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For the Conference, *On the Very Idea of Secret Laws: Transparency and Publicity in Deliberative Democracy*, University of Pennsylvania School, Center for Ethics and the Rule of Law, November 22-23, 2013

## Secrecy and the Nature of Law

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### *Introduction*

In 1978, Congress established the “Foreign Intelligence Surveillance Court,” which reviews “warrants related to national security investigations.”<sup>1</sup> Apparently, this court has been, for some years, “developing what is effectively a secret and unchallenged body on law on core Fourth Amendment issues....”<sup>2</sup> The way this court has authorized the massive surveillance by the (formerly secret) National Security Agency, has prompted the focus of this Conference: “Is a law that is not publicly shared a conceptual contradiction...? What are the conceptual conditions on the nature of law with respect to transparency, publicity and dissemination?”<sup>3</sup> This paper will explore some aspects of the theoretical question of whether secrecy is contrary to something “necessary” or “essential” to the nature of law, and what, if anything follows.

### *I. Secrecy and the Nature of Law*

The idea that it is essential to the nature of law that it be *public* has long roots. It is sometimes discussed under a rubric that laws must be “promulgated.” It is natural to equate law

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<sup>1</sup> Federal Judicial Center, History of the Federal Judiciary, Foreign Intelligence Surveillance Court, [http://www.fjc.gov/history/home.nsf/page/courts\\_special\\_fisc.html](http://www.fjc.gov/history/home.nsf/page/courts_special_fisc.html)

<sup>2</sup> Editorial, “The Laws You Can’t See,” N.Y. TIMES, July 8, 2013, [www.nytimes.com](http://www.nytimes.com).

<sup>3</sup> Conference Invitation Letter, dated June 26, 2013.

with the directives (or “commands” or “norms”) government officials provide to members of the community. It seems an obvious point: whether the objectives of the rulers are benign or malevolent, based on reason and persuasion or based on coercion alone, little will be accomplished if citizens never learn of their government’s wishes. Over the long history of theorizing about the nature of law, one can find numerous examples of theorists describing promulgation as essential to law; below, I offer two instances, one hundreds of years old, the second from just a few decades back. In Thomas Aquinas’ great work, the *Summa Theologica*, one can find the following definition: “[T]he definition of a law . . . is nothing other than a certain dictate of reason for the Common Good, made by him who has the care of the community and promulgated.”<sup>4</sup> On the topic of promulgation, Aquinas explains:

“[A] law is imposed on others as a rule and measure. Now a rule or measure is imposed by being applied to those who are to be ruled and measured by it. Hence, in order for a law to obtain the power of obligating, which is proper to law, it must be applied to those who are directed by it. This application takes place by being made known to them by promulgation. Therefore promulgation is necessary for law to have its binding force.”<sup>5</sup>

In more recent times, in Lon Fuller’s famous debate with H. L. A. Hart on the merits of legal positivism that was published in the 1958 volume of the *Harvard Law Review*, Fuller focused in part of his argument on how Nazi Germany’s actions failed to be law, not (only) in the sense that they were substantively abhorrent, but in the sense that they failed to meet basic requirements of legal process (what Fuller would come to call the “internal” (or “inner”)

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<sup>4</sup> Thomas Aquinas, *Summa Theologica*, Question 90, article 4, corpus (emphasis added), available in SAINT THOMAS AQUINAS, THE TREATISE ON LAW (R. J. Henle, S.J., ed. & trans., 1993), p. 145

<sup>5</sup> *Id.*

morality of law<sup>6</sup>). Fuller wrote: “During the Nazi regime there were repeated rumors of ‘secret laws.’ ... Now surely there can be no greater legal monstrosity than a secret statute.”<sup>7</sup> On a general note, Fuller commented:

“The extent of the legislator’s obligation to make his laws known to his subjects is, of course, a problem of legal morality that has been under active discussion at least since the Secession of the Plebs. There is probably no modern state that has not been plagued by this problem in one form or another. It is most likely to arise in modern societies with respect to unpublished administrative directions. Often these are regarded in quite good faith by those who issue them as affecting only matters of internal organization. But since the procedures followed by an administrative agency, even in its ‘internal’ actions, may seriously affect the rights and interests of the citizen, these unpublished, or ‘secret,’ regulations are often a subject for complaint.”<sup>8</sup>

In a later work, Fuller notes that there may be trivial laws, *e.g.*, regarding designation of a “state bird,” where secrecy would warrant no serious complaint, and some types of legislation (*e.g.*, involving the funding of a new, secret weapon), where secrecy would be understandable.<sup>9</sup>

However, he continued, “I can conceive ... of no emergency that would justify withholding from the public knowledge of a law creating a new crime or changing the requirements for making a valid will.”<sup>10</sup>

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<sup>6</sup> See generally LON L. FULLER, *THE MORALITY OF LAW* (rev. ed., 1969).

<sup>7</sup> Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 651 (1958). The particular matter being debated at that point in the article was whether it would be correct to exonerate citizens for their actions at the time if those actions were authorized by Nazi statutes. In relation to that issue, Fuller continues: “Would anyone seriously recommend that following the war the German courts should have searched for unpublished laws among the files left by Hitler’s government so that citizens’ right could be determined by reference to these laws?” *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> FULLER, *supra* note 5, at 91-92.

<sup>10</sup> *Id.* at 92. In another work, Fuller warned:

“Whether we disclose particular operations of government or shield them from public scrutiny is not something that can be decided on a purely *ad hoc* basis, still less is it a question to be resolved by mere

Fuller's "internal morality of law" included not only the requirement of promulgation,<sup>11</sup> but also other requirements that touch on aspects of informing citizens about what is required of them: that laws should not be retroactive, and that they should be clear and consistent, not require the impossible, stay relatively constant through time, and that the rules as enforced be congruent with the rules as promulgated.<sup>12</sup>

With other writers, the question of secret laws is discussed, if at all, only indirectly, through rule of law concerns that individuals should not be punished for their disobedience of rules of which they were not, and could not be aware. This, in a sense, had been Jeremy Bentham's complaint about common law adjudication. In the past, judges and some legal theorists had characterized common law decisions as "discovering existing law" rather than making new law.<sup>13</sup> Whether one thinks that judges are (or should be) discovering existing law rather than making new law, in difficult cases the effect will usually be the same: a retroactive application of a standard to actions that occurred at a time when that standard had not been clearly promulgated. Bentham, an ardent opponent of judicial legislation and common law decision-making, commented:

"It is the judges . . . that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of,

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good intentions. The allocation of secrecy and disclosure within the body politic will depend in large measure on the manner in which the various forms of social order are organized to provide a structural framework for that body."

Lon L. Fuller, "Government Secrecy and the Forms of Social Order," in Carl J. Friedrich, *Community* (NOMOS II) (New York: Liberal Arts Press, 1959), pp. 256-268, at p. 268.

<sup>11</sup> FULLER, *supra* note 5, at 49-51.

<sup>12</sup> *Id.* at 51-91.

<sup>13</sup> One can see evidence of this in Justice Story's comment in *Swift v Tyson*, 41 U.S. 1, 18 (1842): "In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws." Justice Oliver Wendell Holmes, Jr., offers a response in his well-known quote: "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified. ...." *Southern Pacific Co. v Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way judges make law for you and me.”<sup>14</sup>

To the citizens punished for violation of legal rules they were unaware of until the judge decided the case, it may seem as much like being punished for a secret law as were the case under the Nazi regime and their secret laws (discussed by Fuller). Of course, some might doubt that the common law rules are helpfully described as having been “secret” prior to their announcement in the course of the decision. Perhaps it is more accurate to say that the rules did not exist at all (at least as valid rules of this legal system) prior to their announcement in the decision.<sup>15</sup>

As noted, the objection to secrecy (and retroactivity) seems straightforward: if it is essential to law’s purpose (whether the law be moral, immoral, or amoral) that it be able to guide behavior, the subjects of the law would need to know of the nature of the prescription in order to alter their behavior accordingly. There are occasions, however, when, though a legal rule affects individual culpability, there may be good reasons for secrecy. One category of such rules was discussed in a famous article by Meir Dan-Cohen.<sup>16</sup> Dan-Cohen’s examples include rules that might mitigate culpability, based (for example) on insanity or provocation. We want the judges to know and apply these rules, because they affect the punishment that should be imposed on individuals guilty of certain crimes under certain circumstances. The reason we might be hesitant for citizens generally to know about these rules is that it creates a strong temptation for those who have been guilty of the crime to lie about their mental state at the time of the crime in

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<sup>14</sup> Jeremy Bentham, “Truth versus Ashhurst”, in *The Works of Jeremy Bentham* (W. Tait, Edinburgh, 1843), vol. V, pp. 233–237, at p. 235.

<sup>15</sup> There are further complications, of course. The only immediate, relatively determinate application of common law “rule” is to the case before the court, because the scope and precise content of a rule grounded on precedent is determined only by how the decision is understood by later courts. And there is also the issue that a decision just handed down might ultimately be reversed on appeal, leaving some uncertainty at the time of decision regarding whether (or for how long) that decision reflects the law of the system.

<sup>16</sup> Meir Dan-Cohen, “Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law,” 97 *Harvard Law Review* 625 (1984), reprinted in *Harmful Thoughts: Essays on Law, Self, and Morality* 37-93 (Princeton: Princeton University Press, 2002).

order to try to qualify for the lesser sentence, and it might also tempt some people to commit a crime who otherwise would not do so, if they believe (reasonably or not) that they might be able to “get away” with the crime by faking some exculpatory condition (like insanity).

## II. What Follows?

If we say that a law that is not promulgated, that is kept secret, is no law at all,<sup>17</sup> what is the significance of that conclusion?

For Aquinas, there *are* important consequences. Just positive law (human-created law) are those legal rules which follow the basic rules of procedure and substantive fairness that Aquinas indicates: rules promulgated by the person in charge of the community, acting within that person’s authority, imposing burdens fairly, and creating obligations consistent with Natural Law and the Divine Law. And just positive laws “bind in conscience,”<sup>18</sup> a phrase which approximates the idea that they impose moral obligations; citizens have a moral obligation to obey them. Thus, for Aquinas, a secret law – a human created rule that entirely failed the procedural requirement of promulgation – would not “bind in conscience,” however otherwise substantively fair and administratively proper the rule might be.

In John Finnis’s work (and in his reading of Aquinas), a law which was not fully just – in this case because not promulgated – would simply fail to be “law in the fullest sense of the word.”<sup>19</sup> It would be still be “law,” but would fail to carry all the elements that law in the fullest sense carried, most importantly, it would likely fail to change our (moral) reasons for action.<sup>20</sup>

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<sup>17</sup> Here I am creating a parallel with the view, attributed to Natural Law theory, that “an unjust law is no law at all” (*lex iniusta non est lex*).

<sup>18</sup> Aquinas, *supra* note 4, Question 96, article 4, corpus, at 324.

<sup>19</sup> John Finnis, *Natural Law & Natural Rights* (2<sup>nd</sup> ed., Oxford, 2011), chaps. 1, 12.

<sup>20</sup> In Finnis, and Finnis’ reading of Aquinas, there might still be a moral reason to outwardly comply even with some unjust laws, if outward non-compliance might create a risk of greater evil (*e.g.*, by undermining a generally just legal system). JOHN FINNIS, *AQUINAS* (Oxford, 1998). pp. 272-74.

With other theorists, especially those on the legal positivist side of analytical legal theory, the consequences of a rule's failing to qualify as "law" due to its secrecy are far less clear. That something does not fall within the category "law," under these writers' theory of the nature of law, may in fact have *no* further implications. One basic point of the separation of law and morality associated with legal positivism<sup>21</sup> is that *nothing* necessarily follows, morally speaking, from the judgment that something is – or *is not* – "law." Even the implications for the duties of judges may not be straightforward: for there may be (legal or moral) obligations for judges in some circumstances to apply standards that are not "law," narrowly understood (or not valid law in *this* legal system), and they may be occasions where judges have a legal or moral obligation not to apply (or to modify or overrule) norms that are (or were, until the judge acted) "law." H. L. A. Hart's point (at least in some of his writings) is that we should separate the question of whether something is law from the question of whether we should obey it.<sup>22</sup> That something is not "law" does not mean necessarily that it is bad, that it should not be followed, or that the government should not have created it.

### *Conclusion*

The idea that a rule should be promulgated and public to be (fully) "law" has a long pedigree, going back many centuries, and it reflects the obvious point that rules cannot guide when they are not known. We understand a limited exception for judicial decisions which may, inevitably, have retroactive elements (though these should be minimized), and there may be rules

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<sup>21</sup> Keeping in mind that there the separation is not as sharp as many had originally assumed. *See, e.g.*, Leslie Green, "Positivism and the Inseparability of Law and Morals," 83 *New York University Law Review* 1035-1058 (2008).

<sup>22</sup> H. L. A. Hart, "Positivism and the Separation of Law and Morals," 71 *Harvard Law Review* 593 (1958)

relating to culpability that we might prefer that only judges know, so that citizens not be tempted to “game the system.”

For some natural law theorists, a rule that is not promulgated cannot be “law” (or “law in the fullest sense”), and (therefore) cannot create legal obligations of obedience. For some legal positivists, whether a secret rule could be “law” would be separate from questions about the merits of such a rule and whether it should be followed.

Whether a secret rule can ever warrant the title “law” is an interesting question, though ultimately some might say that it may be among the less interesting – and certainly among the less important – questions to be asked about such rules.