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Secrecy as a Meta-paradigmatic Challenge

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Inside an imposing office in Washington, DC, I conducted an interview with a senior legal official in the US government.[1] The official, previously an academic of high standing and well-informed, argued that most post-9/11 scholarship about security, human rights, and the rule of law was of little use to anyone outside of the academy. The official was adamant that the material scholars have been copiously producing was irrelevant to the issues at hand, that it was based on spurious assumptions about the basis of state security claims. When I retorted, 'That is not something we can change, as we don't have the relevant facts at hand,' the official replied, 'Well then, academics shouldn't say anything about things they know nothing about.'

Sparked by this methodological stand-off, this chapter reflects on the challenges that secrecy – legal secrets and secret law in particular – pose for scholarship and law.[2] It will argue that secrecy challenges academic scholarship in ways that mirror the conflict between secrecy and the rule of law. It seeks

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[1] This interview was conducted anonymously in Washington, DC on 13 October 2012.

[2] It is well known that legal processes protecting secret intelligence information ('secret facts') have proliferated since 9/11; it is also well known that secret legal processes can govern national security processes ('secret laws'). For a deeper exploration of these developments, see, *inter alia*, DS Rudesill, 'Coming to Terms with Secret Law' (2016) 7 *Harvard National Security Journal* 241–390; E Goitein, 'The New Era of Secret Law', research report for Brennan Center for Justice at New York University School of Law (2016); L Lazarus, C McCrudden, and N Bowles (eds), *Reasoning Rights* (Oxford, Hart Publishing, 2014) Part III; E Nanopoulos, 'European Human Rights Law and the Normalisation of the "Closed Material Procedure"' (2015) 78(6) *Modern Law Review* 913–44; M Scheinin, 'Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: Report of the Special Rapporteur', UN Doc A/63/223 (6 August 2008); and D Barak-Erez

to open up debate about the way forward in this field and makes some general proposals about legal accountability for contemporary secret-keeping.

I. SECRECY AND SCHOLARSHIP

Academic scholarship is a site of profound and inherent contestation. Not only do academics disagree about the specific concepts they propose and the evidence they present; they also disagree at the foundational level about their capacity to make value-free 'knowledge claims'.[3] Notwithstanding these intractable disagreements, most academics at least agree that secrecy (state secrecy in particular) presents a significant impediment to scholarship. By blocking access to relevant and crucial information, state secrecy constrains the field of scholarly enquiry and undermines the capacity of academics to analyse and meaningfully engage with specific legal practices and the frameworks that govern important aspects of life and society.

However, as more than a practical hurdle for scholars, secrecy also constitutes a fundamental challenge for academic freedom more generally.[4] Writing at the early stages of the twentieth century, Max Weber argued that the notion of academic freedom (*Lernfreiheit*) rests on the assumption that academic enquiry is based on 'ethics and values that cannot be bought'.[5] Today, scholars argue that academic freedom is the 'cornerstone of academic identity',[6] 'highly prized by the vast majority of academics'.[7] In the United Kingdom, legislation protects the 'freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions',[8] while

and M Waxman (2009) 48(3) 'Secret Evidence and the Due Process of Terrorist Detentions' *Columbia Journal of Transnational Law* 4–60. For wider and fascinating accounts of the way in which secrecy has transformed US governance, see S Horton, *Lords of Secrecy: The National Security Elite and America's Stealth Warfare* (New York, Nation Books, 2015); and T Melley, *The Covert Sphere: Secrecy, Fiction, and the National Security State* (Ithaca, Cornell University Press, 2012).

[3] MP Lynch, 'Academic Freedom and the Politics of Truth' in J Lackey (ed), *Philosophy and Academic Freedom* (Oxford, Oxford University Press, 2018); T Dant, *Knowledge, Ideology & Discourse: A Sociological Perspective* (London, Routledge, 1991); M Whetherell, S Taylor, and S Yates, *Discourse Theory and Practice: A Reader* (London, Sage, 2001); P Ghosh, 'Beyond Methodology: Max Weber's Conception of *Wissenschaft*' (2014) 52(2) *Sociologia Internationalis* 157–218; B MacFarlane, *Intellectual Leadership in Higher Education* (London, Routledge, 2012) 83–84; A Bloom, *The Closing of the American Mind* (New York, Simon and Schuster, 1987); R Kimball, *Tenured Radicals* (New York, Harper & Row, 1990); and R Kimball, '"Tenured Radicals": A Postscript' (2019) 37(8) *New Criterion*.

[4] The modern articulated concept of academic freedom is traced by most scholars to the nineteenth-century Prussian education reforms of Wilhelm Von Humboldt, which enshrined the twin concepts of *Lehrfreiheit* (freedom to teach) and *Lernfreiheit* (freedom to learn). S Dea, 'A Brief History of Academic Freedom', *University Affairs* (9 October 2018).

[5] Ghosh (above n 3) 34. See also W Hennis, *Max Webers Wissenschaft vom Menschen* (Tübingen, Mohr Siebeck, 2003); and J Dewey, 'Academic Freedom' (1902) 23 *Educational Review* 1–14.

[6] MacFarlane (above n 3) 77.

[7] E Barendt, *Academic Freedom and the Law* (Oxford, Hart Publishing, 2010) 1.

[8] Education Reform Act 1988, s 202(2)(a); and Higher Education and Research Act 2017, s 36. See Barendt (ibid).

in the United States, the American Association of University Professors has expressed the value of academic freedom as 'the indispensable quality of institutions of higher education'.[9] At the international level too, UNESCO and the World University Service have endorsed academic freedom and the institutional autonomy of higher education institutions.[10]

Nevertheless, the meaning of academic freedom and its status relative to other values are highly contested. While there is significant concern about the policing of so-called 'radicalisation' on campus under government prevention programmes,[11] there is also considerable controversy about the use of academic freedom as a shield to protect the dissemination of objectionable arguments[12] and about the extent to which government should intervene in the 'no-platforming' of these voices.[13] It is also clear that academic freedom has been weaponised to silence marginalised voices seeking to transform or decolonise the canons of their disciplines.[14] This in turn can result in self-censorship

[9] American Association of University Professors (AAUP), '1940 Statement of Principles on Academic Freedom and Tenure', http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure (last accessed 18 February 2019).

[10] UNESCO, 'Recommendation Concerning the Status of Higher-Education Teaching Personnel' (11 November 1997), http://portal.unesco.org/en/ev.php-URL_ID=13144&URL_DO=DO_TOPIC&URL_SECTION=201.html; World University Service, 'Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education' (6–10 September 1988).

[11] L Zedner, 'Counterterrorism on Campus' (2018) 68(4) *University of Toronto Law Journal* 545–87; Joint Parliamentary Committee on Human Rights, 'Freedom of Speech in Universities' (HC 589, HL 111) (27 March 2018); Equality and Human Rights Commission, 'Freedom of Expression: A Guide for Higher Education Providers and Student Unions in England and Wales' (2 February 2019), https://www.equalityhumanrights.com/en/publication-download/freedom-expression-guide-higher-education-providers-and-students-unions-england (last accessed 25 March 2019). See also the chapters in this volume by Aziz Z Huq and Andreas Armborst.

[12] Certainly, the enjoyment of academic freedom by legal academics such as John Yoo and John Finnis, whose arguments breach clear anti-torture norms of international law and LGBT rights, have come under serious attack. See R O'Neill, 'Academic Freedom: New Challenges in the United States' (2009) 57 *International Higher Education* 3–5; and A Benn and D Taylor, 'We Don't Think John Finnis Should Teach at Oxford University. Here's Why', *Guardian* (11 January 2019).

[13] In the United Kingdom, Government guidance on no-platforming has been issued by the Equality and Human Rights Commission (above n 11). See also K Rawlinson, 'Trigger Warmings OK, but No-Platforming May Be Illegal, Universities Warned', *Guardian* (2 February 2019).

[14] It is beyond the scope of this chapter to discuss the contemporary battle surrounding renditions of Empire, brought to the fore most recently by the Rhodes Must Fall movement in South Africa and the United Kingdom. See G Bhambra, D Gebrial, and K Nisancioulu (eds), *Decolonising the University* (London, Pluto Press, 2018); S Chigudu, 'Rhodes Must Fall and the Politics of Historical Consciousness', presentation at the Centre of African Studies, University of Edinburgh (2016), https://www.academia.edu/24732358/Rhodes_Must_Fall_and_the_Politics_of_Historical_Consciousness (last accessed 25 March 2019); T Garton Ash, 'Rhodes Hasn't Fallen but the Protesters Are Making Me Rethink Britain's Past', *Guardian* (4 March 2016); J McDougall et al, 'Ethics and Empire: An Open Letter from Oxford Scholars', *Conversation* (19 December 2017; P Gopal et al, 'A Collective Statement on Ethics and Empire', *Scholars of Empire* (21 December 2017), https://medium.com/oxfordempireletter/a-collective-statement-on-ethics-and-empire-19c2477871a0 (last accessed 18 February 2019). It is worth noting that the recent European Parliament Resolution of 26 March 2019 on fundamental rights of people of African descent in Europe (2018/2899 RSP)

of the very groups whose voices need most urgently to be heard.[15] In short, the meaning and status of academic freedom are rightly contested. As Edward Carvalho and David Downing have noted, while academic freedom is 'so foundational to higher education … that even today, no one will argue against it …, everyone will argue about it.'[16]

While academic freedom and university autonomy are contested and contestable, these values continue to be viewed as hallmarks of democratic and liberal societies.[17] Conversely, the decline of academic freedom is commonly associated with the rise of illiberalism and populism. The political threats to academic freedom range in intensity. In the runup to the UK Brexit referendum, Michael Gove's famous assertion that 'Britain has had enough of experts' was a sign of the long-standing antipathy between populist rhetoric and specialised knowledge.[18] In Hungary, the conservative Christian regime of Viktor Orban launched a sustained attack on the freedom of the Central European University, leading to the CEU's recent move to Vienna.[19] In Turkey, thousands of academics have been dismissed, arrested, and put on trial, resulting in what Human Rights Watch has referred to as a 'hollowing out' of academic freedom there.[20] But Hungary and Turkey are only the latest examples of historical recurrences that include the obliteration of university autonomy in Nazi Germany and the suspension of academic freedom in the McCarthy-era United States.[21] Such is the concern regarding occurrences like these that in November 2018, the European Parliament adopted a formal recommendation in defence of academic freedom.[22] This instrument acknowledges that there is a 'general need … to raise awareness of the importance of

'encourages Member States to make the history of people of African descent part of their curricula and to present a comprehensive perspective on colonialism and slavery which recognises their historical and contemporary adverse effects on people of African descent, and to ensure that teachers are adequately trained for this task and properly equipped to address diversity in the classroom' (s 20).

[15] See more generally S Ahmed, *On Being Included: Racism and Diversity in Institutional Life* (Durham, Duke University Press, 2012).

[16] EJ Carvalho and DB Downing, *Academic Freedom in the Post-9/11 Era* (New York, Palgrave MacMillan, 2010) 1. For recent discussion on the broad range of controversies affecting academic freedom, see J Lackey (ed), *Academic Freedom* (Oxford, Oxford University Press, 2018).

[17] European Parliament Committee on Foreign Affairs, 'Report on European Parliament Recommendation on Defence of *Academic Freedom* in the EU's External Action', A8-0403/2018 (27 November 2018), http://www.europarl.europa.eu/doceo/document/A-8-2018-0403_EN.pdf; M Ignatieff, 'Academic Freedom and the Future of Europe', Centre for Global Higher Education Working Paper No 40 (July 2018), https://www.researchcghe.org/perch/resources/publications/wp40.pdf, 6.

[18] H Mance, 'Britain Has Had Enough of Experts, Says Gove', *Financial Times* (3 June 2016).

[19] Ignatieff (above n 17).

[20] Human Rights Watch, 'Turkey Government Targeting Academics: Dismissals, Prosecutions Create Campus Climate of Fear', *Human Rights Watch* (14 May 2018); Eurasia Review, 'Turkey: Academic Freedom Under Threat', *Eurasia Review* (7 August 2018), https://www.eurasiareview.com/07082018-turkey-academic-freedom-under-threat/ (last accessed 26 March 2019).

[21] Dea (above n 4).

[22] European Parliament Recommendation (above n 17). See point L of the Preamble concerning Hungary directly: 'Foreign education institutions within the European Union are facing attacks from national governments and encountering violations of their academic freedom.'

academic freedom as a tool to promote democracy, respect for the rule of law and accountability'.[23]

Academic freedom might thus be conceptualised as a realm of political accountability, as an independent space from which to speak truth to power. Instead of being cast as a 'privilege of professors', academic freedom might be recognised as the sixth estate within a constitutional order, as the critical reflective domain in which social knowledge is rigorously scrutinised and contested. As the EU Parliament Recommendation puts it,

> Academic freedom – including its constituent freedoms of thought, opinion, expression, association, travel, and instruction – contributes to creating the space in which any open and stable pluralistic society is free to think, question, share ideas and produce, consume and disseminate knowledge.[24]

Simply put, academics ought at the very least to be protected from pressure to make claims in the pursuit of a specific government, corporate, or political agenda. We ought to receive some protection as the guardians of independent knowledge, the seekers and speakers of what Weber prized as 'inconvenient facts'.[25] Our independence and activity sit at the core of the democratic exchange of truth and ideas. As Michael Ignatieff, President and Rector of the Central European University, has argued, 'Academic freedom is one element of a countermajoritarian fabric that is integral to the health of a democratic society.'[26]

From this perspective, it is easy to see how state secrecy fundamentally undermines academic freedom. Scholars depend on information. The state's control over material that we need in order to draw well-reasoned conclusions constitutes a silent but powerful form of intellectual influence. I hardly need to point to the Foucauldian nexus of knowledge and power to make the case that the state's monopoly on knowledge is maintained by the management of the information it keeps to itself and, through this, by the erosion of critical academic scrutiny.

For any scholar, this lack of access to relevant data is problematic. However, for legal academics (and by this I mean anyone who has an academic interest in the law), the fundamental challenge presented by state secrecy has particularly direct and wide-reaching consequences. As part of the wider legal system, or to use Dworkinian language, as part of the interpretive community that criticises and examines law from the inside,[27] legal scholars are a key component of the law writ large. While we cannot determine the law authoritatively in the sense of law-making, we are part of a dialogic audience to which the law speaks. In this

[23] Ibid, Preamble, point P.
[24] Ibid, Preamble, Point E.
[25] M Weber, 'Science as Vocation' in HH Gerth and CW Mills (eds), *From Max Weber: Essays in Sociology* (Oxford, Oxford University Press, 1946).
[26] Ignatieff (above n 17) 6.
[27] I am borrowing liberally here from the general ideas of Ronald Dworkin. See R Dworkin, *Law's Empire* (Cambridge, MA, Harvard University Press, 1988).

broader exchange, legal academics and commentators bring the essential quality of expertise and knowledge.

The part played by legal academics within a legal system is nevertheless culturally manifested, as the extent of academic influence will depend on where we sit as legal authority within a particular jurisdiction's rule of recognition.[28] In a civil law system, a legal academic is explicitly a part of the legal interpretive community and forms part of the codification system as a whole.[29] But in the Anglo-American model, legal scholars are less formally acknowledged within the material of the law. Notwithstanding this difference, legal academics are a service to law; our normative evaluations and our legal analyses form part of a process that shapes and sustains the rule of law.

If, as argued above, academics more generally have a counter-majoritarian role in holding knowledge accountable, then legal academics have a more specific role of critiquing, shaping, interpreting, guarding, and refining the rule of law, as well as the paradigm of law itself. As Jeremy Waldron has argued, law is an 'intellectual formation', an 'articulate, self-conscious intellectual discipline'.[30] Historically, the norms common to all – the norms of *ius gentium* (the 'law of nations') – have transcended courts of particular jurisdictions and have been identified by the 'learned doctors of jurisprudence'.[31] Legal academia is thus an interpretive and normative legacy distinct from other academic disciplines in its situated place within the formation of law and legal principles.

If this is right, then legal academics have a double obligation: to scholarship and to the rule of law. If we are part of law too, our job is to evaluate all relevant normative considerations when evaluating the normative standing of law and the extent to which it guides social and state behaviour. The quality of the arguments produced, their factual basis, and their intellectual rigour are essential parts of legal accountability. Thus, both our role as scholars and our role within the legal community require the same conditions in order to be adequately fulfilled. Legal academics need the relevant evidence that courts (acting properly) also require. We need all the facts relevant to the normative considerations at play within the legal process. Legal academics are challenged in both positions – as legal actors and as legal scholars – by the existence of secret information, since this information forms the tacit background to the legal processes we study. Without material that is held secret, how can we fulfil our function or proceed at all?

[28] HLA Hart, *The Concept of Law*, 3rd edn (Oxford, Oxford University Press, 2012) 100.

[29] See R van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge, Cambridge University Press, 1987).

[30] J Waldron, *'Partly Laws Common to All Mankind': Foreign Law in American Courts* (New Haven, Yale University Press, 2012) 205–6.

[31] Ibid, 206.

II. THE ANATOMY OF LEGAL SECRETS

Drawing on Kim Lane Scheppele and others,[32] David Pozen has distinguished between deep and shallow secrets.[33] For Pozen, a state secret is deep if:

> … a small group of similarly situated officials conceals its existence from the public and from other officials, such that the outsiders' ignorance precludes them from learning about, checking, or influencing the keepers' use of the information.[34]

Such a deep state secret is distinguished from a 'shallow secret', when 'ordinary citizens understand they are being denied relevant information and have some ability to estimate its content'.[35]

The distinction for Pozen is between what we *know* we don't know, and what we *don't know* we don't know – a simplification of Donald Rumsfeld's argument, upon which Pozen draws. Rumsfeld's aphorism has more methodological importance than we might realise. Academics may be able to draw limited conclusions about partial information but not about information that is invisible to them. As Pozen has explained further about deep secrets:

> Because no one outside of a small, cohesive circle is aware of their existence, deep secrets relieve their keepers of the burden of reason giving. There can be no public defense of deep secrets, no case made to the parties who may be affected, because if any such case could be made, then the secret should not be deep in the first place. Paradoxically, the best justification for keeping deep secrets is that they cannot be justified to others.[36]

So deep secrets are problematic not only because it is impossible to know of their existence but also because, as outsiders, observers cannot be privy to the logic or rationales that might play a role in determining a normative appreciation of them. Deep secrets create a divide and a power imbalance between those who know and those who don't know they don't know, not only in terms of factual knowledge but also in our understanding of the reasoning around those facts.

On the other hand, Pozen has argued:

> Shallow secrets at least put members of the public on notice of the gaps that exist in their knowledge. They can learn the general contours of the material that is being withheld and can frame the decision problems that face them. The world is not entirely knowable, but it is not entirely mysterious either.[37]

Shallow secrets at least leave the public – and scholars – with the potential for some partial analysis. By being explicit about the existence of a secret, shallow secrecy allows some recourse to scrutiny, albeit incomplete.

[32] See KL Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* (Chicago, University of Chicago Press, 1988); and MJ Rozell, *Executive Privilege: Presidential Power, Secrecy and Accountability*, 3rd edn (Lawrence, University Press of Kansas, 2010).

[33] D Pozen, 'Deep Secrecy' (2011) 62(2) *Stanford Law Review* 257–339.

[34] Ibid, 274.

[35] Ibid.

[36] Ibid, 289.

[37] Ibid.

To a large degree, the legal material that many academics are concerned with (closed material proceedings, for example) involve shallow secrets:

> In many information-access disputes, the government has restricted public access to something: a trial, a hearing, a prison, a foreign visa. These are important domains of secrecy, but they are not likely to involve very deep secrecy.[38]

Nevertheless, deep secrets are more likely to become the object of scholarly study if they are closely connected to the redacted material contained in legal proceedings: 'Deep secrecy might still be lurking, as information might emerge from the courtroom deposition, the administrative hearing, the prison interview, or the foreign country that was not anticipated.'[39] Moreover, key elements of the evaluative background for the rationale of shallow secrecy may be deeply secret. The line between what is lawful and unlawful in the 'war on terror' is often blurred, and scholars of the subject need to be just as concerned with unlawful processes that may operate out of sight as we are with lawful processes. Extraordinary rendition is one example, targeted killing another (although both have arguably moved along the spectrum towards shallower secrets), and certainly meta-data surveillance and the system of 'secret law' that applied to it is another.[40] At any time, when examining a counterterrorist policy, there are deep secrets lurking in the background. Deep secrecy 'is generally more likely to occur in backrooms and back channels, in government discussions and decisions that take place outside of any formal, regularized, quasi-public structure'.[41]

A. The Moral Ambiguity of Secrecy

Just as secrets may vary in depth, their moral status may be complex and ambiguous. The holding of secrets is not always and automatically wholly illegitimate. For example, most agree that protecting the anonymity of an endangered witness during a legal process is justified.[42] In his seminal work on secrecy, Georg Simmel emphasised this key distinction between the existence of a secret and its moral status:

> We must not allow ourselves to be deceived by the manifold ethical negativeness of secrecy. Secrecy is a universal sociological form, which, as such, has, nothing to do with the moral valuations of its contents.[43]

[38] Ibid, 305.

[39] Ibid, 306.

[40] For more on the topic of targeted killing, see the chapter in this volume by Shiri Krebs; on surveillance and data, see the chapter in this volume by Arianna Vedaschi; on revelations about US and other counterterrorist policies, see the chapter in this volume by Kent Roach. On secret law, see Goitein (above n 2); and Rudesill (above n 2).

[41] Pozen (above n 33) 305.

[42] For further discussion of witness and other types of anonymity during trial, see the chapter in this volume by Juan-Pablo Pérez-León-Acevedo.

[43] G Simmel, 'The Sociology of Secrecy and of Secret Societies' (1906) 4 *American Journal of Sociology* 441–98. See also C Birchall, 'Six Answers to the Question "What is Secrecy Studies" (2016) 1(1) *Secrecy and* Society 2–13.

The difficulty for scholars engaging with most national security secrets is that we do not know the reasons for keeping shallow secrets or the surrounding facts behind these reasons; nor do we know about the existence of deep secrets. Without that knowledge and knowledge of the secret itself, we cannot evaluate the legitimacy or illegitimacy of secret-keeping. Equally, we may be overly attracted towards transparency despite lack of knowledge for the secret-keeping in the first place. David Cole has argued that transparency may be overrated, while secrecy may be underrated:

> Some advocates of transparency seem to treat any exposure of secrets as an unmitigated good; this appears to be the philosophy behind Assange's WikiLeaks. But that position is morally untenable; there are undoubtedly good reasons for secrecy in many aspects of government, especially foreign relations, and particularly during wartime. And there are many legitimate bases for condemning disclosures, particularly when they reveal the identities of sources and methods of foreign intelligence.
>
> Security hawks consider any unauthorized disclosure of classified information unacceptable, stressing that cleared employees take an oath not to disclose such information, and that no government can operate without some secret deliberations and covert actions. But this, too, is an untenably extreme position. History demonstrates that secrecy is used not only for legitimate purposes of national security but too often to shield illegal or embarrassing activity from public scrutiny. Even the most ardent security proponent must concede that the benefits from revealing illegal abuses of authority will sometimes outweigh the costs of disclosing those secrets.[44]

Consequently, scholars need to keep the moral ambiguity of secrecy in the balance when we approach secrecy and law. There is a tendency to deny that there may be good reasons for secrets and a strong temptation to leap to critical suspicion. But it is possible that with greater information, the basis of such suspicion could be viewed as an assumption. It may in such circumstances be necessary to limit our conclusions when we simply do not know.

B. Shallow Secrecy, Partial Information, and Academic Inquiry

Partial information is information we know that we don't know – material we can only glean from the existence of a shallow secret. An example of partial information is the kind of material available during the open part of a closed material procedure. This is information shown in a legal document or government file that is redacted for legal or policy reasons. It might also consist of leaked information that indicates the existence of a broader set of shallow secrets. Whatever the content, we know that data is missing. We are without the information required to draw firm scholarly conclusions.

[44] D Cole, 'The Three Leakers and What to Do about Them', *New York Review of Books* (6 February 2014).

What are academics to do with partial information? How are we to avoid it skewing our perspective? How should we weigh partial information? Empirical social scientists have mechanisms for dealing with partial information and controlling for variables that cannot be empirically substantiated.[45] But for interpretive legal scholars and normative critics, it is less clear how to utilise such partial information. Can we draw normative conclusions without all relevant normative material? What can we define as normatively relevant material? Are we entitled to make suppositions in place of facts when weighing up the normative considerations in play?

In actuality, partial information provides clues to deeper inquiry, and partial information is rarely static, with secrets becoming increasingly shallow as inquiry progresses or leaks gaining a critical mass in response to a particular policy flashpoint. In such cases, a scholar's best approach is to wait until the secrets unfold to a sufficient tipping point at which commentary is possible. But in this process, scholars must also be conscious of their access to partial information and of their approach to its sources. Was the information leaked by a rebellious, heroic individual or a determined journalist? Or is it part of a state-sanctioned leaking programme aimed at tacit acknowledgment of policies such as targeted killing? There may be ways in which scholars respond to different kinds of partial information that colour their approach to this material. Are we drawn towards believing one source over another? Are we inclined towards suspicion of state sources? Does our view of a policy change in light of how it was exposed? How neutral are we in the assessment of these sources? What methodology do we choose to approach this material? These are all questions which must be considered, for example, when unravelling the national security context of a rights-limiting policy.

C. Deep Secrecy as a Deep Scholarly Challenge

Deep secrets present different challenges to shallow secrets, as academics are simply without knowledge of their existence.[46] Because of this, deep secrets

[45] HJ Adèr, 'Missing Data' in HJ Adèr and GJ Mellenbergh (eds), *Advising on Research Methods: A Consultant's Companion* (Huizen, Johannes van Kessel Publishing, 2008) 305–32; and SF Messner, 'Exploring the Consequences of Erratic Data Reporting for Cross-National Research on Homicide' (1992) 8(2) *Journal of Quantitative Criminology* 155–73.

[46] Examples of deep secrets that have come to light are the surveillance order procedures under the US Foreign Intelligence Surveillance Courts (see Goitein (above n 2) and Rudesill (above n 2) for overviews); and the programme of extraordinary rendition operated by the CIA and facilitated by US allies in the early years post 9/11. The latter has been exposed in a range of reports and cases. See, *inter alia*, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar ('Arar Commission'), 'Report of the Events Relating to Maher Arar' (2006), available at http://publications.gc.ca/site/eng/9.688875/publication.html (last accessed 26 March 2019); the chapter in this volume by Kent Roach; D Marty (Special Rapporteur), 'Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report', Council of Europe Parlia-

appear at first glance not to raise the sort of methodological dilemmas brought on by shallow secrets as discussed above. After all, we may well ask: what is lost by not knowing what we don't know?

These are precisely the epistemological questions around which serious legal academic inquiry pivots. How should academics manage deep secrets? Do we in fact need to know what we don't know before we can complete any normative critique or empirical analysis? Do we need to acknowledge the constraints on our ability to draw conclusions, as background deep secrets may play a role in the normative landscape of those who seek to protect shallow secrets? Scholars must face the methodological conflict between our own scholarly ideals on the one hand and deep secrets on the other, as the very essence of a deep secret is that it avoids scrutiny and evaluation: 'Deep secrets block out all sunlight from the decisional process beyond the small circle of secret-keepers. No public reasons need be given, no adversarial testing need occur.'[47]

Pozen's work on deep secrecy is primarily aimed at the policy, normative, and constitutional implications of its existence. He has been less focused on the implications that deep secrecy has for scholarship. Nevertheless, his work emphasises the serious challenge raised by the impossibility of knowing something:

> When members of the public and their representatives are unaware that information is being concealed from them, their ability to provide input, oversight, and criticism relating to that information is not simply inhibited but nullified.[48]

He has recognised in a footnote how this nullification process challenges scholarly assessment:

> It would be quite a challenge to test empirically the relationship between the depth of state secrets and the quality of policy outcomes. The researcher would have to devise not only quantitative measures of depth and quality but also a reliable way to monitor state secrets, to assess their impact, and to predict how outcomes would have differed had alternative types or amounts of secrecy been used. The study of particular deep secrets would perforce be conducted retrospectively, after the relevant

mentary Assembly report (7 June 2007), http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf; B Emmerson, 'Framework Principles for Securing the Accountability of Public Officials for Gross or Systematic Human Rights Violations Committed in the Context of State Counter-Terrorism Initiatives', UN Doc A/67/396 (1 March 2013); Intelligence and Security Committee of Parliament (UK), 'Detainee Mistreatment and Rendition: 2001–2010' (28 June 2018, HC 1113); *Mohamed v Jeppesen Dataplan* [2010] 614 F 3d 1070; *Khaled El-Masri v United States*, Inter-Am CHR (Admissibility) Case 419.08, Report No 21/16 (15 April 2016); *El-Masri v Tenet*, 437 F Supp 2d 530, 539; *EI-Masri v United States*, 479 F.3d 296, 300 (4th Cir 2007) cert denied, 552 US 947 (2007); *El-Masri v the Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25; *Al Nashiri and Husayn v Poland* (2015) 60 EHRR 16; *Nasr and Ghali v Italy* (2016) ECHR 210; *Abu Zubaydah v Lithuania* (2018) (App No 46454/11) (31 May 2018); and *Belhaj v Straw and Rahmatullah v Ministry of Defence* [2017] UKSC 3.

[47] Pozen (above n 33) 280.

[48] Ibid, 279.

> information has emerged, and even then, one could never be sure how those secrets compare to others that may remain entirely unknown.[49]

This particular focus of Pozen's – the question of whether deep secrecy lends itself to better policymaking – is of course one way in which we might wish to engage with a deep secret, and we will return to others below. But Pozen's brief reflection here on scholarly methodology highlights the difficulty of critique or analysis of deep secrets in real time.

There is a particular and subtle sense in which deep secrets may conceptually be more urgently challenging to legal scholarship in ways that other fields do not encounter. It is the relationship between deep secrecy and the likelihood that such actions are taken outside, or at the edges, of law. As Pozen has argued, 'Illegal programs will tend to be deeper secrets than legal ones, all else equal, given the assumption that laws are followed.'[50] If the reason for maintaining deep secrecy of a particular set of policy actions and decisions is because that set is without legal authority, then the issue becomes more pressing for legal scholars, who, as argued earlier, constitute a crucial dialogic audience within law itself.[51] Officially sanctioned choices to pursue a policy without legal authority in an otherwise legal state may have implications for our understanding of the nature and boundaries of legality and for our evaluation of the effectiveness of what we know to be legal. Our lack of knowledge of such covert unlawful activity in real time undermines our insight into the law as a whole, making our understanding necessarily partial; we cannot subject the law to comprehensive analysis.

When deep secrets relating to unlawful behaviour become shallow or even transparent, they often lead to re-evaluation of the law or even changes to it. This can happen in a range of complex ways. Frequently, legal officials seek to rationalise their actions *ex post facto*, proposing arguments of legality to cover their previously secret unlawful activity. This is evident in the fallout from the leaks regarding the US National Security Agency surveillance programme.[52] In such a case, unlawful activity held as a deep secret can over time become the source of a challenge to the legal *status quo* and start to test the boundaries of the legal.

Legal scholars can also view the existence of a deep secret masking an unlawful policy as a signal that there is something wrong with existing legal arrangements. They are often drawn to reconsider the boundaries of legality in order to pre-empt official recourse to deep secrecy or a sidestepping of law. Alan Dershowitz's proposal for torture warrants was in many ways an attempt to bring otherwise unlawful behaviour into the light.[53] His was clearly a wrong

[49] Ibid, fn 62.
[50] Ibid, 274.
[51] See above section I.
[52] Such arguments were indeed successful in *ACLU v Clapper*, 959 F Supp 2d 724 (SDNY 2013).
[53] AM Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, Yale University Press, 2002); AM Dershowitz, *Shouting Fire: Civil Liberties in a*

turn and has been roundly rejected,[54] but it highlights one conceptual challenge that deep secrecy may raise for legal scholars in particular: once deep secrets touching on the boundaries of legality come to light, how are legal scholars to respond? Is the pre-emptive response always off the table? Should legal scholars think more closely about the conditions of *ex post facto* accountability? Should we be thinking more about how law and regulatory structures prompt deep secrets?

D. Secrecy as a Meta-paradigmatic Challenge

Secrecy in law challenges the basic premises of the rule of law, the commitment to open justice, to fair proceedings, to transparency and foreseeability.[55] Secrecy as a whole is hard to reconcile *prima facie* with the rule of law. But secrecy does more than that. It not only tests the premises of legal proceedings or the premises of their benchmark – the rule of law – against which the normative integrity of these proceedings is normally evaluated. It also undermines the capacity of legal scholars to evaluate these proceedings, thus preventing them from fulfilling one of their core functions as dialogic participants in the creation of law. In this way, state secrecy serves to impoverish the legal project.

In the context of security and rights, secrecy (deep and shallow) hampers the ability of legal academics to evaluate the normative reasoning behind supposed trade-offs between security and the rule of law, between security and human rights. If we don't know any or all of the facts at the time that secrecy is invoked (even though we may well know them later), then we can only surmise what these facts are – and this isn't a sufficient basis upon which to draw firm normative conclusions. Legal scholars are thus left falling back on a general rule-of-law critique: we can make statements about the rule of law but are unable to reflect on the validity of the specific security claims being made. Even when faced with shallow secrets, we are in no stronger position in a

Turbulent Age (Boston, Little, Brown and Company, 2002); AM Dershowitz, 'Want to Torture? Get a Warrant', *San Francisco Chronicle* (22 January 2002); AM Dershowitz, 'Legal Torture', interview, *60 Minutes* (17 January 2002).

[54] See, *inter alia*, J Waldron, 'Torture and Positive Law: Jurisprudence for the White House' (2005) 105(6) *Columbia Law Review* 1681–750; RA Posner, 'Torture, Terrorism, and Interrogation' in S Levinson, *Torture: A Collection* (Oxford, Oxford University Press, 2004) 291; E Scarry, 'Five Errors in the Reasoning of Alan Dershowitz' in S Levinson (ed), *Torture: A Collection* (Oxford, Oxford University Press, 2004) 281; RS Brown, 'Torture, Terrorism, and the Ticking Bomb: A Principled Response' (2007) 4 *Journal of International Law and Policy* 1–33; RD Covey, 'Interrogation Warrants' (2005) 26(5) *Cardozo Law Review* 1867–946; J Kleinig, 'Ticking Bombs and Torture Warrants (2005) 10(2) *Deakin Law Review* 614–27.

[55] For an articulate judicial outline of the incompatibility of closed material procedures and *in camera* proceedings with the rule of law, see *Guardian News & Media Ltd v Incedal* [2016] HLRL 9 (also discussed further below). On the wrong of secret law, see also Goitein (above n 2) 16–20; and Rudesill (above n 2) 313–25.

secret proceeding than is the defendant. We can respond only to a set of partial statements, unable to ascertain the full foundation of the claims in question, unable to know whether the secret information itself would affect or undermine security operations or intelligence, or how the information fits into a web of otherwise secret information.

If the rule-of-law critique of secrecy is persuasive, then it follows that the position of scholars is also weakened. In normal circumstances, failing to expose all relevant information to all relevant parties and to subject this information to the proper process of legal contestation is considered not to satisfy the conditions of the rule of law. The same may be said for the standards of rigorous academic scholarship. How, then, are scholars able to move beyond mere assertions that secrecy conflicts with the rule of law or human rights? How do we confidently move to a deeper assessment of the balance between counterposing security claims and rule-of-law considerations? We are left locked in the claim that there is a challenge to the rule of law or to human rights, without the relevant information against which to test the balance. We do not have the information we need to draw comprehensive independent conclusions about how the balance has been struck and whether it was necessary and legitimate. The force of academic critique, from a rule-of-law perspective, must apply equally to our own capacity to draw specific conclusions, and this in turn undermines our capacity to draw larger conclusions.

This is a challenge that legal scholars must confront. While history certainly gives academics ample reasons to approach secrecy claims with critical suspicion,[56] our capacity to deliver coherent real-time analysis is constrained. The danger also exists that a lopsided assessment of secret material may thus be made at the expense of material hiding in plain sight. As Baroness Manningham-Buller, former Director General of MI5, has commented, 'sometimes secrets take on more power … than open facts'.[57]

III. CONTEMPORARY SECRECY AND RETROSPECTIVE ACCOUNTABILITY

> Deep secrets [cause] corruption and abuse, ideological amplification, bias, and groupthink will be more likely to flourish.… More speculatively, deep secrets may also exacerbate the social trust, perverse consequences, and budgetary arguments

[56] See the references listed above at nn 2 and 46, as well as D Gibbs, 'Sigmund Freud as a Theorist of Government Secrecy' in S Maret (ed), *Government Secrecy* (Bingley, Emerald Group Publishing, 2011); S Bok, *Secrets: On the Ethics of Concealment and Revelation* (Oxford, Oxford University Press, 1984); and C Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (New York, Henry Holt, 2005).

[57] E Manningham-Buller, 'From Bugs to Bugs', Lecture, Oxford Martin School (15 February 2016); see also KS Olmstead, 'Government Secrecy and Conspiracy Theories' in S Maret (ed), *Government Secrecy* (Bingley, Emerald Group Publishing, 2011) 91.

> against government secrecy.… Deep secrets are the stuff of conspiracy theories. A government that uses them cannot help but engender skepticism.[58]

Let us return to the warning of the US official I interviewed: that academics shouldn't say anything about things they know nothing about. Evidently this warning poses a dilemma. Some may argue that the challenge to the rule of law and human rights is so great that it is necessary to assume that all information held secret is done so illegitimately. For them, the onus of justification must rest on the state, and if secret information remains unexposed, then this onus remains unfulfilled. Others argue that some matters are more complex, and if there is secret or missing material, then scholarly rigour requires us to heed the official's warning and remain silent because we will not have the information necessary in that case to evaluate the balance between security, human rights, and the rule of law. Between these opposing positions, however, a potential resolution may be found in the timing of scholarly analysis. A framework for considering the temporality of scrutiny might make it possible for scholars and legal commentators to move beyond abstract scepticism and denunciation and into true academic critique that is based on genuine expertise.

While always demanding adequate scrutiny of the justifications for secrecy claims in real time and insisting that secret mechanisms violate the rule of law and human rights, academics and other critics may nonetheless need to delay their full conclusions for a later date. To achieve this, we will need to fight consistently for the prospect of future scrutiny of contemporary secrecy claims. We need to think of the prospect of retrospective accountability (in law) and evaluation (in scholarship) once we can gain access to full information. This notion of 'retrospective accountability and evaluation' ought to feature more in the law itself. The more secrecy claims arise and the stronger the claim that secrecy is a necessary handmaiden to security in contemporary contexts, the more we will need to demand structures of retrospective accountability within law. The state should know that the secrets it holds now will be fully scrutinised later, once the justification for such secrecy has diminished or elapsed. So too within legal scholarship: while some limitations to contemporaneous analysis might be accepted, the conditions in which rigorous scholarly conclusions can be made about a particular policy or legal outcome may be scheduled to materialise later.[59]

[58] Pozen (above n 33) 280. On the tendency of government secrecy to encourage conspiracy theory, see Olmsted (ibid).

[59] In light of this self-limitation, it is striking that Pozen has felt confident to draw conclusions about the consequentialist arguments for and against state secrecy while in his argument using historical cases both for and against it. In so many respects, Pozen's work is insightful and exemplary, but his keenness to draw generalised conclusions about the utilitarian value of deep secrecy may be one step too far. If Pozen is right about all the other aspects of what he describes, then I would have expected a more tentative conclusion on this question. If deep secrecy nullifies all evaluation, then how is it possible to conclude confidently that 'although it would be wrong to maintain that deep state secrecy categorically produces inferior outcomes, the rule-utilitarian case in its favor

A. Case Law

Case law relating to historical truth provides us with lessons about how to ensure current decisions are subject to future scrutiny. *Mutua v The Foreign and Commonwealth Office* was heard in 2011,[60] after the exposure of colonial torture of Mau Mau fighters in Kenya between 1954 and 1959 in two historical studies based on painstaking archival research.[61] The detailed evidence contained in these studies became the central part of an action in tort by five surviving claimants against the Foreign and Commonwealth Office of the UK Government for remedies related to their 'physical mistreatment of the most serious kind, including torture, rape, castration, and severe beating'.[62] The preliminary hearings in the case centred on whether it was possible to hold a 'fair trial' so long after these events had taken place. The case was settled after two preliminary judgments from Justice Richard McCombe forced the disclosure of further archival evidence and revealed that document destruction was ordered by colonial authorities during the period in question. Justice McCombe concluded that there was ample historical evidence to launch a fair trial, despite the absence of live witnesses. An otherwise sober and conservative judge, he was evidently concerned with the ways in which the UK government had sought to bury the relevant material:

> I consider that there is good evidence of attempts by both governments, throughout the emergency, to limit enquiries and investigations into abuses committed in the camps. This I think is conduct that has some relevance to the exercise of my discretion under the section in favour of the claimants, although obviously it can only be a 'make weight' over and above my view that I have reached that a fair trial of these issues on cogent evidence is still possible. It also detracts to some little degree from the intrinsic merit of the defendant's submission that those at senior levels who could give an account on behalf of the defendant are no longer alive to explain what happened and what is recorded in the documents.[63]

Once the legal action was allowed to move forward and had forced disclosure of further archival materials at Hanslope Park, the Government knew it had no option but to settle the claim in order to avoid more damaging revelations if the case were to be heard in full. *Mutua* is thus a lesson in the power of deep scholarly archival research to trigger retrospective accountability.

In contrast, just a few years later in *Keyu v Secretary of State*, the attempt to force an inquiry into establishing the historical truth of the Batang Kali massacre

appears as precarious and narrow as the case against appears clear and robust'? See Pozen (above n 33) 285.

[60] *Mutua and Others v The Foreign and Commonwealth Office* [2011] EWHC 1913 (QB), [2012] EWHC 2678 (QB).

[61] Elkins (above n 56); and D Anderson, *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire* (London, Weidenfeld and Nicolson, 2005).

[62] *Mutua* (above n 60) para 1.

[63] Ibid, para 40.

failed,[64] despite new historical research contesting the official narrative.[65] While acknowledging the 'desire to discover "historical truth"', the majority of the UK Supreme Court were swayed by the 'justifiable concern that the truth may not be ascertainable'.[66] This view was taken despite the general concession that the official account of the killings 'may well not be correct' and constituted a 'cover up',[67] that the 'killings may well have been unlawful',[68] and that the case involved 'investigating whether a serious wrong, indeed a war crime, may have been committed'.[69]

In her dissent, Lady Hale took issue with the way in which the majority had 'set the bar so high as to establishing the truth' by focusing on the criminal responsibility of the actors, such that it obscured the wider 'beneficial purposes' served by the 'value of recognising the truth'. Instead of seeking to establish facts that could lead to criminal liability,

> [The majority] did not seriously consider the 'bigger picture': the public interest in properly inquiring into an event of this magnitude; the private interests of the relatives and survivors in knowing the truth and seeing the reputations of their deceased relatives vindicated; the importance of setting the record straight – as counsel put it, balancing *the prospect of the truth* against *the value of the truth*.[70]

Mutua and *Keyu* dealt with historical evidence, but in both, the arguments and outcomes were shaped by questions of evidential reliability for the purposes of meeting civil or criminal standards of proof. In *Mutua*, that standard was met, but in *Keyu*, it was not. Nevertheless, Lady Hale's dissent in *Keyu* points to wider interests, both public and private, served by an inquiry into the past. This wider public interest is expressed increasingly in the concept of the right to truth, which, unlike the narrow focus on establishing individual culpability or compensation for secret wrong-doing, provides a potential platform for a general principle of retrospective accountability and protects the possibility of future academic scrutiny.

B. The Right to Truth and the Duty of Archival Integrity

The right to truth emerged in the late 1940s in international humanitarian law, was subsequently cast by the International Red Cross as part of international customary law,[71] and came to prominence during the 1970s in Latin America

[64] *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69.
[65] I Ward and N Miraflor, *Slaughter and Deception at Batang Kali* (Singapore, Media Masters, 2009).
[66] *Keyu* (above n 64) para 136.
[67] Ibid, paras 137 and 138.
[68] Ibid, para 137.
[69] Ibid, para 136.
[70] Ibid, paras 312 and 313, emphasis added.
[71] Art 32 of the Additional Protocol to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (entry into force 7 December 1978); Rule 117 in J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law (International Committee of*

in response to the practice of enforced disappearances.[72] More recently, the right to truth has been 'explicitly recognised' by an extensive range of international instruments,[73] intergovernmental mechanisms, peace agreements, international and regional soft law materials, as well as forming the basis of several truth commissions within domestic jurisdictions.[74] The right to truth in the context of gross violations of the right to life has received legal affirmation from, *inter alia*, the UN Human Rights Committee,[75] the Inter-American Court and Inter-American Commission on Human Rights;[76] the European Court of Human Rights (ECtHR);[77] the Constitutional Courts of Colombia and Peru;[78] the federal criminal courts of Argentina;[79] and the Human Rights Chambers of Bosnia and Herzegovina.[80]

the Red Cross): Volume I, Rules (Cambridge, Cambridge Press University, 2005) 421. See in general UN Commission on Human Rights, 'Study on the Right to the Truth: Report of the Office of the United Nations High Commissioner for Human Rights', E/CN.4/2006/91 (8 February 2006) paras 5–7.

[72] See in general Y Naqvi, 'The Right to the Truth in International Law: Fact or Fiction' (2006) 88(862) *International Review of the Red Cross* 245–73; D Groom, 'The Right to Truth in the Fight Against Impunity' (2011) 29(1) *Berkeley Journal of International Law* 175–99; S Szoke-Burke, 'Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies' (2015) 33(2) *Berkeley Journal of International Law* 526–78.

[73] For example, UN Commission on Human Rights, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity', E/CN.4/2005/102/Add.1 (8 February 2005), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement:

> **Principle 2** (**The Inalienable Right to the Truth**)**:** Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.

See also UN General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', Commission Resolution 2005/35 and General Assembly Resolution 60/147, Principles 11, 22(b), and 24.

[74] UNCHR, 'Study on the Right to the Truth (above n 71) paras 9–22.

[75] *Quinteros v Uruguay*, UN Human Rights Committee, Communication 107/198, decision of 21 July 1983.

[76] *Trujillo-Oroza v Bolivia*, Inter-Am CtHR No 92 (27 February 2002) para 112–15; *Gomes Lund and Others v Brazil*, Inter-Am CtHR No 219 (24 November 2010) paras 200–2 and verdict; *Massacres of El Mozote and Nearby Places v El Salvador*, Inter-Am CtHR No 252 (25 October 2012) paras 297–98 and 354–65; *Gudiel Álvarez et al ('Diario Militar') v Guatemala*, Inter-Am CtHR (Ser C) No 253 (20 November 2012); *Heliodoro Portugal v Panama*, preliminary objections, merits, reparations and costs, judgment of 12 August 2008, Series C No 186); and *Ellacuria and Others v El Salvador*, Inter-Am CtHR Case 10.488, Report No 136/99 (12 December 1999).

[77] *Janowiec v Russia* (2014) 58 EHRR 30, paras 142–44; *Association '21 December 1989' v Romania* (2015) 60 EHRR 25, para 106; *Varnava v Turkey* (2009) nos 16064/90–16073/90, ECHR 2009; and *Brecknell v the United Kingdom*, no 32457/04 (27 November 2007).

[78] Constitutional Court of Colombia, Judgments of 20 January 2003, Case T-249/03 and C-228 of 3 April 2002; and Constitutional Tribunal of Peru, Judgment of 18 March 2004, Case 2488-2002-HC/TC.

[79] See Agreement of 1 September 2003 of the National Chamber for Federal Criminal and Correctional Matters, Case *Suárez Mason*, Rol 450 and Case *Escuela Mecánica de la Armada*, Rol 761.

[80] *Palic v Republika Srpska*, Case No CH/99/3196, Decision of 11 January 2001; '*Srebrenica Cases*', Cases Nos CH/01/8365 et al, Decision of 7 March 2003, para 220 (4).

Most recently, the ECtHR examined the question of whether the right to truth as a stand-alone right applied to victims of torture and arbitrary detention in the context of extraordinary rendition activities.[81] In *El-Masri*, the concurring opinion of Judges Françoise Tulkens, Dean Spielmann, Linos Sicilianos, and Helen Keller called for an explicit recognition of the right to truth of applicants who have suffered serious rights violations. This call and its reasoning were subsequently confirmed by the ECtHR in two later cases dealing with extraordinary rendition: *Al Nashiri v Poland* and *Abu Zubaydah v Lithuania*.[82] The reasoning in *El-Masri* highlighted a number of key elements to the right to truth that are important for our purpose of framing a general principle of retrospective state accountability and ensuring future scrutiny.

First, the judgment was clear that the right to truth served both the individual victims of human rights violations as well as the broader public: 'For society in general, the desire to ascertain the truth plays a part in strengthening confidence in public institutions and hence the rule of law.'[83] Second, the judgment framed the value in obtaining the truth beyond the narrow question of culpability or compensation:

> For those concerned – the victims' families and close friends – establishing the true facts and securing an acknowledgment of serious breaches of human-rights and humanitarian law constitute forms of redress that are just as important as compensation, and sometimes even more so.[84]

Third, the judgment twice cast the right to truth as an antidote to the harm of secrecy. Early on it referred to the 'right to the truth' as a 'particularly compelling norm in view of the secrecy surrounding the victims' fate';[85] later it noted that 'ultimately, the wall of silence and the cloak of secrecy prevent these people from making any sense of what they have experienced and are the greatest obstacles to their recovery'.[86] Fourth and finally, the concurring judgment linked the right to truth to access to detailed and comprehensive information:

> The applicant was denied the 'right to the truth': that is, the right to an accurate account of the suffering endured and the role of those responsible for that ordeal.

[81] See *El-Masri v the Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25; *Al Nashiri v Poland* (above n 46); *Nasr and Ghali v Italy* (2016) ECHR 210; and *Abu Zubaydah v Lithuania* (above n 46).

[82] *Al Nashiri v Poland* (above n 46); and *Abu Zubaydah v Lithuania* (above n 46).

[83] *El-Masri* (above n 81) Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, para 6. This collective or public aspect has been confirmed in *Al Nashiri v Poland* (above n 46) para 495 and *Abu Zubaydah v Lithuania* (above n 46) para 610. In *Al Nashiri*, however, the Court joined the majority in *El-Masri* in rejecting the argument that the collective right to truth might be grounded in the right to receive information under Art 10 of the European Convention on Human Rights. On this point, the justices in *Al Nashiri* were not persuaded by the submission of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of nonrecurrence.

[84] Ibid.

[85] Ibid, para 1.

[86] Ibid, para 6.

> Obviously, this does not mean 'truth' in the philosophical or metaphysical sense of the term but the right to ascertain and establish the true facts.[87]

The reasoning in the concurring judgment in *El-Masri* thus presents a general justification for a broad principle of retrospective accountability, as well as a practical requirement of the preservation of information required for future scrutiny. This latter aspect is echoed in a number of sources. The report of the United Nations High Commissioner for Human Rights on the Right to Truth makes it plain that 'access to information, to official archives, is crucial to the exercise of the right to truth'.[88] Similarly, detailed guarantees relating to archival information are set out in the 'Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity'.[89] Importantly, Basic Principle 3 (The Duty to Preserve Memory) connects the right to truth with archival protection:

> A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the state's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.

This connection is reiterated in Section C of the Updated Principles on the 'Preservation of and Access to Archives Bearing Witness to Violations', which lays out a range of detailed guarantees relating to archive preservation.[90] Chief amongst these is Principle 14:

> The right to know implies that archives must be preserved. Technical measures and penalties should be applied to prevent any removal, destruction, concealment or falsification of archives, especially for the purpose of ensuring the impunity of perpetrators of violations of human rights and/or humanitarian law.

Indeed, the connection between archival integrity and human rights more generally was expressed in 2016 by the International Council on Archives in the 'Basic Principles on the Role of Archivists and Records Managers in Support of Human Rights'[91] and in 2011 by UNESCO's Universal Declaration on Archives.[92]

[87] Ibid, para 1.

[88] UN Commission on Human Rights, 'Study on the Right to the Truth (above n 71) para 52.

[89] UN Commission on Human Rights, 'Updated Set of Principles' (above n 73).

[90] Section C of the Updated Principles (above n 73) includes Principles 14 (Measures for the Preservation of Archives); Principle 15 (Measures for Facilitating Access to Archives); Principle 16 (Cooperation between Archive Departments and the Courts and Non-judicial Commissions of Inquiry); Principle 17 (Specific Measures Relating to Archives Containing Names); and Principle 18 (Specific Measures Related to the Restoration of or Transition to Democracy and/or Peace).

[91] International Council on Archives Human Rights Working Group, 'Basic Principles on the Role of Archivists and Record Managers in Support of Human Rights' (September 2016), https://www.ica.org/sites/default/files/ICA%20HRWG%20Basic%20Principles_endorsed%20by%20PCOM_2016_Sept_English.pdf.

[92] UNESCO, 'Universal Declaration on Archives', adopted by the 36th Session of the General Conference of UNESCO (2011), https://www.ica.org/sites/default/files/UDA_June%202012_press_EN.pdf.

Just as the right to truth is premised on the protection of archives, so too is the requirement of future scrutiny, which is incapable of realisation without adequate state records. The case law on historical accountability plainly bears this out. The *Mutua* case was a success because of rigorous and extensive scholarship into deep secrets, which came to light retrospectively. But the achievements of the researchers would have been impossible without the archival material they uncovered.

The duty to sustain archival integrity, which flows from the right to truth, may thus also be viewed as essential to maintaining historical and future accountability.[93] As Elizabeth Denham, UK Information Commissioner, has argued,

> Effective record-keeping and the proper maintenance of government information is an essential public service and is a prerequisite to good governance. The responsible management of these records ensures the maintenance of institutional memory, that appropriate information is available to decision-makers, that evidence of a public body's activities is retained, and that legal requirements are met.[94]

Presently, however, there are a number of battles relating to the preservation of historical records. On 26 December 2017, it was revealed that the UK Foreign Office had been withdrawing thousands of historical documents from the National Archives and 'losing' them.[95] The 'loss' of this archival material has elicited significant concern from historians and human rights organisations alike. Human rights groups are concerned that the prospect of achieving accountability for historical wrongs committed under colonial rule is under threat.[96] Historians, critical of the liberal accounts of colonialism, are rightly suspicious that the 'loss' of this material will play directly into the hands of those seeking to maintain a particular rendition of Empire.[97] Both the larger

[93] In the United Kingdom, any 'records in central government departments and agencies, the courts and the National Health Service' are subject to the Public Records Act 1958, which stipulates a range of duties on record keepers. For example, s 3(1) reads, 'It shall be the duty of every person responsible for public records of any description which are not in the Public Record Office or a place of deposit appointed by the Secretary of State under this Act to make arrangements for the selection of those records which ought to be permanently preserved and for their safe-keeping.' In the United States, a similar framework is developed under the Federal Records Act 1950, which regulates federal agencies overseen by the National Archives and Records Administration. The Act is supplemented by a range of additional provisions. See National Archives and Records Administration (USA), 'Basic Laws and Authorities of the National Archives and Records Administration' (2016 edition), https://www.archives.gov/files/about/laws/basic-laws-book-2016.pdf (last accessed 26 March 2019).

[94] E Denham, 'Keynote Speech at the Archive and Records Association (ARA) Conference' (31 August 2017), available at https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2017/08/archives-and-records-association-annual-conference/ (last accessed 26 March 2019).

[95] I Cobain, 'Government Admits "Losing" Thousands of Papers from National Archives', *Guardian* (26 December 2017); and S Fenton, 'Why Do Archive Files on Britain's Colonial Past Keep Going Missing', *Guardian* (27 December 2017).

[96] M Busby, 'Theresa May Must Search for Missing Archive Papers, Say Human Rights Groups', *Guardian* (26 December 2017).

[97] See the discussion above at n 14. A recent victory in this respect has been won in the European Parliament Resolution of 26 March 2019 on fundamental rights of people of African descent in Europe (2018/2899 RSP). This instrument 'encourages the EU institutions and the Member States to

project of historical erasure and the destruction of evidence of human rights violations work hand in hand here to undermine legal and democratic accountability. As historian Richard Drayton has argued,

> Public archives are instruments through which democracies recognise their citizens ownership of and responsibility for government. The practice of full release [of state documents] acts as a break on abuses of power. The hand of the present is kept honest by the gaze of the future.[98]

A similar controversy taken place in the United States over the records of the torture programme of the Central Intelligence Agency (CIA) in the years following 9/11.[99] There appeared to be early progress from the US Senate Select Committee on Intelligence. The 480-page executive summary, including twenty findings and conclusions of the five-year study on the CIA Detention and Interrogation Program were declassified in 2014.[100] This opened the way for detailed analysis by legal scholars and other commentators. The remaining 6200-page report of the Committee remains classified, however. Just before President Barack Obama stepped down, there were urgent calls for him to declassify the report entirely.[101] Carl Levin, previously Chair of the Senate Armed Services Committee, and Jay Rockefeller, previously Chair of the Senate Select Committee, made a public and urgent entreaty:

> Drawing on our decades of work in the Senate and our chairmanships of the Armed Services and Intelligence Committees, we are calling on President Obama to preserve the full torture report as a matter of profound public interest. We … are asking him to protect it as an important piece of history.[102]

After Obama stepped down, the American Civil Liberties Union (ACLU) failed in its attempt to sue for its release,[103] and the Trump Administration handed

officially acknowledge and mark the histories of people of African descent in Europe, including of past and ongoing injustices and crimes against humanity, such as slavery and the transatlantic slave trade, or those committed under European colonialism (s 5) and 'calls on Member States to declassify their colonial archives' (s 9).

[98] R Drayton, 'The Foreign Office Secretly Hoarded 1.2 Million Files: It's Historical Narcissism', *Guardian* (27 October 2017), https://www.theguardian.com/commentisfree/2013/oct/27/uk-foreign-office-secret-files.

[99] As of March 2019, a further potential controversy is brewing in the United States. At the time of writing, it is unclear whether the Mueller Report on President Donald Trump's possible collusion with Russia will be released in full to Congress or to the wider public for further evaluation. See Reuters, 'Democrats Want Full Mueller Report Released to Congress by April 2, While Republicans Resist', *CNBC* (26 March 2019), https://www.cnbc.com/2019/03/26/democrats-want-full-mueller-report-released-to-congress-by-april-2-while-republicans-resist.html.

[100] Office of US Senator Dianne Feinstein, 'Intelligence Committee Votes to Declassify Portions of CIA Study' (3 April 2014), http://www.feinstein.senate.gov/public/index.cfm/2014/4/senate-intelligence-committee-votes-to-declassify-portions-of-cia-detention-interrogation-study (last accessed 18 February 2018).

[101] C Levin and J Rockfeller, 'The Torture Report Must Be Saved', *New York Times* (9 December 2016), http://www.nytimes.com/2016/12/09/opinion/the-torture-report-must-be-saved.html?_r=0.

[102] Ibid.

[103] See the ACLU website, https://www.aclu.org/cases/senate-torture-report-foia (24 April 2017) (last accessed 18 February 2019).

the unopened Report back to Congress, which is not subject to freedom of information obligations. Many therefore fear that the Report could be buried for good.[104] If so, not only will public officials be held unaccountable for their actions under US law, but the chance for victims to vindicate their rights or for scholars to draw fine-grained, evidence-based conclusions about this period in history will be significantly undermined. The opportunity to enhance legal safeguards will thus be lost.

The idea of a duty of archival integrity and access could thus not be more prescient. As the declassification of the Pentagon Papers in 2011 demonstrated, archival declassification can bring about crucial insights into state action.[105] An expectation of such future declassification, preferably within a shorter time frame than current legal arrangements,[106] should be embedded in contemporary state action when secrecy is invoked. Certainly, the destruction of archival documents can be viewed as a violation of the right to truth.

C. Open Justice: *Incedal* and the Library of Closed Judgments

Alongside the right to truth, the rule of law principle of open justice offers a complimentary foundation for the principle of retrospective accountability and the preservation of national security material for future scrutiny. In *Guardian News v Incedal*,[107] the UK Court of Appeal dealt with a challenge to the *in camera* trial of Erol Incedal, who was charged with terrorist crimes. The case dealt predominantly with the question of when and under what circumstances a departure from the rule-of-law principle of open justice might be permitted on the grounds of national security. The argument of the press was that while it accepted the 'necessity' for the trial to be held *in camera* two years earlier, there was 'no longer any proper justification for departing from the principles of open justice'.[108] The Court of Appeal dismissed the appeal, holding that the evidence (included in a closed annex to the judgment) 'continued to necessitate a departure from the principle of open justice after the conclusion of the trial and at the present time'.[109]

[104] This stands in contrast to the decision of the UK Parliamentary Intelligence and Security Committee of Parliament to publish its 2018 report 'Detainee Mistreatment and Rendition: 2001–2010'. See Intelligence and Security Committee of Parliament (above n 46).

[105] M Cooper and S Roberts, 'After 40 Years, the Complete Pentagon Papers', *New York Times* (7 June 2011), https://www.nytimes.com/2011/06/08/us/08pentagon.html.

[106] Rudesill (above n 2) and Goitein (above n 2) suggest a four-year period for declassification of secret laws. I suggest this timeframe could apply also to secret facts included in closed material procedures and *in camera* proceedings.

[107] *Guardian v Incedal* (above n 55) para 40.

[108] Ibid.

[109] Ibid, para 74. In coming to this conclusion, the Court of Appeal noted that public accountability could still be served by the scrutiny of the Parliamentary Intelligence and Security Committee.

However, in three short paragraphs, the Court of Appeal made a crucial set of 'observations'.[110] Noting that courts were likely for 'some time' to have to deal with applications for *in camera* proceedings on the grounds of national security, Lord Thomas stated:

> Whilst the judgments given in open court are a matter of public record and can be referred to, the closed judgments which contain the detailed reasons why the court has decided that the evidence should be heard *in camera* are not retained within the court files or, as far as we have been able to ascertain, in any specified place within the court.[111]

This was in Lord Thomas's view an unsatisfactory state of affairs, as it prevented courts from being able to take advantage of the 'experience to be derived from the way in which the issues were approached'.[112] He then went on to provide a secondary reason of significant importance:

> Furthermore, for the reasons we have explained, it must always be a possibility that at a future date, disclosure will be sought at a time when it is said that there could no longer be any reason to keep the information from the public, including this Court's reasons for upholding the decision of the trial judge.[113]

Consequently, Lord Thomas announced that they had asked that the 'Registrar of this Court to form a working party from those interested in these matters to advise the Court of Appeal, Criminal Division on the course of action it should adopt'.[114]

The outcome of these working party deliberations was produced on 18 January 2019 in the form of a one-page, six-paragraph Practice Direction entitled 'Closed Judgments'.[115] This simple document requires:

> A single printed copy and an electronic copy of each closed judgment and any related open judgment must be lodged with the RCJ Senior Information Officer within 14 days of being delivered or handed down, for consideration for inclusion in the library of closed judgments now established in the Royal Courts of Justice.[116]

The creation of a 'closed judgment library' has been welcomed in principle by observers. Lawrence McNamara, for example, has taken the view that 'it adds considerable certainty to the closed judgments regime and will ensure that judgments can be considered in subsequent cases'.[117]

[110] Ibid, paras 77–80.
[111] Ibid, para 78.
[112] Ibid, para 79.
[113] Ibid.
[114] Ibid, para 80.
[115] Courts and Tribunals Judiciary (UK), 'Practice Direction: Closed Judgments' (14 January 2019), available at https://www.judiciary.uk/announcements/practice-direction-closed-judgments/ (last accessed 26 March 2019).
[116] Ibid, para 2.
[117] L McNamara, 'Closed Judgments: Security, Accountability and Court Processes', *UK Human Rights Blog* (25 January 2019), https://ukhumanrightsblog.com/2019/01/25/closed-judgments-security-accountability-and-court-processes/.

However, the Practice Direction also contains a number of problems, not least that it refers to a document entitled 'Closed Judgments Library: Security Guidance of 2017', which is itself marked as officially sensitive and not available to the public.[118] But the most glaring difficulty with the Practice Direction is that it explicitly provides for the destruction of some judgments:

> If it is decided to retain the judgment in the library, the relevant judge(s) or tribunal judge(s) will be informed. If the judgment is not to be retained, it will be disposed of securely.[119]

The risks to future accountability in this respect are considerable, and it is no surprise that McNamara has called for no judgments to be destroyed, arguing strongly that closed material procedures are 'concerned with the actions of the state in matters of liberty and rights':[120]

> There are massively important public interests at stake. It is of course hugely challenging for the government and the courts to manage information it needs rightly to keep secret for good reasons, but it is important that the management of closed judgments works to enhance not only security but also transparency and accountability.[121]

Allowing the destruction of documents is moreover inconsistent with the direction of the Court of Appeal in *Incedal*, where it was stated clearly that there is always a possibility that disclosure will be sought in the future.[122]

There is no question therefore that the prospect of future accountability is both enhanced by the closed judgment library and also undermined by its allowing for the destruction of documents, especially as there is little principled guidance as to which judgments might be selected. Further guidance on this issue may indeed be available in the 'Security Guidance of 2017', but in a twist of irony, we cannot establish this for certain.

IV. CONCLUSION: FUTURE SCRUTINY

Contemporary state secrecy inhibits rigorous academic scrutiny and limits academic freedom. When relevant information is missing, scholars cannot move beyond generalised critique and suspicion of secrecy claims to engage in normative evaluation of the particularities of any individual case in which secrecy is applied. This asymmetry places scholars at an immediate informational disadvantage and allows state actors to discredit the general critique of

[118] Ibid.
[119] Courts and Tribunals Judiciary, 'Practice Direction: Closed Judgments' (above n 115) para 3.
[120] McNamara (above n 117). McNamara is currently doing a research project entitled 'Opening Up Closed Judgments: Balancing Secrecy, Security and Accountability' and funded by the Joseph Rowntree Charitable Trust Foundation.
[121] McNamara (above n 117).
[122] *Guardian v Incedal* (above n 55) para 79.

secrecy's metastasisation within law. Secrecy thus has profound implications for the status or standing of academic critics of law and security. More fundamentally, by constraining our ability to critique, interpret, guard, and refine the rule of law, secrecy prevents scholars from fulfilling their role in the interpretive community of law.

There is therefore an urgent need for legal scholars and commentators to acknowledge the limits of academic scrutiny and to reconcile the fundamental challenges that secrecy presents. Legal academics must fight to gain access to material, if not immediately then certainly in the future. If we are successful, we will be serving not only the demands of academic rigour but the rule of law. For a structure of future accountability ought to be embedded too in contemporary procedures when secrecy is invoked against those whose rights are at stake. We must all, in short, think more carefully about bolstering future accountability. We should interrogate the temporal frameworks of national security secrets and insist that they are subject to future review close enough in time to ensure the capacity for real accountability and the right to truth.

While it is beyond the scope of this chapter to develop a comprehensive proposal for ensuring state accountability when secrecy is invoked, there are nonetheless a number of key guarantees that should feature in any such system. First, accountability measures must be grounded in the collective and individual right to truth and the principle of open justice. It must be clear, as a consequence, that it is a violation of the rule of law and of human rights to cover up material in bad faith or use national security-based secrecy as a veil to cover up unlawful state action. As an extension of the right to truth, this wrong must have clear grounds, and there must be a human rights remedy. Second, we need to strengthen the human rights dimension of the duty to maintain the integrity of public records and archives, in particular in light of the prospect of subsequent review. Tampering with archival material and destroying closed judgments must be clearly conceptualised as human rights wrongs. This can also be framed as a violation of the principle of open justice.

Third, when rights are restricted through secrecy claims, there should be an established future judicial check on these claims, with temporal and substantive dimensions. A time limit must be established for when judicial review of an initial decision to maintain a closed material procedure is permissible. These time limits cannot be too far apart and must have a proportionate justification. While a rebuttal on national security grounds against a challenge to open up the secret file in a further closed material procedure may be possible, that second procedure should be subject to subsequent review. In short, there should be an escalation of timed checks. Each review can assess all previous reviews, until such time that the presumption falls against the national security exception. Moreover, a substantive standard of review will need to be established under which the initial decision to hold a closed material procedure will be assessed. Proportionality would serve here as an initial starting point, and we would need to establish the way in which this test would apply when the judge reviews the

second, third time, and last time. Questions would include whether the initial material was adequately reviewed in closed material proceedings. Was the first instance judge sufficiently rigorous in testing the closed material? Was there bad faith in deploying a closed material proceeding?

Fourth, in the case of deep secrets coming to light, we need to think hard about the nature of evidence required to trigger a broader review of materials. Is it to be left to scholars, documentary makers, authors, whistleblowers, or leakers to create a weight of evidence that can convince a government minister or court that there are sufficient grounds to investigate further? What benchmark is appropriate in light of the general right to truth held by those who are subject to illegalities covered by deep secrets?

In sum, as secrecy metastasises in law and as the dignity and fair trial rights of those subject to secret processes are undermined, academic scrutiny and freedom are also implicated. The right to truth (both individual and collective) and the principle of open justice serve as a platform for two valuable ends: the prospect of retrospective accountability in law and the realisation of future scrutiny for scholarship. In supporting these ideals, academic scholarship on security and human rights may find an answer to the challenge posed by the government official at the beginning of this chapter. By engaging in this way with the temporal dimension of scrutiny and accountability, we can also send a message to officials more generally: that the actions they take now will be subject to judicial and scholarly scrutiny in the future. In this way, 'the hand of the present' might be 'kept honest by the gaze of the future'.[123]

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[123] Drayton (above n 98).

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