CHAPTER ONE
The Sociology of Secrecy

This is a book about secrets. It examines the way in which Anglo-American legal culture discusses and regulates secrets. Law is, among other things, an institution where the unspeakable is spoken, where the details of situations and lives are made public, and where the dominant normative forces of a culture are brought to bear on the raw materials of human life. Law is, in short, one of the few places in social life where one can see the magic and the devastation wrought by secrets. In the chapters that follow, I examine the legal description and justification of secrecy.

This is also a book about economics. Lawyers increasingly have been learning to talk about law in the language of economics since “law and economics” has become a regular feature of the law school curriculum. Much of law and economics purports to be a positive theory of law, asserting that judges in many areas of law actually decide cases in a way that maximizes economic efficiency. In examining what secrets count as legal secrets, I ask whether these secrets are also efficient secrets, whether the way legal language describes and justifies secrets can be squared with what lawyer/economists say is ideal. I will argue that, whatever else law and economics may be, it is not a descriptively accurate positive account of law.

Finally, this is also a book about law and legal theory. It develops a way of thinking about law that extends beyond the boundaries of the empirical case of secrecy and beyond the boundaries of an economic

theory of law— and it does this in two ways. First, the book makes a methodological point about how law ought to be studied. The stories law tells about what is and what ought to be provide a modern mythology, narratives that describe and justify. The way these legal narratives are accomplished—the way what is, in the world, blends imperceptibly into what ought to be, in law—illuminates how descriptions of fact reveal what is valued. An interesting question to ask in legal theory is how we conceive the relation between the “is” of the empirical world (the facts) and the “ought” of law (the rules). This raises an interpretive question, asking how judges should find meaning in legal texts, meanings that make sense of abstract norms in the context of particular instances. I will argue that the facts of particular disputes and the rules of texts that are called on as resources in resolving the particular disputes provide constraints on each other. The process of legal interpretation can be seen as the mutual construction of facts and rules.

Second, the book develops a theory about what we might expect, in a democratic regime, the content of the law to be if law is to attract obedience and not simply impose its threats of punishment on an unwilling populace. Those who study politics have puzzled over the countermajoritarian tendencies of courts, wondering how it is possible to justify the presence of institutions that protect minorities against the momentum of the majority will in a democratic culture. But democracy does not have to mean that numbers alone justify political action. Democracy may instead be a commitment to a certain sort of political justification, justification that relies on the consent of the governed. And this consent does not have to be of the Gallup Poll variety but may instead be what rational argument, starting from certain shared premises, commits us to. In short, it may be possible to see, as a positive matter, the law as the repository of the results of rational argument generated in an effort to attract consent. Where the law fails to mount a plausible case for such consent, it may be open to criticism for failing to justify its own rules.

Our story begins with secrecy.

The Trails of Five Secrets

By the time a secret is discussed in a public, legal setting, it no longer exists as a secret. But the trails in memory that secrets leave reveal the distances they have traveled, the force of their passage, the gaps they have left in the ongoing order of things. The creation and destruction of human social relationships are linked to secrets shared and secrets betrayed.

Secrets have a dual character. They constitute large parts of the social world by creating alliances and divisions, social spaces that are shared and those that are partitioned off from others. We know our friends by what they tell us, our enemies by what they do not. The creation and maintenance of secrecy shapes the social world around us by establishing insiders and outsiders, groups of “us” and “them.”

But secrets are also used as tools of power, wrenching advantage from the unknowing actions of others. What we don’t know often does hurt us—and serves to benefit others who kept us in the dark. Secrets provide the unobservable weapons of the devious. So while secrets enable the social world to be partitioned and individualized, making the expression of individual autonomy in the construction of the social world possible, they also serve as staging grounds for the deployment of power, assaults on the very autonomy that they constitute.

We can see this in a series of examples.

In August 1935, John B. Fuller was hired to teach German at DePaul University in Chicago for the 1935–36 school year. With a Ph.D. from the University of Chicago and eight years of teaching experience, Fuller met with the immediate approval of Father O’Connell, then dean and soon to be president of the Catholic college. But before classes began that fall, Fuller received a letter, indicating that the college would not be needing his services.

Through an elaborate network of Catholic contacts, DePaul had learned that John B. Fuller was in fact the former Father Bernard Fuller, who had once been ordained to the priesthood and had served as a priest at Techyny, a Catholic community near Chicago, from 1912 until 1927. In 1927, the former Father Fuller had apparently gone off to Greece, from which news of his death returned shortly thereafter. A requiem high mass had been held for him.


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The former Father Fuller had in fact started a new life, but not just in the spiritual sense. Changing his name to John B. Fuller, the former priest was found to be "not dead, but . . . teaching at Amherst College." He had broken his perpetual vows of poverty, chastity, and obedience and had married Anna Kuber in Buffalo, New York. He and his wife had two children, and the former Father Fuller became a fugitive from the faith.

After Fuller filed a lawsuit for breach of contract, DePaul University claimed that Fuller's initial secret was illegitimate, amounting to fraud. The university argued it had been misled since it never would have hired him had it known his secret. With an apostate priest on the faculty, the university contended, irremediable damage would be done; all the nuns and priests currently on the faculty would leave. Fuller, for his part, claimed that the information was a well-kept secret and that no harm would come to the university if they just did not publicize the information.

The Illinois Appellate Court approved the university's action in firing Fuller. By withholding clearly relevant information that he knew would be important to the DePaul, he had led them into doing something that they regretted. Moreover, the experience of hundreds of years past has shown that a teacher, to be qualified to perform his duties, must possess such a character that he may be a good example to pupils and create character in them. The teacher must be honest and honorable, not performing his duties under the cloak of honesty, but genuine, and beyond suspicion as to his character. The defendant, DePaul University, is surrounded by an unusual religious atmosphere, and to have injected plaintiff, an apostate priest, into this world would have been disastrous.

Fuller's secret, the court said, amounted to fraud.

Very early on the morning of 19 February 1815, Hector Organ paid a visit to Francis Girault, an agent of Peter Laidlaw and Company in New Orleans. During their brief conversation over the sale of tobacco, Girault asked Organ whether he had heard any news. Fighting in the War of 1812 had flared up again and people were anxious to learn whatever they could. Organ responded rather vaguely and then bought more than sixty tons of tobacco from Girault. Later that day, Girault seized the tobacco that had already been delivered to Organ, claiming he had been defrauded. The dispute between Organ and the Peter Laidlaw Company raised the issue of legal secrets for the first time in the U.S. Supreme Court.

Before Organ bought the tobacco, he had heard of the signing of the Treaty of Ghent, ending the war and, more important for the tobacco trade, ending the naval blockade of New Orleans. As long as the port had been blocked, tobacco and cotton sales had been depressed and merchants were selling these goods at very low prices. News of the treaty caused prices to rise by 30–50 percent in one day, and Organ, keeping his exclusive information secret, was able to make a substantial profit on the sixty tons of tobacco he purchased from the ignorant Girault.

Organ had heard the news from three American merchants who happened to be sailing with the British fleet at the time that the fleet heard the news of the treaty. The treaty apparently surprised everyone, since fighting had been particularly heavy at that time and no one expected such a rapid settlement. By 8 A.M. on the morning of 19 February, word of the treaty was being circulated in handbills prepared by one of the merchants who had sailed with the British fleet; but Organ's deal had already been wrapped up. Girault, for his part, claimed that Organ should have revealed his secret at the time of sale and further claimed that Organ's reticence amounted to fraud.

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The question in this case is, whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor? The court is of the opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally open to both parties. But at the same time, each party must take care not to say or do anything tending to impose upon the other.

4. 293 Ill. App. 261, 265 (1938).
5. 293 Ill. App. 261, 269 (1938).
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Since the exact words Organ said at the time of the sale were unclear, the Court remanded the case with instructions for the lower court to inquire into Organ’s truthfulness. Had Organ lied, he would not have prevailed. But if Organ had merely kept secret what he knew, the Laddlaw Company would lose the profits that the war’s end brought. Organ’s secret was a legally permissible secret.

In the 1940s the Powell Station Water Company in Powell Station, Tennessee, had the odd practice of turning off the water to the residences it served at 7 p.m. each evening and turning it on again at 7 a.m. each morning; between those hours, no water could be had. The Evans family owned one of the affected residences, and they decided to sell their house. The Simmons family bought the house for $6,000 and were quite surprised when they moved in to find the house was waterless half the time. The scarcity of water made the property worth at least $2,000 less than they had paid.

The Simmons immediately took the problem up with the Evanses, who responded by saying, “We did not tell you because we knew that you would not buy the property if we told you about the water being off half the time.” Having got this admission, the Simmons sued to rescind the contract of sale on the house, claiming that they had been defrauded.

The court agreed that this was fraud and that the Evanses should have told the Simmons about the water because ordinary inspection would not have revealed the problem. Moreover,

Complainants in the exercise of ordinary care would not be required to make a nightly inspection in order to ascertain whether the water situation with reference to this residence was different from what it was during the day. A person of ordinary prudence would not have the remotest idea that there would be any difference, for such difference is so extraordinarily unusual as not to be anticipated. Nor were complainants called upon in the exercise of ordinary care to go to the people in the community or to the utility which furnished this water and inquire whether the water situation with reference to this residence was different from what it appeared. The fact that there was a difference at night from that which appeared to be the fact during the day was so entirely contrary to ordinary experience as to make such inquiry more or less ridiculous.¹⁰

The court believed that a secret whose existence was so unexpected had to be disclosed.

On 27 October 1969, Prosenjit Poddar killed Tatiana Tarasoff. But the awful event was not entirely without warning. During the course of outpatient therapy with Dr. Lawrence Moore, a psychologist employed by the University of California hospital in Berkeley, Poddar had indicated that he wanted to kill Tarasoff, his former girlfriend, when she returned from a summer in Brazil. Moore was sufficiently concerned that Poddar would actually try something that he attempted, but failed, to have Poddar committed for observation in a mental hospital. Shortly after this attempt, Tarasoff was murdered and her parents sued the University of California. They claimed that the university, through its doctors, should have warned their daughter of the impending danger.¹¹

Contending that the secrecy maintained in psychotherapeutic relationships was essential to their success, the university and Moore argued that they did not have to notify Tarasoff of this threat against her life. The court acknowledged this by stating:

We realize that the open and confidential character of psychotherapeutic dialogue encourages patients to express threats of violence, few of which are ever executed. Certainly a therapist should not be encouraged routinely to reveal such threats; such disclosures could seriously disrupt the patient’s relationship with his therapist and with the persons threatened. To the contrary, the therapist’s obligation to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others.¹²

But here, the court decided, there was reason to expect that violence was likely. Moore would not have sought to commit Poddar if this were not the case. But although the attempt to commit Poddar was unsuccessful, this did not discharge Moore’s obligations. He had a further duty to warn Tarasoff of the threat on her life. Poddar’s secret had to be disclosed.

Because their marriage was falling apart, Dr. Jane Doe, a university professor, and her husband entered therapy together. They

9. 185 Tenn. 282, 284.
10. 185 Tenn. 282, 286–287.
11. Tarasoff v. Regents of the University of California, 17 Cal.3d 425, 131 Cal. Rptr.
12. 17 Cal.3d 425, 441.
consulted Dr. Joan Roe, a psychiatrist with several decades of experience. After they had confided a wide range of very personal information to Dr. Roe, Dr. Doe left therapy.

Eight years after her treatment ended, Dr. Doe discovered that Dr. Roe was publishing a book that used the life stories of Dr. Doe and her husband as a case history. After attempting but failing to stop publication, Dr. Doe sued for invasion of privacy when the book, "a book which reported verbatim and extensively the patients' thoughts, feelings and emotions, their sexual and other fantasies and biographies, their most intimate personal relationships and the disintegration of their marriage," appeared.

Dr. Roe's defense was that while in therapy Dr. Doc had consented to the publication of her case history. But the court found that this was highly unlikely. Instead, the court focused on the nature of a relationship between a patient and psychiatrist:

Every patient, and particularly every patient undergoing psychoanalysis, has . . . a right to privacy. Under what circumstances can a person be expected to reveal sexual fantasies, infantile memories, passions of hate and love, one's most intimate relations with one's spouse and others except upon the inferential agreement that such confessions will be forever entombed in the psychiatrist's memory, never to be revealed during the psychiatrist's lifetime or thereafter?

The court concluded, on the basis of a theory of implied contract, that the relation of trust established between patient and therapist required that the therapist not publish the patient's secrets.

These five secrets reveal both the tensions and the variety in conflicting claims to knowledge. In the first three stories, Fuller, Organ, and the Evenses kept their secrets in order to complete a deal that would not otherwise have taken place. In each of these cases, those from whom the secret was kept claimed later that they should have been told. The secret-keepers were able to get something that they wanted by hiding information that the targets would have thought relevant, thereby gaining at the latters' expense. Despite the structural similarities in the three cases, however, Organ's secret was acceptable while the secrets of Fuller and the Evenses were not.

In these cases, we might ask, whose claim is more compelling? Should the person who is keeping the secret be permitted to operate without having to disclose unique knowledge—or should the targets of secrets be informed before they act at their peril? Should we expect innocent individuals to find out for themselves—or should we require disclosure by those in the know?

In stark form, disputes over secrets like these present all-or-nothing problems. Either the secret-keepers, hiding relevant information from ignorant others, are allowed to prevail as they please—or the targets of the secrets, being able to demand knowledge, can thwart them. In such cases, the information at issue can be thought of as a strategic secret. Strategic secrets are kept for the purpose of influencing the actions or feelings of others. Withholding information about one's discreditable past, about a significant peace treaty that affects the likelihood of foreign trade, or about the dry spells in one's house provides leverage for the secret-keeper to influence the innocent other. The secret-keeper withholds information in order to achieve some desired goal; therefore, the secret can be considered part of a strategy.

In the last two of the five cases considered above, the secret involved three parties rather than two. The subject of the secret was not the one whose action in disclosing to third parties was at issue; in both cases, the subject confided in someone else who then claimed to be able either to reveal the information over the subject's objection or to hide it in the interests of the subject. These cases explore whether confidants can or should reveal others' secrets. One secret was found acceptable and the other was not.

In these two cases, the question, again, is, which claim is more compelling? Should individuals be allowed to retain control over information that they have confided in others—or can those in whom they have confided reveal the information in particular circumstances?

Poddar's secret was clearly a strategic one; if his former lover had found out, he would not have been able to accomplish his evil plan. But Doe's secret is of a different character. It may be called a private secret. Private secrets are pieces of information that are withheld not to influence others but because the secret-keeper feels that the information is not relevant, is none of the other's business, or gains its symbolic significance because it is not shared. Much of what is withheld in the name of privacy consists in information that cannot be used for strategic purposes. It is information that usually has a special value for the
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person hiding it, a value that it does not have in the same sense for others. One guards private secrets from other people not because one is trying to hide something that would be useful if these others knew but because this information anchors one's sense of identity. While the motivation behind the strategic secret consists first and foremost in controlling other people, the motivation behind the private secret consists in the construction and preservation of an internal and/or selectively shared symbolic life.

In both two-party (direct) and three-party (serial) secrets, the clash of claims is evident. Sometimes courts allow secrets to remain hidden; other times, disclosure is permitted. Organ could hide news of the treaty while Fuller could not hide his mutiny from the priesthood and the Evanses could not hide their water problems from the buyers of their house. Doe could hide her sexual fantasies while Poddar could not hide his fantasies of killing. Why the courts allow some secrets to be kept but require (or at least do not punish) revelations of other secrets is the subject of much of this book.

Before analyzing in more detail the types of secrets and the social circumstances in which they are found, it would be best to examine what secrets in general are.

The Concept of Secrecy

In this book, I will use the following concept of secrecy:

A secret is a piece of information that is intentionally withheld by one or more social actor(s) from one or more other social actor(s).

There are several features of this definition that are important to note:

1. Secrecy is a property of information, the property that it is withheld from others. It is not a property of individuals or groups. Thus, when we speak about secret societies, for example, we refer to organizations about which the distribution of information is limited. It is not, properly speaking, the society that is secret; it is the information about the existence, membership, or purpose of the society that is restricted. Our everyday language represents a shorthand; wherever the word secret appears, the term information or knowledge is always implied. 16

16. This definition may appear to include much of what we think of as privacy, such as information about oneself that one hides from others. But I wish to reserve the term privacy to represent not a property of information but a property of individuals. Privacy is a state of the individual that can be achieved through withdrawal from others.

17. The way in which "intentional" is used here generally parallels the usage of that term in G. E. M. Anscombe, Intention, 2d ed. (Ithaca, NY: Cornell University Press, 1976), §47. Intentional accounts "are all descriptions which go beyond physics, describing 'what further they [actors] are doing in doing something'" (p. 86). To say someone is doing something because or in order to is to give an intentional account. But this usage differs from Anscombe in that Anscombe does not require that the actors themselves be aware of the relation between their actions and the consequences, while my usage assumes that actors will be able, when pressed, to give an account of their secrecy-keeping. Since the law generally requires that people be able give reasons (at least after the fact) for their actions if they are to claim or defend against a legal action, it seems reasonable to suppose that an intentional account in a legal theory would consider that the subject's reasons be self-conscious and capable of explication.

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2. Another important feature of the definition of a secret is that the information in question is intentionally withheld. Mere observation of the failure to transmit information is not enough to establish secrecy. This is an intentional, not strictly a behavioral, definition. People may forget, think they already have revealed the information, or intend to transmit the information eventually when the opportunity arises. When we observe that knowledge is uniquely in the possession of a particular person, however, we cannot conclude that this information is necessarily a secret. The requirement that a secret be an intentional 17 withholding means that there must be a self-conscious and identifiable motivation for keeping someone else in the dark about something in particular.

The intentionality of secrecy is crucial to the present study for two reasons. First, we might think of the unequal distribution of knowledge in a particular society as the result of a series of forces operating at the same time. People may not know something for a variety of reasons. There may be psychological factors at work affecting what people may know. They may forget, fail to perceive, misunderstand, or distort the information they receive. In addition, there is an economic consideration: people may not be able to afford to acquire information. The technology may fail, leaving people without information to which they would otherwise have access. In short, people may not know something for a variety of reasons that do not indicate through keeping information about oneself away from others, through retaining control over the demands on one's self. Privacy is a condition in which individuals can, temporarily at least, free themselves from the demands and expectations of others. Secrecy is one of the methods that an individual may use to attain this condition. But privacy and secrecy describe different entities. Secrecy describes information, and privacy describes individuals. (I am indebted to Robert Schmidt for first suggesting this line of thought.) In the present work, then, secrecy will be the primary focus, since the purpose is to shed light on the withholding of information, not on all of the other methods that individuals use to escape from the control of others, although the two concepts are clearly related.
that someone else is keeping a secret from them. By saying that a secret is a piece of information intentionally withheld by particular individuals, we can limit our inquiry to those cases in which knowledge is being used as a social resource in the achievement of particular goals.

Second, highlighting intentionality enables us to see secrecy as a rational process, in the sense that we may expect people to be able to recognize that they are withholding information from others and to give reasons why they are doing this. Purely behavioral accounts either find reasons irrelevant or reduce reasons to speech actions, analyzable as behavior. Seeing secrecy as intentional withholding of information both allows reasons to be seen as causes of social action and requires that an analysis of secrecy consider the subjective dimension of social life.

3. This definition of a secret, with its emphasis on one person withholding information from another, stresses that secrets are always located in particular social contexts. Speaking of secrecy in general misses a critical point, that secrecy always occurs against an important backdrop of particular social relations. In the limiting case, one person who knows something may choose to withhold the information from everyone, regardless of their relationship to her. In these cases, the secret is absolute and does not serve to create special communities of knowledge. More frequently, however, people engage in selective disclosure; for example, one may confide in a lover what one would never tell one’s boss.

The patterns of selective disclosure shape the contours of the social world. To say that national defense information is secret, for example, implies that it is secret from some particular others. Generally, this information is withheld from the enemy; but it is also withheld from the vast majority of those who are allegedly being defended. This reveals a fear that the more people there are who know the information, the more likely the information is to be spread to those who should not know. The permeability of networks and a distrust of the population are revealed by this pattern of distribution. Multiple communities of “us” and “them” are created, leading not only to a strain in communication between potentially warring states but also to an isolation of the military and national security communities both from other policymakers and from the general public. The audience or audiences for the secret help us to understand how the secret functions as a social resource.

Information may be secret even if it is being consciously withheld in only one social context. The degree of secrecy may be specified by examining the number and quality of different contexts in which the information flow is intentionally blocked. When information is shared in one context and restricted in another, we can begin to see differences in types of social relations (who is “us” and who is “them?”) and in the relation of the information in question to the strategic purposes of the secret-keeper (how is the secret being used?).

4. The term “actor” has been used instead of “person” so that groups can be considered as creators and targets of secrecy. Collectivities of all kinds seek, create, transmit, and withhold information just as individuals do. Some may object that there are conceptual problems that arise in treating corporate entities as actors like individuals, problems with, for example, determining the intentionality required for our definition.

We may say that withholding information is intentional when a decision has been made by some authoritative group within the organization or by some authorized agent of the group. But there may be unauthorized leaks of information (by, for example, whistle-blowers), leaks that impair secrecy but that cannot be said to be an intentional release of information on the part of the corporate actor. The general point to be made is that one cannot infer from the revelation of information possessed by a corporate actor that this disclosure is intended by the organization. In addition, one cannot infer from the withholding of information that secrecy exists. A corporate actor’s failure to reveal information may mean that the information has been “forgotten” (deleted from the files, lost somewhere in the organization, sitting under a pile of papers on someone’s desk). Although there may be some areas where referring to the knowledge of a corporate actor may be a bit strained, corporations clearly engage in strategic manipulation of information and thus fall within our orbit of study.

From our simple definition of secrecy, then, several important features of the phenomenon can be illuminated. First, secrecy is a property of the information, a property that indicates its level of availability to others. Second, secrecy may not be bestowed on information accidentally; it must result from an intentional decision. Third, secrecy is defined in terms of its social context, specified by the identification of...
the concealer(s) and the target(s). And, finally, both those who maintain secrets and those who are excluded by them may be either individuals or groups.

Forms of Secrecy

Although the secret is a simple sort of social device, entailing only the withholding of information by one person from another, it can take on a variety of different forms as social contexts become more elaborate. These forms, as we will see in the next section, shape the sorts of normative claims people can make for the keeping and disclosing of secrets. They also reveal the way in which secrets construct social relations, bringing some people together while pushing others apart.

There are three major forms of secrets to which all other forms may be reduced:

1. *In the direct secret* there are two actors, A and B, who can be either individuals or groups. A is keeping from B a secret that B wants to know; for example, a defense secret the United States keeps from the Soviet Union would be a direct secret.

2. *In the serial secret* A shares her secret with B and a third actor, C, wants to acquire A’s secret from B: for example, if the United States revealed one of its defense secrets to Great Britain, Great Britain would possess a serial secret as against Soviet attempts to find out by going to Great Britain rather than to the United States.

3. *In the collective or shared secret* A and B jointly create a secret and C wants to find out the secret from either A or B: for example, if the United States and Great Britain shared a common defense secret, they would possess a collective secret as against Soviet attempts to acquire it from either of them.

In each of the three cases, the secret-keeper can act in one of two ways:

1. The secret-keeper can reveal the information. This action has different implications across the three forms of secrets. A can tell B the direct secret, resulting in *disclosure*. B can tell C the secret, making A feel a *betrayal*. Finally, either A or B can reveal the collective secret to C, creating a *leak*.

2. The secret-keeper can hide the information. If A hides the direct secret from B, this is a *simple secret*. If B hides the secret from C, this is a *secondhand secret*. If A or B withhold the collective secret from C, this creates a *conspiracy*.

The types of secrets outlined above can be seen more clearly in Table 1.1.

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<thead>
<tr>
<th>Party involved</th>
<th>Type of Secret</th>
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<tbody>
<tr>
<td>Direct</td>
<td>Serial</td>
</tr>
<tr>
<td>A to B (Dyad)</td>
<td>B to C (Triad)</td>
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<tr>
<td>Activity</td>
<td></td>
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<tr>
<td>Reveals info.</td>
<td>Disclosure</td>
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<tr>
<td>Hides info.</td>
<td>Simple secret</td>
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*Note: A, B, and C are three social actors. The information in question starts as A’s secret, and, in direct secrets, A chooses to disclose or not disclose the secret to B. In serial secrets, B must decide whether to disclose A’s secret to C, and, in collective secrets, either A or B may reveal secrets jointly created by A and B to C.*

Justifications for Secrets

People can give an enormous variety of justifications for keeping or requiring revelation of particular secrets. A justification, as the term is used here, is a form of normative argument; giving a justification makes at least a plausible case for a particular "should" proposition. By examining the sorts of justifications that people can offer in situations involving secrets, we can see how different social contexts give rise to clashes of normative arguments.


21. B may be an individual, a group, or a set of unrelated individuals.

22. If C wants to acquire the secret directly from A, then this situation collapses into the direct-secret case.

23. If A and B share a secret with a larger group, this secret is formally identical. It is the ability of any one person to defect from a jointly-created secret that is at the core of collective secrets.
In all three forms of secrets, the key normative question is whether A (in the direct or collective case) and/ or B (in the serial or collective case) are allowed to claim that they can keep their information secret. The direct secret poses the issue of A's duties to B. The serial secret frames the problem of B's duties to A in the face of a potential obligation to C. The collective secret questions the extent to which A's and B's obligations to each other can overcome any duties to C.

Each of the six types of secrets that we have identified has its own universe of justifications that might arise:

1. Justifications for disclosure.—When A reveals a secret to B, A may do so because B has made a convincing argument that she should know. A may also have disclosed the secret because he felt the need to unburden himself. But no matter what the reason for the initial disclosure, A may later discover that he would rather that B not know this information. A may claim that he is injured by B's possession of the former secret and try to claim that B now should not know. This sort of situation arises in law when criminal suspects want to retract confessions or when relations between the A's and the B's of the world turn sour and the previously shared secrets become potentially harmful to A, as happens frequently between employer and former employee in trade-secret cases. Knowledge being what it is, repossessment is impossible. A may claim that B's possession of the information now harms A and that A should be able to prevent B from using the information to A's detriment. B, in turn, may claim that A's initial disclosure was voluntary and that any later restriction on the information is therefore invalid.

2. Justifications for betrayal.—If A has revealed a secret to B, the circumstance may arise where B voluntarily discloses A's secret to C.

25. It is interesting to note in this regard that people may make themselves vulnerable to others in two ways. They may make themselves physically vulnerable by abandoning traditional defenses such as weapons, locks, clothes, or barriers. These physical defenses usually can be reinstated when a relationship turns ugly, as long as no permanent physical damage has been done. But people may make themselves psychologically vulnerable (and maybe physically vulnerable also) by abandoning defenses created by personal secrets. By disclosing secrets, one opens up to others and becomes vulnerable to their knowledge and manipulation. Unlike physical defenses, which can be rebuilt, the defense of secrecy can never be reclaimed. One cannot make someone else forget what one has told them: any attempt to do so will probably turn the information more firmly in the other's memory. When the relationship in which the confidence was expressed changes, people often later want to retract what they once voluntarily disclosed. Although it may seem that disclosing a secret creates less risk of harm than allowing oneself to be physically vulnerable, this is a decided short-term view. Physical invulnerability often can be reclaimed. The exclusive possession of knowledge cannot be.

In these cases, C may either be a specific person or C may be a large group (the general public, for instance). B generally claims that A's secret really belongs to B—or at least no longer uniquely belongs to A—and that B should be able to do with that information whatever B wants. A's justification for wanting B to keep the secret, however, is that, since the information was A's to begin with, A should therefore be able to restrict B's ability to distribute the information further. A is claiming not only the right to keep a secret but also the right to restrict B's actions so that B will keep the secret also. The most common sorts of legal cases presenting this justification involve the mass media, for example, when A claims that B's publication of personal details about A violates A's privacy. Other cases include debt collections, for example, when A is in debt to B and B reveals this fact to some C (A's employer, for instance) in an effort to encourage A to pay up. The Doe case described above is another example of such a situation.

3. Justifications for leaks.—If A and B share a jointly constructed secret, either A or B might disclose the secret to C without the approval of the other. The remaining secret-keeper may claim that the secret should not have been unilaterally revealed to another because the secret is a joint product, not an individual one. Often, these sorts of disclosures destroy the relationship that created the secret, and the remaining secret-keeper might claim that the disclosures caused harm because they ended the alliance. But the discloser might argue that the knowledge was for each to use and that the secret-keeper cannot prevent the discloser from telling others or from leaving alliances that no longer benefit the discloser. Trade-secret cases where the inventor takes her own invention with her on leaving employment and termination-of-employment cases where the employee has leaked information and been fired as a result often present justifications like these.

4. Justifications for simple secrets.—When A keeps a secret from B, B may often claim that she should be told. B may have asked A directly and A refused to disclose the secret, or B may not have even known to ask; for example, in Laidlaw Girault did not know that Organ knew about a treaty, but he, like everyone else in the tobacco trade, knew that such a treaty was possible and that it would be very important when it occurred. Fuller's secret about his former status as a priest and the Evans's secret about the lack of water in the house may have come as total surprises to those from whom the secret was kept. In all of these cases, A may claim a property right, if the information is likely to be

26. If A and B jointly reveal the secret to C, then this collapses into the simpler case of a direct secret and disclosure.
commercially useful (as in Laidlaw) or A may claim a privacy right, if
the information pertains to A (as in cases where A refuses to answer
nosey questions on an employment application). A's may also claim
that B's should have to look for the information themselves and not
have to acquire it through A's disclosure (as in Simmons). But the B's
often claim fraud; they claim they are being fooled by A's silence; they
claim a right to know. Legal issues involving this sort of problem come
up frequently in fraud and nondisclosure cases, where after a deal has
been completed, one party discovers he has been had. They also come
up in face-to-face privacy cases, where A claims that B has no right to
intrude.

5. Justifications for secondhand secrets.—In these cases, A tells B a
secret and then C wants to find out the secret from B. B hides the
information. B is caught between A's justifications for why B should
not reveal the secret and C's justifications for why B should reveal it.
C's in these cases, like the B's in the shallow-secret cases, claim a right
to know, particularly when they can show that they have a compelling
interest in the information. B's maintain that their affiliation with and
obligation to the A's makes the disclosure an unwarranted intrusion on
the relationship between A and B. These sorts of cases arise most
frequently in law as confidential relationships cases, where doctors or
social workers or priests or journalists claim that their patients or
clients or parishioners or sources have confided in them with the en-
forceable understanding that the professional will not disclose this
information. The psychiatrist in Tarasoff tried to avoid revealing the
information because he felt an obligation to his client to keep the
information secret. The psychiatrist in Doe obviously felt no such
obligation, although Doe (and later the court) thought she should.

6. Justifications for conspiracy.—In this situation A and B share a
jointly constructed secret that they together withhold from C.
The justifications in this situation are very similar to those in the
secondhand-secret cases, with one addition. Because the secrets were
jointly created, A and B each have a direct interest in the secret. C, in
trying to get the secret from either A or B, tries to split them apart by
forcing revelation of common information.27 Again, C claims some
right to know. For A and B, the conspiracy is a combination of the
simple secret and the secondhand secret, because both a personal and a
joint interest can be claimed. Legal cases that present these sorts of
justifications often fall under the heading of privileges, such as the
husband-wife privilege. One cannot be made to testify against the
other, partly because each reveals him- or herself in so doing and also
partly because such disclosure would destroy the relationship.

TO THE DISCUSSION OF JUSTIFICATIONS, one complicating element must
be added. Sometimes the targets of the secret know about the potential
existence of a secret, even though they do not know the content of the
secret itself. Laidlaw's agent, for example, clearly suspected that there
might be a treaty; otherwise he would not have asked Organ whether
he had heard any news. Laidlaw's agent just did not know whether the
treaty had been signed. When the target suspects that there might be a
secret, we find shallow secrets. When the target is completely in the
dark, never imagining that relevant information might be had, we find
depth secrets. The Simmonses, for example, never thought to ask the
Evanses whether the water was turned on all the time. The simple
secret, secondhand secret, and conspiracy all have shallow and deep
forms. The depth of a secret affects the sorts of justifications that can
be made by those left out of the secret.

If someone knows that a secret exists, making this a shallow
secret, she can ask for the information directly and claim that her direct
questions should be answered. As in the card game Go Fish, where
players ask whether their opponents have particular cards in their
hands and where they can capture these cards if they guess correctly,
people who ask direct questions can claim that the whole negotiation
process, like the game, is undermined if their skill in asking questions is
not rewarded. With shallow secrets, however, the secret-keeper can
claim that the targets at least know that they are deciding with the risk
of ignorance. Keepers of shallow secrets may be able to claim that the
targets should search for the information rather than expect to have it
handed to them outright.

The deep secret allows the targets to make stronger justifications
against the secret-keepers. If the targets have no idea that the informa-
tion exists, let alone what the information consists of, then the targets
have a more forceful case that the secret amounts to fraud. The targets
cannot protect themselves against information they cannot imagine,
and so the secret-keeper can always gain advantage at the expense of the
target.28 But the deep-secret-keepers may claim that they have

27. Georg Simmel (''The Triad,''' in Wolff, pp. 154–160) analyzes this sort of
social configuration as the ter tio gaudens, the third party who takes advantage of splits
between the other two.

28. If the targets of the deep secret never find out what hit them, they cannot
bring legal action against the deep-secret-keeper. Any disincentives that the law provides
only work if the secret is eventually discovered. If the deep-secret-keeper is rational, self-
property rights in the information and do not have to reveal it to those who do not know.

In legal disputes, these sorts of justifications are made explicit and courts must decide among them. Who is to prevail in a particular case? On what basis should the decision rest? Which secrets are like others—and which justify a different treatment? The way in which courts frame and resolve these disputes reveals not only the role knowledge plays in society but also the way in which legal facts and legal rules are joined.

A Note on Lies and Half-Truths

In common usage, lying generally means not telling the truth. But the purpose in not telling the truth is often the attempt to keep a secret.29 The lie in these instances, then, is only a more complicated form of secret, one involving not only the withholding of information but the substitution of some other information. In other words, a lie is often a secret with a story on top. Once one uncovers a lie, then, one must still uncover a secret before the hidden knowledge is revealed.

The half-truth is also related to the secret. It is accomplished by the partial revelation of the secret itself. Its effectiveness in hiding the secret comes from the fact that appearing to reveal the secret (while hiding certain clarifying portions) makes others think they know all there is to know. But knowing part of a secret can lead to different sorts of inferences about the true state of affairs than knowing the whole secret. One may selectively reveal true information and do it in such a way that the overall impression is misleading. This is the essence of the

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29. This idea was clear to Simmel, who noted that: “the lie consists in the fact that the liar hides his true ideas from others” (“The Secret and the Secret Society,” p. 312). But Steven Bok, who has written a book on the subject of lying (Lying: Moral Choice in Public and Private Life [New York: Pantheon, 1978]) and another on the subject of secrecy (Secrets: On the Ethics of Concealment and Revelation [New York: Pantheon, 1982]), sees the relationship between the secret and the lie differently: “Lies are part of the arsenal used to guard and invade secrecy; and secrecy allows lies to go undiscovered and to build up” (Secrets, p. xvi). There may be other motivations for telling lies; the compulsive liar may not have any particular secret to hide. But generally, lies, by purporting to be true, substitute for other information, which is true. Eric Goofman refers to the lie not as a falsehood but as a “self-disbelieving” statement (Strategic Interaction [Philadelphia: University of Pennsylvania Press, 1969], p. 7.) The fact that the teller thinks that the information is false is the essence of a lie; information that the teller believes is true but that turns out to be false is not a lie when it is told as believed.

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half-truth. At the same time that true facts are being given out, the impression being created is false.

The half-truth shares with the lie the inaccuracy of the final impression. But it shares with the secret the use of withholding as the means of accomplishing this. Both the lie and the half-truth, then, can be seen as types of secrets. The motivating force for many lies and half-truths is the desire to maintain a secret. Both the lie and the half-truth hide secrets by aggressively forwarding a version of the knowledge that is hidden. The lie substitutes false information while the half-truth selectively reveals the truth. In both cases, the final impression masks the existence of the secret as well as the content of the secret itself.

Secrets and the Social Distribution of Knowledge

The secret is the social mechanism through which the interests and intentions of particular social actors, making decisions in their daily lives, become translated into inequalities in knowledge. Of course there are other sources of this inequality also; psychological, economic, and technological constraints may operate even when there are no decisions to restrict information. But the secret is significant precisely because it is the means through which the social distribution of knowledge is shaped by the translation of individual, intentional actions into larger social patterns.

Knowledge may not be power, Bacon's aphorism notwithstanding, but it is often important in the accumulation and exercise of power. Shared knowledge by no means guarantees consensus, but it is hard to imagine any common culture or any surviving society without it. What one doesn't know may not hurt one—but, then again, it might. The social distribution of knowledge permeates social relations from the most intimate to the most impersonal,30 and much of what we think of as social structure grows out of the patterns of hidden and revealed knowledge.

The conflicting justifications over secrecy present difficult decisions for courts. At stake may be something as personal as an individual sense of privacy or as public as the fair operation of markets. How courts choose among the conflicting justifications people give for keeping or disclosing secrets is our subject in the rest of the book.

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30. In fact, intimacy and impersonality themselves may be defined in terms of the quality and quantity of shared knowledge that particular relationships and collectivities possess.