

The repugnance of secret law

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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, leading to Congressional investigations on the topic. The dangers of secret law from the perspective of democratic accountability are clear, and need no elaboration. But the disgrace – and abhorrence – of 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. Panoptic –like transparency in governance is not only a utopian ideal, but a false one as well. On the other hand, these observations fail to capture the distinctive disgrace of secret law, and so fail to reveal an important dimension of value implicit in the rule of law.

This paper takes up strands in recent positivist debates about the relationship between the moral value of publicity (and legality) more generally, and the validity conditions of law. It 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 yet further, and still secret, memoranda by the Office of Legal Counsel justifying torturous interrogation methods managed still to shock.¹ The gist of the memos, according to the report in the *New York Times*, was that a range of CIA “enhanced interrogation techniques”, including – it is thought – waterboarding, sleep

¹ Scott Shane, David Johnston, and James Risen, “Secret U.S. Endorsement of Harsh Interrogations,” Oct. 4 2007, *New York Times*.

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.²

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. Most controversially, the Torture memo argued two points: first, that only the infliction of pain tantamount to organ failure or greatly prolonged mental distress would constitute torture, and so be prohibited under federal law; and second, even as to torturous techniques, that the President has the inherent constitutional authority as Commander in Chief to order any interrogation methods. To many readers, both claims smacked of poor legal reasoning aimed at legitimating a dubious objective. Indeed, the Office of Legal Counsel seems to have reached this conclusion as well, for at the direction of Jack Goldsmith, successor to Bybee, the Yoo-Bybee memo was withdrawn, because the analysis in the memo was deemed unnecessary (and inadequate, according to Goldsmith’s new memoir) to establish its conclusions.³

Congress had also acted in the interim, to pass the Detainee Treatment Act sponsored by John McCain, which on its face prohibited cruel, inhuman and degrading treatment (including, McCain was specifically told, waterboarding), as well as torture. The same prohibitions were re-enacted in the Military Commissions Act of 2006, with

² Evan Wallach, Drop by Drop (detailing prosecution of waterboarding by US), *Columbia Journalism Review* [cite].

³ See Jack Goldsmith, *The Terror Presidency* (XX). It should be noted that the rescission of the memorandum did not apparently affect which techniques were permitted. See Mayer, *The Dark Side*.

the important proviso that the President alone was given the authority to interpret the scope of the prohibitions. What we have now learned is that, in between these two statutes and in the wake of the repudiation of the initial Yoo-Bybee memo, the Office of Legal Counsel secretly issued two new opinions, written by the acting head of the OLC, Stephen Bradbury, justifying the deployment of the very techniques thought to have been made clearly illegal. According to the *Times*, 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.⁴ 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.

One of the memoranda, dated February 2002, and signed by John Yoo, has since been released, and while its content is consistent with that of the earlier Bybee memorandum, its arguments extend rather further, with yet fewer qualifications.⁵ The ACLU has obtained portions of some related memoranda discussing the use of the “enhanced” techniques. Recently released letters from the Department of Justice governing current practice (but not clearly extending to the harshest forms of interrogation) make clear that the Administration has adopted the legally dubious sliding-scale theory of limitation.⁶ There has not yet been a proper accounting of why the

⁴ The U.S. signed the Convention against Torture, etc., on the understanding that the prohibitions it enacted would be fully co-extensive with the 5th Amendment constitution prohibition of official conduct that shocks the conscience. The argument of the still secret memoranda, apparently, is that the conscience cannot be shocked by any interrogation techniques motivated by a sufficiently compelling state interest.

⁵ Memorandum available at XX [get]

⁶ Bradbury letters [get].

memoranda have been kept confidential. In addition, the memoranda revealed the existence of a further secret aspect of the interrogation program: Yoo had secured an agreement by the DOJ criminal division not to prosecute CIA or military personnel who did or would rely upon the memoranda.⁷

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 Administration's insistence on using these techniques in the face of international condemnation and congressional prohibition. The justification for the conclusion, if it matches the *Times* assertion, is also extremely dubious, since the Convention against Torture and Cruel, Inhuman, and Degrading Treatment, explicitly rejects any balancing test according to which otherwise prohibited techniques might become licit.⁸ Thus, the new opinions seem also to reveal a troubling, new pattern to the activity of the OLC, which has increasingly come to tailor its advice to the desires of the President and Vice President.⁹

Some background on the OLC is in order. The OLC's charge is, traditionally, twofold: first, to provide candid evaluations to the executive branch of the legality (including the constitutionality) of proposed policies; and second, to serve as an arbiter of

⁷ [This is somewhat more complicated yet, because it is commonly thought (and reported by Mayer as well as Suskind) that the CIA "enhanced interrogations" began before and thus prompted the issuance of the original memoranda. Thus, the earlier actors did not rely upon the memoranda at all.]

⁸ Moreover, U.S. constitutional law on the "shocks the conscience" standards displays no balancing test either – in the principal case, *Rochin*, the state's act of forcing open a defendant's mouth and pumping his stomach to obtain evidence of drug possession, was held to violate Due Process in virtue of the force and brutality of the methods alone, notwithstanding the governmental interest in the balance: "They are methods too close to the rack and the screw to permit of constitutional differentiation." *Rochin v. California*, 342 U.S. 165, 172 (1952).

⁹ According to Mayer, the President played little role in the bureaucratic struggle over the limits of interrogation policy. It was, rather, the Vice President's office, especially his legal counsel and eventual Chief of Staff, David Addington. *The Dark Side*.

inter-agency legal disputes. When its opinions are signed by the Attorney General, they bind the executive branch as a matter of internal policy and custom, although they are not enforceable against the executive by any third-party.¹⁰ In effect, the opinions of the OLC can offer immunity to any executive actor later accused of violating federal law who acts in their reliance, because they can offer an authoritative interpretation of federal law consistent with what the actor has done. Executive branch actors, including prosecutors, are bound by the opinions, unless and until they are rescinded by the President. Moreover the process of rescission can itself, by tradition, only go by way of a further determination by OLC that the earlier opinions were incorrect.¹¹

What makes the OLC opinion writing-process a legitimate rather than corrupt exercise of internal discipline is the way in which the OLC has traditionally understood its client – the United States, not the current Chief Executive – its role, as a purveyor of sound legal analysis untempered by particular policy goals, and conducted in delegation of the President’s Take Care duty – and its process, careful and judicious legal analysis. This tradition has been effectively dismantled, by many accounts.¹²

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. Put another way, if OLC decides that a case cannot be prosecuted because an agency’s conduct complies with the law, it matters not at all whether a court or any other

¹⁰According to former OLC head Randolph Moss, “When the views of the Office of Legal Counsel are sought on the question of the legality of a proposed executive branch action, those views are typically treated as conclusive and binding within the executive branch.” Moss, “Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel,” 52 *Admin. L. Rev.* 1303, 1305 (2000).

¹¹ This is a rough summary of the OLC’s current practice. See [[xx]] and other cites in Note, “The Immunity-Confering Powers of the Office of Legal Counsel,” 121 *Harv. L.R.* 2086 (2008).

¹² See Moss, *op cit.*; Dawn Johnsen, *Guidelines for the President's Legal Advisors*, 81 *INDIANA LAW JOURNAL* 1345 (2006). According to Johnsen (and echoed in a letter jointly signed by xx former OLC attorneys, the OLC had a long-standing tradition of maintaining a principled distance in its analysis from the policy goals of the Executive branch.

interpreter would disagree – would assert, for example, that induced hypothermia and simulated drowning clearly meet the semantic criteria of “torture” as laid out in a range of domestic and legal provisions and precedents. Thus, the OLC opinions are more than statements of internal executive policy. 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. This is because taking a case to court, in the U.S., requires showing that the plaintiff has “standing” – an identifiable and discrete injury caused by the defendant. But in a non-prosecution, only the public interest is injured. There is no one, save the executive branch itself, to challenge the opinions, and thus they will stand until a new administration’s appointees decide begin the process of withdrawing them.¹³

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

¹³ 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, *Terror Presidency*, [cite].

the king's words to be law, they must be written and public. 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' worth 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 perhaps prompt an overreaction to the excesses of a particular set of politics. Indeed, that fount of liberal political theory, Immanuel Kant, declared that a principle of "publicity," meaning a requirement that any law must, hypothetically, be defensible even if rendered public, served as a "transcendental" standard of justice for all legal regimes: "All actions relating to the right of other men are unjust if their maxim is not consistent with publicity."¹⁴ Moreover, just as hard cases are said to make bad law, 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.

More specifically, 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 decisions and practices of the frequently morally-wanting individuals to whom the decisions and practices belong. On a positivist

¹⁴ Immanuel Kant, "On Perpetual Peace," Appendix II, par. 2. Available online at <http://www.mtholyoke.edu/acad/intrel/kant/kant6.htm>; and in Harry Reiss, ed., *Kant: Political Writings* (New York: Cambridge University Press, 1991), 93-130.

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. Indeed, a positivist could hold that publicity may be a necessary condition of a legal system as a whole, on pain of inefficacy.¹⁵ But, given positivism's commitments, there would seem no basis for a retail restriction on secrecy: the criteria of validity might well make no mention of publicity. Whatever publicity as exists in the system could be merely non-binding custom, or understood as a demand of justice, not law. A particular statute, then, could count fully as law, despite its secrecy.

Practice, superficially taken, seems to confirm the positivist's theoretical premise, for secrecy abound in government, not always in the starkest form of secret amendment or secret statute, but 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 government 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 as well. Thus, this paper represents a joining of the recent jurisprudential conversation suggesting a more normatively-oriented positivism, one open

¹⁵ 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. But little seems informative in pursuing this pathological case.

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. This aspect of law's secrecy has prompted Senate hearings, by Russell Feingold, entitled "Secret Law and Democratic Accountability."¹⁶ 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 secret law's repugnance 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.

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, making us citizens rather than subjects. Consequently, secrecy undermines not only our democracy but the legitimacy of the state itself. This is, perhaps, the most repugnant aspect of secret law: it is barely law, and by its very existence 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 – in the dire words I have been using – constitutes a threat to law's function as a basis of legitimacy and moral orientation, then we are faced with a problem of reconciling

¹⁶ Confirm names. April 2008.

efficiency with morality, governance by law with governance by performance. I believe the balance can be struck, if ephemerally. And so another face of this project is to pursue the description of secret governance further, to distinguish between the desirable and merely tolerable, and the deplorable. 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.

I will discuss a range of cases of secrecy, but will focus on two examples. The first are the OLC memoranda, mentioned above. The second is an interesting episode in Israeli legal history: the covert decriminalization of consensual sodomy – a decriminalization whose condition of possibility appears to have been precisely its meta-secrecy. While I am inclined to applaud the liberation represented by these secret amendments, I will try to show why they are so disturbing, nonetheless.

2. Secret law and history

So much is clear: 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.¹⁷ Hence the modern conception of tyranny as lawless rule was born, as expressed by Bodin: “Tyrannical

¹⁷ ¹⁷ Jean Bodin, *Six Books of the Commonwealth*, Bk II, Ch. iv (trans. M.J. Tooley), available at http://www.constitution.org/bodin/bodin_.htm.

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.”¹⁸ 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 (as we would not), 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, to put it another way, 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.¹⁹

But the problem with tyranny is not just disorder and the terror such disorder brings. Tyrants are despised not just for the chaos of their rule, but for its cruelty. And what makes the enforcement of a ruler’s will cruel is its application without notice – without the chance for subjects to decide on their own whether to abide by that will, or to risk its defiance. The harshness of punishment -- delivered or withheld – is another matter entirely. For punishment to be punishment, to be something other than the

¹⁸ Bodin, *Commonwealth*, Bk II, Ch. ii.

¹⁹ 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. *Republic*, 414b. The seriousness and meaning of Plato’s proposal is subject to extensive and unyielding interpretive dispute (I myself do not regard it as a serious proposal), but I do not mean here to enter the interpretive morass.) One point to be kept in mind, however, is that the noble lie does not undercut the law, but renders the scheme of hierarchical governance into a story intelligible to the less sophisticated members of the city, while being consistent with what Plato regards as a philosophically-justified rule by the enlightened. Hence there is no secret about the law as such, only about the basis for the distribution of political power.s

arbitrary infliction of pain, law must do at least this much: it must mediate 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. Moreover, this law must be known to the ruled, not just the ruler, to have this effect. Principles must be public to be seen as principles: rules must be known by the ruled.

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.²⁰ 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.²¹ 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. Law is the point of correspondence, and mutual intercourse, between the public and its deliberative body.

²⁰ Cite to Maine, History of Ancient Law [cite]

²¹ *Digests*, Bk I, Ch 2 (Pomponius); *Institutes of Justinian*, Book I, Title II, trans. J.B. Moyle (Oxford: Oxford University Press, 1913 [reprinted by The Lawbook Exchange, 2004]), p. 4.

The relation between legitimacy and law has been maintained throughout the history of political thought, even among such theorists of absolute sovereignty as Jean 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.²² 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.”²³ 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’ mind, in opposition to the basic project of state authority. Authority, including absolutist authority over the very terms of justice, requires public law.

The relation between law’s inherent authority and its public knowability is most strongly manifest in the greatest (successful) 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,

²²[Cite to Bodin]

²³ Thomas Hobbes, *Leviathan*, ed. Richard Tuck (New York: Cambridge University Press, 1996 [1651]), Ch. 30, p. 240. I owe this reference to Jeremy Waldron , “Hobbes and the Principle of Publicity,” *Pac. Philosophical Quarterly* 82 (2001): 447-474, n. 8.

when they can be known.”²⁴ Unpublished law, let alone secret law, is nugatory, an oxymoron. On this line of reasoning, 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::

That a law may be obeyed, it is necessary that it should be known: that it may be known, it is necessary that it be promulgated. But to promulgate a law, it is not only necessary that it should be published with the sound of trumpet in the streets; not only that it should be read to the people; not only even that it should be printed: all these means may be good, but they may be all employed without accomplishing the essential object. . . . To promulgate a law, is to present it to the minds of those who are to be governed by it in such manner as that they may have it habitually in their memories, and may possess every facility for consulting it, if they have any doubts respecting what it prescribes.²⁵

To the subject-citizen, again, it will, taken all together, according to the extent occupied by it in the field of morals and legislation, 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.²⁶

This argument is independent of the moral quality of the law, reflecting Bentham’s break with the 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

²⁴ “*Les lois sont exécutoires dans tout le territoire français, en vertu de la promulgation qui en est faite par l’Empereur. Elles seront exécutées dans chaque partie de l’Empire du moment où la promulgation en pourra être connue. Code Napoléon*, Preliminary title, Art. I. For discussion, see John Chipman Gray, *The Nature and Sources of the Law* (New York: 2nd ed., 1921), p. 164. I owe the Gray reference to Fuller, *The Morality of Law*, p. 49.

²⁵ Jeremy Bentham, “Essay on the Promulgation of the Laws,” Ch. I, in *The Complete Works*, vol. 1, ed. J. Bowring (Edinburgh: William Tait, 1843).

²⁶ Bentham, “Codification Proposal,” Pt. I, sec. ii, in *Complete Works*, vol. 4..

deep. Rule without law can be done, but it is not a pretty sight. Terrorizing regimes can survive long enough precisely through the unforeseen and unforeseeable application of power, in the absence of constraining rule. Internal wars, like external wars, are won through the fear of overwhelming force being applied to the captive population. A captive population will work under siege, and otherwise acquiesce in the theft of its treasure. Jacobin France and Stalinist Russia are the models here. But an acquiescent population is not a population living under law, nor does its compliance with the orders of the regime indicate anything about that regime's legitimacy. To be clear, the point is not that secret law entails terroristic rule. The risk of terror, or tyranny, is simply the deepest manifestation of the way that secret law undercuts legitimacy, and undermines the right of those in power to rule.

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 secrecy. I want here to lay out some of the different forms in which secret law occurs. I will 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 famously 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 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.²⁷

I want first, however, to make and then complicate a preliminary distinction, between secrecy as such and meta-, or hidden 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.”²⁸ Now, a budget item might be disclosed, but buried in a mass of other provisions so that only someone who knew about the change in advance could discover that it had been made. Or, as in the Israeli case I discuss, a law could be changed without apprising the most significant constituencies for that law. 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.

One other preliminary matter: 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. Moreover,

²⁷ This is the category of “unknown unknowns,” which Donald Rumsfeld famously said are the ones that bite you on the ass. (Of course unknown knows, such as the false presence of the WMDS, can also have serious posterior effects.)

²⁸ Blackstone, *Commentaries*, Bk. I, sec. ii, *40. The reference is to Dio Cassio’s *Roman History*, Bk. LIX, Ch. 29: “But when, after enacting severe laws in regard to the taxes, he inscribed them in exceedingly small letters on a tablet which he then hung up in a high place, so that it should be read by as few as possible and that many through ignorance of what was bidden or forbidden should lay themselves liable to the penalties provided . . .” (Loeb Classical Edition translation, 1924), Vol. VII, p. 357.

secrecy of the sort mentioned at the beginning of the spectrum can easily transform into secrecy of the second sort. I will address these issues along the way.

(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 (with consent of Congressional staff), but also sometimes by legislative initiative.²⁹ 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 – think Bay of Pigs – the consequences for public diplomacy can be disastrous. Large scale operations, like the 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. I do not mean to minimize the costs of such adventures. Yet 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. Domestically, such operations may

²⁹ “Charlie Wilson’s War” is one such example: the contours of the CIA’s program to assist the Mujahadeen changed dramatically because of the intervention of the legislature

require consultation (for example with Congressional leadership or the chairs of the Intelligence Committees) and limited disclosure; and where such disclosure is made, they will be tolerated. Internationally, the continued existence of 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.³⁰ 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.

³⁰ A current species of the category of enforcement secrecy involves “National Security Letters,” issued typically by the FBI under authority found in the PATRIOT Act. Until recently, recipients of these letters – typically librarians or registrars – could not disclose the receipt of the letter to anyone, including legal counsel, on pain of punishment. Under current FBI guidelines, recipients can now discuss compliance with counsel, but not beyond. For discussion of the legal foundations of NSL letters, and some of their problems, see the reports by the Department of Justice Inspector General, Report of March 2007 (covering 2003-2005) [available at <http://www.usdoj.gov/oig/special/s0703b/final.pdf>] and Report of March 2008 (covering 2006) [available at <http://www.usdoj.gov/oig/special/s0803b/final.pdf>]. The Inspector General found a dramatic increase, post 9-11, in the incidence of National Security Letter requests, from 8,500 in 2,000 to roughly 50,000 annually today. The IG also documented a range of concerns in the issuance of the letters, including problems of accountability.

My focus, however, is not on the distinctive evil of state practices of enforcement and popular terrorization, which may be controlled at the level of law (if not discretion) by perfectly public laws. Rather, it is on control of government operations by rules that are themselves secret. Needless to say, the categories overlap, insofar as secret practices may be used to enforce secret law.

(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 apparent objection

from the point of view of law (except the windfall unfairness that some malefactors will simply not be punished).³¹

(C) **Black-box 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.³² Practices vary in the quality of briefing given to legislators who approve the funds. In the United States, 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. The classified annexes have rested in a disputed middle ground between executive action and law; until 1989, the President had treated the line items in the annex as Congressional “suggestions,” without force of law, but Congress in 1990 declared that the annex too should enjoy binding legal status. (One might imagine difficulties policing the fidelity of secretive agencies to Congressional will on the one hand; while on the other hand, agencies failing to respect Congressional preferences might well suffer wrath in the following budget cycle.)

Such secrecy in the budget process, as well as other forms of accounting gimmickry which enable the invisibility or low salience of expenditures, clearly are a source for mischief, even if they may in other cases represent a reasonable balance between democratic accountability and national security. Congressman Randy

³¹ Law enforcement procedures are protected from mandatory disclosure under FOIA, 5 U.S.C. 552(b)(7).

³² See, e.g., Defense Appropriations Bill of 2007, Report of the Committee of Appropriations, p. 305 (2006). For a scholarly discussion of the intermittent and frequently ineffectual nature of congressional oversight of intelligence matters, see Lock Johnson, “Supervising America’s Secret Foreign Policy: A Shock Theory of Congressional Oversight (MS, Date?), <http://web.pdx.edu/~hpmg/PS545PS645/SupervisingAmericasSecretForeignPolicy.pdf>); John and

Cunningham was recently convicted of a host of influence-peddling offenses, which included inserting earmarks into the classified portion of the Defense Appropriations Bill.³³

The category described so far consists of *mere secrecy* insofar as the fact of the secrecy is itself known, if not (of course) 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 want not 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 it 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.³⁴ More recent examples include agreements on mutual defense, joint administration, and de-accession of territories. The destabilizing effects of

³³ “Dirty Secrets of the Black Budget,” *Businessweek* (Feb. 27, 2008) (available at http://www.businessweek.com/magazine/content/06_09/c3973050.htm).

³⁴ For a catalog of such treaties, see Edward Grosek, *the Secret Treaties of History* (Buffalo: William S. Hein & Co., 2007).

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."³⁵

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 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.³⁶

(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

³⁵ President Woodrow Wilson, Address delivered to Joint Session of Congress, January 8, 1918 (available at http://wwi.lib.byu.edu/index.php/President_Wilson%27s_Fourteen_Points).

³⁶ See Beth A. Simmons and Richard H. Steinberg, eds., *International Law and International Relations* (New York: Cambridge UP,

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, initiated by President Gerald Ford and re-authorized by Presidents Carter and Reagan.³⁷ While the Reagan era ban on assassinations in principle remains in place, slippage in the term “assassination” meant that President Clinton could authorize the targeted killing of specially designated terrorist figures without quite rescinding Order 12333.³⁸ 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.³⁹ As recent examples, NSA’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.⁴⁰

A somewhat different category are the OLC memoranda, which are not formally regulatory instruments, but interpretations of already 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

³⁷ Respectively, Executive Orders 11905, 12306 and 12333.

³⁸ Barton Gellman, “CIA Weighs Targeted Killing Missions Administration Believes Restraints Do Not Bar Singling Out Individual Terrorists,” *Washington Post* (Oct. 28, 2001).

³⁹ FOIA, 5 USC 552(B).

⁴⁰ The NSA directive was reported by the New York Times (Risen and Shane), and is explored more fully by Eric Lichtblau in *Bush’s Law: The Remaking of American Justice* (New York: Pantheon, 2008); National Security Presidential Directive/ NSPD 51 (May 9, 2007).

surveillance permitted by the opinions, then their effect is to work a change in the underlying law. Such opinions establish principles changing the legal position of the United States going forward, and so determine future legal outcomes generally, thus going beyond simple executive action. When the opinions are sharply at variance with conventional understandings of the statutes, have broad scope (as these memoranda did), 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.⁴¹

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 (and were) shocked to discover the 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.⁴² One might contrast the status of these opinions with another recent matter that has engendered controversy: the “signing statements” issued by the President at the signing of legislation, noting the possibility of his constitutional objections. President Bush routinely issues such statements, to the effect that they

⁴¹ There are, evidently, interesting constitutional questions raised by the idea of executive revision; in U.S. terms, the “Take Care” clause (Art. II, sec. 3) is in tension, rather than in support, of the Art. I, sec. 1 vesting of legislative power in the Congress.

⁴² 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, *Dark Side*, 268.

indicate the general possibility of his non-compliance (from the legislative point of view), and they thus serve as a low-salience mask of ordinary secrecy for executive operations.

There is another example I mention here as well, at odds in some respects with the OLC torture and surveillance opinions: 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.”⁴³ 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 Cohm, in the 1960s [need date] 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 below.

(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

⁴³ Sec. 152(2) of the British-mandate enacted Penal Code. I owe this discussion to conversation with Meir Dan-Cohen, and Alon Harel, “The Rise and Fall of the Israeli Gay Legal Revolution,” 31 Colum. Hum. Rts. L. Rev. 443 (1999-2000). Early judicial interpretations of the statute included oral sex and (per dictum, lesbian sex); but subsequent interpretations restricted it to anal penetration.

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.⁴⁴

While secret trials have persisted around the world, as a way of administering political repression with minimal backlash, secret trials *per se* have played little or no role in liberal states, even in the post 9/11 legal regime of the United States.⁴⁵ What *has* played a role, continuously but increasingly, is the use of secret evidence and redacted public records of proceedings at nominally public trials. (Secret evidence has been used in a range of military and national security cases, as well as immigration cases, for a long time.⁴⁶) 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.

[Develop?: Another intriguing case involves the use of sealed court dispositions, not just of juvenile crimes or family law matters, but of contract or tort disputes. As these are, by definition, not precedents, they perhaps do not count as law, insofar as they do not bind the future. And yet they are legal decisions – applications of law – knowledge of which would presumably be of enormous value to some citizens, kept secret from those citizens.]

⁴⁴ Need cites.

⁴⁵ Writing about the CSTs is a matter of focusing on a moving target, insofar as internal and external political pressures, along with legislation, have done some work to open up the processes. But the provisions for secret evidence remain. [Get cites]

Authoritarian states have also famously made use of the complement of the secret trial: the show trial, where all is public but the verdict is a product of political pressure. Show trials are, of course, no improvement over secret trials, but their vices run along a different spectrum. See Mark Osiel [cite].

⁴⁶ For a critical overview of the use of secret evidence in criminal and quasi-criminal proceedings, see Note, "Secret Evidence in the War on Terror," 118 *Harv. L. Rev.* 1962 (2005).

(G) **Secret law:** Secret law as such – legislation passed by due process, approved by the executive, but whose existence and content are secret – 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 is not part of the essence of law.⁴⁷ 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.⁴⁸ Some of the Eastern European totalitarian states kept volumes of secret laws, governing the conduct of their censors and secret police, as a basis for protecting the regime from political dissidents.⁴⁹

Secret law is not unknown in what is now the United States. According to Clive Parry, the 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 1812.⁵⁰ Between 1811 and 1813, the Eleventh and Twelfth Congress 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

⁴⁷ Thomas Aquinas, *Summa Theologica*, Q. 90, Art. Iv.

⁴⁸ John Austin, *Lectures in Jurisprudence* (5th ed., ed. Robert Campbell), Vol. II, Lecture XXIX, p. 526 (1863/1885).

⁴⁹ Poland apparently had a secret code for censors, and Slovenia had volumes of secret law discovered only after the breakup of Yugoslavia.

⁵⁰ Clive Parry, “Legislatures and Secrecy,” 67 *Harvard L. Rev.* 737 (1954).

ordinary volumes for those Congresses.⁵¹ The Confederate Congress, between 1861 and 1864, passed a number of secret resolutions in closed sessions, ranging from empowering Confederate President Davis to negotiate with European powers (and to compensate the negotiators) and with the Indian tribes, authorizing the president to seize Fort Sumter, gunboat procurement, to removal of the governmental archives, to orders for loan repayment.⁵² The reason for the secrecy of some of these resolutions was clear: to avoid tipping the Confederacy's hand to the Union. The secrecy may also have been a function of a nascent political enterprise with a weak executive, with far less discretion (hence role-based secrecy) in relation to his legislature than we are accustomed to.

Secret legislative sessions, in part or as a whole, are not uncommon, in the U.S. or elsewhere. But since 1947, the U.S. Code has included provisions requiring new legislation to be delivered to the Archivist of the United States, who then "shall cause to be compiled, edited, indexed, and published, the United States Statutes at Large, which shall contain all the laws and concurrent resolutions enacted during each regular session of Congress."⁵³ While the law speaks in exceptionless terms – an apparent amendment of earlier statutory requirements of publication as soon as "expedient" or "practicable" - there would appear to be some underenforcement, given the existence of the secret spending annexes.⁵⁴ Some suggested, before existence of the non-prosecution agreement was revealed, that the apparent inconsistencies between the interrogation techniques the

⁵¹ Charles J. Zinn, "Secret Statutes of the Eleventh Congress," 156 U.S. Congressional and Administrative News 2475 (1952).

⁵² Charles W. Ramsdell, Ed., *Laws and Joint Resolutions of the Last Sessions of the Confederate Congress* (Durham: Duke University Press, 1941), Part Two ("Secret Laws and Resolutions of the C.S.A."), respectively Provisional Congress, No. 7 and 39 (Feb. 13 and 27, 1861); No. 47 (March 5, 1861), No. 16 (Feb. 15, 1861); Nos. 326 and 330 (Dec. 24, 1861); Second Congress, No. 17 (May 27, 1864); No. 46 (June 10, 1864).

⁵³ 1 U.S.C. Sec. 106a, 112.

⁵⁴ See Zinn, 2484.

US was known to use (including slapping and close confinement), and the Field Manual, might have been resolved by asking Congress, in executive session, to secretly amend the USMC. It now appears that the “amendments” to the Field Manual and the federal criminal code were done through the OLC’s opinion process discussed above, although further surprises may be in store. There is, in any event no clear constitutional principle forbidding such a law. Attempts to extract a principle of “legislative due process” from the Fifth and Fourteenth Amendments have generally foundered, with even weaker demands than publicity.⁵⁵

However, the second chapter of Israel’s decriminalization of sodomy does provide such an 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 inherent public?

⁵⁵ See Hans Linde, “Legislative Due Process,” *Oregon L.R.*; Mashaw.

I have described a range of forms of secrecy, within the executive, judicial, and legislative branches. There are pragmatic rationales for secrecy 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.⁵⁶ 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 floor for legality, and not just a murkier aspiration.⁵⁷ 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 has elaborated.⁵⁸ As long as the law guides some, its secrecy (or non-general, or contingent) promulgation might well enhance its social efficacy, as I have indicated above. 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.⁵⁹

So 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

⁵⁶ Coleman, *The Practice of Principle* (Oxford 2001), 190.

⁵⁷ Lon Fuller, *The Morality of Law* (Yale: 1964), 34-35, 43-44. Fuller later qualifies the relevant notion of publicity as publicity with respect to those to whom the law applies. As I will argue, I regard this as too narrow – the inner morality of law stretches even more widely than Fuller thought.

⁵⁸ See Meir Dan-Cohen, “Conduct rules and Decision rules: On Acoustic Separation in the Criminal Law,” in *Harmful Thoughts* (Princeton University Press).

⁵⁹ The “in principle” caveat is relevant, because within both democratic and non-democratic regimes, secret law invites disobedience from internal processes of law-generation.

support the positivist critique of Fuller: that 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,” which insists that there are *no* necessary connections between law and morality, these observations suggest a limited form of its truth: even such a great fault as secrecy does not render the category of secret law an oxymoron.

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 it, a human construction, it is perforce a human construction existing in time. 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.”⁶⁰

Put aside methodological questions about a strictly conceptual analysis of law, or any other comparably rich, normative social subject. Perhaps that method can be reconstructed, as Coleman suggests, in pragmatic terms, so that the concept is equally synthetic and analytic. The largely unbroken historical record of condemnation of secret law reveals that publicity is part of our running experience, our concept of law, 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 of 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 newfound sympathy to a value-embedded analysis needs to include publicity.⁶¹

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

5. The defects of secrecy: identity and 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

⁶⁰ Coleman, *The Practice of Principle*, 194.

⁶¹ 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 [cite]. But Hart’s own position was more complicated, as reflected in his own account of the truth of the natural law tradition, in Ch. IX’s “The Minimum Content of Natural Law.” *The Concept of Law* (New York: Oxford University Press, 2nd. Ed. 1997). 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, *Natural Law and History* (New York: Oxford University press, 1981) [cite].

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. While one cannot infer from legality to legitimacy, one can infer from legitimacy to legality. Positivism has lost sight of that connection.⁶²

As to the first: we are of course social animals, and this means not just that we run in a pack and share our prey or scavengings, but that – as the particularly linguistic sort of social animals that we are – 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.⁶³ 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.⁶⁴ 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

⁶² Questions whether secret laws can, on my account, still warrant the predicate of law are no more helpful than questions whether Kadi justice is law, or stumps are chairs, or bagpiping is music.

⁶³ See, e.g., Allan Gibbard, *Wise Choices, Apt Feelings*, Cosmides and Tooby.

⁶⁴ To pick a Schmittian form of the claim about the nature of politics.

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.

All that is 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 normative identity.⁶⁵ 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 identity-giving 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

⁶⁵ Joseph Raz makes a similar point about the distinctive political value of the Rule of Law for pluralistic moderns such as ourselves, in “The Politics of the Rule of Law,” *Ethics in the Public Domain* (Oxford: 1994), 370-378. See also his “The Rule of Law and its Virtue,” in *The Authority of Law* (New York: Oxford University Press, 1979), ch. 11.

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.⁶⁶ 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 nonetheless a part of our embodiment in public space, and we understand ourselves internally at the same time as we understand ourselves externally as well.⁶⁷

And while I, personally, am prone to 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 in on 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

⁶⁶ Waldron, “Jurisprudence of the White House.”

⁶⁷ I mean to echo Plato’s claim in the *Republic* of the relation between intra-and inter-psychoic equilibria.

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.⁶⁸ While the secret change in the law did not threaten them with a loss of control over their particular futures (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.⁶⁹ 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.

These points about identity and membership may sound woolly, though I believe they are real. But perhaps the point can be made more forcefully, in the more traditional language of legitimacy. The first step of disentangling legality and democracy is

⁶⁸ See Harel.

⁶⁹ See John Yoo, on claim that 2004 election vindicated the memoranda. Another example might be the quite low levels of non-military foreign aid by the U.S., which coincides with a majority's preferences for low levels of foreign spending, even as they erroneously believe the U.S. spends far more than their preferences.

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 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.

So law is necessary to legitimacy, essential to a state that can claim authority over its citizens. That much we knew. But it is worth laying out further why law must be public to serve this purpose. After all, one can imagine a constitutional framework in which legal power can be exercised in secret — indeed, this is the constitutional framework imagined by the Vice President’s office. Secret law might even be effective, in some instances, if just enough people know the secret. A secret law forbidding certain kinds of communications would provide a basis for arresting and convicting people deemed enemies of the state, and the trap set by the law would be enhanced by its secrecy. In the present case, a secret legal permission to torture would be known by members of the CIA, and by the department charged with prosecuting CIA abuse. Again, the secrecy of such a system would be effective, even doubly so, for it would enable the CIA to surprise its detainees with techniques they thought unlawful, and would encourage its interrogators to go beyond the limits they had previously trained up to. So neither the existence nor the effectiveness of a secret law seems to me called into question.

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.⁷⁰

⁷⁰ Thanks for conversation, criticism, suggestions, and references, to Jules Coleman, Meir Dan-Cohen, Stephen Galoob, Carla Hesse, Kinch Hoekstra, David Lieberman, Joseph Raz, Jessica Riskin, Scott Shapiro, Matthew Smith, and the participants in the "Beyond Inclusive Legal Positivism" conference at the University of Bologna (May 11-13, 2008).