

# Secrecy as Mystification of Power: Meaning and Ethics in the Security State

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## ABSTRACT

*Secrecy as Mystification of Power: Meaning and Ethics in the Security State argues that post-9/11 federal secrecy is incompatible with two fundamental principles of the liberal state. It is incompatible with individual autonomy, understood following Simone de Beauvoir as the power to ascribe meaning to one's self and one's world, because it conceals the effects of a citizen's choices on her life. It is also incompatible with political liberty, understood following Jurgen Habermas as the opportunity to engage in the public use of reason about shared norms, because it institutionalizes the de facto unreviewable security choices of powerful elites. It is concluded that these practices are prima facie morally objectionable.*

## I. INTRODUCTION: MOVING PAST UTILITARIANISM

I'm being accused of a serious--even treasonous--criminal intent by a faceless bureaucracy, with no opportunity (that I can find) to refute any errors or false charges.... With no real information to go on, I'm left to guess why this is happening to me.... My name is on a list of real and suspected enemies of the state and I can't find out what I'm accused of or why....

- TSA "Listee" John Graham<sup>1</sup>

The quote that leads this article does not come from the Soviet Union in the dark days of gulag, nor from Kafka, Orwell, Dickens, or

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\* J.D., 2000, Harvard Law School. Credit for anything that is right should go in substantial part to the long-suffering souls who read early drafts of this piece, including K.A.D. Camara, Kathleen Holtz, Jennifer Martin-Romme, and an anonymous reviewer. Major credit is also due to Shannon Rogers and staff at I/S, who tolerated and even corrected my egregious errors of both English and Bluebook (two languages which have only my blunders in common). As for blame for anything that is wrong, well, "we never find anything but ourselves in our work." JEAN-PAUL SARTRE, LITERATURE AND EXISTENTIALISM 40 (Bernard Fretchman, trans., Citadel Press 1965)(1949).

<sup>1</sup> John Graham, *Who's Watching the Watch List?*, ALTERNET, July 7, 2005, <http://www.alternet.org/story/23362> (last visited July 16, 2005) (recounting experiences on the TSA no-fly list).

Huxley. It comes from the United States, today. It is time to consider the ethical position of a state that motivates these words. In what follows, I critique the generally expedient and utilitarian theme of the brunt of the discourse on secrecy. I then examine state secrecy as a question of applied deontological ethics.

The academic (particularly legal academic) and public discourse on government secrecy is overwhelmingly produced in the mode of utilitarian expediency. The underlying assumption seems to be that secrecy is merely a question of strategy, or instrumental reason, and that we are free to conceal the behavior of the State from its citizens if the costs of such action outweigh the benefits. Thus, the typical discussion of secrecy – even from opponents of secrecy – limits itself to analyzing the effect of secrecy on one or more of a fairly well-trod set of “goods,” ordinarily: state security, physical safety, efficient markets, scientific research, judicial accuracy, public trust in government, or official accountability.<sup>2</sup> Even those that choose to term their approaches “ethical”<sup>3</sup> provide a loophole not only for

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<sup>2</sup> See, e.g. Joseph A. Siegel, *Terrorism and Environmental Law: Chemical Facility Site Security vs. Right-to-Know?*, 9 WIDENER L. SYMP. J. 339 (2003) (arguing that keeping environmental risks secret to reduce terrorist risk might also increase public safety risk); Pablo da Silveira, *Representation, Secrecy, and Accountability*, 12 J. INFO. ETHICS 8 (2003) (primarily arguing that secrecy may be compatible with accountability goals of political representation); Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91 (2003) (defending “public domain” information as useful to public political participation and civic education); Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95 (2004) (criticizing secrecy as permitting government misconduct to go unchecked); Kathryn E. Durham-Hammer, *Left to Wonder: Reevaluating, Reforming, and Implementing the Emergency Planning and Community Right-to-Know Act of 1986*, 29 COLUM. J. ENVTL. L. 323 (2004) (supporting increased public information about environmental risks to facilitate public safety). See also *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (establishing balancing test between functional utility of public access and interest in closing proceedings); Note, *Plugging the Leak: The Case for a Legislative Resolution of the Conflict between the Demands of Secrecy and the Need for an Open Government*, 71 VA. L. REV. 801, 822 (1985) (“[T]he risk of a truly damaging disclosure outweighs the justifications for not eliminating the current gaps in the law [which promote openness]”); Kristen Elizabeth Uhl, Comment, *The Freedom of Information Act Post-9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM. U. L. REV. 261 (2003) (opposing post-9/11 FOIA exemptions as unnecessary and detrimental to public safety); Mary-Rose Papandrea, *Under Attack: The Public's Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35 (2005) (criticizing secrecy as failing to meet the need for official accountability and public trust).

<sup>3</sup> An ethical discussion of secrecy in general is contained in SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* (1983), but Bok does not extensively analyze government secrecy as such, its connection with specific acts upon citizens, or its effect on the perceptual/experiential worlds of the objects of secrecy.

grudgingly using secrecy, but even for endorsing it: if the act is “really necessary,” we hold open the possibility of calling the act “justifiable.”<sup>4</sup> At times, even those opposing other forms of governmental overreaching in a consequentialist mood find themselves opening the door to extreme versions of secrecy.<sup>5</sup>

Yet utilitarian conceptions of secrecy miss something important—our distinguishing human value, the root of the “good” that they seek to maximize: meaning. Even if the “good” at issue is “preference satisfaction,” the question remains: where is the self transcendent value? Phrased differently, what reason have we to believe that the products of human consciousness are worth something, in some non-solipsistic calculus, to make our preferences worth satisfying?<sup>6</sup> This is

<sup>4</sup> See, e.g. Martha Minow, *What is the Greatest Evil?* 118 HARV. L. REV. 2134, 2144-45 (2005) (reviewing MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (2004)) (applying reviewed author’s necessity test to condemn “sneak and peek” warrants). This criticism may be unfair: it is unclear whether Minow holds that a “lesser evil” is still an evil, or is instead “justifiable,” or, indeed, whether she endorses Ignatieff’s tests that she applies. A “justifiable evil” is an oxymoron, and not the same as a “necessary evil.” If by “justifiable,” Minow (and perhaps Ignatieff?) simply mean “tolerable but still wrong,” then I can endorse her approach. See discussion *infra* note 22, 56.

<sup>5</sup> See, e.g. Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L. J. 1801, 1829 (2004). In a critique of Bruce Ackerman’s proposal for time-limited internment of suspected terrorists without probable cause, they go overboard and suggest that Ackerman would actually *reduce* the nation’s security because he would disclose to terrorists (and the public) the length of time for which semi-suspicious persons could legally be held under subconstitutional rules. Presumably (one hopes), Tribe and Gudridge do not intend to suggest that the converse should be true: that the government should be permitted to withdraw the writ of habeas corpus for *undisclosed* amounts of time. Yet, their objection to Ackerman’s proposal invites that suggestion.

<sup>6</sup> Korsgaard elaborates Kant’s version of this point (which relies on good will and rationality rather than meaning) in CHRISTINE M. KORSGAARD, *CREATING THE KINGDOM OF ENDS* 345 (1996). I do not offer a formal critique of utilitarianism, but instead invite a broader perspective. An ethics of meaning is an ethics that seeks to ensure that we have what we need in order to be free to meaningfully choose utilitarianism or any other ethical theory. To the extent a refutation of utilitarianism is needed, Madame de Beauvoir’s point will suffice: “Oppression tries to defend itself by its utility. But we have seen that it is one of the lies of the serious mind to attempt to give the word ‘useful’ an absolute meaning; nothing is useful if it is not useful to man: nothing is useful to man if the latter is not in a position to define his own ends and values, if he is not free.” SIMONE DE BEAUVOIR, *THE ETHICS OF AMBIGUITY* 95 (Bernard Frechtman trans., Citadel Press 1976) (1948) [hereinafter EA], explicated further *id.* at 109-15 (see also *id.* at 45-53), as well JOHN RAWLS, *A THEORY OF JUSTICE* 548-60 (Belknap Press of Harvard Univ. Press 1971). More broadly, see generally UTILITARIANISM AND BEYOND (Amartya Sen & Bernard Williams, eds., 1972). It should be clear that I am not using the term “utilitarianism” here in its strictest formal sense, but am using it to refer to those arguments that set up the various social goods (economic efficiency, political accountability, etc.) that are commonly paired with secrecy. Those arguments tend to reduce to utilitarianism, in the sense that there is no deontological argument offered for e.g. economic efficiency, state

a question that utilitarians are traditionally not very good at answering, but one that, I suggest, gives us a path into a non-utilitarian ethics that may be suited to an examination of state secrecy.

The non-utilitarian approach actually has a utilitarian justification. As a practical matter, utilitarian arguments in favor of secrecy are likely to be given irrationally disproportionate weight in the political marketplace versus utilitarian arguments against secrecy, regardless of their relative merit.<sup>7</sup> Current psychological research suggests that the public is likely to react irrationally to the unusual salience of the September 11, 2001 attacks.<sup>8</sup> Researchers have found empirical evidence that 9/11 salience affects our voting behavior.<sup>9</sup> More generally, mortality salience has been shown to increase people's in-group identification and consequent hostility toward perceived outsiders (like Muslims) – and this is hardly an optimistic scenario<sup>10</sup> for dealing with secrecy (particularly if believed to be likely to

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security, etc., but instead an underlying assumption that all of those things are themselves useful in maximizing human happiness.

<sup>7</sup> Of course, I need not justify a non-consequentialist ethical approach on consequentialist grounds! I offer this discussion purely to bring along the hardened utilitarians.

<sup>8</sup> The empirical research surrounding cognitive biases and salience effects is, by now, well-known to the legal academy, and I do not propose to tread this well-worn territory again. See generally Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999). Terrorism is treated in Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L. J. 61 (2002).

<sup>9</sup> See, e.g. Mark J. Landau et al., *Deliver Us From Evil: The Effects of Mortality Salience and Reminders of 9/11 on Support for President George W. Bush*, 30 PERSONALITY SOC. PSYCHOL. BULL. 1136 (2004) (reporting study showing increased support for president strongly identified with anti-terrorist stance when presented with salient reminders of their own mortality); George Shambaugh & William Josiger, *Public Prudence, the Policy Salience of Terrorism and Presidential Approval Following Terrorist Incidents*, Joint Conference of the Int'l Security and Arms Control Section of the Am. Political Sci. Ass'n, Int'l Security Studies Section of the Int'l Studies Ass'n, and Women in Int'l Security (2004), <http://www.georgetown.edu/faculty/shambaugh/Public%20Prudence.pdf> (finding some empirical support for "rally effect" following costly terrorism). Additional evidence is cited in Jeffrey Rosen, *The Georgetown Journal of Law and Public Policy: Symposium on Security, Technology and Individual Rights--2003: Opening Address*, 2 GEO. J.L. & PUB. POL'Y 17, 24-25 n. 22-24 (2004).

<sup>10</sup> Nor, ethically, may opponents of secrecy lie to the public in order to balance the irrational scales. For the reasons that secrecy is wrong, *a fortiori* so are lies. The wrongness of the secrecy is the subject of this article. On lies, Korsgaard dispatches them nicely from a Kantian perspective. KORSGAARD, *supra* note 6, at 335-58. Thanks are due to K.A.D. Camara for pointing out this possibility.

manifest as profiling of disfavored groups) on a cost-benefit basis.<sup>11</sup> As a consequence, it is unlikely that a public motivated by fear and mortality salience will make political decisions relating to perceived terror risk in accordance with the principle of utility maximization, even with the benefit of a full consequentialist public discourse on the matter.<sup>12</sup>

On the other hand, approaching the question on the basis of universal deontological ethical duties might cause the public and policymakers to pause and consider their policies in a mode beyond hasty reaction to fearful events. The mere act of publicly considering the non-utilitarian ethics of state secrecy (and other political responses to terror) might serve to moderate the rush to policies driven by in-group identification and mortality salience.

## II. THE AUTONOMY ALTERNATIVE

The main alternative to consequentialist and utilitarian ethical theory is deontological ethics, and the dominant modern form from Kant onward is centered on human autonomy. The (hopelessly oversimplified) root idea of deontological autonomism is that individual humans, as humans, have inherent dignity and claims on

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<sup>11</sup> See TOM PYSZCZYNSKI, SHELDON SOLOMON & JEFF GREENBERG, IN THE WAKE OF 9/11: THE PSYCHOLOGY OF TERROR 72-77 (Am. Psychol. Ass'n 2002). The legal literature has a good introduction to Terror Management Theory, the branch of existential psychology in which Pyszczynski, Solomon and Greenberg work. See Donald P. Judges, *Scared to Death: Capital Punishment as Authoritarian Terror Management*, 33 U.C. DAVIS L. REV. 155 (1999). For a discussion of the effect war-talk can have on public acceptance of secrecy, see Bok, *supra* note 3, at 192-96; see also Geoffrey R. Stone, *War Fever*, 69 MO. L. REV. 1131 (2004) (discussing these effects in detail). For a discussion of the same phenomena in relation to the behavior of jurors in cases related to September 11, see Neal R. Feigenson, *Emotions, Risk Perceptions and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959 (2003). As for the idea that the courts would be a bastion of rationality, see Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115 (2005). For a general discussion of fear and civil liberties, see David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 956 (2002) ("Fear, by contrast, is immediate and palpable; it takes physical form as stress, anxiety, depression, a pit in the stomach, a bad taste in the mouth. It is easy to take liberty for granted, and to presume that government powers to intrude on liberty are not likely to be directed at one's own liberty. Fear affects us all, especially after an attack like that of September 11.").

<sup>12</sup> Among the political opportunists who have seized on the salience of the recent spate of terrorist attacks to implement despotic policies are the likes of Robert Mugabe and Vladimir Putin. See Human Rights Watch, *Opportunism in the Face of Tragedy: Repression in the Name of Anti-Terrorism*, <http://www.hrw.org/campaigns/september11/opportunismwatch.htm> (last visited June 18, 2005) (listing opportunistic government action in 17 nations in ostensible response to September 11, including press censorship, institution of internal passports, and mass arrests of Muslims and opposition parties).

other humans rooted in their freedom that are superior to the broad social goal of welfare maximization.

Since Kant, this river of thought has forked into many streams that are generally compatible in their overall aims, but diverge in the path to their satisfaction. For example, Habermas and Rawls, two of the most influential post-Kantian theorists, take Kant's requirement of universalization (the applicability of norms only when all could be charged with rational consent to them) in very different directions. Rawls held that universalization could be achieved with a reflective process that considers the consent that each person would rationally offer in a hypothetical "original position," ignorant of one's eventual place in society, while Habermas insists that the members of society must conduct an actual discourse to achieve justifiable normative positions.<sup>13</sup>

I have chosen to examine secrecy though the lens of primarily one particular – somewhat more obscure – stream of autonomist ethics, embodied in the work of Simone de Beauvoir. Her work holds two qualities that distinguish it from the broader river of post-Kantian thought. First, it is based in existential ontology, and particularly, in Sartre's ideas about the creation of one's self and metaphysical freedom. Second, it is focused on the notion of meaning as the primary transcendental quality to which humans strive.

One need not accept the (sometimes extreme) claims made by the existentialists about freedom and self-creation in order to accept Beauvoir's ethics. As I will show, one need only accept the centrality of meaning-formation in human life. On the other hand, the "existential attitude" may be more amiable to those who are coming to deontology for the first time, perhaps having seen the unsatisfactory results of purely consequentialist debate about secrecy. Existentialism as a grounding for an autonomy-based ethics has one significant advantage over most other deontological theories: it is compatible with radical skepticism. Many of the deontologists, starting with Kant, seem to assume altogether too much about human nature and the reasons that humanity is endowed with certain capacities. Kant's ethical theory, for example, might seem to be rooted in the notion that humanity is endowed with reason as part of some overall teleology,<sup>14</sup>

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<sup>13</sup> For the distinction between Rawls's and Habermas's positions, see JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 66-67 (Christian Lenhardt & Shierry Weber Nicholsen trans., MIT Press 1990) [hereinafter *MCCA*]. Toward the end of this article, I make direct use of Habermas's work to consider the question of democratic, as opposed to individualistic, consent to secret acts.

<sup>14</sup> Thus, his argument rests in part on a dubious "principle that in such a being [humanity] no organ [reason] is to be found for any end unless it be the most fit and the best adapted for that

and that this capacity ought to be used in accordance with its intended aims. While this notion might (arguably) be necessary to align oneself to Kant's formulations, it is not necessary to Beauvoir's theory. In fact, Beauvoir's theory embraces (outright insists on) the absence of any such teleological or essential qualities to humanity, and derives much the same ethical principles as Kant from just that absence. The absence of any obvious and uncontested source of transcendence, which is an unavoidable stance for 21st century ethics, gives rise to certain pressing questions that anyone who wishes to act ethically must ask. "What is the source of value by which I can judge my choices?" "What significance do my choices have in the world at large?" As I show below, Beauvoir's ethics can be derived from the mere fact that those questions are a necessary precondition to moral judgment. Those questions (and some cousins) can be collapsed into the general question of "meaning," in the sense of signification and significance that is a fundamental function of human consciousness.

Beauvoir's ethics thus have an advantage over traditional Kantianism in that the basic assumptions about the nature of humanity that one must accept to get to roughly the same practical conclusions are much more modest. At the same time, existentialism (like post-Heidegger continental philosophy generally) is somewhat marginalized in the United States, and some readers may be put off by the frequent appeals to Sartre and Beauvoir for various concepts and ideas. I invite such a reader to ignore the existential excursions and consider the argument that follows as one based in the humanity formulation of Kant's categorical imperative: one must treat the humanity in another as an end in itself, never a means. The actual analysis of secrecy and the conclusions drawn should not greatly suffer from such a substitution. In fact, the kinds of secrecy I analyze are easily handled by the humanity formulation. Korsgaard's analysis of lies<sup>15</sup> applies almost word-for-word.

The basic substantive change Beauvoir's ethics makes from Kant is that the former presents meaning-ascription as "prior" to reason: reason itself must be based on the idea that the products of reason are meaningful. Otherwise, Beauvoir's virtue of being "in a position to define his own ends and values"<sup>16</sup> is equivalent to Kant's "capacity to

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end." IMMANUEL KANT, *Grounding for the Metaphysics of Morals*, in ETHICAL PHILOSOPHY 8 (James W. Ellington trans., Hackett Pub. Co. 1983) (1785).

<sup>15</sup> KORSGAARD, *supra* note 6, at 345-52.

<sup>16</sup> EA, *supra* note 6, at 95.

propose an end to oneself.”<sup>17</sup> We simply must replace reason with meaning, so that “ends” are not, on Beauvoir’s account, “‘set’ by practical reason”<sup>18</sup> but by the need to make life meaningful, rationally or otherwise.<sup>19</sup>

With that established, the modern ethicist must confront the problem that (on skeptical accounts) there is no uncontested source of meaning external to humanity.<sup>20</sup> Beauvoir’s solution<sup>21</sup> to the problem of transcendence is to derive our ethics from the search for meaning itself.

Simone de Beauvoir denies (as a skeptic must) that our lives have any inherent nature or meaning beyond what we give them. Abandoning the conception of norms and decisions as preexisting in the world, we see that each moment in a human life is created and chosen by the subject who is living it, if only by default, and that the subject is responsible for those choices. Sartre has set forth the concept of “bad faith” to capture the self-deception that occurs when subjects externalize their choices to other people, forces of history, their unconscious, transcendent norms and the like.<sup>22</sup>

The need then arises to confer some meaning on our lives - to transcend our subjectivity so that we can make our choices with some

<sup>17</sup> KORSGAARD, *supra* note 6, at 110.

<sup>18</sup> *Id.*

<sup>19</sup> It is not clear to me whether this amounts to a distinction without a difference. Perhaps it does, since Beauvoir’s requirement that one find meaning through others (discussed *infra*) implies a need for communication, which is inherently subject to the constraints of rationality (also discussed *infra*). At any rate, this is a technical question that may be ignored.

<sup>20</sup> See generally GIANNI VATTIMO, *Ethics Without Transcendence*, in *NIHILISM AND EMANCIPATION* 60-70 (William McCuaig trans., Santiago Zabala ed., Columbia Univ. Press 2004); *Ethics of Provenance*, *id.* at 36-48.

<sup>21</sup> EA, *supra* note 6. This is the primary ethical text of existential thought, and can mostly stand alone (without undue ontological excursions). On most interpretive questions, KRISTANA ARP, *THE BONDS OF FREEDOM: SIMONE DE BEAUVOIR’S EXISTENTIALIST ETHICS* (2001) is helpful (although I prefer the term “meaning” to Arp’s term “moral freedom,” and I do not endorse all the details in Arp’s analysis). There are similarities between this system and Levinas’s ethics, which I will avoid except to note that the acts analyzed here should be understood as totalization, both in that they necessarily reduce the other into a field of data for the exercise of power and in that they privilege the experience of the actor over that of the acted-upon. Some of these connections are made by Vattimo as well, and he appears to endorse a similar notion of ethics. See VATTIMO, *supra* note 20, at 46, 67, 69-70.

<sup>22</sup> See generally JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* 86-116 (Hazel E. Barnes trans., Washington Square Press 1966) (1956) [hereafter BN] (describing bad faith).



basis beyond nihilistic randomness. This problem has been approached from several directions. For the existentialists, Beauvoir spoke of "moral anxiety,"<sup>23</sup> Camus demanded a reason not to commit suicide,<sup>24</sup> and Frankl found a "will to meaning."<sup>25</sup> For the Kantians, Korsgaard poses the same problem without the trademark existentialist melodrama: "The reflective structure of human consciousness requires that you identify yourself with some law or principle which will govern your choices. It requires you to be a law to yourself."<sup>26</sup>

Without any a priori or teleological sources of justification, we may only transcend our subjectivity through other subjects.<sup>27</sup> Other humans are, in a sense, the only external entities with equal dignity to judge our choices and create their own meaning to match ours. Our participating in mutual projects with others allows our choices, and the meaningful values they embody, to transcend both our solipsistic consciousness and our mortality.<sup>28</sup> This conferral of intersubjective meaning comes with a price: the other people must really have equal dignity. For us to make meaning with them, they must be able to make meaning themselves: they, too, must be free. A joint project with a slave is no joint project at all. This is the central principle of Beauvoir's ethics: "[t]o will oneself free is also to will others free."<sup>29</sup>

We thus return to Kant via a different route and a sounder foundation.<sup>30</sup> We need not derive moral imperatives from dubious

<sup>23</sup> EA, *supra* note 6, at 72.

<sup>24</sup> ALBERT CAMUS, *THE MYTH OF SISYPHUS & OTHER ESSAYS* 3 (Justin O'Brien trans., Vintage Books 1955) (1942).

<sup>25</sup> VIKTOR E. FRANKL, *MAN'S SEARCH FOR MEANING* 121-22 (Washington Square Press 1984) (1946).

<sup>26</sup> CHRISTINE M. KORSGAARD, *THE SOURCES OF NORMATIVITY* 103-04 (Onora O'Neill ed., Cambridge Univ. Press 1996).

<sup>27</sup> EA, *supra* note 6, at 72.

<sup>28</sup> *Id.* at 70-71; see also HANNAH ARENDT, *THE HUMAN CONDITION* 4 (1958) (asserting that people can only "experience meaningfulness" in communicative interaction).

<sup>29</sup> EA, *supra* note 6, at 73. At bottom, this is a pragmatic point: we can not meet our need to confer some external meaning on our choices through slaves. Only other free humans can do so, in a community of mutual and equal relation.

<sup>30</sup> See, e.g. KANT, *supra* note 14, at 41 ("Thereby is he free as regards all laws of nature, and he obeys only those laws which he gives to himself. Accordingly, his maxims can belong to a universal legislation to which he at the same time subjects himself. For nothing can have any worth other than what the law determines. But the legislation itself which determines all worth must for that very reason have dignity...."). See also EA, *supra* note 6, at 17, 135

teleological ideas about reason or the transcendent virtue of good will. Instead, in an almost naturalistic movement, we derive much the same ethical principles from the facts of our freedom and our search for meaning.

As Beauvoir basically reads Kant through the will to meaning, the humanity formulation of the categorical imperative is largely equivalent to Beauvoir's insistence that we refrain from mystification (a concept I will explain shortly). Each demands that we permit those with whom we interact to cognitively incorporate what we are about to do to them, and to understand it and respond to it from their own ends, rather than ours. If we deceive someone by virtue of a mystification, we also use her humanity as a means rather than respecting it as an end in itself. An unethical act can be described as one which denies the human capacity of another or oneself to be in control of her life and understand the world around her.

The heart of Beauvoir's ethical system, the freedom to confer meaning on ourselves and the world around us, is most significantly constrained by mental impositions: the self-determination of meaning can be understood as the subject's ability to choose a position on one's situation. A person who is physically oppressed is freer than one who is mentally oppressed, because the former may at least revolt.<sup>31</sup>

For clarity's sake, I will try and further articulate the concept of meaning that I am using. By "meaning," I mean, generally, that source of value and understanding that a subject has reference to in understanding her experience and choices. The concept of meaning does not have a stable definition, but can be seen as tied to

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(making the connection between existential ethics and Kant); FREDERICK A. OLAFSON, PRINCIPLES AND PERSONS: AN ETHICAL INTERPRETATION OF EXISTENTIALISM 54-56, 202-24 (1967) (discussing Sartre and making the connection between existential ethics and Kant in more detail). Simone de Beauvoir's conception of the serious man, a critical actor in any public imposition justified by "necessity," is equivalent to one who violates the humanity formulation of the categorical imperative in the context of the existentialist view of freedom: the serious man is in a position of bad faith because he subordinates the moral autonomy and freedom of choice of both himself and others to some transcendent cause, and thereby reduces the humanity of all concerned to a means. See EA, *supra* note 6, at 47-52.

<sup>31</sup> See, e.g., CAMUS, *supra* note 24, at 40-41, 91 (discussing value conferred on life by revolt – by stubborn self-assertion in the face of reality); BN, *supra* note 22, at 621-22 (arguing that freedom does not mean physical success at getting what one desires, but rather the power to choose to desire it and act accordingly – in Sartre's example, the freedom of a prisoner not to get out of prison, but to try to get out of prison). The primacy of the knowledge to choose is best shown by an example in EA, *supra* note 6, at 150-52. There, Beauvoir described two hypothetical sacrifices of the interests of individuals' party goals. The first, where the individuals knew what they were getting into, would be permissible. The second, where they were deceived into believing they were being defended, constituted a mystification and was thus impermissible.

transcendence, that which permits us to see the universe in terms other than those generated by our own subjectivity and avoid nihilism. "Justification" is part of meaning, in that when we make a choice we are asserting that we have a meaningful reason for that choice. "Freedom," as used in this article, is to be understood not in the Sartrean sense (which is illimitable), but in the sense of the ability to understand the world and make one's choices, both with reference to a self-transcendent meaning. With this understanding and this choosing, one develops one's identity in relation to the external world. "Mystification" is Simone de Beauvoir's term for an act that denies the freedom of another by deceiving that other into believing that a state which was chosen, and may be resisted, is actually natural and fixed.<sup>32</sup> When we perform a mystification, we defeat the mystified person's freedom because we impose our choices, rooted in our meaning, on her and deceive her into failing to see that our choices could be made differently or resisted; we deceive her about the real character of the world and her role in choosing it, and we conceal our acts from her moral judgment.

The concept of meaning can be broken down into internal and external senses. Internal meaning could be described as individual significance: in psychological terms, the idea that what one does matters. (This can be further subdivided into control and value: we need to be in control of our lives, as well as exercise that control in a fashion consistent with our values.) External meaning could be described as groundedness in the world: in psychological terms, the sense that what happens to oneself is deserved, or at least caused, as opposed to random. These senses of the word are similar in the fundamental way that both are opposed to nihilism. At least some philosophers tend to conflate (wittingly or otherwise) the two.<sup>33</sup> Psychologically, there is also evidence that they are related.<sup>34</sup>

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<sup>32</sup> See ARP, *supra* note 21, at 115-16, 140 (explaining mystification). I will elaborate the application of these concepts to law in more detail in future work.

<sup>33</sup> See e.g., Leszek Kolakowski, *The Death of Utopia Reconsidered*, The Tanner Lectures for Human Values, delivered at The Australian National University, at 229-47 (1982), <http://www.tannerlectures.utah.edu/lectures/kolakowski83.pdf> (last visited June 26, 2005) (noting that "the quest for meaning" is the root of questions both of choosing humankind's own actions and of understanding the world). This lecture is reprinted in LESZEK KOLAKOWSKI, *MODERNITY ON ENDLESS TRIAL* 131-45 (1990).

<sup>34</sup> See Ronnie Janoff-Bulman & Darren J. Yopyk, *Random Outcomes and Valued Commitments: Existential Dilemmas and the Paradox of Meaning*, in *HANDBOOK OF EXPERIMENTAL EXISTENTIAL PSYCHOLOGY* 122 (Jeff Greenberg, Sander L. Koole & Tom Pyszczynski eds., Guilford Press 2004).

Moreover, intuitively, these conceptions of meaning are interdependent: one can only be in control over an aspect of one's world once one knows what it is, and one can only choose and value something when one is in control over it. My argument treats meaning as a whole, linked to the fundamental human capacity for choice in a world that is comprehensible and subject to being shaped by our decisions.

When the State deprives someone of the power to confer meaning on an event or an act, it deprives her of the autonomous dignity to act with regard to the act as if she were the end in herself – to place the act within her project – and takes away her role in integrating the event into her own identity and justifying it in relation to the events and people in her life. This act reduces her from the status of an ends to a means for the execution of someone else's choices. The actor upon another (and there must be an individual actor, for the State only acts through people) in a meaning-denying transaction injures himself as well, because by that act he can no longer transcend his subjectivity through the subjectivity of the person he has acted upon. He has, as feminist theory would suggest, "objectified" the person who he has acted upon, by denying the reciprocal accountability inherent in an interaction between equals.<sup>35</sup>

This approach – which is fundamentally phenomenological, in that it focuses on how humans experience the web of self-universe interactions at any given moment<sup>36</sup> – is necessarily heavily psychological. We have psychological evidence for the centrality of meaning in human experience.<sup>37</sup> We also may use psychological evidence, to the extent that it shows people losing their sense of

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<sup>35</sup> Sartre has perhaps put it best: "In a word, my apprehension of the Other in the world as probably being a man refers to my permanent possibility of being-seen-by-him; that is, to the permanent possibility that a subject who sees me may be substituted for the object seen by me." BN, *supra* note 22, at 233.

<sup>36</sup> For a discussion of the sociological status of meaning-orientation, as well as an excellent non-specialist explanation of phenomenological reasoning, see Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw out that Baby*, 87 CORNELL L. REV. 309, 328-40 (2002).

<sup>37</sup> See *id.*; PYSZCZNAKI ET AL., *supra* note 11; James C. Crumbaugh & Leonard T. Maholick, *An Experimental Study in Existentialism: The Psychometric Approach to Frankl's Concept of Noögeni Neurosis*, in *PSYCHOTHERAPY AND EXISTENTIALISM SELECTED PAPERS ON LOGOTHERAPY* 183 (1967). This evidence is not strictly necessary. If we took the position that meaning was important because it makes people happy, we would be forced to return to utilitarianism. Meaning is a self-transcending value for the reasons detailed above, and the psychological evidence shows only that people recognize this value.

meaning in response to certain stimuli, as evidence for an ethical violation.

With the outlines of an ethical system based on the freedom to find meaning, we can return for a closer analysis of government secrecy. As will appear, government secrecy is often an unethical mystification that hides the choices of the people who act for the State and the consequences of the choices of the citizen behind a wall of facticity.<sup>38</sup>

### III. SECRECY AS MYSTIFICATION

The scope of government secrecy, particularly as manifested in post-9/11 “security” measures, can be subdivided into three general types of secrecy-mediated interactions: those where the State acts upon a citizen and conceals the fact of the act (act-secrecy), those where the State acts upon a citizen visibly but conceals the reasons for its decision to act (reason-secrecy), and those where the State conceals the risk to a citizen, of which it is aware, from a third-party or thing (risk-secrecy). Each of these variants of secrecy can be seen through a prominent post-9/11 manifestation.<sup>39</sup>

Act-secrecy is exemplified by the “sneak and peek” provisions of the Patriot Act.<sup>40</sup> A court may now issue a warrant which permits search without notice to the party being searched. Reason secrecy appears most prominently in the United States Transportation Security

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<sup>38</sup> The term “facticity” in this context means basically “nature” or “immutability,” that which is not chosen by humans. The idea of concealing something “behind a wall of facticity,” which as far as I know is my own coinage for an act that works a mystification, is that the choice of one person in an interaction is presented as an immutable fact of nature to the other. We might say that to turn a choice into facticity is to present the other person with a fait accompli that they do not even get to see as such and blame you for.

<sup>39</sup> I address only those forms of government secrecy that primarily function in the relationship between the state (and its agents) and its own citizens. The area of concern for a phenomenological ethics is necessarily limited to those types of acts that actually enter the lifeworld of the persons whose interests are at stake. Thus, analysis of secrecy as it relates to international affairs, military strategies, etc. is beyond the scope of this article.

<sup>40</sup> USA PATRIOT ACT, 18 U.S.C. § 3103a(b) (2005), which permits “any warrant or court order under this section, or any other rule of law, to search for and seize any property or material that constitutes evidence of a criminal offense” to be issued and executed without any notice whatsoever to the person whose property is to be searched if “the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result.” The statute limits the court’s discretion in determining what constitutes an “adverse” result in 18 U.S.C. § 2705 (2005), but the standards—which define “adverse result” as including “otherwise seriously jeopardizing an investigation”—are not constraining.

Administration (TSA) “no-fly list.” It maintains two secret lists: one for “selectees” who are subject to unusual search at an airport, and one for people who are forbidden from flying into, out of, or within the United States. The standards for placement on the lists are secret.<sup>41</sup> A significant instance of risk-secrecy is the post-9/11 removal of public sources of information relating to the security risks of local vulnerabilities, including dams, power plants, and the like.<sup>42</sup>

Government secrecy places the holder of secrets in a dual relationship to objects of the secrecy.<sup>43</sup> The holder is vested with the duty (based on his control of information relevant to their choices) to exercise choice in a matter protective toward them – he must take their interests into account in exercising his choices over their life, just as the state must actually attempt to reduce those risks it keeps secret. After all, the public justification for security measures (secret or otherwise) is precisely that it will increase the safety of the public in proximity to the secret acts (such as airline passengers). At the same time, he is placed in an oppositional relationship to each individual who is the object of a secret: the only justification offered for post-

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<sup>41</sup> The details of these lists are revealed in The Electronic Privacy Information Center (EPIC) which maintains copious information regarding these practices. The Electronic Privacy Information Center, *Documents Show Errors in TSA's "No Fly" and "Selectee" Watch Lists*, April 2003, [http://www.epic.org/privacy/airtravel/foia/watchlist\\_foia\\_analysis.html](http://www.epic.org/privacy/airtravel/foia/watchlist_foia_analysis.html) (last visited Nov. 28, 2005). See generally 49 C.F.R. § 1520.5 (2002) (setting out extensive list of secret transportation security related information); 49 C.F.R. § 1550.5 (2005) (requiring every airline to “screen passengers, crewmembers, and other persons and their accessible property (carry-on items) before boarding in accordance with security procedures approved by TSA” and declaring such procedures to be “sensitive security information” which must be restricted “to persons with a need to know”); 49 U.S.C. § 40119 (2005) (exempting security-oriented “behavioral research” by DOT from FOIA). See also Sara Kehaulani Goo, *Sen. Kennedy Flagged by No-Fly List*, Washington Post (Apr. 20, 2004), available at <http://www.washingtonpost.com/wp-dyn/articles/A17073-2004Aug19.html> (last visited May 29, 2005). Of course, personally identifiable information on these lists has been broadly exempted from the protections of the Privacy Act, including those provisions of the Act providing for disclosure of records to the subjects thereof. 49 C.F.R. § 1507.3 (2004). The very existence of these lists had, apparently, been kept a secret from 1990-2003. See Deborah von Rochow-Leuschner, *CAPPS II and the Fourth Amendment: Does it Fly?*, 69 J. AIR L. & COM. 139, 144 (2004).

<sup>42</sup> A useful entry point into this area is the 2003 Widener Law Symposium, Symposium, *Combating Terrorism in the Environmental Trenches: Responding to Terrorism*, 9 WIDENER L. SYMP. J. 339 (2003). See generally Siegel, *supra* note 2 (detailing many instances of government risk-secrecy following September 11 attacks). See also Durham-Hammer, *supra* note 2.

<sup>43</sup> I use the phrase “object of a secret” to mean “the person who is forced to make choices despite the absence of relevant information which is concealed from her by secrecy.”

9/11 secrecy is that such objects might use the withheld information for evil (or negligently let it slip to some evil outsider). Government secrecy is inherently accusatory at the same time as it must be protective.

In addition, each type of secrecy as currently applied is visible in the abstract: we know the government is keeping secrets, we simply do not know what those secrets are. This is suboptimal for the State; since such awareness carries a risk of investigation by angry citizens, the State would prefer the populace to be completely unaware that secrets are being kept. Since the public tends to discover the secrets, sooner or later, anyway, the State has openly established the legal authority for its secrecy. Consequently, the people are placed into apprehension of their own interests being affected by government secrecy.<sup>44</sup> Knowing the government is keeping secrets, one is subjected to uncertainty as to whether those secrets are about, or connected with, oneself. Similarly, knowing specific examples of secret-keeping raises the suspicion that there are additional examples of secret-keeping that are not known.

The essential feature of risk-secrecy is that, from the perspective of the object of secrecy, it converts what was once a calculable risk into an incalculable uncertainty. Before the imposition of risk-secrecy, each citizen was free to make an individual and autonomous decision about the risks she was willing to take in exchange for whatever benefits. She might, for example, choose to move to a neighborhood with a dangerous nuclear plant in exchange for a higher-paying job. In the risk-secrecy regime, not only is that choice forced upon her, but it is done invisibly, so that the possible presence of secret risk is presented as pure facticity, impossible to cognitively incorporate or take a position in regard to. In my existential-Kantian terms, we no longer have the freedom to make meaningful and responsible choices regarding that portion of our lives. We cannot connect our decisions (like where to live) to the factors (like environmental risk) that would, were we free, enter into that decision, nor can we take a cognitive position on those factors. In Beauvoir's terms, risk-secrecy is a mystification: the choices of the state actors and the consequences of her own choices are concealed from the object of secrecy. They are instead made to appear as uncontrollable acts of nature whose injurious potential presents as random.

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<sup>44</sup> Each of us must view ourselves as an object of secrecy since persons who are not actually on some TSA list, or living under a dangerous dam, do not have such information. We are all placed in exactly the same cognitive relationship with the government as someone who is on the list or under the dam – for all we know, it could be *us*.

Because the fact of the secrecy is known, we are all aware that we *might* be subject to an unknown risk. As a consequence, we subjectively must experience the world as less within our control and thus, less meaningful.<sup>45</sup>

The keeper of the secrets appropriates the right and burden of self-definition for his charges, and thus reduces them to a state of protected obedience similar to that of a parent and a child, or a pre-feminist woman under the stifling protection of a patriarchal husband. This is unlike ordinary state protection (e.g. police work) where the protected person still has some role in her own safety. Consequently, that secret-keeper takes upon himself her anguish of choice:<sup>46</sup> he must decide who is to risk destruction without any input from the actual victim of the risk. He thereby objectifies those for whom he decides. By making the decision for them, according to his values, the secret-keeper turns the objects of secrecy from ends in themselves— autonomous subjects with their own meaning to be respected in their own right – into means – objects of his suspicion and protection priorities. This is the behavior of the person Beauvoir describes as the “serious man” (and characterizes as “mak[ing] himself a tyrant”)<sup>47</sup> – the installation of an abstract ideal (of “security”) above the freedom of the people supposedly to be served by the ideal, and thereby above his own freedom as well, since his freedom depends on their freedom to have intersubjective meaning. Kantians too would object to this secret paternalism. As Korsgaard explains in the context of a lie, the object of such a non-consensual transaction can not “‘contain in himself’ the end”<sup>48</sup> of the action, not even if she would consent if she knew about it, because she is denied the opportunity to “choose, freely, to contribute to its realization.”<sup>49</sup> Since she can not rationally or autonomously choose the end of the secret act, her involvement is as a “mere means.”<sup>50</sup>

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<sup>45</sup> There is some empirical support for this. See Ian H. Langford, *An Existential Approach to Risk Perception*, 22 RISK ANALYSIS 101, 114, 116 (2002) (finding that “fatalists” who saw risks as unavoidable had greatest amount of “meaninglessness anxiety”). See also ROLLO MAY, *THE MEANING OF ANXIETY* 52 (1950) (explaining anxiety as inaccessibility of information about sources of danger).

<sup>46</sup> Cf. BN, *supra* note 22, at 65-68 (elaborating Kierkegaard’s concept of anguish).

<sup>47</sup> EA, *supra* note 6, at 49-50.

<sup>48</sup> KORSGAARD, *supra* note 6, at 347.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*



Should the feared risk come into being, the people injured experience a loss of meaning in the understanding sense: what appeared before as the possibility of a random, uncontrollable harm now appears as the fact of a random, incomprehensible harm. Risk-secrecy is converted into reason-secrecy because she is not permitted to know why what has happened to her occurred. She is not permitted to see the reasons and the choices and the autonomous actors *behind* the maybe-seen catalyst security lapse and understand that act as an *act* of the subjects who are (supposedly) accountable to her, rather than as a *fact*. She is not permitted to take a position in relation to the other people whose actions she experienced as injury.<sup>51</sup> This, *mutatis mutandis* to the risk before it came into being, is an unethical mystification, and our victim will experience it as a loss of meaning.

Much the same holds for reason-secrecy. When the State carries out its will on a person on the basis of a secret standard, that person has the experience of an arbitrary imposition of power. The experience of being put on a no-fly list must be seen as akin to the experience of being hit by a meteorite: an utterly meaningless and unpredictable event, impossible to ground in familiar reality.<sup>52</sup>

Reason-secrecy necessarily depends on invasions of privacy and undermining of the control that the object of such secrecy has over her own identity. In order for people to become fields for the exercise of

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<sup>51</sup> Silveira, *supra* note 2, at 13 points out that secrecy is not necessarily permanent. A policy may be kept secret until shortly after its implementation, or may be released to the public into the distant future. This is true, but only goes so far. Humans interacting with each other in secrecy-mediated transactions must exercise choices at every moment including those moments where the secrecy regime is still in effect. See BN, *supra* note 22, at 601. One who fears the explosion of a neighborhood power plant is not reassured by knowing that the policy under which he was put at risk will be released in one year, or twenty. Moreover, to the extent that secret policies cause injury to the public requiring accountability (as in the case of risk-secrecy where the plant has exploded) or confer power on those who implement them (as in the case of reason and act-secrecy), the keepers of the secrets will have an incentive to delay or eliminate future disclosures.

<sup>52</sup> The secrecy of the behaviors makes it more difficult to find empirical evidence for the experiences detailed in this section, though they are compelled by the structure of the relationship mediated by secrecy. Here, however, we at least have the stories of some affected individuals. See, e.g., Graham, *supra* note 1. EPIC maintains copies of numerous complaints relating to the TSA watch lists. See EPIC, *supra* note 41. An individual may have sufficient blind trust in officialdom to be exempt from the actual experience of anticipated arbitrary imposition inherent in reason-secrecy. Such trust, however, would amount to an abdication of one's autonomy, ceding (in Sartrean bad faith) the right to make choices about the consequences of one's actions to the unchecked will of another.

power, the State must first collect data about them.<sup>53</sup> If the State is to exercise its power, on the basis of that data, pursuant to secret reasoning, it must collect (or transfer and misuse) the data secretly (unless the reasons are some grossly visible characteristic of the object of secrecy, like race). Otherwise, the objects of secrecy might be able to learn the sort of data that the State is examining and infer the secret reasons. Even worse for the secret state, the individual objects of secrecy might learn of and evade the examination.

Consequently, the disciplinary power of the security state comes from the conjunction of the power of the officials to watch everyone and the lack of power in the watched class to reciprocally watch the officials.<sup>54</sup> This permits the application of power universally on each citizen under the panoptic eye, since no citizen can know whether she is being watched at any moment. Reason-secrecy achieves this effect by secretly examining data about the public, which then is used to exercise power on individuals selected by this secret examination. The security state thus exercises power over us all by placing us in anticipation of power being exercised on us.<sup>55</sup>

Because of that structural feature of reason-secrecy, it implies all the ethical difficulties inherent in risk-secrecy. The panoptic nature of the relationship between the holder of secret reasons and a citizen who is the object of secrecy implies that each person presenting herself for inspection under secret reasons (i.e. at an airport) has no way of knowing whether or not harm will be inflicted on her (i.e. a denial of flight) by the State. Thus, whether or not she is actually harmed, the citizen is not able to ground the possibility of harm in any choice or characteristic of herself. From the point of view of the experience of the person presenting herself for inspection, the State is placed in exactly the same position as the terrorist: each may strike at any moment and do injury to our beleaguered citizen without any rhyme, reason, or predictability.

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<sup>53</sup> For a discussion of observation as disciplinary power, see generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 170-77* (Alan Sheridan trans., Vintage Books 2d ed. 1977) (1995).

<sup>54</sup> *See id.* at 187 (discussing one-way observation as mode of power).

<sup>55</sup> *See id.* at 200-03 (explaining how one-way nature of panoptic observation establishes power of watcher over all who may be). This is not to be confused with Foucault's observation that the warder in the panopticon can be himself watched by *outsiders* who are not themselves watched. *Id.* at 204, 207. Our concern is with the ability of those who are watched to watch back. *Cf. id.* at 189-94 (revealing objectifying nature of conversion of individuals, via data, to field for exercise of power).

Act-secrecy also necessarily implicates the ethical objections to reason-secrecy (and thereby to risk-secrecy), because the concealment of an act implies a concealment of the reasons for the act. (The State can not announce “we will search the homes of anyone who does X” without disclosing the searches to its targets.) Moreover, in the case of unexplained, arbitrary, and random risks (whether imposed by third parties or the government as in risk and reason secrecy respectively), the citizen has at least a minimal opportunity to ascribe meaning to the random nature of the act and initiate some project. For example, the citizen might gain a sense of control by participating in political action to demand disclosure of the secret reasons or punishment for risk-negligent officials. The same can not be said for act-secrecy. Because act-secrecy conceals not only the reasons for the act, but the very act itself, it deprives the victim of such an act of any way of taking a position with regard to that concealed act. Each citizen is placed in apprehension of utterly random exercises of power that she will never have the opportunity to resist or understand.

The function of these forms of secrecy is thus to reduce the decisions of individual people to nothingness. The decisions of government agents become invisible and appear as mere manifestations of nature. The decisions of third parties become random and unavoidable chance. The decisions even of the object of secrecy are disconnected from their consequences.<sup>56</sup> If the ability to understand and choose to act in the world is the fundamental characteristic of humanity, an act upon another that renders the choices both parties have made invisible, so that the situation seems a meaningless “brute fact” rather a changeable choice, must be seen as dehumanizing and consequently, unethical.<sup>57</sup>

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<sup>56</sup> In effect, it puts each citizen into a position of bad faith by disconnecting her from her choices. See also Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903 (2005) (defending ethical need to take responsibility for one’s actions).

<sup>57</sup> The State cannot escape its ethical obligations by resorting to its special duties as the State to protect the people (one might call this the Machiavelli-Neibuhr objection). The State can not act except through people, and a person should not be able to escape her ethical duties to other persons through assuming the cloak (and the power) of the State. While the State’s duty to protect its citizens can certainly be prioritized (see discussion *infra* sec. V), the wrong it does to its citizens in the process can not be transformed into ethical conduct. Moreover, the “just following orders” defense as to individuals (who are, after all, the actual actors) tasked to implement unethical law has been refuted. HANNAH ARENDT, *Personal Responsibility Under Dictatorship*, in RESPONSIBILITY AND JUDGMENT 17-48 (Jerome Kohn ed., Schocken Books 2003). States only act through people. While one might defend one’s implementation of an otherwise freedom-denying law by appealing to one’s duty to respect the freedom of the people who enacted it, this defense is not available in the case of secrecy for the reasons discussed *infra* sec. IV.

#### IV. SECRECY AS POWER

The book is not yet closed on secrecy, for both the person who holds the secret and the object of the secrecy in the secrecy-mediated transactions discussed above are members of a democratically structured society which permits a level of ultimate command over the actions of the State. If secrecy as discussed above is a product of a legitimate process, it might be permissible as an exercise of the freedom of citizens in a democratic state to create their collective meaning via the political process.

This defense is unavailable to advocates of secrecy because secrecy defeats the principles of rationality which must underlie any such legitimate process. Habermas's discourse ethics are a useful critical tool for understanding this procedural aspect of secrecy. Habermas argues that a legitimate norm is one which is reached by a rational discussion about values which provides all concerned the opportunity to assent.<sup>58</sup> Broadly speaking, Habermas defends a technique of determining if a process for reaching agreed-upon social norms and plans of action is legitimate. The legitimate process - the "ideal speech situation" has certain characteristics, inherent in the structure of communicative action, that lend - more or less, depending on the proximity of the actual discourse to such an impossible ideal speech situation - contingent validity to the conclusions reached by the participants.

Habermas's work is mirrored in the American literature, primarily by deliberative democracy theorists. I rely on Habermas here partly for consistency: his conception of discourse is based in Kantian concepts of autonomy, and he strictly holds to the principle of consent as the source of legitimacy. This is not necessarily required of deliberative democracy scholars.<sup>59</sup> Also consistent with a consent-based framework is Habermas's notion that a person, *merely by*

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<sup>58</sup> I am brutally oversimplifying Habermas's argument here. For a more general, non-specialist explication of Habermas's discourse ethics in a legal academic context, see A. Michael Froomkin, *Habermas@Discourse.Net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749 (2003). I will not elaborate discourse ethics in detail here, but adopt Froomkin's explanation. There is also a lucid explanation of discourse ethics in the translator's introduction to JÜRGEN HABERMAS, *JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS* xi-xxxii (Ciaran P. Cronin trans., MIT Press 1993) [hereinafter JA]. The most straightforward defense in Habermas's own words is in chapter 3 of *MCCA*, *supra* note 13, at 43-115.

<sup>59</sup> See, e.g., James D. Fearon, *Deliberation as Discussion*, in *DELIBERATIVE DEMOCRACY* 44-68 (Jon Elster ed., Cambridge Univ. Press 1998) (offering five consequentialist reasons for deliberation and one deontological reason that is not so explicitly based in autonomy as such).

*engaging in normative communication* (an engagement that is necessary to live and function in society) endorses the presuppositions of a rational argumentative process.<sup>60</sup> Since my goal in discussing democratic deliberation is to show the conditions under which one may be said to consent to the application of secrecy to oneself, I rely solely on Habermas and avoid entry into the largely redundant American deliberationists. Nonetheless, since Habermas and the deliberationists reach roughly the same destination, those who prefer to understand the question through American rather than “continental” theory may substitute their favorite deliberative democracy work with no loss to my argument.

Under Habermas’s theory, the participants in a legislative enterprise, acting communicatively, inherently agree as part of their participation in the public sphere that they will *give reasons* for their proposed norms.<sup>61</sup> After all, what we are concerned about here is imputing the persons who are forced to follow a law with some level of consent to it. Even in a system where one is permitted to charge each citizen with “consent” to a norm based on representative majoritarianism, some bare minimum of respect for individual autonomy must be retained for the notion of “consent” to have meaning. If advocates of a position wish to respect the autonomy of the other participants, as they speak in a fashion that necessarily implies an argument based on reason, they will follow constraints of honesty and rationality.

These ground-level honesty, rationality, and reason-giving presumptions imply some kind of travel toward a full explication of the reasons for a proposed norm. If the advocate of a norm wishes to obtain anything resembling consent, and the reasons for the proposed norm are incomplete or rely on other unarticulated reasons, a sufficient explanation to permit consent would require the advocate to give the reasons for believing his reasons, and so on *ad nauseum* to something that society has decided counts as consensus.<sup>62</sup> Moreover, the reasons given must be genuinely held.<sup>63</sup>

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<sup>60</sup> MCCA, *supra* note 13, at 66-67.

<sup>61</sup> MCCA, *supra* note 13, at 58-59. Moreover, Habermas notes that in order for law to be effective, the people must be able to see the justification for the law. JA, *supra* note 58, at 156.

<sup>62</sup> This, of course, assumes that the public as a whole is permitted to participate as active combatants in the discourse underlying the policies at issue, as would be necessary to justify those policies as manifestations of their wills. The opposite assumption is made by Daniel Naurin, leading to an erroneous conclusion that publicity might actually impair the discursive quality of policymaking. Daniel Naurin, *Does Publicity Purify Politics?*, 12 J. INFO. ETHICS 21 (2003). Naurin’s argument rests on the unfortunate assumption that some discrete subgroup is engaging in discourse about the policies to be formulated, and that the deliberations

This reason-giving is impossible to accomplish when the full nature of the acts which will be done pursuant to the norms agreed-upon are concealed by some parties to the discourse. Secrecy is inconsistent with any minimal approximation of an ideal speech situation, even in a discourse about secrecy, because even a far-from-ideal speech situation presupposes a chance to examine the effects, both past and planned, of a norm. Yet, for secrecy to achieve its proponents' goals, those effects must be concealed. Obviously, the TSA can not defend its no-fly list by the chance of catching potential terrorists when it refuses to disclose how it determines who those potential terrorists are.

We might attempt to resolve these complaints by stepping back to another level of consent. If the people, by a legitimate discursive process, chose to delegate the authority to institute secret norms to one of their members (such as the director of the TSA), this might be legitimate in itself. This is certainly the case for ordinary norm-enactment in a representative government.

Secrecy defeats that claim to legitimacy too once we introduce time into the equation. The nature of claims to normative validity (like all claims analogous to truth claims) is that they are contingent on future knowledge and discourse.<sup>64</sup> This is a common-sense principle:

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of that group might be impaired by the requirement to "focus more on their appearances in the views of the audience." *Id.* at 25. *But see* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 362-65 (William Rehg, trans., MIT Press 1996) [hereinafter BFN] (posing a very different position). It is difficult to see how policies and norms can be legitimized by relegating some section of the community that is to be subject to them to the status of mute "audience." The relevant discourse is not between Naurin's "elite" actors, but between the entire community, acting through those elites. The non-elites need to be able to form their own positions by argumentation in order to manifest their will via the elites. This point is made strongly in the following article in that volume. *See* Christopher Griffin, *An Egalitarian Case Against Executive Privilege*, 12 J. INFO. ETHICS 34, 40 (2003). Naurin's errors are repeated in different form in Robert E. Good, *Democratic Deliberation Within*, in DEBATING DELIBERATIVE DEMOCRACY 54-79 (James S. Fishkin & Peter Laslett eds., Blackwell Pub. Ltd. 2003). Good argues that Habermasian public-sphere deliberation is too impractical to succeed due to the sheer number of people necessitating a shift from face-to-face interaction to publications and the consequent fact that nobody need read any opposing viewpoints. My answer on behalf of Habermas to this and similar problems is that the problem would go away in a deliberative world: people would have good reason to experience themselves as influential over their government. Assuming they would want to actualize this positive experience, they would satisfy that desire only by convincing others to make the political change they want, which in turn requires seeking out and refuting opposing views.

<sup>63</sup> MCCA, *supra* note 13, at 88-89.

<sup>64</sup> *See* BFN, *supra* note 58, at 13-16.

to validate anything by argumentation, we must be willing to permit ongoing inquiry to determine if new insight proves us wrong. Thus, Habermas's universalization principle requires an opportunity for people in the future to participate in the discourse.<sup>65</sup>

Secrecy creates a path-dependence which operates to prevent future participants from engaging in a future discourse. It impairs data-gathering about the effects of secret policies, thus divesting future actors of the reasons they may consider in determining whether their representatives are serving them.<sup>66</sup> This is surely inconsistent with our notions of democracy.

Similarly, secrecy skews the incentives for those in control of the secret information. As we saw above, secrecy modifies the power relationship between the holder of the secret information and the object of secrecy. Assuming that such holders have an incentive to hang on to that power, we can expect them to take advantage of the unavailability of information about the functions and effects of their power to present a falsely positive view of their actions to future discourse-participants. They will act strategically and lie.<sup>67</sup> Because this is enabled by secrecy, we must reject that secrecy as inconsistent with a legitimating discursive process.<sup>68</sup>

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<sup>65</sup> See BFN, *supra* note 58, at 365; MCCA, *supra* note 13, at 89. Apart from the obvious (normative quasi-) truth-finding role of this practice, it also permits future persons to be charged with consent.

<sup>66</sup> One must be careful not to push discourse ethics too far. Read to an extreme, discourse ethics could be understood as invalidating all law to the extent that it purports to bind actors in the future. The simple answer to this objection is first, that we must make compromises in our discursive principles for practical purposes, and second, that legitimate law will be open to revision by the people in light of future information. Secrecy deprives the future of that capacity for revision, and is thus distinct from all other forms of future-binding law. (This point also eliminates many concerns about the cost and delay of discourse-ethics style public speech, since a decision that is subject to revision can often be made on a provisional basis while deliberation is ongoing.)

<sup>67</sup> See BOK, *supra* note 3, at 106-11, 177 (discussing this vicious circle/entrenchment effect of secrecy); *id.* at 202-03 (giving an example of an appeal to secrecy even as to the reasons for secrecy by an entrenched government actor). In general, this is the problem with all expedient justifications for infringements on freedom: it becomes a habit to do violence to freedom in the name of freedom. When one becomes accustomed to treating people as means rather than ends (or as means for some higher allegedly humanistic ends), one tends to continue doing so. In this vein, see HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 460-68 (Harcourt, Brace & World, Inc. 1966) (1951). The role of secrecy in all of this as one of the tools of power entrenchment is also discussed by Arendt. *Id.* at 376-82 (see particularly the analysis of Stalin's rise to power aided by the secret police at 379-80).

<sup>68</sup> One might fairly object here that the State necessarily takes many other actions which might deprive the people of the opportunity to fully participate in the political process. For example,

## V. CONCLUSION: WHAT IS TO BE DONE?

We have gone full circle, and return to utilitarianism. If we are convinced that secrecy has significant ethical problems, what are we to do about it? How are we to conduct a discourse in the public sphere about secrecy? The utilitarian mode of present discourse is not likely to be conducive to rational or meaningful public decision making about secrecy. For the same reasons that secrecy is inconsistent with discourse ethics, it is inconsistent with a consequentialist mode of analysis: secrecy cloaks the effects of secrecy. If we do not know what risks are being concealed or what groups are going on the no-fly list, we can not judge the harms from the risks or the discrimination. We are forced to focus our deontological gaze on the act of imposing secrecy itself, not cloaked consequences.

We must reach beyond narrow self-interest and expediency and address the public on a (deontological) ethical plane. When we change the relationship between citizens and their government from one of mutual accountability to one of command and surveillance, we deny the essential humanity of each person faced with the faceless facticity that hides the choices of the humans behind the State. We must open our eyes to the wrong we do when we strip our interactions of communication, understanding and shared projects. To the extent that secrecy denies the human capacity to stand as a sovereign subject, giving meaning to our choices and our experiences, we should see it as a moral transgression.

Of course, this does not mean that we can never do what is necessary. While my analysis has been fundamentally deontological – we do wrong whenever we treat another person as a thing rather than a human, when we deny her will to meaning – there is a tinge of consequentialism in special cases. As Beauvoir discussed<sup>69</sup> ethical conflicts do exist, and one must sometimes choose one outrage over

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its choice of which fields of study to fund in the schools might deprive a citizen without, say, training in economics, of the opportunity to fairly reason about public policy. This would indeed be unfortunate, and the State that wants to fully realize the possibilities of a robust public discourse would do well as both a practical and an ethical matter to fully fund education. However, one ethical violation can hardly excuse another from the same actor! The critic might respond that secrecy can compensate for an imperfect education: without an adequate grounding in probability theory, a public that is exposed to risk information might irrationally panic. However, if we take the longer view this connection between education and secrecy is actually helpful to the general cause of discourse. If risk-secrecy is forbidden to the State, the State has an incentive to supply probability education to ethically meet its need to avoid public disorder. I thank K.A.D. Camara for raising this objection.

<sup>69</sup> EA, *supra* note 6, at 145-52.



another.<sup>70</sup> That does not, however, mean that we are not committing an outrage. Utilitarianism declares that we do not do a wrong when we commit a putatively bad act if we avoid a greater injury. One can instead hold, with Beauvoir, that a wrong is a wrong, regardless of the greater harm it avoids – but that sometimes we must swallow our compunctions and choose to do a necessary wrong. Above all, we must do so with our eyes open to the character of our act.<sup>71</sup>

The State certainly has an ethical obligation to protect its citizens from terrorist attack, and the leaders of the State may choose to prefer that ethical obligation over the ethical obligation to not mystify the people with secrecy. This is not something that can be weighed and calculated because the harm from loss of freedom is not translatable into any currency. I simply suggest that we must not thereby hide from the moral implications of our “lesser evil” choices.

My aim in this article has been modest: I do not propose to delineate those acts of state secrecy which, while unethical, might be seen as necessary alternatives to still more unethical acts or omissions. I am satisfied to open some discourse in the legal and policy literature space for a critical examination of secrecy from a deontological viewpoint, and to leave the hard choices of implementation to others. Nonetheless, one principle suggests itself from the above discussion: any choice to use the types of secrecy discussed here must be made only after all ethically permissible alternatives are exhausted and must consider secrecy only in the context of the most effective ethical alternative. As yet, there is no reason to believe that the American policymakers have taken any such considerations into account.

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<sup>70</sup> Cf. RAWLS, *supra* note 6, at 40-45 (discussing the need to appeal to prudence and intuition in setting priorities among conflicting moral duties even as a deontologist).

<sup>71</sup> Cf. RONALD E. SANTONI, *SARTRE ON VIOLENCE: CURIOUSLY AMBIVALENT* 147-50 (Penn St. Univ. Press 2003) (attributing a roughly similar position to Sartre).

