This is a draft of a chapter that has been accepted for publication by Oxford University Press in the forthcoming book Sovereignty and the New Executive Authority, edited by Claire Finkelstein and Michael Skerker, due for publication in 2019 (but which began appearing in various forms in October 2018). See the rest of this entry for links to the Google Books version, which differs in minor ways from this version. Both versions differ in being much amplified versions of the draft which first appeared online under the title “Logically Private Laws” as a paper mooted at the conference, “On the Very Idea of Secret Laws: Transparency and Publicity in Deliberative Democracy”, sponsored by the Center for Ethics and the Rule of Law (CERL) at the University of Pennsylvania Law School, November, 2013. Here is a link to the original paper. https://www.law.upenn.edu/live/files/2453-macintoshlogically-private-laws-full

**Logically Private Laws: Legislative Secrecy in “The War on Terror”[[1]](#footnote-1)**

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**I. Introduction**

Wittgenstein taught us that there could not be a logically private language -- a language on the proper speaking of which it was logically impossible for there to be more than one expert. For then there would be no difference between this person thinking she was using the language correctly and her actually using it correctly. The distinction requires the logical possibility of someone other than her being expert enough to criticize or corroborate her usage, someone able to constitute or hold her to a standard of proper use.[[2]](#footnote-2)

I shall explore the possibility of something opposite-sounding about laws, namely, that there could in principle be laws whose existence, legitimacy, goodness and efficacy depend upon their being private, in this sense: their existence is kept secret from those who legitimately benefit from the laws and yet who would misguidedly destroy them were they to come to know of them; and it is kept secret from those who would illegitimately benefit from being able to circumvent the laws, and who could circumvent them if they knew of them. The secrecy of the laws increases their efficacy against bad behaviour; and since were the public to come to know of these laws the public would lose its nerve and demand that the laws be rescinded, it prevents the public from destroying laws which are in fact in the public interest. These laws are therefore in a way logically private: they cannot at the same time exist, have the foregoing virtues and be public.

After proposing conditions under which such laws ought to be enacted, I moot logical objections to the very idea that there could be such laws, practical objections to their workability and moral objections to their permissibility. I conclude by suggesting that, while we normally think of secret laws as creatures of the Executive Branch, things functionally equivalent to secret laws could also be created by other branches of government and societal institutions, and that all of this would be compatible with the form of sovereignty that is democratically grounded in the will and interests of the people.

**II. The definition and analysis of logically private laws**

In my terms, a law is secret to the extent that it is not widely known. But a law’s being logically private involves further conditions. A law is logically private if, and only if, its not being widely known is essential to its existence, legitimacy, goodness and efficacy. So, something is only such a law if its becoming public would rob it of these characteristics. Merely secret laws, on the other hand, would not be so threatened in these respects, and might even be enhanced.

Logically private laws must stay secret if they are to continue to exist because if they were made public they would be voted away. They must stay secret in order to have efficacy because they have their effects by means of stealth and ambush. They must stay secret in order to be good laws, because one condition on them being good is that they have good effects, to have effects at all by their operation they must stay secret (as we just saw), and so to have effects that are good they must stay secret. But further, their becoming public would have indirect bad effects, effects owing not to consequences of their operation, but to consequences of public reactions to their very existence. Their publication could cause social unrest and destabilize governments, something that might happen were the public to come to know, for example, of secret laws allowing them to be spied upon, and of laws preventing the disclosure of the existence of the technical means to do this, something we saw in the Edward Snowden case. Their publication could threaten international relations, something that could happen if secret treaties between nations were to become public. And their publication could allow criminals to escape regulation, something officials feared would happen were terrorists to learn of the laws allowing their electronic communications to be monitored. Finally, logically private laws must stay secret in order to have legitimacy. Again, this is for several reasons. First, their legitimacy depends on them having, or at least being plausibly expected to have, good effects, which they can have only if they are secret. Second, they are authorized by rules (e.g., The Constitution), institutions (e.g., The Executive Branch) and persons (e.g., the President) who are themselves authorized to do the sorts of things secret laws authorize only in secret. Secret laws are born of the recognition that some things are both defensible (as, say, being in the national interest) and inherently such that they can only be done clandestinely, and they are birthed by the democratically vetted creation of rules and institutions authorized to act in secret. Spying, for example is the activity of coming to know something about someone without them knowing you’ve come to know.

I’m tempted to make it a condition on a private law’s being a good law that it has the aim and effect of improving compliance with public laws; and to suggest that part of what makes private laws legitimate in a democracy is that the laws compliance with which private laws aim at improving are themselves voted into place publicly, after public deliberation, in a non-controversial expression of democratic values and in accord with democratic principles. But this may be too strong. For some public laws are not good laws – they are not in the public interest – and it may be that sometimes a secret law could be justified by the very fact that it would undermine compliance with a bad public law. Think of JFK trying to undermine racist laws: for all I know he might have promised pardons to officials who would act in violation of public laws in order to subvert those laws, thereby making it a secret law that it is OK to act to prevent the enforcement of racist laws. Or think of prosecutors in Chicago trying to “get Capone”. A similar problem would afflict the suggestion that secret laws are good only if they compel behaviour in accord with the values the citizenry publicly holds. For again, these values might in a given instance be bad values. And I can imagine situations where a good leader would enact secret laws with a view to changing or going against public values. Racist values would be an example.

Of course, it seems there could also be secret laws with the properties that their being unknown is a harm to those whom good law should not harm, and a benefit to those whom good laws should not benefit. This would happen if, for example, corrupt or ideologically extreme agents infiltrated the government and enacted secret laws benefiting their cronies or alike-thinkers and harming the public interest. The secrecy of the laws would allow these people to proceed unmolested and would prevent the public from awakening to privations of its own interest. And of course, one objection to permitting secret laws is that if our institutions permit the former, good secret laws, they will be at risk of becoming corrupted and resulting in the latter, bad secret laws. More on this in due course.

**III. Appropriate conditions for enacting logically private laws**

Assuming for now that good such laws are conceptually intelligible, under what conditions should they be enacted? There are two: conditions of universal justice and conditions of absolute war.

By conditions of universal justice, I mean this: suppose there is a total set of arrangements which would be best for everyone, a deal that offers everyone a higher expected utility than any other deal. But suppose there are people incorrigibly too stupid or ignorant to recognize the deal for what it is, or too weak-willed to do their part in it. Suppose their behaviour would ruin the deal for themselves and others. Those who can’t recognize the deal for what it is might directly act against it; while those too weak-willed might balk at the severity of the laws needed to deal with the former sorts of people, and so might themselves wrongly worsen the deal for everyone. But now suppose there are arrangements which would save the deal for others and even for these problematic people because, while the arrangements might result in the secret manipulation of these people’s circumstances, or in their incarceration or death, the arrangements still give them a better chance of a good life than would any other arrangements that also constituted a best deal for everyone else. Finally, suppose these arrangements would have to be brought about by secret means for the reasons stated in the definition of logically private laws, namely that otherwise people who benefit from them would, from stupidity or weakness of will, destroy the arrangements, thereby worsening the deal; and the people meant to be dealt with by the arrangements could evade them, again, worsening the deal. Then secret laws effecting such arrangements should be instituted.

The other conditions where such laws should be instituted, conditions of absolute war, are when some deal is best for some people, another deal is best for other people, but no deal is best for all, and each deal puts its people at war with the people of the other deal. Then by right of self-defence each group would be justified in trying to enact such laws to try to win in the battle with the others.

**IV. Instances of secret laws**

In the American context the following have been offered as instances of secret laws: it not being made public what the criteria are for being on a drone kill list, or when a kill will occur; there not being a public trial for an alleged terrorist; there being non-public Presidential orders, for example, orders authorizing interrogation techniques that would be widely seen as torture, or authorizing the killing of an American citizen, or the violation of the privacy of citizens, or orders forbidding disclosure of violations of that privacy or of the existence of means to its violation; or, speaking more generally, there being private Presidential authorizing of exceptions to publicly proclaimed principles in what is arguably a kind of legalized hypocrisy; or there being secret treaties between nations.

I suggest that sometimes any of these things can be the proper object of good logically private laws. But are they even prima facie cases of laws at all, let alone private laws? Yes, for in the United States, under certain conditions – especially in war or to defend the country, and especially if Congress has declared war so that the President’s Commander in Chief status is invoked -- the Executive Branch of government has the power to make things law by judicially unobstructed decree so that, for example, Presidential edicts are then *eo ipso* laws.[[3]](#footnote-3)

**V. Possible objections**

We all have as our default intuition the idea that law must be public in every dimension. I now explore reasons why this might be thought to be true, reasons formulated as possible objections to what I’m proposing; and I try to meet those objections.

For example, **don’t laws have to be enacted by a lawful authority?** Let’s say yes. But that doesn’t mean their enactment has to be public -- duly elected representatives could oversee the enacting of the law by duly enacted processes and just keep quiet about it.

**But mustn’t laws be public to make a difference?** Well, some people must know of them, namely those who are to implement them. But not everyone. For laws can affect lives in ways other than by people deliberately obeying them. It can be enough that people exist within the social structures the laws create, for example, without people having to be aware that these structures are the product of a given law. Think of secret treaties between governments: a peaceful co-existence of countries is secured, so their citizens enjoy peace; but the law securing this is private and unknown to the public that enjoys it. Perhaps for many years the countries’ populations hated each other over past conflicts and are not ready to forgive, even though forgiveness would be in everyone’s interest. Their leaders see this and so deceive their populations with secret treaties while publicly posturing in the attitudes their populations demand. There are current examples in the politics of the Middle East.

Another way a law can be both non-public and yet influential is by its existence being merely suspected: this could induce people to comply with the law without it being publicly known that it actually is the law. Think of totalitarian regimes like Russia and China where it’s never quite clear what you can say about the government, and where the worry that saying a certain thing won’t be tolerated inhibits saying it. Even in liberal democracies with strong traditions of freedom of speech there is the category of legally regulated hate speech; but it is not always clear in advance what sort of speech would be so categorized. And the worry that a given utterance would be so categorized inhibits those who might otherwise engage in language behaviour at the borders of hate. Here the law is in effect secret because it won’t be known until after the fact and judicial mooting whether a given uttering was illegal. This is sometimes thought to be a feature of common law – the law allowing citizens to sue each other, creating a situation where the defendant doesn’t know that what’s been done is illegal unless and until a judge finds for the plaintiff – in contrast to criminal law, where it is supposedly clear in advance what will count as a violation of law.[[4]](#footnote-4)

**But surely a law must be in the public interest in order to be a good law. And doesn’t this require that the public be consulted in order for its interests to inform the content of the law? So, doesn’t this require that the public approve of and so know of the law?** No and no. Even if a law must be in the public interest to be a good law, it doesn’t follow that the best or only way to produce such a law is by public consultation in the deliberative production of law. Instead it might be better done by social experts and technocrats who privately poll or otherwise discover the public interest, and who thereafter are the only ones who know of the law.[[5]](#footnote-5)

**But mustn’t the law express the public will in order to be legitimate?** Let’s say yes. (Although the public will might be evil on a given matter and so not something that should find its way into law – more below). **But doesn’t this require the public to know of and expressly approve the law?** No. Again, the public will might be discovered other than by collectively and overtly asking the public. And sometimes a law might more fully express the public will if it is arrived at by a process not involving public, deliberative democracy. This might happen where the public is distracted into misunderstanding its own will by demagoguery, superficialities of personality and appearance in a public figure, or local, temporary, unrepresentative events. As an example of that last phenomenon, in Canada capital punishment is illegal. The issue sometimes comes up, however, usually in response to some horrible crime which inflames the public. But the leaders of Canada’s political parties have long had a little-known pact never to let legislation be proposed re-instituting capital punishment. They think it would not express the better angels of their citizens’ natures -- their true wills.[[6]](#footnote-6) Likewise for the abortion issue. Abortion is legal under many conditions in Canada; and the parties’ leaders try to head off private members’ Parliament bills to make it illegal.

**But if a law is secret, won’t there be slippery slope dangers of its abuse? Mightn’t a given clear case of something’s being appropriately kept secret create a penumbra of endorsement extending to some less clear case? But then better not to have the category of secret law at all.** Such slippery slopes won’t necessarily occur, however. For there could be oversight by elected representatives who do not apprise the public of what they are doing. Besides, publicity of laws is no guarantee against slippery slopes. The public can become inured, can uncritically fail to make distinctions needed to block slides down the slope from good laws to bad; and in these instances, perhaps better that matters be controlled by professionally critical thinkers habitually on guard against this sort of thing. At any rate, perhaps the best insurance against such things is good general education of those who will eventually have legislative power, and electing to these offices people of good character, broadly democratic and liberal values and critical intelligence.[[7]](#footnote-7)

**But surely fairness, and so the ultimate legitimacy and goodness of the law, requires that the law be published in order to give people fair warning before they violate it and incur punishment?**[[8]](#footnote-8)Not necessarily. First, suppose we don’t expect the law to deter. And suppose the reason for the law isn’t to attempt deterrence. Instead it is to make legitimate the use of force to deal with behaviour that we expect some people to attempt whether or not there are laws against it. In that case it’s not clear that any sort of fair warning is required, especially if this would only make it more likely that these people would succeed.

Thus, it is not always true that the main or only point of a law is to improve behaviour by people coming to obey the law upon learning that it is the law (whether from respect for the institution of law, from agreement with a given law and its aim, or from fear of punishment). Rather, the means by which a law improves behaviour can be by its authorizing officials to directly intervene in problematic people’s behaviour. A law might authorize officials to directly control the behaviour of those whose behaviour other, public laws are supposed to regulate. In extreme cases, it might even authorize officials to incarcerate or kill those who would violate the public laws. Laws therefore don’t necessarily operate by their publicity having a direct effect on their target population; they can also or instead operate by inducing officials to act to control the target population. The officials obey the secret law for the usual reasons people obey a law; but the people on whom they act behave a certain way by being compelled to so behave.

There is a precedent in the literature for a less radical version of this idea: Meir Dan-Cohen points out that our legal culture is consistent with the possibility of some rules being known (audible, in Dan-Cohen’s terminology) only to judges and enforcers of law—decision rules—while other rules—conduct-rules—are known (audible) to everyone.[[9]](#footnote-9) The decision rules may contain information about, for example, leniency in sentencing. If this information was widely known, it would make the conduct-rules less likely to be followed. For people would expect lenient sentencing and so wouldn’t fear punishment enough to comply with the law. (Perhaps a good conduct rule would be “don’t steal”, while a good decision rule might be “give lenient sentences to those who stole from need”.) And yet it might be a good thing that the laws constituted by conduct rules be followed. This would justify the acoustic separation of which Dan-Cohen speaks. That is, it would justify keeping it a secret from the general public just what the decision rules are. Apparently even now many laws are so worded as to give instruction not to citizens, but to judges. For example, the law against murder is in effect phrased like this: “the act of murder shall be punished by a sentence of no less than ten years in prison;” it is not worded like this: “No one shall commit murder”.[[10]](#footnote-10)

**But surely for something to exist and operate in a society qua law, the law must be publically known? Otherwise, the role this thing is playing isn’t that of a law.** This is false, partly for the reasons just discussed, but also because most of (what everyone would regard as paradigm) law is non-public in the following senses: most people don’t know exactly what the laws are, people who violate laws don’t know if or exactly when they will be arrested, and they don’t know exactly what punishments they will face. (The last fact is partly from ignorance of the rules about punishment, and partly because often the matter requires a judge’s or jury’s decision in order to become determinate. This is true not just of common law, where it obviously holds, but also criminal law. After all, criminal law provides a range of possible punishments and then the judge’s or jury’s judgment chooses from that range.) Moreover, most laws are not exactly understood by most people. Some laws are so complex that some people could not understand them even with instruction. And most people don’t know exactly what happens to most law violators.

And yet no one can argue that it is a moral surprise when they are found to have broken a good law, when they are arrested, and when they face a punishment. (It is at best strategically surprising; and for laws designed to effect control of terrorists the element of strategic surprise is a necessary part of effective enforcement.) That is, moral outrage from those accosted by agents of the law when it is good law is not appropriate, and is untypical. Remarkably, when the laws are good one can work out what they are—by which I mean what is in their spirit, not their exact letter[[11]](#footnote-11)—by asking what they ought to be. One doesn’t need to be told. And it is one’s sense of what the laws ought to be that informs one’s expectations and one’s sense of justice about the matter.

Lon Fuller claims the explanation of public knowledge of the law is that some people trouble to learn the law explicitly and their expertise percolates into society broadly.[[12]](#footnote-12) I’m suggesting a different epistemology for public legal knowledge, one more a priori. Moreover, Fuller’s theory of our knowledge of laws requires that people can simply choose to inform themselves of them. But in the case of secret laws this would be impossible. For even those permitted or obliged to learn of the laws as, say, members of over-sight panels, would be sworn to secrecy—they could not be a source of knowledge for the public. And if I’m right that secret laws can be legitimate, then neither does their legitimacy require that people in the general public have the right to become informed about them by means of inspection, whether directly by themselves, or indirectly from experts who became such by inspection. Fuller’s epistemology would, however, go some way towards explaining the public’s general knowledge of morality, justice and the basic ideas of what the rule of law involves, the things from which I’ve been saying the public infers its legal obligations and its expectations about what laws exist. But part of the explanation is also that the public’s attitudes and dispositions are part of what constitute morality and justice.

Indeed, because of all of this, terrorists, like everybody else, know in some sense what the general law is and what it ought to be. And they don’t even disagree with us about this; they agree that what they do is ordinarily wrong. They don’t even think it ought to be legal for them to do what they do in pursuit of their cause. They just think their cause justifies breaking laws. Of course, they don’t agree with every law of, say, the US or Canada; and they may want certain additional laws, for example, about the behaviour of women. But they agree in general that there should be laws against killing, theft, torture, slander, libel, etc. And they are generally in favour of the rule of law, even where they disagree about particular laws. In effect, even those punished by a secret law would probably satisfy the Hobbesian condition on the justice of punishment that the punished consent to their own punishment—they recognize the illegality of what they do, and the appropriateness of punishing it. (They might have been prepared to sign a social contract enshrining these laws prior to finding themselves inclined to violate them. And a common motivation in terrorists is precisely resentment at the non-enforcement of laws by whose violation they are victim in the legally hypocritical and corrupt states in which they live.)

There is an esoteric but plausible idea from Wittgenstein relevant to this issue. Before him it was thought that people learn things like the rules of language or the laws of the land by being given some description of these things plus a few examples­­—of proper and improper language use or conduct in accord with the law—and then generalize from this data to what behaviours the rules and laws require. Unfortunately, due to the phenomenon of the under-determination of theory by data, any number of conjectures about what the rules and laws require are compatible with any finite set of examples. The examples cannot suffice to dictate how rightly to carry on from them. So, it cannot be that this is how people learn the rules/laws; and this cannot be in what knowledge of them consists. Rather, “knowing the rules/laws” is just a matter of being disposed to carry on from the examples in ways which will not be objected to by the community whose rules and laws these are. What is involved is a prior shared tendency of people to carry on in the same ways from the same precedents. And this may—indeed, must—pre-exist instruction by example, else examples couldn’t instruct.[[13]](#footnote-13) So our agreeing to a practice can’t be our literally following a law conceived as a verbal instruction. It’s not like, when people behave law-abidingly, they do so purely in consequence of having the law books before them and running their finger under the sentences describing the law as if following a recipe. Even when it seems like this is all that’s going on—for example, when trying to follow difficult rules about income-tax—in the background there is a shared tendency, itself not learnable by induction over example cases, that makes possible this sort of legal behavior by close reading of the relevant law.

I am a law-abiding citizen. Yet I do not know a single law of my country. I couldn’t recite a single one of them. (What about the law against jaywalking? Don’t we all know that? Well, what is that law? Is it “don’t cross except at intersections?” “Don’t cross except within five feet of an intersection?” What if it’s a really long block? Is the law “except where a block is over one third of a mile long, don’t cross except at an intersection?” I would be astounded if any of you know the answer.)

And yet in spite of my ignorance of the laws, I am inveterately law-abiding. I have the ability to behave legally. We’re all like this. But as we have just seen, this is not by virtue of our having had the law proclaimed to us and our having heard, understood, recalled and complied with the proclamations. Therefore, it cannot be a condition on something being the law that such an instruction is made public—proclaimed—as an explicit rule. Rather, a law is in place if (i) it has been enshrined in the right way,[[14]](#footnote-14) whether we know of this or not; (ii) we would all generally go on in the same way (in our making judgements of what is and isn’t legal, not necessarily in the sense of invariantly complying with such judgments, something we each might sometimes have reason not to do); and, (iii) we would not be morally astonished to discover that there is a law written down about this somewhere, that some due process made it official. (As for the jaywalking law, we are all generally able to go on in its spirit – we get the idea that if you recklessly walk into traffic you are at fault; and we can evaluate arguments about what would and wouldn’t count as such recklessness.)

I suspect a lot of the controversy about non-public laws isn’t really about their secrecy. It’s about their content, that is, about whether they are correct laws, that is, about how we ought all to carry on given how we’ve carried on in the past, and given the new circumstances we face. The controversy is really about a failure of national consensus concerning the correctness of the behaviours these laws authorize.

We’ve all heard it alleged how President Bush authorized torture, how Presidents Bush and Obama authorized using technology to spy on citizens’ communications, how both ordered that this technology and this use be kept from the public—how they in effect made it illegal to disclose these things. (These are the laws Edward Snowden allegedly violated.) And now, after the whistles have been blown, there is outrage.

But imagine instead that President Bush had secretly outlawed torture rather than permitted it. Or that Presidents Bush and Obama had secretly outlawed using technology to monitor electronic communication between citizens. We’d all be applauding; we’d think these were wonderful uses of Presidential authority in war, good secret laws, laws rightfully kept secret in order not to embolden the enemy, and so on. Unless of course there had been a sequence of even worse 9-11s, and evidence that if only the Presidents had required torture and spying, all of it could have been prevented. Then now we’d be castigating them for their failures of moral courage, for their excessively tender-hearted reluctance to order the hard things, to be our Dark Knights, to take moral stain upon themselves in order to keep us all safe.

**But surely if we all think and act publicly as if the law was one way when secretly it’s another, then our law, our nation, and we ourselves in so far as we are represented by and think of ourselves as endorsing our law and our nation, are hypocrites. And isn’t hypocrisy in law a decisive objection to something’s being good law?** **Relatedly, the law is an ambassador for the people whose law it is; and shouldn’t they know what laws their system is creating? Worse, if their system’s laws are conflicted, isn’t that a problem for citizen self-concept and self-identity?[[15]](#footnote-15)**

I begin with the hypocrisy issue. I suggest that, first, arguably what’s going on in many of the contested cases isn’t hypocrisy; and second, if it is hypocrisy, it’s not necessarily bad in a given instance. Suppose American public policy forbids torture; suppose President Bush secretly authorizes water boarding. There is a dispute about whether that’s torture. Let’s say it is. Is America now hypocritical? Not necessarily. America may in effect be saying, “we think torture is generally bad, we think it shouldn’t be used in ordinary times, we think we should all work to bring about a world in which there are no times so extraordinary that its use would ever be called for; but for now, in this imperfect world, in these extraordinary times, we’ll use it if we have to.” This is a consistent message; and it is not trying to have anything both ways. Nor would the following message be hypocrisy: “we can use torture for our cause because our cause is good, but you can’t use it for your cause because your cause isn’t good.” Since in one case the ends justify the means and in the other, not, the cases are different and there is no hypocrisy.

But suppose the message is literally, “do as we say, not as we do,” with the acknowledgment that we are proposing to use torture secretly in exactly the same circumstances as we publicly forbid it. This might be hypocrisy. But is it necessarily bad? Suppose torture would in fact advance our cause, and suppose our cause is good. And suppose torture would only advance our cause if we were generally against it, and generally seen to be against it (even if we’re not in fact against it in this very limited case). Then our multiple, conflicting messaging could be a good thing. It allows those who oppose torture to endorse us for our public stance on the issue. It allows those who think an exception needs to be made in these extraordinary times to endorse us for our secret realpolitik – secret in this sense: it is suspected that we engage in the practice, there is some evidence of this but nothing conclusive, it is officially denied, and those of us who do engage in it on behalf of our state are legally barred from revealing that we do this. Our secret-ish realpolitik makes our enemies fear us -- which, incidentally, makes it less likely we’ll actually have to use torture, because the suspicion that it might be used will be deterrent -- and our public stance makes our potential allies more disposed to ally with us, since they like to think of themselves as people against torture; and their allying is for a good cause, and, incidentally, also makes the need for torture less likely, because now the enemy sees it faces overwhelming force and so will more likely give up. For all of these reasons, consistency is over-rated as a feature of good law. (Perhaps the reason it is over-rated is that it is assumed people will read conflicting elements of law as summing to unfollowable instructions – “do x, but don’t do x”, a paralyzing command. But instead it might be that people would uptake different parts of the law in different ways, prioritizing one part in one context, a different part in another.)

Something similar might be said about whether consistency is always good and necessary for the ambassadorial function of law, and for our relation to it in our self-conception and self-identity as citizens: greyed out, ambiguous, ambivalent, or even conflicted identities aren’t necessarily always bad.In fact, tolerance for vagueness, ambiguity and even contradiction might sometimes be as much a mark of good law and politics as it is of a psychologically healthy person.

I said a good logically private law has the property that, were it to become public, it would wrongly be voted away -- the electorate would demand that it be rescinded. **But surely if a law would be voted away were it to become public, it must by that very fact be a bad law?** Not necessarily. After all, sometimes the public in a moment of clarity messages to its government that it wants something done – wants a war won, for example. But it is known that the public can experience fading resolve and weakness of will during war. This is why in war the government invariably propagandizes the enemy as more evil than they really are, the war as going better than it really is, the number of casualties as less than they really are. Now suppose that in the public’s initial moment of clarity the President enacts laws that have a good chance of winning the war. In order to protect the public from its own failure of will perhaps the laws should be kept secret. Paradigms are laws suspending rights to privacy, public trial and freedom from torture.

Received wisdom is that 9-11 is an example: the nation is attacked and the President, with popular support from a terrified population, announces that he will handle it, but of course, he can’t say all the things he’ll be doing because full disclosure would aid the enemy. The President then decrees to national security agents that it is legally permissible for them to spy on all citizens (in hopes of catching terrorists among us); and that it is illegal to tell citizens that the technology exists to make this possible and is being so used (for then terrorists could evade the technology, and the citizenry would lose the resolve embodied in their Commander In Chief and insist that the violations of citizen privacy stop). Further, the President decrees that it is legally obligatory secretly to try citizens for conspiracy to commit terrorist acts where the convicting evidence would, were it to become public, make citizens aware of the foregoing technology and its use. And the President decrees that, for similar reasons, it is legally permissible to secretly impose punishment on those convicted­­ -- e.g., death by drone for those tried in absentia, where this is the only way to prevent a terrorist act; or incarceration without *habeas corpus* – that is, without right to a public trial and demonstration of guilt.

Note that there are logically possible logically private laws that don’t involve coercion, torture, or any other such negative thing. Suppose Presidents Bush and Obama had instead used executive authority to non-violently eliminate all conflict, making it part of secret law to pay off terrorists with enormous amounts of money instead of using these resources on kinetic weapons in physical wars; or had used the money in expensive and secret social work, psychotherapy, education, subsidies, and so on, proceeding on the assumption that most of America’s enemies are such because they are afraid, ignorant, ill-educated, traumatized from past conflict, hopeless, under-affiliated, confused by self-defeating, self-oppressing ideologies infused in them by problematically illiberal cultures, under-schooled in the self-liberating tools of critical thinking, or justly resentful of past hegemonic actions by Western powers. Suppose the Presidents had decided to deal with all of this with “love bombs”, not real bombs, soft-skills rather than weapons. And suppose the public would never have accepted this, thinking that the attacks on America were unjustified and should be met with retaliation and revenge, not paternalistic indulgence, therapy, restitution and constructive nation-building. Again, there would have been an argument for making initiatives legally mandating these sorts things private. After all, were they publicized, the public would have objected; and unscrupulous people would have tried to horn in on the benefits. So, it is not just prima facia vile things that may have to be stealthed in secret laws for the laws to be efficacious. This means the issue of secret laws is not itself a left/ right issue. For there could be secret laws preferred by left-wingers and bleeding hearts, others preferred by right-wingers and hawks.

Now some further analysis of the possibility that good law need not be able to pass public scrutiny. I said sometimes laws must be secret to protect those whom they are meant to benefit from their own weakness of will. Here the secrecy functions much in the same way as, in the Greek myth, do the instructions Ulysses gives to his crew-mates. Ulysses wants to hear the song of the Sirens. But he knows the song would seduce him into crashing his sail-boat on the rocks, killing everyone on board. So, he orders his men to tie him to the mast, plug their ears, and not free him until the boat is safely past the Sirens. This may seem like arranging un-freedom. For Ulysses will not be free to take the action that would result in his crashing his boat, even though he will want to. But arguably his preparations in fact make him freer and give him strength of will: in forgoing the freedom to sail towards the rocks he gives himself freedom to hear the Sirens’ song in safety. And of course, at the outset he would prefer being tied and hearing the song to not being tied, hearing the song and crashing. So, in the end he gets exactly what he wanted at the outset. True, while hearing the song he wants desperately to be untied and to sail to the Sirens on the rocks. But this is precisely the self-destructive impulse from which he has saved himself.[[16]](#footnote-16)

In the case of national security, we know we want procedures that will keep us safe; but we also know we’ll want to undo them if we ever see them in action. At the outset, we want security more than freedom, yet we know that once we see the freedom infringing policies in practice, our resolve will fade and we’ll prefer freedom to security. So, like Ulysses, and judging now that even then security would be more important, we take steps to ensure that we’ll never be in a position to undo the initiatives – we “tie ourselves to the mast” by allowing the result of the initiatives to be stealthed. So even though we’d undo secret laws the President might enact if we were offered the option, that doesn’t mean the laws are illegitimate; for they express our will.

It might be objected that nothing like this explicitly happened for President Bush’s response to the events of 9/11. Americans didn’t say, “protect us from terrorists, even to the extent of enacting secret laws to save us from our own weak wills.” On the other hand, Americans are governed by the Constitution, a document in force unless two-thirds of the House or of State Legislatures vote to overturn it, which did not happen. And it contains a clause which, arguably, authorizes the President to do what he thinks necessary to defend the country. So, in accepting the Constitution Americans are in effect authorizing him to do that. And if he decides this requires secret laws, then Americans have in effect authorized him in that, too. Just not explicitly. So again, all of this expresses the will of Americans. And again, even though Americans might try to rescind the laws if they came to know of them, that doesn’t mean the laws are now illegitimate.

There is, of course, a discussion to be had about just how blanket legitimate authorizations can be. Must we have envisioned that one option the President might use would be secret laws in order for his enacting them to be an expression of our will? I’m not sure. But even if once we discover that he’s done this we would want to amend the Constitution to preclude such laws, that wouldn’t necessarily entail that his enacting secret laws before this was illegitimate or did not express our will as it then was. For the goodness of the Constitution, and of any given law, aren’t things which need to be revisited each time they are applied in order to be legitimately applied and to express our will. Reconsideration is required only upon extensive experience of problems with them.

The Ulysses scenario was a case where, in making a plan to advance a current desire of ours that we endorse – the desire to hear the Sirens – we seek to prevent being befallen by a desire we do not now endorse – the desire to sail towards the rocks. The plan will result in our will being expressed even if it will also result in us going against a new desire we expect to have. But there are other sorts of scenario in which we expect our desires to stay the same, and yet it still might express our will to put in place a plan that will have us go against those desires. These are sometimes called paradoxical choice situations. Here our irrevocably committing to doing an action would advance our desires, but our actually performing the action to which we have committed would not. Suppose we are Americans who believe it would most benefit us to live in a nation which, if ever it is attacked, will respond at the dictates of the President – we think this will make attack less likely because enemies will fear his vengeful-mindedness. But we also believe that, once attacked, our judgment would be better than his on what should be done – he’d make war by means including the suspension of principles we favour (the right to a public trial, the publicity of laws, and so on), while we would preserve the principles. Here, it would advantage us to be committed to matters being governed by the President, but it would not advantage us to actually have him govern post-attack. Would it be rational for us to form the commitment? And would it be rational for us to act in accord with it if we are attacked, allowing the President to govern? Or would it be more rational for us to violate the commitment, seeking to oppose him? Which would best express our true will?

Some will say that we should commit, for that would be to our advantage earlier, and that we should violate the commitment if we’re attacked, for that would be to our advantage later. But if we intend to violate the commitment, arguably we can’t rationally sincerely make it; so that advice is unfollowable.

Others will say that, since we should violate the commitment, we cannot rationally make it; for it cannot be rational to commit to something it would be irrational to do. So, we should not make the commitment; and this means there will be no occasion of having to decide whether to act on it.

I suggest, following David Gauthier[[17]](#footnote-17), that there is a case for making the commitment, since that will best advance our desires (in the sense of making them more likely to be satisfied), and for acting on the commitment, even though acting on it will not advance our desires. It would be rational to act on it because it is rationally obligatory to fulfil any commitment it is to rational to make, and it is rational to make the commitment because doing so will advance our desires.

It would then be rational for us not to seek to undermine the President, refraining from trying to penetrate any secret laws he may enact, taking steps to prevent our accidentally discovering them, and refusing to publicize discoveries we may make. The idea is that an action is rational not in virtue of the fact that doing it would best serve our desires, but because disposing ourselves in some way to do the action would have this effect. Gauthier argues that is rational to do whatever it maximized our expected utility (advanced our desires) to commit to doing even if doing it doesn’t itself maximize – here the disposing takes the form of making a commitment, and making the commitment has good effects separate from those of acting on it. It makes our enemies even more afraid to attack, for they will know Americans will back their President.

I have elsewhere argued that there is a problem with Gauthier’s view: if it’s rational to form whatever disposition it advantages our desires to form and then to do whatever it advantaged us to become disposed to do, after the nation is attacked, won’t it advantage our desires to dispose ourselves to act on our own judgement instead of the President’s? After all, that’s still what we desire. And won’t it then be rational for us to act against the President, since that has become what is advantaging for us to be disposed to do? So, Gauthier’s view can’t really explain the possibility of rationally forming and fulfilling these sorts of commitments.

But I think there’s a fix for this: the correct theory of rationality would have it that it’s rational to do whatever it was maximizing to form a desire to do, whether or not the thing to be done was initially desired – here, our disposing ourselves to support the President if attacked takes the form of us undergoing an alteration in our desires, and altering them advances our initial desires even if acting on the new desires might not. For example, prospective attackers will be more fearful, because they will see that we now desire to support the President if attacked. We won’t have to somehow make themselves do this against our own desires; for doing it will be exactly what we (have come to) desire, this making it even more certain that it will be done. Should the nation be attacked, we will now support the President, since we will have undergone a change in our desires so that this is what we desire to do. And it would not advance these new desires to re-adopt the old ones, for the latter would have us do things we no longer desire to do. So unlike on Gauthier’s rationale, on mine there would be no reason to back-slide. Thus, people would genuinely find it rational to support the President, including not trying to sleuth out secret laws.[[18]](#footnote-18)

On the assumption that something is democratically grounded if it would be endorsed by the will of the people, and on the assumption that their will is whatever it would be rational for them to commit to given their desires, all of this would mean that secret laws might have democratically grounded legitimacy and would therefore not be objectionable on democratic values. If Gauthier’s proposal can be repaired in its own terms, such laws are legitimate even if they go against our current desires, provided that those desires justified us in a commitment to a process – Presidential decision making -- that could have resulted in them. While if my variant on Gauthier’s proposal works, if, through the operation of the variant’s conception of rationality, we now have desires that are expressed by the existence of the laws – because we’ve come to desire to see the President’s decisions prevail -- then the laws are democratically legitimate even if their existence would not have expressed the desires we had before disposing ourselves towards the laws by undergoing a revision in our desires. For it was rational to have undergone the revision. So, the new desires are now ones appropriate to have. And the secret laws are legitimate because their existence expresses legitimate desires.

But suppose a law is one citizens would vote to rescind were they to learn of it, and the government keeps the law secret because it thinks the law to be in the public interest. Wouldn’t this be excessively paternalistic of government?[[19]](#footnote-19) Not where I’m advocating secret laws, since citizens there in effect ask for them in the pre-attack situation. And given the foregoing points about how this in effect empowers and expresses the citizenry’s true will, we shouldn’t see this as the government paternalistically over-riding the will of its citizens.

But situations change -- laws that once were of moment become obsolete, the terrorist threat is overcome -- and it’s time for things to return to normal. Or maybe there is still a threat but the nation matures in its conception of it, sees it more proportionately. After all, only 3,000 people lost their lives, the number of terrorists is small as is their capacity to harm us, perhaps we can afford to have the nation’s agenda be less focussed on the threat, maybe we over-reacted, maybe our war-conception of how to respond is only making things worse, etc., etc. These changes, whether of fact or of our attitudes to the facts, mean that secret laws properly have a half-life -- their correctness tends to decay.

But doesn’t that rebut the rationale for them in the first place, the rationale that secrecy is required to prevent re-consideration that would undermine the resoluteness needed to attain our original goals? No. For that rationale only justified steps to make the laws persistent on certain assumptions about what the facts of the situation were. If the facts change – for example, if the threat that the laws were invented to deal with has been eliminated -- or if the facts weren’t as originally thought – for example, if it turns out that the threat was never factually as bad as it seemed, or if our reaction was out of proportion -- then of course the laws should change, and the justification for stealthing them to preserve them evaporates.

There is an irony here: insofar as secret laws tend to work, they tend eventually to be vilified. The secret laws allowing torture of enemies and spying on citizens, for example, might eliminate the terrorist threat directly by means of the legally enabled behaviour of officials in law enforcement, government and the military against the enemy – the officials torture and spy, and so prevail. Or the laws might succeed by creating a mind-set that encourages officials to behave boldly and yet in ways perhaps strictly legal even without the laws. Officials feel like, whatever they must do to eliminate the threat, they won’t face reprisals – “if we’re now allowed to torture”, they think, “surely we’re allowed to do this other thing that’s just short of torture”, a thing there might naturally be some question about but which might yet have been OK by pre-threat laws. (I’m not sure how many of the interrogation methods the so-called torture memos authorized after 9/11 were ever used – perhaps only ones which would have been at least borderline acceptable even without the memos.) Either way, the laws will later tend not only to get renounced, but also retro-actively condemned as over-reactive, unnecessary, or otherwise under-pretexted and pernicious. Part of this owes to the fact that people tend to over-react to unexpected bad events and then, once they digest them, see them more proportionately and recriminate upon the initial reaction. Another part owes to the fact that initially one worries the bad thing is a harbinger of worse things. But if the extreme steps initially taken reduce the likelihood that further bad things will happen, the harbinger argument disappears and again the initial steps seem like over-reactions.

At any rate, the fact that the laws had to be enacted and enforced secretly doesn’t mean they should be permanent. Trying to save a population from being weak willed is one thing. Failing to recognize that its will has rationally changed is another. Leaders have a duty to periodically review secret laws and ask whether there is still good reason for them. In this, secret laws are like any other laws.

Next, I want to explore a concern raised by Christopher Kutz.[[20]](#footnote-20) Kutz draws a distinction between two forms of secrecy, direct secrecy, where the fact that there is a secret is known even if the secret itself is not, and meta-secrecy, where it is unknown even that there is a secret. Kutz thinks that if the state has meta-secrets, it is in effect accepting no limits on its power and so loses legitimacy.

**Aren’t my logically private laws instances of meta-secrecy and therefore the illegitimate artefacts of a government itself illegitimate?** Well, some of them may be instances of meta-secrecy; but I don’t think they go too far, for I don’t think meta-secrecy is the thing Kutz thinks. I agree that the state loses legitimacy if it accepts no limits on its power. But the mere fact that not only does the state have secrets, but it is a secret that it has secrets, is not automatically an over-reach of power. After all, it is fully consistent with there being oversight by elected officials, the judiciary and branches of government that were designed to ride herd on each other. Further limitations are imposed by the requirements of re-election for all levels of government, so that people in the know get voted out, and new people get voted in who might vote differently about whether to continue secret policies, and who might demand penalties for their predecessors if their actions are found indefensible. Apparently Kutz thinks that when laws are secret – not just in content, but in their very existence -- the law issuer has no limit on its power. But as we’ve just seen, the two issues are separate.

Perhaps it is true that, as Wittgenstein might tell us, there is only such a thing as something legitimately being a law if there is a distinction between someone saying it’s a law and it’s actually being a law. And a state features rule of law rather than rule by decree only if there is a distinction between the President saying that something is a law and it’s actually being a law. His mere saying that it’s a law can’t make it so. But these conditions are met by the fact that the law-maker in my picture is duly elected, is enacting secret law by provisions in the Constitution -- itself democratically created -- and has those laws examined by the judiciary and oversight committees from elected bodies of government, is accountable to these bodies, and so on. This means it is not sufficient for something becoming law that the President so decrees it; all these other hurdles must be overcome. Of course, if we take all these hurdles and call them the government, then if the government says something’s a law, then it is. But this is exactly as it should be and cannot be called the state accepting no limits on its power. Rather, its accepting limits is its producing laws by a process that includes these checks and balances.

Similar considerations afford a reply to objections along Wittgensteinian lines to the very idea of a logically private law. For example, Julian Sanchez objects that, when the President proposes to do something and consults the Office of Legal Counsel – OLC -- to see if it is legal, he can keep asking different people in that office until one of them tells him it’s legal. So, there is really no constraint from law on the President. *He* decides what’s lawful, by waiting until he likes an answer.[[21]](#footnote-21) Likewise Claire Finkelstein worries that there is merely the illusion of constraint in the process the Executive uses to review its own orders, when really, it's like one hand giving the other money. And if there is any constraint in this process it is only self-constraint, which is no constraint at all.[[22]](#footnote-22)

But I suspect Sanchez and Finkelstein underestimate the degree to which there is external constraint on the President’s impulses. It’s not really like he can keep asking people in the OLC until someone says he can do what he proposes. For it’s not guaranteed anyone will ever say he can do it; and even if someone will, that doesn’t mean them saying it is ungrounded and so not in principle regulated by some constraint. Instead, things would be fine if they went like this: The President asks, "Am I allowed to order secret spying (or waterboarding, or whatever)?” and his counsel consults the constitution, or asks someone at OLC to consult it, and they say, "Yes, Mr. President, you can do whatever you want in defending the nation." But if the constitution had said otherwise then his counsellors would have said otherwise, too (probably). And if it looked like what the President was proposing had nothing to do with defending the nation (e.g., the waterboarding was really to get information out of a business competitor of a friend of the President's), then (probably) someone would have told him he can't do that. So, there is constraint. And it is not mere self-constraint. The constraint is provided by the externally determined drawing of a perimeter within which the President may act at will, and, in so acting, make it that something is law.

Sanchez and Finkelstein have similar worries about the reluctance of the Judiciary to obstruct decisions of the President in defence of the country. But there are similar replies: the Judiciary relies on the Constitution, which it reads as giving the President certain powers in these situations. This is not the Judiciary refusing to hold him to rule of law. It is the Judiciary believing that he has the legal right to so manoeuvre.

It is certainly true that, while there are all sorts of rules and institutions supposedly informing and constraining what the President can do, if those in the ruling classes in the various branches of government don’t object, then he can do what he wants. But that’s obviously not the same as saying he can just do what he wants; for he does in fact have the ruling classes to answer to, and so long as they are responsive to the law and have integrity in staffing the aforementioned institutions, the President is constrained.

In sum, the President is not acting without the constraint of law. There is real constraint afforded by the OLC: if he can’t find someone to agree with his proposed conduct then on the face of it it’s unlawful. And there is oversight by judges, Congressional committees, and so on. And the President will eventually be replaced, by due process, by someone who might revoke his orders, or even punish him for malfeasance.

Of course, Sanchez and Finkelstein know all of this. I suspect therefore that their real objection is that the constraints on the President are not *timely* – he can have things done and only have to pass scrutiny later – by oversight committees, by his successors, and so on. And by then it is too late. I acknowledge this concern, but I’m not sure secrecy is the problem. For something similar can happen for any part of government that is required to take action in haste, including parts that operate transparently. And arguably the whole point of the privileges given the President by the Constitution is to allow him to be able to shoot first and be asked questions later. The alternative of fighting wars by the method of committee is too plodding.

It is also worth speculating that, if the President is given the right to do what he wants in defence of the realm by the Constitution, then in such cases, his dictate is the law. He is an exception to the idea that something cannot come to be the law by someone saying it’s the law. Or more precisely, he is an exception to the idea that the difference between rule of law and rule by a man is that in rule by law, no man makes the law. In these cases, some man does. But of course, only with a lot of background rule-of-law conditions in place making this possible and legitimate.

Returning to Kutz, perhaps he thinks full legitimacy requires full accountability -- accountability to everyone whom the law is to govern. Now in one sense the process I’ve just described yields that very thing -- we elect people who elect people who oversee secret law for us, so there is accountability all the way down. What there is not is every person to whom the laws are to apply perusing the laws and voting on them. But that is not a reasonable ambition of legitimate government. For one thing it’s impossible -- see above on the competence of people as existing under laws. And for another thing it’s not conceptually necessary to the distinction between legitimate and illegitimate law. As the philosopher, Hilary Putnam, tells us, what is needed for distinctions marked in language to be real is the possibility of expertise upon them. But not everyone needs to be an expert. Only some people, with others disposed to defer to their judgment. He calls this the distribution of linguistic labour. The world is divided into natural kinds, for example -- substances like gold and water -- and we have words for these kinds; but we are not all expert on what counts as instances of each kind, and so on what instances deserve to be called by the names that are the words for those kinds. I can’t tell the difference between gold and fool’s gold, but an expert can, and we all recognize that there are or could be such experts. And because of these factors, the distinction between those natural kinds is a real distinction in my language. The same for genuine and non-genuine law, good genuine law and bad genuine law. What makes it true that something the President decrees to be a law actually is a law is that it is a law only if it passes oversight by the foregoing institutions. And some of those are operated by experts on the constitutionality of prospective laws. Moreover, all of those bodies, the President included, are accountable to tests for something being not just a genuine law but a good one, one in the public interest. So here too there is a distinction between the President saying something is a good law and its actually being one. And none of this requires explicit consulting of every person to whom a law is to apply.[[23]](#footnote-23)

At least the foregoing is true provided we are talking about matters whose nature is not constituted by collective opinion about them. If there is a criterion for something’s being x, and if it is possible for several people to be experts on whether the criterion for something’s being x is met, and if the criterion for something’s being x is not everyone’s thinking it’s x, nor the majority’s thinking it’s x, then it isn’t true that everyone needs to vote that something is x for it to be x. If legitimate laws are like this, then it isn’t true that something is a legitimate law only if everyone voted to make it a legitimate law. But of course, the possibility of secret laws raises this very question about the legitimacy of laws. In the next section I consider more fully, and in the context of the democratic conception of sovereignty, whether laws can be legitimate only if voted on by everyone.

**VI. Sovereignty, logically private laws and secret laws from other branches of government and societal institutions**

On then to some reflections on the relation between secret laws and sovereignty. In a democratic society, the citizens are the Sovereign, in two senses: laws are to serve their interests (rather than, say, the King’s), and something is a law only if the citizens so decree, whether directly by referendum, or indirectly by electing representatives to make judgements and vote for it. In secret law, arguably the interest of citizens is sovereign – the laws are supposed to be in the collective interest. And if the laws are created by people voted for by the citizens, then arguably the citizens decree them, at least indirectly. Especially if all elected officials manoeuvre in ways constrained by the Constitution.

But secret laws are an extreme instance of the more general fact that what would be in the interest of citizens, and what they do or would vote for, can come apart. And since it could happen that citizens make mistakes and fail to vote for the laws that are in their interest, it appears that we have conflicting criteria of the democratic legitimacy of a law. John Stewart Mill resolved the conflict in this way: he thought that, sooner or later, if laws are decided by the direct vote of those who have interests at stake in them, the result will be laws that serve their interests. And many theorists of legitimate government think that the only guarantee that laws will be in the interest of citizens is the requirement that citizens be the ones who decide laws by direct voting.

Arguably the system we in fact have represents a compromise between the interest test and the citizen vote test for the democratic legitimacy of laws: it recognizes that laws should reflect the interests of citizens, but it also recognizes that not all citizens are always the best judges of their own interests and how to serve them. For citizens vary in the time they have to pay attention to issues, their capacity to understand them, the soundness of their judgment about them, and so on. As a partial solution to these problems we have representative democracy. Decisions are made not by referendum, with each person voting on each issue. Instead, decisions are made by representatives elected for their perceived possession of the character traits, values and knowledge that would make them good curators of the interests of citizens. The fact that in our system some people are empowered to enact secret law can be seen as just the logical extreme of this compromise – these people have been elected for their presumptively good judgment and for their commitment to the interests of citizens, and have been elected to offices in a governmental system presumptively required to act in the interests of citizens; and sometimes this is thought to require secret law, especially where the very publicity of law and the process resulting in it would compromise the public interest.

I suggested that, if the Constitution gives the President the right to enact secret laws, then since the Constitution was voted into place, as was the President, democratic legitimacy flows from the people, to the Constitution and President, thence to the laws. But how far can such legitimacy flow? Could the President order others to create whatever secret laws they deem necessary but also order these people not to tell him what they are? Perhaps he wants deniability; or he fears capture and doesn’t want knowledge the enemy might wring out of him. Would these laws be democratically legitimate?[[24]](#footnote-24) On the one hand, (let’s say) the Constitution makes the President the ultimate (even if constrained) authority in these circumstances – the “Decider in Chief”. Arguably then the President fails his constitutional duty if he deputizes others to decide secret laws. On the other hand, if he picks people of good character, people he expects to express his values, to respect the Constitution, and so on, and if he gives them broad guidelines he wants followed in their choosing of laws, then arguably he’s just being a good delegator, an effective executive; and, again, the resulting secret laws have democratic legitimacy.

The President’s enacting secret laws could be democratically legitimate because both he and the Constitution that regulates him were democratically created. But there are other sorts of officials in other sorts of government structures who were voted for, officials and structures permitted or required by the Constitution to engage in their characteristic functions. Could this ever give *those officials* the right or duty to manoeuvre in secret in ways that would mean we are tacitly governed by de facto secret laws in their respective domains?[[25]](#footnote-25)

In America, several institutions comprise the democratic corpus, each charged with offering checks and balances against the others: the Executive Branch, composed of the President and the Cabinet; the Supreme Court, Congress and Senate; the Fourth Estate comprising journalists; the police, prosecutors and ordinary judges; arguably the military, comprised of Generals, the Joint Chiefs, and so on; and perhaps even the defence industry – the so-called Military Industrial Complex -- comprised of private corporations some of whom are virtually branches of Government due to getting the bulk of defence contracts and having security clearances, with a mutuality of influence between them and the official government through lobbying, the employment by the defence industry of former government employees and vice versa, plus the shared recognition that America and its businesses are closely allied in interests, actions and consequences. I suspect that each of these institutions – the Congress, the Senate, the Judiciary, etc. -- could, with democratic legitimacy, operate with secret pacts biasing society in various directions, this in effect comprising the creation of logically private laws.

For example, suppose the members of the Supreme Court conspire to use a certain principle to decide cases. They agree to always decide them in ways legally plausible given book law and precedent, but wherever those constraints leave latitude, agree to slant the decisions towards, say, wealth equalitarianism. They make a pact never tell anyone about this; and like members of the French resistance who sustained the appearance of co-operating with German invaders, they decide enough cases in ways against this principle that no one suspects its existence.

Arguably the resulting decisions would be law, since if what the Supreme Court decides isn’t law then nothing is. And arguably it’s legitimate law, at least case by case, since the Court ensures that all its decisions are defensible in ways standardly legally plausible. But the cumulative effect of these decisions is a pattern. Can individual legal rulings be questioned for contributing to a pattern? Does it matter whether the pattern forms with conscious intention? Certainly, those who vote in appointing Justices seek to detect patterns, both in recent decisions by the Court, and in past legal judgments by nominees to the Court; and they aim to vote in people whose legal opinions will create the patterns they favour. Arguably this is their prerogative. But when someone with an interest in how a judge or a whole court tends to vote detects a pattern, they do not thereby have a basis for invoking legal censure or punishment. What I’m talking about is a private pact between members of the Court to generate a pattern.

At any rate, for all I know, this is exactly what happens. There are only a handful of Supreme Court justices so it wouldn’t be difficult for them to conspire. In fact, it would be difficult for them not to influence each other, difficult for them not to form a school of thought. And if patterns in their decisions emerged simply from their inevitable mutual influence as colleagues, surely there could be no legal objection.

Moreover, such activity would meet the conditions on logical privacy of law. For this sort of legal decision making might be challenged were it to become public, its method of achieving its effects is stealth, there is a constitutional basis for the activities of this group, such goodness as may inhere in this sort of legal decision making may depend on its secrecy, and its effects could be in the public interest. So, it meets all conditions for being good logically private law.

Something similar could happen if The Fourth Estate – the community of journalists who comprise the free press protected by the Constitution -- conspired to interpret certain recently passed laws in certain ways, and in so doing, in effect influenced what laws people in the country are following – a law interpreted this way, or a law interpreted that way. As with members of the Supreme Court making sure their decisions are legally plausible case by case even while having a predetermined judicial direction, so the media could ensure that they meet sound journalistic standards case by case even while taking the interpretation of the law as reported in a predetermined direction. After all, just as correct judicial decisions are underdetermined by book and case law, so every law is subject to interpretation in its reportage; and more than one way of reporting the law will be defensible by journalistic standards. (Besides, the Constitution only makes provision for freedom of the press; it doesn’t tell the press how to interpret what it reports.) The result would be that journalists, in nuancing the reporting of laws in certain directions, are in effect making it the case that we are hearing of and following laws so nuanced – secretly nuanced laws.

Or suppose police officers or prosecutors conspire to do only token enforcement of certain laws, in effect making the law as implemented different from the laws on the books. Again, in each case let’s say their decision is defensible – it’s often grey whether a given case merits arrest or prosecution; it’s just that in our thought experiment there is a pre-arranged cumulative tendency in play. Here each journalist, police officer, prosecutor, is doing something in her rightful purview. And maybe all of it is in the public interest, saving people from what would otherwise be their worst tendencies. And of course, the jig is up if any of this ever becomes public. So, all of this has the defining characteristics of logically private law.

And again, for all I know, it’s exactly what happens, in ways more or less deliberate and explicit. For all of these organizations hold conferences and conventions, they drink together, they have friends in the business, they talk about the direction of the country, about how they think of the law, about whether they think certain laws are good, worth enforcing, and so on. They may not think of themselves as in some coordinated and Machiavellian way seizing control of the country. But perhaps they don’t need to be thinking of their professional interactions as like this in order for what they do to count as the manufacture of secret law (or the secret manufacture of law).

What are the implications of all of this for sovereignty? Obviously, it is even less plausible to demand that all of the foregoing sorts of decision be made instead by referendum: we’re not going to have Supreme Court decisions by referendum, newspaper stories written by referendum, decisions on whether to arrest or prosecute this or that minor law violator by referendum, and so on. This is for any number of reasons, all decisive, e.g., that there are too many of these issues for it even to be possible given limitations of time to have the nation vote on all of them, many of them require specialized expertise so that the nation voting to decide would be to wrongly let ignorance do the deciding, some of them involve processes designed to produce verdicts precisely when the public itself is divided on the issue and so when voting could not resolve the issues because it would just keep producing ties. So, either these things cannot be democratically grounded, or it is not necessary to democratically grounded sovereignty that all decisions about law be fully directly publicly taken in the sense figuring in governance by referendum.

But in what sense could the foregoing activities be democratically legitimate? How can they be seen to represent the collective will?

The question is urgent, both because the nation will continually face pretexts for secret law enacted by the Executive Branch, and because, as I’ve just suggested, so much of the operation of all the institutions of the democratic corpus probably feature elements of secret law in their operation and effect, whether by the conspiracy of the agents who operate these institutions, or by the cumulative effect of individual decisions of such agents even if not so expressly motivated. If we cannot find a way to see these as democratically well-founded, the recognition of the foregoing practices stands as a prima challenge to the legitimacy of the very institutions supposed to constitute our democracy.

I suspect the problem is not as intractable as it seems. For suppose a society with secret laws would be more workable and would better serve everyone’s interests than a fully publicly governed society: wouldn’t we all vote for it? And if certain arrangements for taking further decisions are voted for, aren’t the decisions from those arrangements themselves democratically taken? The argument that they are is that the mechanism of their production was voted for. The argument that they are not is that no voting is operant in the actual method by which further decisions are taken. But we’ve just seen that, to the degree a system of governance is not exhausted by the method of referendum, there will always be that argument against the democratic legitimacy of its decisions; and yet we’ve also seen that the method of referendum simply cannot assure the respecting of the interest of citizens. The non-referendum methods can do that, however; therefore they are to be preferred. And the decisions in which they issue therefore count as democratically grounded by two measures: first, they serve the interest of citizens; second, they are the only practicable method of doing so. Indeed, I suspect that the fact that we would assent to the preceding argument itself transmits consent to the deliverances of the resultant process.

If it still seems doubtful that secret laws from these sources and processes could be justified as expressing our will, even if we don’t know of them and haven’t directly voted for them, then consider the following. Suppose for all you know there is an Angel prepared to subtly bias social arrangements in ways advantageous to the general welfare. Wouldn’t you be happy to have this happen? Wouldn’t you now be prepared to say a prayer asking this Angel to make things better? Now suppose Supreme Court Justices, or journalists, or Congressmen and Senators, or police officers and prosecutors, or leaders of major corporations, are in effect doing this very thing. (Angels work in mysterious and subtle ways, maybe through ordinary people.) Surely their doing it is an expression of your will even if you don’t know they’re doing it. Of course, there is the argument that nothing guarantees they’ll do this, and the point of having arrangements be made by collective, informed decision is to make it more likely that arrangements will be to the advantage of the collective. But suppose you thought some people know better than you what would make things best go in the ways you’d prefer if you weren’t subject to bad information, bad judgment, and so on. Wouldn’t you want them to subtly bias things in good directions, even if you in your ignorance or bad judgement or weakness of will, wouldn’t directly make their decisions?

Yet it could still reasonably be argued that the foregoing processes and results are democratically legitimate only if we can guarantee that matters will be arranged in the best way. Is there any way to make this happen without our directly voting for each arrangement? Yes: we need only vote for educational systems inculcating the value of the public interest into anyone likely to be in authority. This is something citizens already do. They use their best judgement in voting for educational systems and government representatives who are like this. And they encourage arrangements in which those who wind up being justices, police officers, prosecutors, journalists, and so on, broadly have this agenda. We recognize, too, that many different ways of choosing laws, and of interpreting, policing and reporting them, are consistent with that agenda. In fact, the checks and balances the various institutions in our democracy are designed to provide on each other can be understood as, among other things, seeking to ensure that all of these interpretations serve the agenda of citizen interest.

1. This chapter began as a discussion paper for the conference, “On the Very Idea of Secret Laws: Transparency and Publicity in Deliberative Democracy”, sponsored by the Center for Ethics and the Rule of Law (CERL) at the University of Pennsylvania Law School. For helpful comments, I’m indebted to my fellow participants at the conference, especially Claire Finkelstein and Jens Ohlin, to my students in my advanced class on the theory of rational decision, to a colloquium audience at Dalhousie University, to Greg Scherkoske and Sheldon Wein for useful conversation, and, again, to Wein, for written comments. I’m grateful to Finkelstein and the Board of Directors of CERL for involving me in their activities. This has required me to stop thinking only abstractly as a philosopher and to grapple with real-world problems with a view to policy and practice. Happily, this began at the same time as my marriage to a person of alternative political vision and great practical wisdom -- thank you, L. Finally, I want to express my admiration for the people I meet at CERL conferences -- academics, businessmen, journalists, medical practitioners, people in the military, the defense industry, the intelligence community, in government and in law. Regardless of the sides they have taken on issues or the roles they have played in events, they have been reflective people of integrity trying to figure out what to do in the fog of war. Never was this exemplified more than by Chris Inglis, who, while he was Civilian Director of the National Security Agency, made common cause with us at the aforementioned conference for two days as we all sat around a table trying to get it right. [↑](#footnote-ref-1)
2. Ludwig Wittgenstein, *Philosophical Investigations* (G E M Anscombe tr, Blackwell 1967). [↑](#footnote-ref-2)
3. My education in this matter (I’m neither an American nor a lawyer) began in conversation with Claire Finkelstein and Jens Ohlin. Quite separately from what they’ve told me, I note that the US Constitution gives the President the right to pardon certain offenses, which means that he can in effect make it legal for people to do various things that are not normally legal, since he can save them from legal consequence (at least so long as he himself can avoid impeachment). And since the President could promise to do this privately, it would be a secret that this person’s action has become legal. For a more thorough review of the sorts of things that can count as secret law, see Dakota Rudesill, ‘Coming to Terms With Secret Law’ (2016) 7 Harvard National Security Journal 241-390. (Unfortunately, this article appeared too recently for me to give it the extensive consideration it deserves.) It is of course controversial just when the President has this sort of power, and just how extensive it is or ought to be, controversial both in the abstract and as a matter of interpretation of the Constitution as the document that authorizes this power. As a Canadian and so an outsider to how Americans think about such matters, I have been struck by two things: first, that so much of the debate in America about whether there ought to be secret laws is conducted as debate about whether the US Constitution permits them, rather than about whether they can be good things in themselves. It is like seeing religious people trying to engage in moral reasoning by interpreting biblical text. Second, I am struck by the vehemence of the disagreement. On casual reading, it seems to me a reasonable understanding of the Constitution to see it as saying the President can do what he judges necessary to defend his country. I can also see how reasonable people, with the benefit of other contexts, might read it another way. But the astounding thing is that so many on each side of the debate think the other side is crazy, evil, incompetent or criminally irresponsible. Recall the controversy surrounding the readings of the Constitution offered by John Yoo when he worked in the Office of Legal Counsel during the administration of President George W. Bush. Perhaps this vehemence is explained by the fact that the real issue isn’t what the Constitution says. It is whether one should favour things like secret laws, or the actions that some of such laws have aimed to make legitimate – torture, spying on one’s own citizens. These are polarizing questions. And when the debate about them is conducted in terms of whether the Constitution permits them, the question how to read the Constitution becomes likewise polarized. In much of this chapter, I shall be arguing about what follows concerning the legitimacy of secret laws from a reading of the Constitution as in effect permitting the President to enact them. But there is of course a debate to be had about whether the Constitution should be amended to prohibit such laws. That debate might be decided by reflecting independently on the goodness of such laws. [↑](#footnote-ref-3)
4. Famously Jeremy Bentham protested against the legitimacy of common law precisely for this feature. See Jeremy Bentham, ‘Truth versus Ashhurst’ in John Bowring (ed), *The Works of Jeremy Bentham* (first published 1808, W. Tait 1843) vol V, 233-7. [↑](#footnote-ref-4)
5. For a more thorough mooting of this possibility see Alexander A Guerrero, ‘National Insecurity: Democracy, War, and Popular Sovereignty’ in Claire Finkelstein and Michael Skerker (eds), this volume (OUP) pt IV ch 14; Alexander A Guerrero, ‘Against Elections: The Lottocratic Alternative’ (2014) 42 Philosophy and Public Affairs 135-78. [↑](#footnote-ref-5)
6. I learned of this from my old Canadian Political Science professor, Hugh Thorburn, who for a generation, trained students at Queen’s University, many of whom became prominent in Canadian government and civil service. [↑](#footnote-ref-6)
7. In this I agree with Michael Skerker, ‘A Two-Level Account of Executive Authority’ in Claire Finkelstein and Michael Skerker (eds), this volume (OUP) pt III ch 8. A student of mine from Iran suggested to me that whether secret laws in a given country would be a good thing would depend on the character of the country. In Canada or the US it might be acceptable to have the possibility of them because there is a strong tradition in these countries of respect for the public interest in formulating and administering law, a respect inscribed in the political nature of the citizens of such countries by their upbringing and education. But the possibility of secret laws would be dangerous in countries where these traditions are not well established. [↑](#footnote-ref-7)
8. Think again of Jeremy Bentham, ‘Truth versus Ashhurst’ in John Bowring (ed), *The Works of Jeremy Bentham*, (first published 1808, W. Tait 1843) vol V; or Lon L Fuller, ‘Positivism and Fidelity to Law – A Reply to Professor Hart’ (1958) 71 Harvard Law Review 630-51; or of the view that it is of the essence of law that it be promulgated, a view expressed in Thomas Aquinas, ‘The Treatise on Law’ in R J Henle (tr), *Summa Theologica* (University of Notre Dame Press 1993) Question 90 art 4, 145. [↑](#footnote-ref-8)
9. See Meir Dan-Cohen, ‘Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law’ (1984) 97 Harvard Law Review 625-77. [↑](#footnote-ref-9)
10. Thanks to Claire Finkelstein and Sheldon Wein for pointing this out to me. [↑](#footnote-ref-10)
11. One reason one can’t always work out their exact letter owes to a phenomenon Sheldon Wein pointed out to me: even in a society of Saints there would be the possibility of dispute about who has a right to what; and the fact who has the right is in part rendered determinate by the process of a judge adjudicating the matter and coming to a decision. Until then there is no fact about what the right is and so no fact to be known either. [↑](#footnote-ref-11)
12. See Lon L Fuller, *The Morality of Law* (Yale University Press 1964). [↑](#footnote-ref-12)
13. For more on this reading of Wittgenstein, see Saul Kripke, *Wittgenstein on Rules and Private Language: An Elementary Exposition* (Harvard University Press 1982). [↑](#footnote-ref-13)
14. Think of H L A Hart’s idea that, as Sheldon Wein explained it to me, ‘every legal system consists of both primary rules (ordinary laws), which get their validity by being made in the proper way, and secondary rules (rules about how one makes, enforces, and interprets primary rules), which get their validity by being recognized as the appropriate way of making primary rules’. [↑](#footnote-ref-14)
15. Concerns like these are raised in Christopher Kutz, ‘Secret Law and the Value of Publicity’ (2009) 22 Ratio Juris 197-217. [↑](#footnote-ref-15)
16. The classic treatment of this idea is Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge University Press 1979). [↑](#footnote-ref-16)
17. See David Gauthier, ‘Deterrence, Maximization and Rationality’ (1984) 94 Ethics 474-95; David Gauthier, *Morals By Agreement* (Clarendon Press 1986). [↑](#footnote-ref-17)
18. Thanks to Claire Finkelstein and Jamaal Hyder for asking about and helping me to more fully elucidate the relevance of Gauthier’s ideas here, and to contradistinguish them from the ideas figuring in the Ulysses case. On the approaches of Gauthier and myself to the rationality of forming and fulfilling commitments, see Duncan MacIntosh, ‘Assuring, Threatening, a Fully Maximizing Theory of Practical Rationality, and the Practical Duties of Agents’ (2013) 123 Ethics 625-56. [↑](#footnote-ref-18)
19. Thanks to Sharon Lloyd for the question. [↑](#footnote-ref-19)
20. See Kutz (n 15). [↑](#footnote-ref-20)
21. Julian Sanchez, ‘Wittgenstein, Private Language, and Secret Law’ (*Cato At Liberty*, 1 November 2011) <www.cato.org/blog/wittgenstein-private-language-secret-law> last accessed August 29, 2017. [↑](#footnote-ref-21)
22. Claire Finkelstein worried about this in her ‘On the Very Idea of Secret Laws: National Security and the Rule of Law’ (Penn Law Faculty Retreat, Philadelphia, September 2014). I don’t know if she still stands by this worry, but either way it’s a concern worth mooting. [↑](#footnote-ref-22)
23. Note that all of this is separate from the issue mooted above of how people come to know of the law. That legal facts depend on the possibility of there being such a thing as an expert about what is law does not entail that people come to know of laws only by consulting experts; nor does it entail that every person knows of the law. [↑](#footnote-ref-23)
24. My thanks to Vaughn Black for this question. [↑](#footnote-ref-24)
25. Something like what I’m about to develop is also suggested in Rudesill (n 3), but I apply the thought more radically, and to institutions additional to the ones he considers. [↑](#footnote-ref-25)