Kantorowicz 1957.

on pain of inefficacy.⁴ But given positivism's commitments, there would seem no basis for a more sweeping restriction on secrecy with regard to non-addressees. Whatever publicity as exists in the system could be merely non-binding custom, or understood as a demand of justice, not law.

Practice, superficially taken, might seem to confirm the positivist's theoretical premise, for secrecy abounds in government, through operations that nonetheless are clearly matters of law and legal governance, constituting binding commitments upon those covered by the secret provisions. And yet the aversion to secrecy in law runs so deep across time that the category serves as a basis to challenge the positivist's insistence on the consistency of legality and secrecy. I want to argue that publicity is both a wholesale and retail value, connected with the validity of particular laws, in a way that suggests positivists should allow more space for this central Rule of Law value to cohabit with the conventional aspects of legality. Thus, this essay represents a joining of the recent jurisprudential conversation suggesting a more normatively-oriented positivism, one open to recognition of law's distinctive moral value—not merely as a useful spandrel of law's structure, but as a core feature.

First, and most obviously, secrecy undermines democratic accountability, raising the possibility that we do not know what our government does in our name, and so cannot demand a change. The democratic case against secret law rests, to be sure, on a particular conception of the province of legislative oversight, but I take this case against secret law to be unproblematic. I want to argue as well that repugnance to secret law is not just found in a deficit of democratic accountability, but in the way secrecy undermines two more fundamental aspects of law's value—aspects that predate liberal democracy by millennia.

Second, law's secrecy hurts us existentially, because it deprives us of the way in which, once we are organized as a polity, law tells us who we are, by constituting our *orientation* in moral and political space—what values and acts we project into the world. In the case of torture, foreigners come to know us better than we know ourselves. Any secret law deprives us of this central form of self-knowledge, a knowledge that makes us citizens rather than mere subjects. This is, perhaps, the most troubling aspect of secret law: It undercuts the authority of the state it claims to serve.

The practical problem of secret law is prompted by the theoretical claim. For if, as I have said, secrecy is well-tolerated in the state today, in virtue of its advantages, yet constitutes a threat to law's function as a basis of

⁴ Perhaps one can conceive of laws generally not known by most subjects, or known only to police or officials. And perhaps such a system might merit the notion of law, if official conduct were sufficiently controlled, though law failed in its usual purposes of interpersonal governance.

legitimacy and moral orientation, then we are faced with a problem of reconciling efficiency with morality, governance by law with governance by performance. I shall argue for a central distinction, between what I call mere secrecy and *meta-secrecy*. By meta-secrecy, I mean to refer to secret law whose very secrecy is itself a secret. Meta-secrecy, I will argue, is the basis of our repugnance, and it is what is manifest in the OLC memoranda.

2. Secret Law and History

A ruler who acts without law is a tyrant, whether democratic or monarchic. Tyranny, in its original Greek manifestations, was understood as governance that was lawless in two different ways: a ruler who took power without benefit of law or constitutional principle; and a ruler who ruled without regard to form of law. While, as Jean Bodin noted, usurpation by conquest was not seen as pejorative, the political threats a usurper faced tended to lead in the direction of rule by terror (Bodin 1955, book II, chap. iv). Hence the modern conception of tyranny as lawless rule was born, as expressed by Bodin: "Tyrannical monarchy is one in which the laws of nature are set at naught, free subjects oppressed as if they were slaves, and their property treated as if it belonged to the tyrant" (Bodin 1955, book II, chap. ii). There is a practical basis for law's centrality, to be sure: How can a leader's dictates be obeyed, much less enforced, if they cannot be known? If a central justification of the state comes from its capacity to coordinate social life, it is hard to see how coordination can be achieved in law's absence. As Plato argued in Book VIII of the *Republic*, a lawless state is incoherent, undisciplined in its passions—like a wanton in its aims and actions. Thus Plato linked tyranny with democracy, seeing democracy as forgoing reason's rule to the chaotic claim of the appetites. Once the appetites are unleashed, free of the rule of logos, there is nothing but power to control the polity—power exercised through a popular dictator, or tyrant. The violence of the tyrant's rule is not the basis of tyranny, but rather the effect of living without law, without a rational, public principle under which the law is known and articulated.⁵

But the problem with tyranny is not just disorder and the terror such disorder brings. Tyrants are despised for the chaos of their rule, as well as its cruelty. And what makes the enforcement of a ruler's will cruel is its application without principle—without affording subjects a basis for understanding its infliction. The harshness of punishment is another matter entirely. For punishment to be punishment, to be something other than the arbitrary infliction of pain, law must do at least this much: It must mediate

⁵ The Platonic principle of rule by law, and of law's relation to an articulable principle of reason, sit at odds with one of his most famous proposals in the *Republic*, that of the "noble lie," or *gennaion pseudos*, concerning the birthright of the guardians to lead (Plato 1997, 414b).

between ruler and ruled. By the same coin, a ruler who omits to punish someone otherwise deserving, independent of any principle of forgiveness or excuse, is not merciful but only indulgent. Without law, there is nothing to distinguish sentimentality from principle on the part of the ruler.

This is made clear in the Roman law tradition, beginning with the publication of the Twelve Tables which were, following the Greek precedent, inscribed on ivory tablets, put together in front of the rostra, so that they might be open to public inspection (Maine 1864, xvi). Written law, publicly displayed, had precedence in this system, whether composed by statute, judgment, or imperial edict (determined in a letter over the Emperor's signature). Even the unwritten law of Rome was public in its way, consisting of ancient custom, livened by continuous observance (Justinianus 1913, 4; Justinianus 1985, vol. 1, book I, chap. 2 [Pomponius]). The annals of Roman history are full of derogations from this principle after the fall of the Republic, where state policy came to consist of the whim of the emperor, promulgated without Senate deliberation, without regard for precedent or public principle. But as a principle, an ideal, the public nature of law went hand in hand with the nature of the republic itself. Indeed, the very idea of a Republic—of *res publicae*, things pertaining to the public—supports the idea of matters of public concern being regulated by public rules, as opposed to the *arbitrario*—the raw will of the ruler.

The relation between legitimacy and law has been maintained throughout the history of political thought, even among such theorists of absolute sovereignty as Bodin. Bodin, who gave the notion of sovereignty its first rigorous elaboration, needed the concept of publicity to distinguish the private acts of the ruler from his law-making acts, lest the separate political identity of the state would be merged with the private opinions of the ruler.⁶ Thomas Hobbes, likewise, insisted that even his absolutist sovereign must inform the public about the content and grounds for the law he promulgates: "It belongeth therefore to the Office of a Legislator, (such as in all Commonwealths the Supreme representative, be it one Man, or an Assembly) to make the reason Perspicuous, why the Law was made; and the body of the Law it selfe, as short, but in as proper, and significant terms, as may be" (Hobbes 1996, 240).⁷ Hobbes's reason for insisting on law's "perspicuity"—its knowability—lay primarily in the dangers ambiguity presented for the contests over justice he saw as undermining the possibility of the state. But this is simply to underline that the very idea of an unknown or unknowable law stands in Hobbes's mind, in opposition to

⁶ See Bodin 1992, 14–5, distinguishing between a Prince's private contracts and his public statements of the law. Oddly for today, for Bodin the publicity of law means precisely that the ruler is not thereby bound (thus not compromising his sovereignty), while private contracts bind the conscience (see, e.g., *ibid.*, 26–7).

⁷ I owe this reference directly to Kinch Hoekstra and indirectly to Waldron 2001, n. 8.

the basic project of state authority. Authority, including absolutist authority over the very terms of justice, requires public law.

The relation between law's authority and its knowability is most strongly manifest in the greatest attempt to rationalize law's institutions the West has known: the Code Napoléon, of 1804. The first article of the Code provided that "The laws are executed through out the French territory, in virtue of their promulgation by the Emperor. They will have executory force from the moment of their promulgation, when they can be known."⁸ Unpublished law, let alone secret law, is nugatory. The need to know law is a function of the structure of the state, and its basic purpose in creating coherent social order, in which ruler and subject can locate themselves. Jeremy Bentham makes this aspiration explicit, linking the conceptual necessity of promulgation to the moral quality of the citizens and state:

To the subject-citizen [the law will] serve as a *code of instruction, moral, and intellectual* together: applying itself to, and calling into continual exercise, the *intellectual* faculty; and not merely, as in the case of a code of ordinary structure, applying itself to the *will*, and operating upon that faculty, by no other means than the irresistible force of a superior will, employed in the way of *intimidation* or *remuneration*: intimidation of necessity for the most part: intimidation, with only a small admixture of remuneration, in a comparatively small number of cases, and to a comparatively minute extent. (Bentham 1962, 539)

This argument is independent of the moral quality of the law, reflecting Bentham's break with Blackstone's naturalism. The connection between law and publicity goes by way of the moral capacities of the actor, not of the law itself. But, of course, the connection between law and the moral aspiration of doing justice is equally deep. I return to this connection below, after a survey of the forms of secrecy.

3. The Forms of Legal Secrecy

The historical insistence I have alluded to above has rested comfortably, perhaps hypocritically, with an equally longstanding tradition of secret governance. Indeed, one might think of the norm of publicity as the homage paid by the value of secrecy. I restrict my consideration now to the modern state, though there are no doubt historical analogues to some of the modern administrative practices, especially to the international components. The spectrum roughly coincides with an increasing dimension of generality, as well, from the singular to the general order. This difference marks one of the central dimensions of legality. But generality and the possibility of secrecy bear no direct relation. I will argue instead for a

⁸ *Code Napoléon*, Preliminary title, art. 1. For discussion, see Gray 1921, 164. I owe the Gray reference to Fuller 1964, 49.

central distinction, between instances where the fact of secrecy is itself generally known, and the meta-secrets, where the fact of secrecy is itself unknown.

I want first, however, to make and then complicate a preliminary distinction, between secrecy as such and low-salience secrecy. Sometimes the kinds of law I discuss, and the legal changes, are directly secret, with a regime of classification and penalties for their disclosure. In other cases, the effective secrecy is maintained by making the law invisible, a matter of very low salience. Caligula, Blackstone tells us, promulgated his laws "in a very small character, and hung them upon high pillars, the more effectively to ensnare the people."⁹ Clearly there are differences between secrecy and low salience, just as there are differences between lying and other forms of equivocation, including misdirective truth-telling. But, in practice, they are subject to similar moral evaluations, and I shall treat them as equivalent.

I array the following forms of legal secrecy in what seems to me a spectrum from unproblematic to highly problematic. But this categorization is not meant to be definitive or uncontroversial. Clearly much depends on the stakes, the possibility of later disclosure, and the extent of the secrecy.

(a) *Covert operations*: One of the prime sites of secrecy in government of course concerns military and intelligence operations. Such operations are not themselves law, although they are initiated and regulated by legal rules, usually generated by the executive, but also sometimes by legislative initiative. The military regularly deploys troops and engages in cross-border operations that are sometimes secret from the country whose border is crossed; but even when the target nation has provided a quiet promise of non-interference, such programs are still secret from the public at large, as well as other nations.

Secret operations present evident problems of accountability, as well as international stability. When they go wrong, the consequences for public diplomacy can be disastrous. Large-scale operations, like the U.S. secret bombing of Cambodia and military actions in Laos, or funding the Contras in Nicaragua, can rise to the level of constitutional crisis, where the secrecy is an attempt to evade one of the few legislative checks on executive military action. While I do not mean to minimize the costs of such adventures, they do not strike at the heart of the notion of law, so much as at questions of stability or separation of powers in a particular constitutional configuration. They are a prime example of "mere secrets," or known unknowns, for it is itself a matter of common knowledge, both domestically and internationally, that there will be a range of operations whose efficacy demands secrecy. Internationally, the continued existence of

⁹ Blackstone 2003, 45. The reference is to Dio Cassio's *Roman History*, book LIX, chap. 29.

secret operations is in the general interest of states, and so no third-party demands are heard for general transparency. While foreign states may complain about particular actions, there are no serious objections by state actors to the category of secret international efforts.

On the domestic front, there is an analogue to the covert international operation: the undercover police investigation. At the level of principle, undercover operations are uncontroversial, provided they meet ordinary civil liberties requirements, such as judicial approval of search and surveillance, and are attentive to the possibilities of entrapment. Clandestine criminal activity is an obvious social threat; and clandestine penetration of that activity is usually the only possible remedy. But application of the principle depends on two further factors: the scope of criminal law, and the degree of clandestine policing. Combine laws criminalizing large swathes of putatively anti-social behavior with extensive secret policing or informant systems, and the result is Cuba or the D.D.R. Large-scale infiltration of social networks destroys trust within a society, rendering ordinary relations impossible.

(b) *Prosecutorial guidelines*: Given general laws, substantial temptations to disobey, and limited state resources, prosecutors have an obvious and powerful incentive not to disclose their particular strategies, lest citizens try to gain benefit to tactical safe harbors, where they can expect no scrutiny. The same practice is true of tax authorities, who must maintain a general fear of audits even (and especially) when the rate of auditing becomes a matter of poor lottery luck. The consequences for non-compliance would be serious, were the audit guidelines made public. By maintaining discretion about where and when enforcement will be made, all are on potential notice that their behavior might come afoul of the law in action, as it already is on the books. Barring illicit discrimination in discretion, such secrecy bespeaks no unfairness.

Such secrecy in enforcement is unproblematic in principle, as are speed traps and sting operations. As long as the general norm is legitimate, it is hard to see the objection to a little *in terrorem* strategy in law enforcement. The problems arise from the possibilities for selective prosecution that arise from the secrecy, or other deviations from good faith efforts. Since the law enforced and the fact of secrecy are known, and assuming internal controls on the exercise of the policy, there is no unfair notice objection.

(c) *Secret budgeting*: Less secret yet are the budgets for covert programs, both domestic and international. Intelligence operations and weapons development are subject to special protocols, and an interesting body of regulation has developed around them.¹⁰ Practices vary in the quality of briefing given to legislators who approve the funds. In the United States,

¹⁰ See, e.g., Defense Appropriations Bill of 2007, Report of the Committee of Appropriations, 2006, 305.

typically only Congressional leadership and committee members are given access to even outlines of the program, and fewer yet are allowed to read the annex before voting on it. Such secrecy in the budget process, as well as other forms of accounting gimmickry, clearly are a source for mischief, even if they may in other cases represent a reasonable balance between democratic accountability and national security.

The category described so far consists of *mere secrecy* insofar as the fact of the secrecy is itself known, if not the content of the secret. I do not mean to minimize the extent to which “merely” secret operations or guidelines can undermine ideals of principled governance, but I also do not want to overstate their threat. Since the fact of their secrecy is known, they provide a target of accountability for other political actors. More generally, as I will argue below, the fact of their secrecy lends itself to understanding and possible justification towards the subject of the state, independent of the capacity of those other actors to bring the executive to task.

The next category I wish to describe goes further, into *meta-secrecy*, where the fact of the secret is itself unknown. This is the category that provides the starkest challenges to the rule of law, since it also involves a shift from one-off operations to more general schemes of rules.

(d) *Secret treaties*: Secret agreements have played a significant role in international diplomacy. Many of the famous intrigues among the kings, queens, and popes of Europe occurred through secret emissaries and diplomatic instruments, with covert promises of assassination.¹¹ More recent examples include agreements on mutual defense, joint administration, and de-accession of territories. The destabilizing effects of secret treaties are clear: They enable coordination among factions, reduce the predictability of response in the international arena, and sow distrust among international actors generally. Hence the first of Woodrow Wilson’s Fourteen Points for Peace was: “Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view.”¹²

Since Wilson’s efforts, a norm has developed that strongly disfavors such treaties, although they still play a significant role, especially in making possible bilateral agreements whose content, if otherwise revealed, would be destabilizing for other actors. The agreement ending the Cuban missile crisis, whereby Kennedy agreed to withdraw the Jupiter missiles from Turkey, is a case in point: Revealing Turkey’s cooperation with the nuclear missile program would have undermined Turkish political actors internally, and threatened to align it more closely than it would like with

¹¹ For a catalog of such treaties, see Grosek 2007.

¹² President Woodrow Wilson, Address delivered to Joint Session of Congress, January 8, 1918. http://www.lib.byu.edu/index.php/President_Wilson%27s_Fourteen_Points.

the US internationally. Despite the emerging norm against secret treaties, the War on Terror seems to have increased their frequency, simply in virtue of the incentives it puts for cooperation between countries (like the US and Iran) that are divided diplomatically, but nonetheless find coordinate interests (see Simmons and Steinberg 2007).

(e) *Secret executive legal action*: Many secret executive programs of the sort mentioned above begin with secret legal action by the executive, exercising his regulatory authority. In the U.S., this authority is exercised through the "Executive Order." Most famously, in the U.S., the authority of intelligence agencies to assassinate individual civilian leaders, has been putatively restricted by a series of Executive orders (respectively, Executive Orders 11905, 12306, and 12333). Whether or not such policies are well-grounded, the executive orders represent a form of administrative law, relied upon by our own agencies; and undisclosed changes to the orders reflect a significant shift in law. Many such executive orders are made public, but they need not be, under an exception in the Freedom of Information Act; and in the important class of National Security Directives, they frequently are kept secret, in whole or in part.¹³ The National Security Agency's warrantless surveillance was conducted pursuant to a classified directive, and important aspects of the continuity plans for the executive branch in the event of the deaths of both the President and Vice President are governed by a further secret annex to a public executive order.¹⁴

The OLC memoranda are not formally regulatory instruments, but interpretations of existing law. Nonetheless, the effect of these interpretations, when accepted by the Attorney General, is to establish the legal position for the United States on the matter at hand. And when the interpretations are at variance with statutory authority prohibiting the forms of interrogation or domestic surveillance permitted by the opinions, then their effect is to work a change in the underlying law. When the opinions are sharply at variance with conventional understandings of the statutes, have broad scope, and are issued in secret, then they are tantamount to a secret executive revision of the penal law. The opinions thus amount to new, secret law—quasi-legislation, and might just as well be grouped under category (g), below.

Moreover, the opinions fall into the category of meta-secrecy, not just ordinary secrecy. Where the domain of (provisionally) tolerated secrecy are those programs consistent with, but not disclosed by, higher-level rules and programs, the torture and surveillance programs were decidedly at odds with governing law. An ordinary citizen—in fact, a sophisticated legislator or administrative lawyer—would have been shocked to discover the

¹³ Federal Open Information Act, 5 U.S.C. Sec. 552(B).

¹⁴ The NSA directive was reported by the *New York Times*, and is explored more fully by Lichtblau 2008; National Security Presidential Directive/ NSPD 51 (May 9, 2007).

existence of these opinions: The fact of their secrecy was itself shrouded in secrecy. Indeed, the OLC opinions permitting the surveillance, in apparent violation of the governing FISA statute, were so secret that they were kept even from NSA's legal counsel.¹⁵

There is another example I mention here as well: The decriminalization of consensual homosexual sodomy in Israel reveals a disturbing face of secrecy even here. Briefly, Israel maintained on its books, and occasionally enforced, a statute forbidding anal intercourse, defined as "carnal knowledge of any person against the order of nature."¹⁶ The statute was general, and covered consensual as well as non-consensual sex. But secret prosecutorial guidelines were issued by Israel's Attorney General, Haim Cohn, in the 1960s prohibiting prosecutions for violations of the Act not involving lack of consent or minor partners, instructions re-issued, again secretly, in 1972. As with the OLC opinions, which won a decriminalization of torture for CIA and military personnel, these guidelines accomplished a dramatic narrowing of scope of the governing statute, which was not itself repealed by the Knesset until 1988, again mostly in secrecy. I elaborate this example further.

(f) *Secret trials*: The Court of the Star Chamber earned its infamy through secret processes based on secret evidence. Used to combat political opposition to the Tudor-Stuart political interests, it made use of the King's Privy Council to legitimate the straightforwardly brutal repression of political dissent and threats to executive power. In recent centuries' political history, Star Chamber trials have featured as an oppositional lodestone, an example of what criminal justice is not—and indeed, form much of the backdrop for the provisions of the Fifth Amendment, as well as modern English criminal procedure.

While secret trials have persisted around the world, as a way of administering political repression with minimal backlash, secret criminal trials have played little or no role in liberal states, even in the post 9/11 legal regime of the United States. What *has* played a role, continuously but increasingly, is the use of secret evidence and redacted public records of proceedings at nominally public trials, as well as secret immigration decisions. The due process objections to secret evidence, and *a fortiori* to secret trials, are familiar and serious, but they do not raise the special conceptual and political problems posed by secret law as such.

(g) *Secret law*: Secret law as such—legislation passed by due process, and approved by the executive, but whose existence and content are secret—

¹⁵ According to Mayer, when an NSA lawyer asked to review the memorandum, he was told by David Addington "You don't need access. The President decides who sees what, not you" (Mayer 2008, 268).

¹⁶ Sec. 152(2) of the British-mandate enacted Penal Code. I owe this discussion to conversation with Meir Dan-Cohen, and to Harel 1999–2000. Early judicial interpretations of the statute included oral sex and (*per dictum*) lesbian sex; but subsequent interpretations restricted it to anal penetration.

would seem to be a conceptual possibility under most systems of government. Indeed, Thomas Aquinas himself argued that since natural law remains in force without any further act of promulgation, promulgation might not be part of the essence of law (Aquinas 1920, *Summa Theologica*, 1.2, q. 90, a. 4). John Austin comments that a British statute constitutes law even if unwritten, on the basis of the Blackstonian fiction that the people are present at its making, through representation. While Austin subjects Blackstone's rationale to ridicule, he appears to endorse the descriptive jurisprudential point. On such a principle, if the fiction is honestly maintained, then secret law is a conceptual possibility as well, since everyone is, in principle, in on the secret (Austin 1885, vol. 2, 526). Large swathes of Soviet-era law, known as the *Sobranie*, including criminal, environmental, and agricultural law and regulations, were either formally secret or strictly limited in their promulgation.¹⁷ Nor is secret law unknown in the United States. The 18th Century Continental Congress met in secret, and the Senate sat in secret until the Third Congress; both houses continued to meet in secret to hear confidential messages from the President, through the War of 1812 (Parry 1954). Between 1811 and 1813, the Eleventh and Twelfth Congresses passed a number of statutes authorizing the President to seize adjoining territories; the statutes were not actually published until 1818, and were omitted from the ordinary volumes for those Congresses (Zinn 1952). The Confederate Congress, between 1861 and 1864, also passed a number of secret resolutions in closed sessions (see part two of Ramsdell 1941).

The second chapter of Israel's decriminalization of sodomy provides a further example. The statute itself was eliminated from Israel's penal code in 1988. But the mode of removal was curious: It was part of a wholesale revision of the sexual offenses law, with this particular change introduced during the legislative conference; and no record was made of the fact that the law had changed so dramatically. That is, homosexual sodomy was decriminalized secretly, first by the Attorney General, and then by the legislature. As a number of commentators have suggested, the reason for the secret change was not a pragmatic desire to minimize resistance to a controversial decision. It was, rather, a stratagem by Israeli religious conservatives to pre-empt a gay rights movement, for anti-sodomy laws had served as a salient point of opposition and coordination for movements around the world. In order to prevent an Israeli Stonewall, and the flourishing of an above-ground homosexual culture, repressive law was altered silently.

4. The Positivist Challenge: Is Law inherently Public?

I have described a range of forms of secrecy, within the executive, judicial, and legislative branches. There are pragmatic rationales for secrecy

¹⁷ See the papers collected in Buxbaum and Hendley 1991.

across all three branches, although of course excess is possible in any case. And at the level of philosophical principle, it would seem, all are consistent—indeed provide further persuasive evidence—of a generally positivist story about legal authority. Attention of a Fullerian sort to the inner morality of law would suggest great hesitancy in attributing what Jules Coleman has called the “weak commendation” of legality to such secretive practices (Coleman 2001, 190). Indeed, Fuller describes non-promulgation as the first way in which one can “fail to make law,” and clearly describes publicity as one of law’s cardinal virtues, singling it out as a possible constitutional condition that can serve as a clear condition of legality, and not just an aspiration (Fuller 1964, 34–5, 43–4). The practical value of promulgation is clear, insofar as law can only execute its conduct-guidance function if it is known—although it might serve other, distinctive, functions, for instance in guiding official decisions as well, as Meir Dan-Cohen (2002) has elaborated. As long as the law guides some, its secrecy (or non-general, or contingent) promulgation might well enhance its social efficacy.

Once we attend to the possibilities of such “acoustic separation” and focus on the official guidance function, the conceptual link between law and publicity becomes both clearer and weaker: Clearly, something only functions as law if it can perform a guidance function, hence it must be known to its addressee; yet weaker, because its addressee need only be the officials who must act on the law’s basis, not necessarily the citizens whose behavior will be indirectly affected. The mainstay rule-of-law values—generality, notice to those affected directly by the law, internal accountability—are in principle consistent with law’s secrecy.¹⁸ In the case of torture, for example, the direct notice interests are served so long as the torturers and their potential prosecutors understand the scope of their legal permission. For the victims of torture, notice of the permission is beside the point; their chief objection is the torture itself, not its surprising quality.

What really presses is a question more philosophical in nature: Is there any internal/conceptual/essential failure in the notion of secret law? For if all these forms of secret legal generation and amendment can count roughly as law, that would seem to support the positivist critique of Fuller: Whatever might be said on behalf of the inner morality of law, actual legal institutions and particular laws can depart very far from these ideals without a sacrifice of legality. While we need not sign on *tout court* to the “Separation Thesis” of Hart, which insists that there are *no* necessary connections between law and morality, these observations suggest a

¹⁸ The “in principle” caveat is relevant, because within both democratic and non-democratic regimes, secret law invites disobedience from internal processes of law-generation.

limited form of its truth: Even such a great fault as secrecy does not render the category of secret law an oxymoron.¹⁹

And yet, the history I have described above, from Solon and Plato, through Hobbes, Louis XIV, and Napoleon, and including even Fuller, must count for something in our understanding of law's relation of value. For if law is, as all acknowledge, a human construction, it is perforce a human construction existing in social time and space. And if those who have elaborated the concept of law over time have come to the conclusion not just that there is something not just undesirable about secrecy in law, but fundamentally repugnant, then the charge of conceptual mistake in the understanding of law is better leveled at those who deny the history.

To put it another way, the problem of secrecy reveals something about the way in which publicity functions not just as a condition of law's efficacy, but as an essential normative component, part of what makes law law. This is to go beyond Coleman's attempt to reconcile observations about law's normative value with his positivist commitments. Coleman says,

Law just is the kind of thing that can realize some attractive ideals. That fact about law is not necessarily part of our concept of it. After all, a hammer is the kind of thing that can be a murder weapon, a paperweight, or a commodity. [. . .] However, the fact that a thing, by its nature, has certain capacities or can be used for various ends, or as a part of various projects does not entail that any or all of those capacities, ends, or projects are part of our concept of that thing. (Coleman 2001, 194)

The largely unbroken historical record of condemnation of secret law reveals that a demand for general publicity is part of our running experience, such that any analysis of law had better build it in from the start. In fact, Fuller does not go far enough in establishing the norms of publicity, restricting himself to general reflections on the inefficacy of secret law. But wholesale publicity, coupled with retail (or marginal) secrecy, is precisely what has motivated concern with tyranny over time. Positivism's new-found sympathy to a value-embedded analysis needs to include publicity.²⁰

I turn now to the task of trying to understand what is wrong with secrecy—or rather, what is also wrong with it, beyond the objections from

¹⁹ While the "Separation thesis" plays a pervasive role in Hart's jurisprudence, it is first neatly stated in Hart 1958.

²⁰ The strongest statements in the positivist tradition are those of Austin, but reflected in Hart's more polemical positions in his famous debate with Fuller on Nazi law and legality (Hart 1958; Fuller 1958). But Hart's own position was more complicated, as reflected in his own account of the truth of the natural law tradition, in Hart 1997, chap. 9. John Finnis' distinction between a "focal," value-rich concept of law and a "penumbral" concept that extends to even hideous law, stakes out a similar ground, although with a different underlying semantics (Finnis, 1980).

democratic accountability and a modern ideal of transparency. The repugnance of the idea of secret law to a illiberal tradition in jurisprudence needs further exploration.

5. The Defects of Secrecy: (Dis)Orientation and (De-)Legitimacy

I want now to argue that the fundamental defect of secret law lies in two connected considerations. First, secret law deprives citizens of their understanding of themselves in relation to the state, and thus of their identity as legal subjects. Second, secret law deprives the governor of his legitimacy, undermining his right to rule. This is because the claim to rule is a claim founded in law—not as a matter of constitutional pedigree, but as a distinctive form of governance, with aspirations beyond mere thuggish control. The connections between legality and legitimacy are hence complex: While extra-legal political change can count (or come to count) as normatively legitimate, strict legality provides only a presumption, and not a sufficient condition, of legitimacy. Bearing the form of law, and meeting the minimal conditions of legal validity within a political system counts for something, and traditional positivism's attention to the character of this thin predicate of legality has been valuable. But law, understood as a human institution imbricated in a range of political values, requires a positivist theory at once attuned to the contingency of specific normative expectations, and aware of the timelessness of others. Non-secrecy is one of the latter concerns.

As to the first question: We are of course social animals, and this means that we orient ourselves mutually in a normative space. As has become a commonplace in evolutionary accounts of morality (whose credibility is irrelevant for this argument), one of the core functions of social norms is to allow us to coordinate our acts and attitudes, stabilizing cooperation across the temptations of free-riding or exploitation. Knowing who we are means knowing our relation to the norms that purport to apply to us: knowing that my loyalty is to this group, while those others are my enemies; knowing that we wear our clothes or hair as so, mate in these patterns not those, or can extend the terms of cooperation this far with this group, and not with that group. Knowing these norms simply is knowing the criteria and implications of the social memberships that provide not just protection, but cultural meaning, for us.

Now, even if our self-understanding depends on an orientation in normative space, it does not follow that we must orient ourselves with respect to law. Clearly, many people are happy with ethno-racial or other social identities that see law only as a colonizing opposition, not a source of meaning. Moreover, understanding oneself "in terms of the law" suggests a monolithic identification belied by the departmentalization of law, and the complexity of human identity: The role of family law, for instance,

in forming a conception of “normal” love and intimacy, bears little relation to the role of criminal law in forming a conception of social harm or deviancy.

True, but insofar as we do think of ourselves as political—as members of political, not just ethno-racial communities—we think of ourselves in relation to law. For reflective persons living in conditions of social pluralism and uncertain or transient sub-political memberships, law provides the most stable basis of social orientation, of understanding our particular identities in a normative environment.²¹ That is to say, law serves sometimes directly, sometimes obliquely, contrastively, or problematically, as a way of organizing the answers to the collective questions of membership: Who are we, what are we for (or against), and where are we going?

Secret law undermines the orienting character of law, not just its guidance function. It deprives us of aspects of our subjecthood, both in its meta-secret form, when we do not know of the secret, and then again, disruptively, when we come to know of its secrets. We discover at that point what was true of us all along: that the group to which we belong has a different normative character than we thought. We are not who we thought we were.

We can see this clearly in both the OLC opinions and the Israeli anti-sodomy history. Since the U.S. signed and ratified the Convention Against Torture, we have come to think of ourselves as a state that does not torture—helped by the frequent declarations of our President that “we do not torture.” This aspect of our identity was known most acutely by military and FBI interrogators, indoctrinated into the belief that deviations from the Geneva Conventions meant a stay in Leavenworth. The stomach-churning aspect of the revelations, for many, was the discovery that in fact we are a nation that tortures—indeed, worse yet, we are a nation that tortures and yet claims adherence to the Convention against Torture. Jeremy Waldron has written evocatively of the central, keystone role played by the norm against torture in our concept of the rule of law (Waldron 2005). To lose a grip on this norm is to have to accept a very different definition of the core norms governing the state.

Moreover, the relevance of these norms is no weaker just because you might not be subject to them, because you are an unlikely interrogator or interrogee. As a member of the polity you nonetheless have a stake in the question of torture, a stake independent of whether you can or have cast a vote on the matter, or see the state as speaking in your name. The acts may be done by the executive, without regard to democratic voice. But the executive is a part of our embodiment in public space, and we understand

²¹ Joseph Raz makes a similar point about the distinctive political value of the Rule of Law for pluralistic moderns such as ourselves, in Raz 1994, 370–8. See also Raz 1979, chap. 11.

ourselves internally at the same time as we understand ourselves externally as well.²²

And while I personally celebrate Israel's liberalization of its laws of sexuality, one can understand, from both the perspective of the right and the left, what is troubling about the *sotto voce* decriminalization, then legalization, of sodomy. For religious conservatives not part of the secret deal, such a change in the law would reflect an enormous moral shift in Israel's politics, a repudiation of an important part of its foundation in the Torah, for all that document's illiberalism. To be wrenched away from religious sources, towards contemporary liberalism, represents a kind of abduction of the moral identity of the state—one, again, that goes beyond questions of consent. Similarly, for the left, removal of the provision eliminated the possibility for gays to insist on their subjection and marginality, not to wallow in victimhood, but to force a more public accounting that could restore them to full subjecthood, not tolerated deviants. While the secret change in the law did not threaten them with a loss of control over their particular futures (and hence did not raise the ordinary concerns about legality and notice), it disrupted their sense of their oppositional relation to Israeli life, without marking an acceptance within that life.

This reveals an interesting aspect of the repugnance of secret law: Its secrecy is distressing even when the secret is one whose truth we could happily acknowledge—as is perhaps the case for many with the OLC opinions, given public opinion polling about the permissibility of torture.²³ The distressing point about secrecy is not just that the state is acting in discord with my values, but that the secrecy of its acts denies my capacity to understand my values in relation to the state. I cannot thereby understand myself *either* as in harmony or in dissonance with my polity. Practically speaking, this may make no difference, if I have no effective voice in the policy matter. But politically speaking, it severs me from membership in my state.

The point can be made more forcefully, in the more traditional language of legitimacy. The first step of disentangling legality and democracy is recovering an older-pre-democratic conception of legitimacy. Law is the predicate of state legitimacy. Legitimacy, broadly speaking, involves the right to rule. Historically, a right to rule could be earned through a variety of channels: through success in establishing the basic conditions of civil order, through claimed divine provenance, or genealogical pathways embedded in convention. Today, in the shadow of democracy, it is hard to conceive of any principle of legitimacy that does

²² I mean to echo Plato's claim in the *Republic* on the relation between intra-and inter-psychic equilibria.

²³ On claims that 2004 election vindicated the memoranda, see Yoo 2006, 180.

not, at base, consist of the exercise of popular will through constitutional channels. Yet, even today, we deploy a concept of legitimacy in our foreign relations that has little to do with democracy and even less with constitutionalism. Presidents, *generalissimos*, and kings, whether they sit on thrones of ballots or bayonets, are deemed the legitimate rulers, in implicit (and sometimes explicit) contrast to the thugs and warlords who aspire to the status. Moreover, their claim to legitimacy—to be treated as the rightful addressees, for example, of international diplomacy—is not merely a descriptive status. Other possible leaders, or other forms of government, might have a better claim to legitimacy in an evaluative sense; but the fact that alternatives would be better does not mean that the current rulers are without right.

These observations about legitimacy are puzzling, for it is hard to see what can underlie the claim. As I have described it, legitimacy comes partly from the form of rule, not just its substantive underpinnings. While there are some substantive matters that serve as a floor for claims of legitimacy, such as respect for basic human rights, it is the articulation of rule in a lawful—possibly constitutional—form that underlies its legitimacy. Of course, legal form does not guarantee legitimacy, for a democratic state can act illegitimately even if it has passed an electoral test in a host of ways, ranging from violation of basic rights, to corruption, to acting without due process. The crucial aspect of form is law.

6. Conclusion

The story of secret law is part of a traditional narrative about the virtues of the Rule of Law, virtues manifest wherever law serves as a central element of the social planner's toolkit. And the history of its repugnance reflects another traditional narrative, of the tussle between the so-called "Natural Lawyers" and the positivists, between those who understand law as having intrinsic moral qualities, and those for whom it serves as an instrument to be used by saints and sinners alike. Now that positivism has moved past its most stringent claims of law's conceptual independence from substantive political morality; and the Natural Law tradition has likewise become rather clearer about the limited range of moral values inherent in law, we can pursue a more material engagement with the way in which aspects of legality serve fundamental moral interests, even while giving wide scope to governmental malfeasance.

The focus on secret law, then, leads past a ceremonial nod to the Rule of Law, past the debate whether the Nazis really had law. It allows us to recover something perhaps lost in contemporary political philosophy, so dominated by the contemporary ideals of liberal rights and democratic accountability. We need not in any way disdain those values to see that

they comprise only a small swathe of the broader spectrum of legal-political considerations that together construct our sociality, our political morality in action.

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