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Why states have no right to privacy, but may be entitled to secrecy: a non-consequentialist defense of state secrecy

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ABSTRACT

Despite an increase in initiatives aimed at enhancing political transparency, democratic states claim the right to withhold information from citizens: classified intelligence and military programs, diplomatic discretion, closed-door political bargaining, and bureaucratic opacity are examples. Can the state's claim to restrict access to information be justified? In the first part of the essay, I focus on the arguments that defend the state's claim to restrict access in terms of the state's right to privacy where the state privacy is presented as a species of group privacy. While I concede that group privacy may be defended, I argue that governments and parliaments are not the kind of groups that may exercise privacy against citizens because of the relation of accountability in which they stand to citizens. In the second part of the essay, I propose an alternative argument to the effect that the scope of openness required in democratic governance is less extensive than traditionally assumed. I focus on the concept of democratic authority and argue that we can understand the practices of classification as an exercise of a special right to secrecy that is implied in the democratic state's right to rule in a content-independent way.

KEYWORDS State privacy; state secrecy; transparency; democratic authority; content-independence; accountability

As the recent large-scale disclosures of classified government information by Wikileaks and Snowden make clear, institutional opacity and the culture of secrecy are deeply entrenched in the political institutions of democratic states. The realm of state secrecy persists in the form of classified intelligence programs, espionage, secret military operations, diplomatic discretion, closed-door political bargaining, and bureaucratic opacity (Sagar, 2013; Thompson, 1999). Can the state's claim to restrict access be justified?

Most defenses of secrecy in politics do not connect to democratic theory, or only connect in a negative way, *viz.* the underlying idea is that democratic authority and secrecy are antithetical. Taking transparency as the default

position in democratic governance, they defend secrecy by way of an exception – as a concession to practical necessity – in the spirit of the tradition of reasons of state (*raisons d'état*). Such defenses of secrecy follow the consequentialist justification of secrecy: secrecy in governance is justified when its consequences are assumed to clearly outweigh the benefits of open governance. Justifications which reach beyond appeals to necessity and a cost–benefit calculus and which appeal, instead, to democratic principles are rare (Sagar, 2013; Schoenfeld, 2010; Thompson, 1999). All the more interesting is a recent defense of the state's right to restrict access proposed by Andrew Murray (Murray, 2011a, 2011b). Murray, a legal scholar, aims to reinforce the otherwise underdeveloped liberal-democratic discourse about the state's claim to withhold information from citizens. His defense of the state's right to restrict access in terms of liberal-democratic principles is a gestalt switch in the existing discussion. Whereas the discussion of the state's right to restrict access proceeds usually in terms of secrecy or confidentiality, Murray suggests to drop this conceptual framework and to conceive of the state's claim to restrict access in terms of a state's right to privacy instead. His claim revives Alan Westin's argument that in liberal democracies, states, just as individuals, have a right to privacy (Westin, 1967). Just as individuals have a right to conduct their affairs without having to keep up a public face, so also 'the government', Murray echoes Westin, 'requires periods where it can find release from the constant scrutiny of its public role' (Murray, 2005, p. 200).

In Westin's view, states, by virtue of their right to privacy, are entitled to keep certain economic and law enforcement policies, diplomacy, intelligence, and defense programs out of the view of citizens and the media (Westin, 1967, p. 43). In the light of these claims, the Wikileaks and Snowden disclosures were wrong because by disclosing classified information concerning intelligence programs, military operations, or diplomatic cables, they violated the privacy of states to which the information referred. Murray emphasizes the part of Westin's argument that deals with the private character of internal communications between state officials in the early stages of policy formulation. On this argument, internal memos, minutes of proceedings, voting records, policy discussions, and political bargaining are a matter of state privacy. Launching his defense of the state's claim to restrict access in terms of its right to privacy in the aftermath of Wikileaks disclosures, Murray focuses his critique of Wikileaks accordingly. 'WikiLeaks is bad for democracy' he writes. 'With the changes to society brought about by the rise of the information society and sites like WikiLeaks, we may now not be affording the necessary level of privacy protection to decision-makers to carry out this staging process [of policy formulation]' (Murray, 2011a, p. 1, 2011b, p. 512).

The value of privacy is acknowledged both in liberal and democratic political thought and, thus, if Murray's argument is successful, it will provide

an interesting contribution to the otherwise underdeveloped liberal-democratic defense of the state's claim to withhold information from citizens. Yet, defending the state's claim to restrict access by an appeal to its right to privacy is striking. In mainstream privacy discourse, privacy is understood as a right pertaining to individuals. As states are not individuals, they cannot hold privacy rights. At first sight, then, there seems to be little to the idea of state privacy. Now it is fair to ask: if individuals enjoy privacy, what about collections of individuals? What about private clubs, institutions, business corporations, and juries? If organized groups indeed have a right to privacy and if governments and parliaments are organized groups, why would they not have a right to privacy too?

In the first part of the essay, I explore this line of thought. While I concede that group privacy may be defended, I argue that governments and parliaments are not the kind of groups that may exercise a right to privacy against citizens. This is because conceiving the state's claim to restrict access in terms of its right to privacy would place classified information, secret decisions, and policies beyond political accountability: whereas demands for oversight and control can be legitimately raised with regard to information that is secret or confidential, they have less force with regard to information that is private. A denial of state privacy in relation to citizens, however, does not automatically lead me to reject the Murray/Westin claim about limits to political transparency. In the second part of the essay, I suggest an alternative argument to the effect that democratic states have a right to withhold information. Returning to the traditional terminology of secrecy and confidentiality, I argue that the political authority democratic states exercise involves a right to secrecy. Anchoring the state's right to restrict access in the authority of the democratic state, my argument is intended to contribute to the reflection about the democratic justification of secrecy in governance.

Whereas my argument offers a case in favor of secrecy, it does not deny the value of transparency for democratic governance. For example, it does not claim that transparency measures – such as freedom of information laws (FOIA) – should be abandoned. The aim is rather to develop a justification of exempting from disclosure a certain class of political decisions and processes and to do it in terms of democratic principles rather than in terms of *raisons d'état* or the state's right to privacy.

Group privacy

Westin's work is celebrated in privacy scholarship for providing the first systematic defense of individual privacy, but most scholars forget that Westin defends not only an individual but also a group right to privacy. Privacy, Westin says, is 'the claim of individuals, groups, or institutions to

determine for themselves when, how, and to what extent information about them is communicated to others' (Westin, 1967, p. 7). Among groups having a right to privacy, Westin lists families, corporations, trade unions, universities, churches, hospitals, welfare organizations, civic groups, political parties, and courts. Importantly, he also lists governments and parliaments (Westin, 1967, p. 42).¹ It is this argument presenting state privacy as a species of group privacy that Murray sets out to revive.

Westin and Murray define privacy as the control that agents, both individuals and groups, have over access to themselves (Westin, 1967, p. 7; Murray, 2005, p. 198). Privacy so understood has an informational and a decisional dimension. Informational privacy refers to control over access to information about agents. It entitles individuals and groups to withhold their data from others' scrutiny. Decisional privacy refers to the control that individuals and groups have over their ability to engage in certain types of action: It removes their choices and actions from interference by others.

Privacy as control over access does not refer to the physical power to grant or deny access. It is about normative control involving a moral claim on the part of the agents to limit the liberty of anyone else to search for information or to interfere with their decisions. In this normative sense, privacy entails duties on other parties to refrain from seeking access to the material that is withheld from them. In setting normative boundaries to access to information about the individual and group agents and attention drawn to their actions and engagements, privacy designates material that is nobody's business except that of the agents themselves. As Judith DeCew has phrased it, 'privacy is a property of types of information and activity viewed (...) as beyond the legitimate concern of others' (DeCew, 1997, p. 60).

Before addressing in more detail the extension of group privacy to state institutions in Westin's and Murray's arguments, I would like to address two objections to the idea of group privacy.

First concern: groups are not right bearers

To defend a right to privacy on the part of groups, one has to present a group as an agent capable of bearing rights. What kind of capacity must the agent possess to be capable of bearing rights? Two competing theories have dominated the discussion on this issue: the choice theory and the interest theory of rights. According to the choice theory, rights provide normative protection for the exercise of autonomous choices (Harel, 2005, pp. 194–195). This theory maintains that for a group to be a right-holder, it must be an agent with a capacity for autonomous choice. According to the interest theory of rights, rights protect certain kinds of interests. From this

perspective, for a group to be a right-holder, it must be an agent with a capacity for having appropriate interests, e.g. well-being. Westin understands a right to privacy as a shield protecting the capacity for autonomous action. This view commits him to the choice theory of rights and to seeing groups as agents with the capacity for autonomous choice.

In linking a right to privacy to autonomy, Westin focuses first on individuals and subsequently extends his argument to groups. Autonomy, in its generic sense, means self-government. Individuals are self-governing if they live their lives according to reasons which are their own and not the product of manipulative or distorting forces external to them. The right to informational and decisional privacy protects individuals' autonomy so understood because it removes individuals from their social environment and minimizes the chances of external interference and manipulation. Conceptualized as the right to 'voluntary and temporary withdrawal (...) from the general society' (Westin, 1967, p. 7) privacy carves out a space around individuals in which they can direct their lives as they see fit, independently of social and political pressures.

Westin extends this argument to groups. Groups exercise group autonomy if they formulate and pursue their group goals free from external interference and manipulation. Westin calls this 'organizational' autonomy (Westin, 1967, p. 43). Group privacy protects the organizational autonomy of groups because it cuts them off from their social environment and in this way minimizes their exposure to external interference and manipulation. Hence, a group right to privacy protects a group's capacity for autonomous choice just as an individual right to privacy protects an individual's capacity for autonomous choice.

Before I proceed, one qualification: In the individual case, having autonomy seems sufficient for granting a person a right to privacy. It is not clear, however, whether Westin would present autonomy as a sufficient condition of the right to privacy on the part of organizations. Possibly, he would agree that there are organizations that should not exist, and should have no rights, but which possess autonomy (the Mafia). In this case, the organization's capacity for autonomy is a condition of its right to privacy unless it engages in immoral actions. Autonomy and the moral permissibility of actions are, then, each a necessary condition and are only jointly sufficient for a right to privacy on the part of organizations.

In extending the right of privacy to groups, Westin is committed to saying that groups, just as individuals, are autonomous agents. The idea that groups are autonomous agents, however, has been contested. An important objection runs as follows: if a necessary condition of autonomy is a capacity to choose and act on one's own reasons, then groups are not autonomous agents because groups have no reasons of their own. More generally, groups have no mental states that would make them

capable of intentional choice and action. Whatever beliefs, desires, and intentions groups have, they are reducible to the beliefs, desires, and intentions of their individual members. Whatever reasons they have, these reasons are reducible to the reasons of individual group members (Narveson, 1991). The implication of this position for the status of groups as holders of privacy rights is clear. If groups have no capacity for autonomous choice and action, then they cannot be right-holders; if groups cannot be right-holders, they cannot hold a right to privacy either.

Answering this objection in a satisfactory way would require engaging with the work on group agency in the field of social ontology. As that would take me beyond the scope of this essay, let me just indicate a promising line of response. The general intuition driving this response is well articulated by Wayne Sumner:

the capacity for agency is a logical pre-condition of having rights. But every social group which qualifies as either an institution or an association must have some procedure of reaching collective decisions and taking collective action. (...) Collectivities will qualify as the subjects of rights as long as they possess the requisite capacity to act on behalf of their members. (Sumner, 1987, p. 209)

Sumner is right to indicate that outcomes of collective decision-making mechanisms count as group decisions. However, it is fair to ask whether the reasons such collective decisions provide are sufficiently distinct from their individual components in order to conceive of a group as an autonomous agent. By way of responding to this question, Philip Pettit demonstrates that the only way in which a collection of individuals can arrive at a consistent decision is by allowing decision-making rules which 'break on some issues with the judgments of a majority, perhaps even a unanimity, of its members' (Pettit & Schweikard, 2006, p. 34), that is, lead individuals to adopt a decision at group level that does not reproduce the judgment of the majority. Leaving aside the social choice theory details of this argument,² let me indicate its implications. In demonstrating that the only method of arriving at a collective decision is by adopting those collective decision-making mechanisms that will allow for a situation in which group judgments and individual judgments come apart, Pettit implies that the outcomes of collective decision-making do not collapse into individual components and, thus, are sufficiently distinct from them to conceive of a group as forming and acting on its own reasons. Following this line of argument, he defends the idea that groups are autonomous agents in the sense that they have reasons that are not reducible to the reasons of their individual members. As he puts it, groups – 'companies, churches, courts, and cabinets' (Pettit & Schweikard, 2006, p. 34) – have their own minds.

If we accept Pettit's argument that groups are autonomous agents in the sense of being capable of forming and acting on their own group reason,

then Westin's idea of group privacy makes sense. On this view, privacy protects the autonomy of groups by ensuring that the 'group mind' operates without external interference and manipulation.

Second concern: group privacy is reducible to the privacies of individual group members

Whereas the first concern about group privacy dealt with the question of whether groups can be bearers of rights, the other concern is that group privacy is merely a misleading way to talk about the privacies of individual group members, taken together. Taking issue with Westin's argument that 'claims to privacy given to organizations (...) are more than a protection of the collective privacy rights of the members as individuals' (Westin, 1967, p. 42), the objection is that group privacy collapses into the aggregated privacies of individual group members and, hence, has no distinct normative status from individual privacy.

In response to this concern, Steven Davis has offered a thought experiment meant to demonstrate that group privacy is not reducible to the privacies of individual group members. He asks us to imagine a:

society that has rituals, information about which the society wishes to keep from the public eye. If the rituals of the group were reported in the newspaper, but no names of members were reported, the group could claim that it had suffered a loss of its privacy, but no member could claim such a loss. (Davis, 2006, p. 120)

As presented in the thought experiment, the disclosure of confidential information at hand is a violation of privacy. However, even though the disclosure violates privacy, we cannot point to any particular individual group member whose privacy has been violated. As they remain anonymous, their privacy has been retained. This thought experiment shows that a group can experience a loss of privacy independently of any loss of privacy on the part of its individual members. To say that a group can lose privacy even if none of its members loses her privacy is to say that group privacy is not reducible to individual privacy but has its own normative standing.

Against that argument, proponents of the reductionist argument could raise the following objection: it is usual for individual members personally to identify themselves with the group and consider information about the group to be information about themselves. If that is the case, then, when information about the group is being disclosed, information about its individual members is also being disclosed. In effect, when a group loses its privacy, individual group members also lose their privacy. Hence, group privacy can be spelled out in terms of individual privacies of the group members. In response, I admit that this argument, if correct, demonstrates that group privacy is linked to individual

privacy. I deny, however, that the link between group privacy and individual privacy it presupposes reduces group privacy to the privacies of its individual members. As Travis Dumsday observes, if the individual was not a member of the group, she would not be implicated in the group-privacy loss, and thus, according to this argument, it is the loss of privacy on the part of the group that causes the loss of privacy on the part of its members. To say that it is the loss of privacy on the part of the group that causes the loss of privacy on the part of its members:

has the result that group privacy is just as real as individual privacy and cannot be reduced to the latter, since it causes the latter in such cases. For reduction to be possible, the dependence would have to flow in the opposite direction. (Dumsday, 2008, pp. 176–177)

From group privacy to state privacy

If we accept Westin's claim that groups are autonomous agents, who by virtue of their autonomy hold a right to privacy against non-members (unless they engage in immoral actions), does that imply that governments and parliaments have a right to privacy?

Governments and parliaments are instances of groups, hence, by a simple extension of the argument, governments and parliaments would have rights to privacy (unless they engage in immoral actions). Along the lines of Westin's argument, they would hold a right to privacy by virtue of their organizational autonomy, that is, their capacity to formulate and act on their organizational goals. Westin coins the term 'executive privacy' to refer to the government's privacy (Westin, 1967, p. 49). 'Legislative privacy' is the term Edward Bloustein coins to refer to group privacy on the part of legislative bodies (Bloustein, 1977, p. 257).

What would be the object of executive and legislative privacy? If privacy protects a group's autonomy, then, endorsing Pettit's understanding of group autonomy, we could say that privacy protects the capacity of the group to formulate and act on its own group reason. With regard to governments and parliaments, then, privacy would protect their group reason formation: (1) the process through which officials and representatives formulate their individual judgments and (2) the collective decision method that transforms their individual judgments into a political decision, law, or policy. Privacy would protect the decision-making process by cutting it off from the external environment – lobby groups, the media, and citizens at large – and thereby minimize the risk of external manipulation and interference.

Without privacy protection, one might worry, the formation of group reason and, thus, group autonomy might be disrupted. Of particular concern for Westin is the impact of the exposure of decision-making processes on

the incentives and quality of arguments that decision-makers employ. He points out that exposing communications between decision-makers might make them conform their individual judgments to the pressure of various lobby groups. When representatives and officials know that their bargaining positions are closely followed, they become concerned with image and presentation rather than with policy and substance. They have an incentive to say what their audiences want to hear rather than defend the proposals they judge best. Privacy isolates decision-makers from interference and manipulation by external lobby groups and preserves the autonomy of their decision-making process. Westin argues: 'Privacy in governmental decision making is a functional necessity for the formulation of responsible policy' (Westin, 1967, p. 49). Similar arguments stressing the need for privacy on the part of executive power can be found in current political practice. An example in point is the UK government's response to the attempts to provide a public account of UK involvement in the Iraq war. A request by an FOI campaigner to disclose the British Cabinet minutes from March 2003, in which military action in Iraq was deliberated, was refused, first by the Lord Chancellor and Secretary of State for Justice and later by the Attorney General. In the Statement of Reasons, they argued that disclosure would be detrimental to, among others, the effective operation of Cabinet government by compromising its need for privacy:

Conventions on Cabinet confidentiality are of the greatest pertinence when the issues at hand are of the greatest sensitivity. (...). Serious and controversial decisions must be taken with free, frank – even blunt – deliberation. (...). Ministers must have the confidence to challenge each other *in private*. Decisions of this nature will not however take place without a *private* space in which thoughts can be voiced without fear of (...) publicity. Cabinet provides this space. Disclosure of Cabinet minutes (...) has the potential to (...) compromise the integrity of this thinking space where it is most needed. (Grieve, 2012, pp. 3–4, emphasis added)

Westin illustrates the importance of the privacy of legislative processes by referring to the historical example of the Constitutional Convention in America. He reminds us that the compromises that lay at the foundation of the US Constitution were struck in private sessions, with no press and outsiders, or lobby groups. He recalls the words of James Madison: 'No Constitution would ever have been adopted by the Constitutional Convention if the debates had been public' (cited in Westin, 1967, p. 46).

On Westin's view, privacy extends not only to the process of policy formulation, but also to implementation. He points out that there are policy areas, in particular diplomatic, military, and economic, in which disclosure of governmental policies might undercut them. For example, disclosing defense information might serve the purposes of potential enemies and thus undercut the effectiveness of those policies. In this case, executive

privacy, entitling representatives to withhold relevant information, protects governmental capacity for action. The same holds with respect to law-enforcement policies, such as when covert operations allow police to infiltrate criminal ranks and gather evidence of crime, as well as for some economic decisions, such as currency devaluation, whose premature disclosure would cause turmoil and instability in the markets. In these areas, governments exercise executive privacy by classifying records compiled for law enforcement and information relating to economic policy (Westin, 1967, p. 43).

I have interpreted Murray's claim that states have a right to privacy along the lines of Westin's argument that presents state privacy as a species of group privacy. States, along with other groups, have a right to privacy by virtue of their capacity for autonomous action *viz.* their capacity to formulate and act on their organizational goals (unless they engage in immoral actions). This argument requires privacy protection for the integrity of political decision-making processes and the implementation of certain policies.

In the next section, I refute this argument. While I acknowledge that Westin's and Murray's concerns about the quality of decision-making and the implementation of certain policies may impose restraints on the openness of democratic governance, I reject articulating these restraints in terms of a state's right to privacy. My contention is that even if groups may have a right to privacy, this argument does not hold for state institutions with regard to citizens.

State privacy and democratic accountability

A model that has been widely used to illuminate the relationship between citizens and state institutions is the principal-agent relation, in which one party (principal) authorizes another (agent) to represent her interests and to act on her behalf and the latter provides an account of her actions with respect to those interests (Christiano, 1996; Pitkin, 1967). In this approach, citizens are viewed as the principals, and the government and legislature as the agents. The application of the model embodies the assumption that the democratic legitimacy of state institutions ultimately derives from those it governs and that their primary purpose is to serve the governed.

The idea that state institutions are the agents representing the citizens-principals is crucial when reflecting on the state right to privacy. Given that representatives are put in a position of responsibility in relation to the interests of the governed, they owe an account of how they look after citizens' interests. 'In political responsibility' Thomas Christiano writes, 'the citizen is the principal and the legislator is the agent. The citizens have

primacy; they are the ones to whom the legislators are responsible' (Christiano, 1996, p. 208). Political representation and, more generally, principal-agent relationships then involve accountability understood as a mechanism through which the principals-citizens can voice their policy concerns and have the agents-representatives respond to these concerns. Exactly which aspect of the performance of state institutions is subject to citizens' assessment differs as we move between the delegate model of representation and the trustee model of representation, yet the possibility of assessment and accountability is conceptually inherent in democratic representation.

Whereas neither Westin nor Murray addresses the issue of political accountability, presumably neither of them would like to deny its importance for democratic governance. My contention is, however, that by spelling out the state's claim to restrict access in terms of a state's right to privacy, they preclude the relationship of accountability between the state and citizens. In other words, the idea of a state's right to privacy is conceptually inconsistent with democratic accountability. Recall that privacy, as DeCew put it, is 'a property of types of information and activity viewed (...) as *beyond the legitimate concern of others*' (DeCew, 1997, p. 60. *Emphasis added*). This means that with regard to private information and activity, the privacy right-holder is not open to evaluation and criticism nor can she be held accountable to society. Privacy so understood correlates with a duty on the part of all others to refrain from seeking the information that the group withholds from them and from interfering with its decisions. From this perspective, to claim that the state has a right to privacy is to say that there are types of information relating to state institutions and state activities that are beyond the legitimate concern of citizens, for which the state is not accountable to citizens and concerning which citizens have a duty to refrain from inquiring.

This denial of accountability built into a right to privacy is in tension with the accountability built into the idea of political representation. In other words, even if it makes sense to speak of state institutions exercising organizational autonomy in taking decisions and formulating policies on behalf of the citizens, this does not suffice for an ascription to them of a right to privacy. State institutions cannot have a right to privacy against those to whom they are accountable.³ The point can be generalized to other principal-agent relationships. Imagine that I delegate the management of my financial assets to a stockbroker. To the extent that the stockbroker, in managing my money, is acting on her own reason (draws on her expertise to formulate a financial strategy and acts on it), she acts autonomously. But her capacity for autonomous action in managing my money does not suffice to grant her privacy with regard to these actions. It would be absurd to say that what she does with my financial assets is her private business. If her

financial investments ruin me, she cannot get away with this just by saying that what she did with my money was her private business for which no explanation is due.

I conclude that groups (just as stockbrokers and other individuals) cannot have a right to privacy against those to whom they are accountable and, thus, democratic states have no right to privacy against their citizens.

If democratic states have no right to privacy against their citizens, does that imply that they are not entitled to conceal information? Should classified intelligence programs or closed-door political bargaining be abolished?

Privacy and secrecy

Privacy is not the only way that might justify withdrawing information from public view. As Stanley Benn and Gerald Gaus put it, 'privateness is only one of a number of grounds that might defeat the presumption of publicness. (...). [I]nformation that is not public may not be private – it may be simply secret' (Benn & Gaus, 1983, p. 15). Along these lines, Sissela Bok abandons Westin's term 'organizational privacy' with regard to the material classified by states and speaks of 'administrative secrecy' instead (Bok, 1989, pp. 175, 184). If states have no right to privacy, can they be entitled to secrecy?

Let me first explain the difference between privacy and secrecy. Privacy and secrecy are often used interchangeably, but they are not equivalent. First, whereas secrecy involves concealment, privacy need not. As Bok puts it, 'Privacy need not hide. A private garden need not be a secret garden; a private life is rarely a secret life' (Bok, 1989, p. 11). In my discussion above, privacy is used to refer to concealed material. Yet even when privacy and secrecy involve concealment of (the same) material, they are not equivalent. One often assumes that the difference lies in their different normative status viz. the fact that 'there is a "right to privacy", but no equivalent "right to secrecy"' (Warren & Laslett, 1977, p. 43). The intuition driving this claim is that privacy is a normative restriction on access while secrecy is a de facto one:

The prescriptive function [of privacy] is tightly tied (...) to the normative use: 'Smith's letter is private (so don't read it)' (...) prescribes a consequent forbearance. (...) Describing the letter as 'secret' (...) points to a *de facto* restriction of access as well as to the desire of someone to keep it restricted. (Benn & Gaus, 1983, p. 12)

This denial of a right to secrecy seems too quick. A de facto restriction may be an expression of a liberty right on the part of the agent to hide things. Liberties mark out what a person has no duty not to do. Smith is at liberty to drive a car in the sense that he has no duty not to do so. Similarly, Smith may have a liberty to keep the letter secret as long as he has no duty not to do so. To the extent that an appeal to secrecy may involve a liberty right, the

difference between privacy and secrecy cannot turn on the former being a right and the latter not.

The idea that there is no right to secrecy equivalent to a right to privacy may reflect the idea that an appeal to secrecy, unlike an appeal to privacy, has no prescriptive component. In Smith's case, neither his intention to keep the letter secret nor his *de facto* hiding of it have the force to obligate us to refrain from reading it. Even when an appeal to secrecy is understood as a liberty, it lacks the prescriptive component we found in a right to privacy. As liberties do not entail that others would be wrong in engaging in actions that would prevent one from doing the things one wishes to do or that they are obligated to assist one in doing them (Flathman, 1977, pp. 39–40), Smith's liberty to hide the letter would coexist with my liberty to seek it. This suggests that secrecy, unlike privacy, is not a claim-right.

What, however, if I consent to Smith's keeping the letter concealed from me? Imagine that the letter concerns arrangements for my birthday party and that I, excited about the prospect of a surprise, have asked Smith to keep them secret. In that case, Smith has a right to keep the letter concealed from me and I have acquired a duty to refrain from reading it. It seems, then, that an appeal to secrecy may become a claim-right i.e. a right with a prescriptive component.

The fact that both privacy and secrecy can involve a claim-right to restrict access returns us to the initial question: How do they differ?

A right to privacy is a right that belongs to the agent by virtue of her intrinsic properties *viz.* capacity for autonomy. The agent has it, not on account of any special transaction or relationship in which she has been involved, but simply on account of what she is – an agent with a capacity for autonomous action. As with other natural or universal rights, a right to privacy exists prior to relations and constrains them.

By contrast, to the extent that secrecy is a right capable of imposing duties of non-interference on other people, it is not in virtue of any intrinsic property of the secret-holder, but in virtue of her relation to those from whom she withholds material, such as the fact that others consent to her concealing material or at least waive their liberty rights to seek and expose the material she conceals. In this sense, a secrecy right is like special rights arising out of contracts and promises, which are created by agents' voluntary actions and would not exist but for these actions.⁴

Below I argue that we can understand the practices of classification on the part of states as an exercise of a special right to secrecy. My contention is that secrecy is a special right that is implied in the democratic state's right to exercise political authority.

Secrecy and political authority

To many, secrecy and democratic authority seem antithetical. In a democracy, one argues, exercises of political power should be authorized by citizens, but how can citizens authorize what they are denied knowledge about? For example, as Christopher Kutz says, if I am denied knowledge of the state's actions, 'I cannot (...) understand myself either as in harmony or in dissonance with my polity' (Kutz, 2009, p. 214). As such, I cannot consent to or dissent from the state's actions nor can I articulate my will that is needed to authorize its rule. In other words, without knowing the content of state policies, citizens cannot authorize them and so secrecy 'strike[s] at the foundation of government's right to rule' (Kutz, 2009, p. 199).

Below I argue that the link between citizens' knowledge of state action and their authorization of state actions is less tight than Kutz presupposes. In consequence, secret uses of power can be democratically legitimate. In order to explain this argument, I must first reflect briefly on the nature of the authority relationship between the state and its citizens.⁵

Political authority is traditionally defined by its possession of a right to rule in a content-independent way *viz.* a right to create new, and to cancel existing, obligations of others without regard to the content of the actions they require or proscribe (Raz, 1979).

The idea that political authority has a content-independent character has a long tradition in modern political philosophy and, as Leslie Green remarks, cannot be abandoned 'without abandoning part of any satisfactory analysis of political authority' (Green, 1988, p. 239. But see critiques of content-independence by Markwick, 2003; Klosko, 2011). The idea goes back to Hobbes's *Leviathan*, where Hobbes defines authoritative commands as follows: 'Command is where a man saith doe this or doe not do this without expecting other reason than the Will of him who Saith it' (Hobbes, 2003, p. 176). On this view, when authority issues a command, it intends its will rather than the content of the command to function as a reason for action on the part of the hearer. This view of authoritative commands has received a powerful restatement in the work of Hart (1982, ch. 10) and Raz (1979, ch. 12). It was Hart who coined the term 'content-independence' to indicate that the binding force of authoritative commands is divorced from their content.

Hart contrasts content-independent reasons with standard cases in which there is a connection between the reason for action and the action to be done, such as when the action has moral merits, is independently desirable or has desirable consequences. Authoritative directives are different in that the content of the commanded act, its moral merits, or consequences are not what makes the act required. The binding force of an authoritative

command lies in the fact of its being issued: it 'is in the (...) fact that someone in authority has said so' as Raz puts it (1986, p. 35).

Where does the right to rule in a content-independent way come from? Earlier political writers understood political authority as natural (on the model of paternal authority), as divinely instituted, or as sanctioned by custom. For modern and contemporary writers, political institutions have no natural claims on people's allegiance or compliance. If the state has authority over its citizens, it is in virtue of the reasons that individuals have to be subject to it. From this perspective, the right to rule in a content-independent way is a special right. The state has it only because citizens have moral reasons to obey it, that is, in virtue of its relation to them.

Democratic authority is a species of the genus authority and most influential theories of democratic authority endorse the idea that democratic states exercise power in a content-independent way.⁶ Content-independence seems particularly well suited to explain the role of political authority in modern democracies. As many scholars emphasize, under the conditions of disagreement characterizing modern societies, the authority exercised by the state relates to its role in arbitrating disputes and solving coordination problems. In such situations, it is more important *that* a decision is taken rather than *what* decision is taken from the range of options available. To put this point in the game-theoretic terms, the government's role in solving coordination and bargaining problems consists of, among other things, marking certain courses of action as salient. Salient points derive their action-guiding force not from *what* they prescribe but from the fact *that* they prescribe it. The content of the prescription, i.e. the quality of the action prescribed is irrelevant to the job it is supposed to do. As David Lewis puts it, a salient point 'does not have to be uniquely *good*; indeed, it could be uniquely *bad*. It merely has to be unique in some way the subjects will notice, expect each other to notice, and so on' (Lewis, 1969, p. 35. Emphasis changed). This argument is implicit in Thomas Christiano's account of the authority of the democratic state. As Christiano argues, in the face of widespread disagreement about justice, it is imperative that we surrender our individual rights to act in accordance with our own understanding of justice and supplant the numerous private conceptions of justice by one single conception that binds all. Given that justice is only possible if we all live by the same set of rules and that a democratic assembly establishes such rules in a salient way, all ought to accept the instructions of the democratic assembly to be the sole source of law (Christiano, 2008). If the directives of the government serve as a salient guide for action, then it is not their content, but the fact that they have been issued that makes them the focus of obligations to obey. Addressing the content-independent character of democratic decisions, Daniel Viehoff argues:

The outcome of the egalitarian procedure must (...) be a content-independent reason: It is the fact that the directive picks out scheme A rather than scheme B, not the merit scheme A has as such, that gives each a reason to act in accordance with A. (For if it were the merit of the scheme that guided their actions, the parties' disagreement would once again upset their attempts at coordination). (Viehoff, 2014, pp. 42, 370)

Content-independence also rings a familiar bell when we recall that many scholars argue that democratic decisions and policies derive their binding force from the fact that they are reached through democratic decision-making procedures. It is the fact *that* they are the outcomes of democratic procedures, not their *content*, which makes them authoritative. Decision and policy with any content can be authoritative as long as it is an outcome of the procedure, i.e. has the right pedigree. Christiano puts it this way:

Democratic directives give content independent reasons. (...) Citizens have duties to obey democratic decisions not because of the content of the decision or the consequences of their obedience but because of the source of the decision in the democratic assembly. (Christiano, 2008, pp. 261, 252, 244)

A qualification is in order. It might seem that a right to rule in a content-independent way grants to the state an absolute discretionary power to create normative requirements in regard to any content it chooses. This is not the case. Recall that if the state has authority over its citizens, it is in virtue of the reasons that individuals have to be subject to it. Such reasons articulate then the side constraints on the legislative and executive decision-making process. The constraints can be substantive: for example, Christiano and Viehoff would argue that democratic states have authority to the extent that their content-independent instructions enable individuals to coordinate on a single set of rules guiding their behavior and, in this way, they realize justice and equality between individuals. Laws and policies that violate these values lose their authority. Laws and policies that are reached through procedures that violate these values, for example, that deny equal voting power to a minority are not binding either (Christiano, 2008, ch 7; Viehoff, 2014). The constraints with regard to decision-making may also be procedural as when citizens specify policy areas and the conditions under which information regarding decision-making processes and details of policies may be classified. Thus, content-independent commands are not absolute but valid only within the boundaries that determine their propriety as substantively and procedurally legitimate.

I have described political authority exercised by a democratic state as a right to rule in a content-independent way. In the next section, I argue that a right to rule in a content-independent way entails a right to secrecy.

Content-independent authority and a right to secrecy

Content-independence refers to the fact that the authorization of state directives and policies is to be sought outside the citizens' evaluation of their content, provided that the directives and policies remain within the substantive and procedural scope limitations. In other words, in order to authorize a state's directives and policies, citizens need only authorize the procedural and substantive rules under which they are made, but need not attend to the details of policies that are created under these rules.

Now if citizens authorize policies without attending to their specific content, then the content of these policies is irrelevant for the purposes of their authorization. If the content of policies is irrelevant for the purpose of their authorization, so is citizens' knowledge of their content. If authorization does not hinge on content, then knowledge of the content of a state's policies neither adds nor detracts from their authoritative character. In effect, policies the content of which is unknown to citizens may be authorized by them.

One way to put this point is to say that what citizens authorize is the state's power to take decisions and make policy rather than the content of those decisions and policies. Recall that democratic decisions and policies derive their binding force from the fact that they are reached by a decision-making body by means of democratic procedures. It is the fact that they are the outcomes of democratic procedures, not their content, which makes them authoritative: decision and policy with any content (within the substantive and procedural limits) can be authoritative as long as it is an outcome of the procedure. If the authority of policies does not hinge on their content but on their pedigree, then to authorize them, citizens must know the pedigree of directives but need not know their content.

I said that the authority of governmental policies is not a matter of their content. This implies, I argued, that citizens need not know the details of the policies in order to take them as authoritative. Now if citizens can authorize policies the content of which they do not know, then they can authorize policies the content of which they do not know because the state restricts access to it. The restriction of access to the content of policies does not undermine their authoritative character because state policies do not derive their authority from their content. From this perspective, policies the content of which is concealed by the government can be authorized. In other words, secret policies can be seen as a special case of policies that citizens authorize in a content-independent way.

To sum up, in the light of the content-independent character of democratic authority, the link between citizens' knowledge of state action and their authorization of state actions is less tight than commonly presupposed. It is not the case that secrecy, as Kutz claims, strikes at the foundation of a

democratic government's right to rule. Citizens can authorize policies knowing nothing about them except for their pedigree. To think otherwise is to fail to take proper account of the content-independent nature of political authority. If we have no problem with authorizing the content-independent power of democratic states, then we should have no problems with authorizing the policies and decisions that democratic states classify.

Intermezzo: Thompson on democratic secrecy

Having set out my defense of secrecy in democratic governance, it is interesting to compare it with Dennis Thompson's influential argument to this effect (Gutmann & Thompson, 1996, ch. 3; Thompson, 1999). Thompson argues that secret policies generate a knowledge deficit that gives rise to two problems. First, it deprives secret policies of *democratic authority*: in a democracy, political decisions are legitimate only if they are authorized by citizens, but people cannot authorize what they are denied knowledge about. Second, it deprives them of *democratic authority*: the exercise of democratic authority requires that citizens be able to hold officials accountable, but people cannot hold state officials to account if they do not know what officials are doing and why (Thompson, 1999, p. 182). Thompson argues that secret policies can be nonetheless justified if the knowledge deficit pertaining to them can be overcome. This is the case, at least partly, if the fact of secrecy is itself public. The publicity about secrecy means that officials admit *that* they resort to secrecy even though they do not disclose the specific contents of secret policies; that they indicate, in terms of general policies, the *reasons* for resorting to secrecy; and that the *processes* by which secret policies are adopted and pursued are known. According to Thompson, such 'second-order publicity about first-order secrecy' (Thompson, 1999, p. 185), by enabling people to learn that the state classifies information in certain policy areas, pursuant to what processes and for what reasons, enables them to authorize secret policies. For example, knowing the anti-terrorism policy adopted by the government and the legal regulations concerning classification of intelligence information related to it makes the act of classification and, hence, the classified anti-terrorism intelligence program, a possible object of consent or dissent. It also circumvents the accountability problem. Even though the details of secret policies remain concealed, knowing that certain political decisions and programs are secret and being able to review the reasons provided by the officials for secrecy, citizens can call state officials to account.

From the perspective of my argument, the knowledge deficit concerning secret policies does not affect their authority and, hence, Thompson's postulate of 'second-order publicity' is not needed to fix it. According to Thompson, publicity about secrecy enhances the authority of secret policies

because it compensates for the knowledge deficit that their secret character generates for citizens. I have argued above that the authority of (secret) policies is divorced from citizens' knowledge of and judgment about them. From this perspective, publicity about secrecy is redundant as a way of compensating for the knowledge deficit because the knowledge deficit is not a problem that needs compensating.

Thompson is right that accountability for secret policies is a powerful objection to any defense of state secrecy. If intractable, this problem will also call into question the defense of state secrecy I have developed above. Thompson's 'second-order publicity' postulate goes some way toward resolving the problem but not the whole way. I return to it in the last section.

In the remainder of this essay, I address two objections to my defense of state secrecy. The accountability objection indicated by Thompson calls into question the *democratic* authority of secret policies which my argument tries to establish. Before addressing this objection, let me respond to yet another objection to my argument, according to which my defense of state secrecy fails to demonstrate that secret uses of power can have *democratic authority*.

The efficacy objection

According to the objection, secret exercises of power cannot be authoritative because they fail in their action-guiding function. One of the conditions of the authoritative character of state policies and decisions, Raz argues, is their capacity to be presented as action-guiding directives, i.e. to be presented as 'someone's (person's or institution's) view as to how citizens should act' (Raz, 1995, p. 202). Now to present a view as to how citizens should act, one must first communicate it to them and, thus, the capacity to be communicated is a condition of exercising authority. In Raz's words, 'what cannot communicate with people cannot have authority over them' (Raz, 1995, p. 201). Thus, directives and policies that are meant to regulate citizens' actions but, due to their secret character, cannot be communicated to them cannot have authority over them. Kutz gives this objection a functional twist. Given that the point of the practical authority exercised by the state is to coordinate social life by issuing directives that guide people's actions, he argues, then it is hard to see how coordination can be achieved if the action-guiding directives are secret (Kutz, 2009, pp. 199–201). Let me call this the efficacy objection.

In response to this objection, note that the state's right to rule in a content-independent way includes a right to pursue policies and take decisions that are not action-guiding at all or not action-guiding for certain groups in society. We can say that such policies and decisions

are legitimate even if they provide no authoritative directives for action for some sections of society. Think of political negotiations conducted behind closed doors. Negotiations are ways of arriving at action-guiding directives and policies, but they are not action-guiding themselves. As they are not action-guiding, it is not the case that secrecy endangers their action-guiding power. As there is no action-guiding power that secrecy endangers here, the efficacy objection does not prohibit the secrecy of closed-door political negotiations. Similarly, the efficacy problem does not arise in situations in which policies coordinate the choices of only a subsection of all citizens, say only the members of intelligence services, the military, or the police. Foreign intelligence gathering programs are an example in point. They are meant to be action-guiding for intelligence agents, but not for citizens. When state directives guide the actions of intelligence agents but not of citizens, the efficacy objection requires transparency with regard to the addressees of the directives *viz.* the intelligence agents. With respect to their non-addressees *viz.* citizens at large, however, the secrecy of the directives does not undermine their action-guiding power because foreign intelligence programs have no action-guiding power for citizens in the first place. With regard to citizens, then, the efficacy objection does not prohibit the secrecy of foreign intelligence programs. I conclude that the efficacy objection leaves an important class of secret uses of power intact.

A similar discussion has been conducted in jurisprudence regarding the validity of laws. For both natural law scholars and positivists, publicity is one of the principles of legality in the sense that it is a condition of the law's action-guiding function (Fuller, 1969; Hart, 1997). At the same time, however, it is acknowledged that not all laws are intended to guide the general public, the implication being that those whose actions the laws are not meant to guide need not know them. According to Lon Fuller, 'the great bulk of modern laws relate to specific forms of activity, such as carrying on particular professions or businesses; it is therefore quite immaterial that they are not known to the average citizen' (Fuller, 1969, p. 51). Hart points out that a law's action-guiding force may be confined to officials, in which case there is no need to make it known to ordinary citizens. In an extreme case, it is only officials whose conduct the law is intended to guide (Hart, 1997, p. 117, cf; Grant, 2012, p. 301). This seems to create a conceptual space for secret laws: as Raz argues, insofar as secret laws are meant to guide someone's actions, the fact of concealment does not deprive them of validity:

I do not mean to suggest that all laws are open. Secret laws are possible provided that they are not altogether secret. Someone must know their content some of the time. They are publicly ascertainable and they guide the behavior of the officials to whom they are addressed or who are charged with their enforcement by being so. (Raz, 1979, p. 51n 9).

The accountability objection

A notorious objection to the secret uses of power in democratic governance draws on the tension between secrecy and democratic accountability. 'At a minimum', Dennis Thompson writes, 'democracy requires that citizens be able to hold officials accountable, and to do that citizens must know what officials are doing and why' (Thompson, 1999, p. 182). The objection states that secret directives and policies inhibit accountability. As Kutz puts it, 'secrecy undermines democratic accountability, raising the possibility that we do not know what our government does in our name, and so cannot demand a change' (Kutz, 2009, p. 200).

This objection can be read in two ways. First, one can understand it as stating that secrecy conceptually precludes accountability, in the same way in which privacy does. If correct, this objection would defeat my claim that states have a right to secrecy for the same reasons that it defeated Murray's claim that states have a right to privacy. Below I argue that secrecy and accountability are not conceptually antithetical in the way that privacy and accountability are.

Secrecy is a right invested in the state in virtue of the reasons people have to be subject to its content-independent authority. The principal-agent relation that generates the authority also constrains it. Content-independent authority is a power that citizens can grant but also withdraw. Secrecy is a right of the agent which is invested in the agent by the principal and therefore subject to her control. In their role as principals, citizens are entitled to call office-holders to account for secret uses of power as for any other use of the content-independent power office-holders hold. Secrecy, then, does not place secret-holders beyond accountability for that which they keep concealed. Privacy, on the other hand, rather than being created in virtue of a relation and constrained by it, is a right of the agent which exists in virtue of the properties of the agent. As such, a right to privacy exists prior to and constrains any relations in which the agent may come to stand to others. In effect, no one other than the agent can claim the right to control its exercise.

The second reading of the accountability objection is the following. Even if secrecy and accountability are not conceptually antithetical, secrecy makes accountability technically impossible: How can citizens determine whether secret policies are legitimate *viz.* satisfy the procedural and substantial scope limitations if the content of these policies is concealed from them? In particular, secrecy obstructs standard mechanisms by which citizens can hold state officials to account, such as elections or public opinion, which are premised on citizens having access to information (Sagar, 2007, p. 405).

The objection presupposes that it is only when citizens know the content of state policies that they can hold state officials to account for them. In

response, I argue that a lack of public disclosure need not be equivalent to a lack of accountability. Transparency is only one possible way of ensuring accountability; there are others that do not require full transparency.

If disclosure of the content of classified material is not possible, Thompson's postulate of 'second-order publicity about first-order secrecy' may offer a solution. As it has it, citizens could demand that state-officials disclose their 'second-order' policy choices. The type of activities the state classifies, the reasons for classifying them, pursuant to what processes. Calling officials to account for 'second-order' policy choices, however, has downsides. Without having the content of particular classified programs disclosed, citizens can judge such programs only at a level of general policies. As Thompson admits, a judgment formed at a level of general policy often fails to engage with the controversial elements of its particular application (Thompson, 1987, p. 24).

Two ways of amending these problems are of special interest. First, citizens can require that the classified information be publicly disclosed when it has lost its sensitive character. Most states have institutionalized retrospective disclosure by either setting a time limit to the classification period or conducting periodic review procedures of classified documents. However, whereas retrospective disclosure of previously classified documents makes it possible for citizens to investigate the secret policy, detect possible wrongdoing, and call its authors to account, it offers little opportunity to take remedial measures. In order to ensure timely response to secret uses of power, classified information can be disclosed only to discrete groups of people, for example, specialized parliamentary or judicial committees. As a solution to the secrecy-accountability dilemma, this mechanism of accountability has received much attention from public administration scholars and legal scholars (Colaresi, 2014; Kitrosser, 2008; Pozen, 2010). Yet pointing to oversight committees as an alternative to the pursuit of transparency is not to deny that they face important challenges. For one, oversight committees usually depend on the willingness of the secret-holders to provide the classified information.⁷ For another, given that the committees must do their work *in camera*, the problem emerges of 'who guards the guardians?' (Sagar, 2007, pp. 413-414).

Whereas a full response to these challenges deserves a separate study, some insights can be gained from the studies of oversight of intelligence services (Born & Caparini, 2007). They point to adjustments in institutional design of oversight committees that may contribute to overcoming the problems indicated above.

In order to maintain objectivity of oversight and avoid overseers becoming too closely identified with the executive, it is considered desirable to strive for an adversarial composition of the membership of the oversight committee *viz.* including members of opposition parties so that they, as well

as the parties in power, may challenge governments. Kim Scheppele draws on the example of the German system of oversight, which is chaired by the majority and minority parties on a rotating basis and operates under the premise ‘that the opposition parties must be able to check that majority parties are not using the intelligence services for their own political purposes’ (Scheppele, 2006, p. 619). True, as Rahul Sagar observes, even adversarial composition can pursue its own partisan agenda. In such cases, however, one could delegate the task to a panel of independent experts who act on reasons rather than interests (Sagar, 2013, p. 99).

Another way to discipline the overseers is to introduce multiple stages of oversight. The possibility that the proceedings of the committee become in this way more widely available creates some incentive to act responsibly (Kitrosser, 2008, p. 1072).

With regard to the problem of the dependency of oversight committees on the political will of those who they are to oversee, the issue is to overcome the secret-holders’ reluctance to comply with reporting requirements. The measures proposed to deal with this problem focus on the stature of the committee and the way it interacts with the secret keepers.

Kitrosser and Caparini argue that the resistance of the executive to provide information to the oversight bodies relates to the fear that it will be leaked:

Whether reasonable or not, fears may arise that the more persons notified – even within the relatively secure realm of the intelligence committees – the greater the likelihood of leakage. More cynically, such fears may provide an easy and politically palatable excuse for avoiding (...) disclosures. (Kitrosser, 2008; p. 1076. Cf. Caparini, 2007; p. 13. For the opposing view, Sagar, 2013; p. 88)

To reduce this fear, a change in the structure and size of oversight bodies would be required. Thus, Kitrosser recommends adjustment of the oversight committees’ structure and size (Kitrosser, 2008, p. 1071). Further measures meant to induce the executive’s compliance with reporting requirements include installing repetitive interactions between the executive and the overseers and increasing the committees’ general powers, stature, competence, and influence (even the authority to wield a power to subpoena of their own): ‘[H]eightening committees’ prestige, visibility and abilities, such changes could increase the political incentives for committees to demand information and for the executive branch to comply with such demands’ (Kitrosser, 2008, p. 1088).

To the extent that these institutional arrangements may solve the credibility problems of oversight committees, secrecy should not be an obstacle to political accountability.

Shallow and deep secrets

I have argued that democratic states have a right to resort to secrecy in virtue of the political authority they exercise. My argument does not defend state secrecy across the board. I have indicated that there are substantial and procedural side-constraints on the secret exercises of power by democratic states. In this section, I would like to qualify my argument further by reflecting on the different kinds of state secrecy.

Sociologists, political scientists, and legal scholars have distinguished between shallow and deep secrets and applied this distinction to secrets of state (Gutmann & Thompson, 1996; Pozen, 2010). Shallow secrets are those of which citizens know the existence even though they are ignorant of their content. For example, citizens know that intelligence services gather information on terrorist suspects, but they do not know the content of the information gathering programs. Deep secrets are secrets the existence of which citizens are not aware. For example, they have no clue that the intelligence services gather suspect-related information of any kind. As Amy Gutmann and Dennis Thompson put it, a deep secret is 'a secret the very existence of which is hidden from citizens. In contrast, a secret is shallow when citizens know that a piece of information is secret but do not know what the information is' (Gutmann & Thompson, 1996, p. 121). Below I argue that democratic authority may extend to shallow secrets, but it does not extend to deep secrets.

Earlier in the essay, following Raz, I argued that insofar as state policies are meant to be action-guiding for citizens, their democratic *authority* requires that they have a capacity to be communicated to them. I denied that this argument refutes the authority of secret policies insofar as the content of such policies is not meant to be action-guiding for citizens (as opposed to, for example, intelligence agents). Note, however, that insofar as secret policies restrict citizens' access to the details of classified information, the restriction itself is meant to be action-guiding. From this perspective, one may meaningfully ask about the authoritative status of the restriction of access secret policies involve. Shallow and deep secrets register differently on this count.

With regard to shallow secrets, the state keeps certain information secret from citizens, but communicates the fact of secrecy by flagging it as 'classified'. In communicating the restriction on access, the state communicates that (1) the content of the policy is not meant to be action-guiding for them and it communicates (2) its will with regard to how citizens should act in relation to classified information *viz.* that they refrain from seeking and disclosing it. Correspondingly, citizens are able to identify the restriction as an action-guiding directive. From this perspective, then, the restriction on access involved in shallow secrets is action-guiding and authoritative. The

case of deep secrecy is different. Unlike the case of shallow secrets, the restriction on access to such programs is itself secret and cannot be communicated to those whose access it is meant to restrict. As this restriction is itself kept secret and, thus, incapable of being communicated to those whose access it is meant to restrict, it is incapable of being action-guiding for them, and thus, it is deprived of authority.

Policies kept in deep secrecy also lack the *democratic* dimension of political authority. Recall that the exercise of *democratic* authority requires that citizens be able to hold officials to account. This condition cannot be satisfied with regard to deep secrets. When deep secrets are at issue, citizens are kept in the dark about their very existence. If a classified program cannot even be thought of as a possible subject of accountability, accountability is precluded. The case of shallow secrets is different. Here, even though citizens do not know the contents of the classified program, they know that a classified program is in force and, thus, the demand for accountability can be raised. As long as it can be raised and the mechanisms of accountability discussed in the previous section are in place, the *democratic* authority of state secrecy is not precluded.

Above I have limited my defense of the state's right to secrecy to shallow secrecy. Circumscribing my argument in this way may raise the following concern. It could be argued that deep secrecy may at times be a matter of necessity in democratic states. A position of this kind has been defended by Gabriel Schoenfeld: 'when one turns to the most fundamental business of democratic governance, namely, self-preservation (...), the imperative of secrecy becomes critical, often the matter of survival' (Schoenfeld, 2010, p. 21). An example in point could be the so-called 'Manhattan Project' – the research program that produced the first nuclear weapons – undertaken during WW2 in the US. This project was a deep secret: not only was the American public held in the dark about this nuclear undertaking but even those who worked on the project were often unaware of the nature of the product they were constructing (Schoenfeld, 2010, ch. 7). Given that its importance at the time was seen to lie in the self-preservation of a democratic polity, Schoenfeld could ask, can we really say its deep secrecy was not democratic?⁸

In response to this concern, recall that political decisions and programs kept in deep secrecy fail as exercises of democratic authority on the two counts explained above: their action-guiding power and their accountability. As they violate the principles of democratic authority, so are they deprived of democratic authority. Contra Schoenfeld, the undemocratic character of deep secrecy is not undone (*viz.* there is no gain in terms of accountability of action-guiding power) when it serves the aims of a democratic state. Similarly, the fact that immoral means (e.g. breaking into your car) may serve a moral end (e.g. bring an accident victim to a hospital) does not undo

their immoral character. For moral theorists, the fact that wrong means may be employed to bring about a good result does not make the wrong means good. At most, we could speak here of justified wrongdoing (for a defense of this view, see Nussbaum, 2001, ch. 2; Gardner, 2007; Thorburn, 2008). Thus, even if Schoenfeld is right that deep secrets like the 'Manhattan Project' may serve democratic aims, deep secrecy remains an undemocratic measure even if its employment may nonetheless be justified.

Conclusion

In classifying material, states claim a right to restrict access and a correlated obligation on the part of citizens to keep off the classified material. Denying citizens access to government information is commonly seen as undemocratic even though, at times, it may be considered justified. Justifications usually appeal to the necessity of secrecy and to consequentialist considerations such as a gain to overall welfare. Non-consequentialist justifications that reach beyond appeals to necessity and attempt to defend secrecy in terms of democratic principles are rare. In this essay, I have set out to contribute to this underdeveloped strand in the debate. First, I have considered a recent non-instrumental, non-consequentialist defense of the state's claim to restrict access that appeals to liberal-democratic rights *viz.* Murray's suggestion to understand the state's claim to restrict access as a right to privacy on the part of states. I rejected this argument on account of its tension with democratic accountability.

In the second part of the essay, I proposed a different democratic defense of secrecy in governance. I argued that the state's resort to secrecy is inherent in the content-independent authority that democratic states exercise. My argument is limited to what has been labeled 'shallow secrets' only. I conclude that whereas states have no right to privacy, they may be entitled to secrecy.

Notes

1. Drawing on Westin's argument, Bloustein (1977) argues that whilst a right to group privacy does not enjoy legal protection, American jurisprudence recognizes it implicitly, for example, business organizations enjoy legal protection of privacy under the rubric of intellectual property and trade secrets, and group privacy attaches to professional associations such as when the law protects the privacy of communication between physician and patient or between lawyer and client.
2. See in particular Pettit & Schweikard's (2006) discussion on 'discursive dilemmas'.
3. Note the implications of my argument: states cannot have privacy against citizens to whom they are accountable, but possibly they may have privacy

against other states given that they are not accountable to them. Positing the rights to state privacy in inter-state relations is, however, subject to other challenges. Relations between states are importantly different from relations between a democratic state and its citizens. Not only do they lack democratic character, some would argue that they resemble a state of nature (e.g., Rolf, 2014). From this perspective, positing privacy rights or, for that matter, any rights as governing inter-state relations is questionable. In order to do justice to the complex topic of state privacy in the context of inter-state relations would take me into a domain of international relations far beyond the scope of the present paper.

4. The discussion of the state's right to restrict access is sometimes conducted in terms of confidentiality, for example, in the debates on executive privilege (Henkin, 1975; Rozell, 2003). Can a claim to confidentiality be spelled out in terms of a claim to privacy? As Bok points out, confidentiality is a form of secrecy: 'confidentiality refers to the boundaries surrounding shared secrets and to the process of guarding these boundaries' (Bok, 1983, p. 25). It relates to 'professional secrecy' where the information is shared within a professional practice (e.g. legal or health care) but withheld from outsiders. Given that confidentiality is a form of secrecy, it is a mistake to see it as equivalent to privacy for the same reasons that it is a mistake to take secrecy as equivalent to privacy. First, whereas confidentiality involves concealment, privacy does not necessarily do so. For example, the choice of clothes I wear is private, but it is not confidential. Second, what is confidential hides more than what is private: confidential information typically concerns issues affecting third parties whereas information that is private concerns actions regarding the individual or group claiming privacy. Confidentiality, Bok says, 'is sometimes mistakenly confused with privacy; yet it can concern many matters in no way private' (Bok, 1983, p. 25). For example, confidential communications between government officials and government advisors rarely concern what is private.
5. My discussion draws on my work in Mokrosinska (2018).
6. Some of these accounts explicitly endorse the content-independent nature of democratic authority. One example is Christiano (2008), who anchors the authority of democracy in the intrinsic value of its institutional structure (equality). Another is Lefkowitz, who defends the hypothetical consent approach (2005). For others, the content-independent concept of authority is implied by the logic of the argument. An appeal to popular consent as grounds for democratic authority provides a straightforward explanation of why the instructions of the state bind citizens irrespective of their content. Consenting to X creates a right to do X irrespective of the further characteristics of X. In virtue of people's consent to the state's rule, then, the state has the right to act and impose duties whatever their content. An argument that derives the authority of democracy from the fact that democratic decision-making procedures more reliably produce decisions that are substantively better than those produced by non-democratic procedures (Arneson, 2003) has the logic of rule consequentialism and it establishes content-independent authority similarly to the way rule consequentialism does so (cf. Mokrosinska, 2012, 187 n.22).
7. For a discussion of problems encountered by the Dutch parliamentary oversight committee to acquire information from the Dutch intelligence services, see Hijzen (2014).
8. I thank the reviewer for drawing my attention to this example.

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