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LIBERTY, SECRECY, AND THE RIGHT OF ASSESSMENT

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ABSTRACT. In this article we argue that governmental practices of secrecy threaten the epistemic dimension of rights. We defend the view that possessing a right entitles its holder to the largest extent of available knowledge of the circumstances that may impede the enjoyment of that right. We call this the 'epistemic entitlement' of rights. Such an entitlement holds in ideal conditions once full transparency is assumed. However, under non-ideal conditions secrecy is a fact that should be accounted for. We argue that, under such conditions, interference due to secrecy is legitimate when the circumstances under which it occurs are open to assessment by the right-holder. We call this the 'right of assessment'. It ensures the ex-post fulfillment of the epistemic entitlement under non-ideal conditions of partial compliance where full transparency is unattainable due to the fact of secrecy. The right of assessment shields against arbitrary interference by imposing an obligation on the government to provide justification for any interference in the sphere of fundamental rights.

I. INTRODUCTION

A common view among political and legal theorists holds that government secrecy is justified in liberal-democratic societies due to considerations of safety or public interest. Secret services and government security agencies, it is argued, provide indispensable intelligence for national security and the prevention of terrorism, thus protecting democratic institutions from existential threats. Secrecy agencies generally respond to the democratic authority since the gathering and classification of information are subject to independent control under the law, including oversight bodies of elected representatives and Constitutional Courts.

In recent years, the general trust in the democratic function of secrecy has been subjected to intense criticism due to whistleblowing

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disclosures of secret surveillance programs, generating an impassioned dialectic between advocates and critics of emergency politics. According to some authors, although secrecy may impinge on constitutional rights, national security is a paramount good that justifies balancing between security and personal liberties in times of emergency[1]. As Richard Posner put it, the constitution is not a 'suicide pact'[2]. On the opposite front, advocates of democratic transparency argue that the balance model authorizes unrestrained secrecy, that is, secrecy[3] eschewing proper judicial and parliamentary oversight. Unrestrained secrecy limits citizens' right to be informed about decisions and policies enacted in their name and, consequently, they are deprived of their ability to assess security policies. Only the transparency of government acts can fulfill the citizen's right to information.

Democratic theory seems to rely too often on a generic ideal of transparency, neglecting the complications arising from implementing it. The advocates of the balance model are more realistic in this regard. They maintain that there is no principled answer to how much transparency is needed to protect rights and democratic

[1] For a defense of this view, see Richard Posner, *Not a Suicide Pact: The Constitution in a time of National Emergency* (New York: Oxford University Press, 2006); Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts*. (New York: Oxford University Press, 2007); Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2010); Rahul Sagar *Secrets and Leaks: The Dilemma of State Secrecy (Princeton: Princeton University Press,* 2013); Rahul Sagar 'Who Holds the Balance? A Missing Detail in the Debate over Balancing Security and Liberty', *Polity* 41(2) (2009): 166–188. For a criticism of the balance, see Jeremy Waldron, 'Security and liberty: The image of balance', *Journal of Political Philosophy* 11(2) (2003): 191–210. See also Cass R. Sunstein, 'Government control of information', California Law Review 74(3) (1986): 889–892, and Daniel J. Solove, 'Data mining and the security-liberty debate', *The University of Chicago Law Review* 75(1) (2008): 343–362, for a critique of the priority assigned to the security interest. Bruce Ackerman discusses the implication of the liberty-security trade-off within the context of a normative proposal on Bruce Ackerman., 'The emergency constitution', *Yale Law Journal* (113) (2004): 1029–1091.

[2] Posner, *Not a Suicide Pact* (New York: Oxford University Press, 2006), citing a remark originally made by Justice Robert Jackson, later taken up by Justice Arthur Goldberg and Ronald Dworkin.

[3] We confine our discussion to national security secrecy, specifically focusing on the management of information concerning intelligence. This form of 'executive' secrecy is required during the execution of emergency powers, including the concealment of specific operational details, plans, strategies, or tactics that are crucial to effectively respond to and manage the constitutional emergency. It is distinct from confidential and closed-door deliberations that occur within governments and legislative bodies during discussions on which decrees and other emergency measures to implement. We don't discuss this form of 'deliberative' secrecy in legislative deliberations. These debates can be found in Amy Gutmann and Dennis F. Thompson, *Democracy and Disagreement* (Cambridge, Mass.: Harvard University Press, 1996), chapter 3; Simone Chambers, 'Behind closed doors: publicity, secrecy and the quality of deliberation', Journal of Political Philosophy, 12 (2004), 389–410; Jon Elster, 'Deliberation and constitution making', Deliberative Democracy, ed. Jon Elster (Cambridge: Cambridge University Press, 1988), pp. 97–112; and more recently in Brian Kogelmann, *Secrecy Government. The Pathologies of Publicity* (Cambridge: Cambridge University Press, 2022). For an overview of the debate on secrecy and transparency, see also Brian Kogelmann, 'Secrecy and transparency in political philosophy', *Philosophy Compass*, 16(4) (2021): 1–10.

accountability since any amount of information can be dangerous when the circumstances are unpropitious. Since rights have to be balanced against countervailing interests of national security, the individual right to information is also subject to limitation when the circumstances demand it. When the right to information is limited, institutional transparency is lost, at least within the timeframe of national emergencies. The implausibility of this view rests on its normative consequences. Its primary injunction stems from a claim of necessity: democracies should accord high discretionary powers to the executive (who has access to secret information) to decide when the circumstances require shifting the balance towards more security. Yet, once the government claims exclusive control of information, the regulatory system of checks and balances becomes ineffective. Not only are ordinary citizens deprived of information, but also elected representatives and the judicial branch may be asked to defer their power of control. Consequently, the prerogatives of state secrecy are always prone to abuse.[4]

In what follows, we explore the role of secrecy in limiting public accountability by paying attention to what we call the 'epistemic dimension' of rights.[5] In Section II, we argue that the limitations imposed on rights by what we call 'unrestrained' secrecy can be better grasped by looking at how lack of knowledge impairs their exercise. Decisions a government makes in the name of its citizens may represent an unjustified interference with their rights no less than other forms of more direct interference. First, we present the intuitive argument and then show how the epistemic requirements on free action provide a condition for the full enjoyment of rights. We claim that limiting individual rights is only justifiable when individuals possess an 'epistemic entitlement' to access all relevant information regarding circumstances that could hinder the exercise

[4] Although the focus of our paper is on executive secrecy during national emergencies, the argument holds for other forms of secrecy, for instance those involved in fighting organized crime, where the prerogatives of security may require the executive to maintain secrecy through covert surveillance operations. Our contention is that any form of secrecy, in emergency or non-emergency circumstances, generates an asymmetry between those who control the information and those who don't. The main argument holds regardless of the circumstances of secrecy and the reasons for which it is proclaimed. However, given the scope of this paper, the focus is on the impact that secrecy has on rights, more exactly civil liberties. We thank an anonymous reviewer for pressing us to clarify the distinction.

[5] For a preliminary formulation of the argument, see Daniele Santoro and Manohar Kumar, *Speaking Truth to Power. A Theory of Whistleblowing* (Springer, 2018), chapter 4 where we outlined the general idea of an epistemic framework of rights. In this paper, we refine the argument and provide a formal justification of the epistemic features of rights as part of a conception of civil liberties.

of their rights. However, the epistemic entitlement may conflict with genuine security requirements in real-world democracies, where full transparency may expose crucial information to potential enemies or in espionage activities and, in the process, threatens national security. When this is the case, the government's prerogative to classify information is justified on the grounds of national security and public safety. In Section III, we discuss the infringement of civil liberties as a model for rights in general. We defend the view that when non-ideal circumstances require the enactment of secrecy measures, those measures are justified provided the agents are entitled to an *ex-post* assessment of the grounds behind the limitation of their liberties. We call such an entitlement 'the right of assessment'. When the right of assessment is violated by abuse of secrecy, our liberties are at risk, and the very ability of persons to act and judge autonomously is compromised.

II. THE EPISTEMIC CONDITIONS OF RIGHTS

Threats to rights come not only from external enemies but also from domestic forces, be it the government or agencies whose prerogatives often stretch beyond the letter of the Constitution. This is also the case of secrecy operations. Edward Snowden's disclosures of the NSA surveillance programs have revealed the extent to which security agencies nowadays can conduct mass surveillance by accessing private data in bulk without authorization.[6] In response to the growing public outrage, governments have invoked the need to balance liberty and security in the exceptional circumstances imposed by the threat to public safety,[7] and law-abiding citizens should have no cause for concern in being subjected to investigations or surveillance if they have nothing to hide.

[6] See the transcripts of Glenn Greenwald's interview with Ed Snowden that marked the outbreak of the NSA gate: Glenn Greenwald, *No Place to Hide: Edward Snowden, the NSA, and the US Surveillance State* (New York: Metropolitan Books, 2014). On the same matter, see also Luke Harding, The Snowden Files. *The Inside Story of World's Most Wanted Man* (New York: Vintage Books, 2014).

[7] According to Eric Posner and Adrian Vermeule, who epitomize this view, the role of the state and role of policymakers is to strike a balance, especially when states of emergency require extraordinary measures. See Posner and Vermeule, *Terror in the Balance: Security* (New York: Oxford University Press, 2007), pp. 15–130, Adrian Vermeule, 'Security and Liberty: Critiques of the Tradeoff Thesis', in *The Long Decade: How 9/11 Changed the Law*, eds. David Jenkins, Amanda Jacobsen, and Anders Henriksen (New York: Oxford University Press, 2014), pp. 31–44. See also Santoro & Kumar, *Speaking Truth to Power*, chapter 4 for a critique of the model.

However, the consequences of balancing liberty and security are more far-reaching than an exceptional interference with individual rights. Since a crucial measure of a secrecy operation's success is its capacity to keep intelligence confidential, it is exactly when it is most successful that secrecy can be easily abused. Secrecy inherently risks becoming unrestrained by depriving citizens and oversight institutions of the information needed to exercise the power of public supervision.[8] The issue is not of legality, for unrestrained secrecy is often legal: except for covert operations that fall outside the chain of command, secret policies, military operations, and classification of documents are all authorized by public officials acting within their power. What distinguishes unrestrained secrecy from other forms of classified activity is that unrestrained secrecy represents a distinctive violation of rights, i.e., it denies citizens the entitlement to assess which restrictions on their rights are justified by the circumstances in which governments operate.

A. Three Forms of Interference

Unrestrained secrecy poses significant risks to the enjoyment of rights because it deprives citizens of their entitlement to assess the restriction on their rights. The reasoning in favor of this claim moves from the premise that a conception of rights specifies the freedoms to which a right-holder is entitled by virtue of possessing a right.[9] We assume that a right is an entitlement an agent has to freedom of action and choice within the scope defined by that right. Rights, in other words, protect the person's capacity to act independently of

[8] Unrestrained secrecy denies not only transparency, but also the right to obtain a justification for why a particular document or decision is secreted. Not only does it violate the duty of transparency, but it also spares the government from being accountable for its acts. For a classic, yet still instructive discussion of the risks inherent to secrecy and how secrecy affects the public domain, see Sissela Bok, *Secrets. On the Ethics of Concealment and Revelation* (New York: Pantheon, 1983), especially pp. 5–9.

[9] See Waldron's introduction to *Jeremy Waldron, ed. Theories of rights* (Oxford: Oxford University Press, 1992), pp. 1–20, and Leif Wenar, *'Epistemic rights and legal rights', Analysis* 63(278) (2003): 142–146.

external constraints, such as the restriction of free movement.[10] Classic liberal theorists have emphasized the absence of interference as a necessary condition for protecting political freedom. However, this view seems too narrow, for it neglects other kinds of interference over and beyond overt coercion that affect freedom of action. Neo-republicans, such as Philipp Pettit, have notably insisted on this point, arguing that there is a difference between conceding freedom and guaranteeing freedom from *arbitrary* interference.[11] A person can act without being subject to direct interference and still be not free if she lacks sufficient legal and constitutional protections from the power a master can exercise over her freedom. When a person is subjected to arbitrary interference – he argues – she lacks freedom 'as the social status of being relatively proof against arbitrary interference by others, and of being able to enjoy a sense of security and standing among them'.[12] Non-domination is the condition of enjoying personal security against the contingencies of arbitrary interference in all those possible circumstances in which a *dominium* may decide to exercise his power.[13] It is this robust freedom, freedom from domination, that liberals neglect.

Another shortcoming of this narrow conception of non-interference concerns the factors that influence the formation of the will. A person may be subject to cognitive and epistemic limits in the formation of the will. She may also neglect or not be able to recognize the reasons to act in ways that are best for her. These constraints, however, do not undermine political freedom. An interference is

[10] It is common in the literature to distinguish between will theories and interest theories of rights. For a general introduction to the debate over the will *vs*. interest theories of rights, see Hillel Steiner, *An Essay on Rights* (Oxford UK and Cambridge USA: Blackwell, 1994); Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986); Peter Jones, Rights (London: MacMillan, 1994); and Leif Wenar, 'Rights', The Stanford Encyclopedia of Philosophy (Spring 2021). For an engaged view of the arguments in favor and against these positions, see Matthew Kramer, N. E. Simmonds, H. Steiner (eds), *A Debate Over Rights* (Oxford: Oxford University Press, 1998). Sometimes the same distinction is drawn in terms of 'choice' and 'benefits'. See Steiner, An Essay on Rights, (Blackwell, 1994): 57–73, and Jones, Rights (London: MacMillan, 1994): 26–35. According to will theorists, rights protect the right holder's authority – or choice – to enforce (or waive) others' duty to comply with the claim of the right-holder protected under the scope of the right in question. On the other hand, interest theories conceive of rights as protecting vital human interests, and those interests constitute the ground for the correlative duty to respect that right. Our characterization of rights is impartial between these two conceptions. We assume that a right protects the person's capacity for autonomous choice, which is also a fundamental interest of agents. Such an interest does not consist in a specific functional resource, but in the authoritative capacity to govern one's conduct that defines the concept of agency.

[11] See Philip Pettit, *Republicanism: A Theory of Freedom and Government: A Theory of Freedom and Government* (New York: Oxford University Press, 1997), pp. 51–79.

[12] *Ibid*., p. vii.

[13] *Ibid*., p. 25.

relevant for political freedom only when it is intentional. Deception is such a case, for the agent's freedom is compromised by inducing false or misleading beliefs that affect the agent's choices. Similarly, manipulation leads the agent to adopt goals she would not otherwise embrace. When a person is manipulated or deceived, she thinks she acts out of her own will when instead, she does not.[14] Domination, manipulation, and deception are *indirect* violations of political freedom. Domination exercises a constant threat that leads to uncertainty and self-censorship prompted by fear. Manipulation and deception alter the personal appraisal of the options available within an opportunity set by misrepresenting the agent's options, or by misleading someone to choose options against her best interests.[15]

A third and more subtle form of indirect interference is due to government surveillance, that is, by all those institutional practices of control and classified storage of information concerning the agent's activities in manners unbeknown to the agent. We may call it *secret* interference since surveillance activities, such as wiretapping or digital tracking of communications, do not coerce or prevent an agent from acting, nor is the agent induced to form beliefs or adopt goals she would not usually pursue.[16] Surveillance does not either induce self-censorship. The paradigm case is surveillance involving the violation of privacy: conversations or internet searches may be systematically monitored, without preventing the agent from engaging in those activities, but with the belief that the activity is confidential. But, if an agent is unaware that her conversations are

[14] How manipulation and deception may affect political liberty is discussed at length in Philip Pettit, *On People's Own Terms. A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press. 2012), chapter 1. Pettit argues that we should distinguish between two forms of hindrances to the freedom of choice: hindrances that affect the satisfaction of one's will by affecting the use of resources in general and those that affect the use of resources for specific purposes (pp. 37–39). While generic hindrances may *vitiate* the freedom of choice, only specific hindrances are *invasive* and inherently inimical to freedom of choice (p.38): 'To suffer invasion is to be denied the very condition by which freedom is identified: to be thwarted in making the choice according to your will'. (p.43).

[15] In Pettit's sense, they are invasive hindrances because they misrepresent the options in the opportunity set of a situation of choice (*On People's Own Terms*, pp. 54–56). For a review of the debate on how manipulation and deceptions are intertwined, see Robert Noggle, 'The Ethics of Manipulation', *The Stanford Encyclopedia of Philosophy (Summer 2022 Edition)*.

[16] See Santoro & Kumar, *Speaking Truth to Power*, *chapter 4* for a discussion of surveillance and wiretapping as a case of indirect interference. A case in point is the mass violation of constitutional rights exposed by Snowden's files on PRISM and the 'Boundless Informant' program. See Greenwald, *No Place to Hide*, (New York: Metropolitan Books, 2014): Chapter 3.

being monitored, she lacks essential information to choose whether or not to engage in that activity.[17]

Secret surveillance is distinct from other forms of indirect interference such as manipulation and deception. Admittedly, both these forms of interference may require a certain amount of secrecy, but not necessarily so. Manipulation can be overt, for instance, when a person is induced to act in ways that are detrimental to her interests despite being advised by others against it. As for deception, it seems to involve some degree of secrecy about the intentions of deceiver, and we can indeed think of surveillance policies as deceptive to some extent, especially when they are presented to the public as narrower in scope than they are. However, deception does not necessarily imply secret surveillance. Deception is a form of communicative interaction in which the deceiver surreptitiously leads the deceived to believe something contrary to facts or her interests. On the other hand, secret surveillance is invisible to the surveilled subject in ways that are completely untraceable and where no communication is required.

When a right is violated by secret surveillance, there is no interference with the action but with the informational resources needed to enjoy those rights and freedom. Without that information, an agent is denied the freedom to decide whether the information is relevant to her choice to act.

B. The Epistemic Entitlement

To appreciate the role that information (or lack thereof) plays in the violation of rights, we suggest specifying a requirement implicit in the concept of rights: exercising a right entitles the right-holder – *inter alia* – to the largest extent of available knowledge of the

[17] In addition to the right to privacy, other rights may also be compromised. Consider the category of rights called privileges, such as the privilege against self-incrimination. Since it is in the agent's right to refrain from an activity that could lead to her incrimination, the privilege-right against self-incrimination is potentially affected by mass surveillance programs. It is a matter of contention whether the privilege against self-incrimination necessarily holds in cases of lawful and more targeted surveillance, such as corruption or drug-related operations. But lawful surveillance requires judicial authorization that lacks in cases of unrestrained secrecy, where the agent expresses no consent. Sometimes, whether authorized or not, surveillance can also impinge on other rights, such as the attorney-client privilege.

interference that may affect her choice. Such a requirement we call the 'epistemic entitlement' of rights.[18] We can formulate the epistemic entitlement as follows:

(E) For agent *A* to enjoy a right *R*:
(i) *A* must not be subjected to arbitrary interference (direct or indirect) within the scope of *R*;
(ii) *A* must be able to know that (i) holds.

(E) specifies a triadic relation between an agent, an action, and a constraint. The first condition is the classical conception of rights as protecting freedom from arbitrary interference.[19] The second condition establishes the epistemic entitlement: since one cannot properly exercise a right unless one also knows the constraints of that choice, being free from arbitrary constraints implies that one *knows* to be free from those constraints. Of course, there are cases when the agent is unconcerned about her status as a right-holder. Merely failing to know that she is not subjected to interference when the information is accessible with reasonable time and effort does not count as a violation of rights. It is the intentional withholding of information, despite the agent's effort, that has normative significance. It follows that, since a right protects freedom of choice from arbitrary interference, an agent properly enjoys a right when she is *entitled* to the knowledge of the conditions of choice protected under that right.

Once the epistemic entitlement is clearly articulated, the threat to rights posed by governmental secrecy becomes manifest. Secrecy not only infringes on citizens' rights when it directly or covertly interferes with the exercise of those rights but also when it hinders their entitlement to knowledge about the circumstances in which rights are exercised. Therefore, although secrecy may not seem to restrain one's freedom to act, it does affect the entitlement of right holders to

[18] Wenar defends a view of rights that he calls 'epistemic', though not in the context we explore here (Wenar, '*Epistemic rights and legal rights*'). More recently, Lani Watson presented a comprehensive view of epistemic rights as 'rights concerning goods such as information, knowledge and truth' (Lani Watson, *The Right to Know. Epistemic Rights and Why We Need Them*. (London and New York: Routledge, 2021), p. 5). Our view is distinct from Watson's. Watson is interested in elucidating the nature of rights whose content is an epistemic good. We are interested in elucidating which epistemic requirements affect rights in general, not just epistemic rights. In our view, also epistemic rights in Watson's sense are subject to epistemic requirements. For a recent review of the literature on this topic, see Rubén Marciel 'On citizens' right to information: Justification and analysis of the democratic right to be well informed', *Journal of Political Philosophy* (31) (2023): 358– 384.

[19] MacCallum originally developed the triadic relation with regard to freedom (Gerald MacCallum, 'Negative and positive freedom'. *The Philosophical Review* 76(3) (1967): 312–334).

the information necessary for informed choices and the exercise of their autonomy.

It may though be argued that the knowledge requirement of rights is weaker than the definition suggests: the epistemic entitlement is not entailed by the possession of a right; it is instead a precondition to act upon a right. The distinction is substantial: when the epistemic entitlement is part of what it means to have a right, failing to fulfill the entitlement equals wronging the right itself. On the contrary, failing to fulfill just a precondition of a right does not imply that the right itself is violated but rather that the right-holder has been deprived of information she should have by virtue of enjoying other rights. For instance, when information about hazardous material polluting the land is secreted, a person may still enjoy the freedom to move and live on that land. However, she should have been informed of the potential risk to her health by virtue of a concurring right of another sort, viz., personal safety.

We claim instead that the epistemic entitlement is a constitutive property of having a right, i.e. having a right entails that the agent holds such an entitlement. The argument for this stronger view is the following: a right not only safeguards the agent's conduct against interference but also from undue interference over the conditions governing the formation of one's choice. Among these conditions, the knowledge of circumstances that may affect a course of action is necessary for a person to choose in light of the best chances available to her and thus take responsibility for her actions. Without that knowledge, we cannot ascribe responsibility to a person; she may have possibly not chosen a course of action had she known its full consequences. And although an agent cannot retrieve complete information about the circumstances affecting her choices in a real-world scenario, it is nonetheless the case that a right is violated when information, which should be potentially available to the right-holder, is intentionally withheld by a third party. In this case, the right-holder is wronged *qua* a subject capable of choosing in full autonomy the course of action that she deems most suitable in the light of the available knowledge. The epistemic entitlement of a right requires that the exercise of a right is conditional on guaranteeing the capacity of autonomous choice to the right-holder. Thus, if someone is aware that a constraint interferes with the right holder's

ability to evaluate the circumstances of choice, and it is in her capacity to disclose this information, then omitting to disclose it equals interfering with the agent's right. Therefore, the informed person has a duty of non-interference to provide the information, which corresponds to the correlative entitlement of the right-holder to know which constraints impinge on her choice.[20] A person is wronged in her right even when it happens that she is free to act in a minimal sense of doing something she wants. Consider the previous example again: when information about the hazardous material is secreted, the person's right to movement is already violated, even if she does not eventually suffer the consequences of exposure. In this case, it is just incidental that the consequences are favorable to her, and even when they are, she is denied the freedom to choose whether or not to expose herself to that risk.[21]

In conclusion, our interpretation holds that the epistemic entitlement is inherent to the definition of a right as it safeguards the capacity of individuals to undertake rational decisions in the light of the best available information. Depriving a person of the relevant information restrains her freedom, for secrecy affects such a capacity, converting what would be a calculable risk into an incalculable uncertainty. Once the fine structure of rights is suitably spelled out, we realize that the epistemic entitlement safeguards the capacity to exercise a right.[22] In the following section, we will show that rights grant protection on epistemic grounds in non-ideal conditions when civil liberties conflict with governmental prerogatives of secrecy.

So far, we have argued for the epistemic entitlement of rights under ideal conditions. But how can such a conception accommo-

[20] Such a duty needs to be qualified: when the person only possesses information regarding the presence of a constraint, she has a moral – but not yet a legal – duty to provide that information. But, when the informed person is also the agent responsible for bringing about the constraint, she has a legal duty to remove it, or – whenever this is not possible – to warn the right-holder of the hindering condition.

[21] In a similar vein, Henry Shue defends the idea that by being entitled to a right, one is also entitled to physical security as a basic right so that 'threats to his or her physical security cannot be used to thwart the enjoyment of the other right'. (Henry Shue, *Basic rights: Subsistence, affluence, and US foreign policy* (Princeton: Princeton University Press, 1996), p. 22) Although Shue does not provide an analysis of the notion of epistemic entitlement, his argument supports the view that basic rights are such 'that everyone is entitled to the removal of the most serious and general conditions that would prevent or severely interfere with the exercise of whatever rights the person has'. (*Ibid.*).

[22] The conception of rights we defend here partly reflects the republican conception of freedom as non-domination. See Pettit, *Republicanism* (New York: Oxford University Press, 1997). However, while the idea that rights protect autonomy is consistent with the republican conception of freedom, it is independent of that understanding.

date the *fact* of secrecy in real-world circumstances? Countervailing security considerations might defeat the requirement of full transparency, for instance, when information needs to remain classified to prevent significant threats or breaches of national security.[23] This constitutes a clash of rights: fulfilling epistemic entitlement may come at the cost of protecting the right to safety of others, for e.g. when a covert surveillance operation targets suspected terror groups it undermines their right to privacy and their epistemic entitlement in order to protect the right to safety and life of other citizens. *Prima facie*, the epistemic entitlement does not allow for exceptions when full compliance is unobtainable. Thus, when secrecy is justified, the epistemic entitlement seems to be undermined, given that the second condition for exercising a right formulated above (E) is not satisfied. This view implies that, in non-ideal circumstances, rights are necessarily violated anytime secrecy is justified. The conclusion seems hasty, however. From the premise that the epistemic entitlement is part of the very idea of having a right, it follows that when rights are justifiably limited, right-holders are *still* entitled to know the extent of such limitations and what reasons support the executive authorization of secret activities. The epistemic entitlement, in other words, entitles the right-holders to advance claims of justification about decisions affecting their rights and – by the same token – provides a foundation for the government's duty of accountability. Therefore, under non-ideal circumstances, the epistemic entitlement is not undermined. Rights keep their epistemic significance even when they are limited, and the epistemic entitlement rests as the normative premise upon which rights can be protected.

We can reformulate (E) as follows:

(E*) For agent *A* to enjoy a right *R*, in conditions of partial compliance with democratic transparency,
(i) *A* must not be conditioned by arbitrary interference (direct or indirect) within the scope of *R*;
(ii) *A* must be able to know that (i) holds, or she must be informed of which constraints limit her enjoyment of R and why these constraints hold.

III. THE RIGHT OF ASSESSMENT

This revised formulation of the epistemic entitlement identifies a proper right, what we call the 'right of assessment'. This is a right in

[23] For a defense of the legitimate exercise of secrecy by democratic states see Dorota Mokrosinska, Democratic Authority and State Secrecy, *Public Affairs Quarterly*, *33*(1) (2019): 1–20.

a proper sense because it is a distinctive claim persons have towards a duty of justification when a right has been undermined. The right of assessment derives from the information requirement of epistemic entitlement. Being entitled to all available information about the circumstances of choice implies an agent is also entitled to know how those circumstances are affected under non-ideal conditions. We may also conceive of a right of this sort as a second-order right, i.e., a claim towards competent authorities to provide evidence and justification for the limitation of first-order rights (call them 'substantive' rights).

The right of assessment holds even in the case of the weaker interpretation of the epistemic entitlement we discussed in the previous section: that is, when the requirement of the fullest extent of available information is regarded just as a precondition for the exercise of substantive rights. Independent reasons can support the legal recognition of a second-order right to information. One may also think of the right of assessment as a right that vests a naked liberty with a protective perimeter.[24] Whatever line of reasoning one privileges, in non-ideal circumstances the weak and the strong views yield the same conclusion.

A. The Structure of Civil Liberties

In the previous section, we have discussed the epistemic conditions that must obtain to enjoy a right in general. In what follows, we show how a conception of rights can accommodate the right of assessment in non-ideal circumstances. To this purpose, we shall focus on a subset of rights, namely the civil liberties included in the Constitutional Charts. The rationale for choosing civil liberties lies in their robust constitutional protection, which enables a more formal approach to addressing the corresponding state duties associated with them, but the same analysis can be applied to all rights having correlative duties and responsibilities. We consider those liberties listed in the First Amendment to the United States Constitution.

[24] The distinction between *vested* and *naked* liberties is originally Bentham's, who referred to them as different types of rights. For a refinement and an interpretation of this distinction, see Hart, Herbert L. A. Hart, *Essays on Bentham: studies in jurisprudence and political theory* (Oxford: Clarendon Press, 1982). Hart takes the protective perimeter to be constituted by a set of duties prohibiting the interference of a right, although not specifically correlative of that right. See Steiner, *An Essay on Rights* (Blackwell, 1994), pp. 75–85, for an assessment of this view.

These liberties include the freedom from the establishment of religion and the freedom to practice religion, freedom of speech, freedom of the press from government interference; the right of the people to peaceful assembly, and to appeal to the government for redress of grievances. We may also include in this set the right to privacy, that is the freedom from unwarranted governmental intrusion into the personal and private affairs of individuals.[25]

We can define civil liberty, within the classical Hohfeldian system of jural relations, as a claim-right protected under an immunity. A claim-right (C), in the Hohfeldian sense, is a right correlative of a duty (Hohfeld 1919: 38). Let's express it this way:

(C) A has a claim-right against B *if and only if* B has a duty towards A not to interfere with A's enjoyment of the activity protected under that right.

Moreover, an immunity (I) is ''one's freedom from the legal power or 'control' of another as regards some legal relation.''(ibid: 60):

(I) A has an immunity *if and only if* B does not have a legal power to alter A's legal standing.

For example, consider the right to free speech, which imposes a duty on everybody not to interfere with free expression. It also implies an immunity such that nobody – either an individual or an institutional agent – may legally alter the agent's legal standing as a bearer of that right.[26]

The two-ply structure of civil liberties can also be represented as a combination of two orders of rights: a set of first-order rights that protect specific fundamental interests or capacity for agency – say, free speech – and a set of second-order rights, which guarantee the enjoyment of those substantive rights from the government's attempt to alter or amend the legal standing of right bearers. In other words, immunities prevent the government from alienating their bearers from their liberties. By combining these conditions, we obtain the following definition of civil liberties:

[25] See, for instance, the mission of the American Civil Liberty Union available at: https://www.aclu.org/about-aclu?redirect=about-aclu-0. (retrieved on November 15, 2022).

[26] Hohfeld's system does not specify which agents are subject to the duty of non-interference. Still, we can reasonably assume that individual, collective, and institutional agents are subjects of duty within the Hohfeldian relations. For instance, the First Amendment to the US Constitution guarantees protection from individual subjects and the government for all six freedoms encompassed by the Amendment.

(CL) A person enjoys a civil liberty *if and only if* (C) a duty holds for everyone else not to interfere with the enjoyment of her activity protected under that liberty, and (I) the government does not have a legal power to alter her legal standing concerning that liberty.

This definition does not yet specify the conditions under which civil liberties can be limited. There are two cases in this regard. Firstly, when an offender violates a first-order right, the state can lawfully alter the legal standing of the violator in response to that offense. Part of the purpose of having a legal system is to administer justice through legal procedures. The second is the crucial case when the government alters the legal standing of citizens to protect the rights of another person or the overall system of rights,[27] an argument often invoked in cases of security emergencies. We need then to amend the definition above to include these restrictions:

(CL*) A person enjoys a civil liberty *if and only if* (i) a duty holds for everyone else not to interfere with the enjoyment of her activity protected under that liberty; (ii) the government does not have a legal power to alter a person's legal standing concerning that liberty unless (iii) her conduct violates or threatens the fundamental rights of other persons; or (iv) a restriction of a person's liberty results from an equal general restriction in the liberty of others in order to protect the overall system of liberties.[28]

The definition above articulates the complex structure of civil liberties, outlining the conditions that establish the right of assessment. The right of assessment applies to the provisos that justify exceptions to the duty of state authorities not to alter the legal standing of a person.

Consider proviso (iii). The proviso is prima facie satisfied by legal standards for investigation and prosecution of offenses. In this case, the right of assessment requires access to information justifying those actions, such as evidence determining the bases for probable cause for search or an arrest.

Consider now the proviso (iv). Given its broad scope, the right of assessment demands an exceptionally compelling justification to show how restricting a liberty would contribute to maintaining the overall system of liberty. In this case, the justification that would fulfill the right of assessment cannot refer to ordinary legislation, but

[27] This follows Rawls' condition for the limitation of the first of his two principles of justice. Liberty – he claims – can be restricted only 'for the sake of liberty itself', i.e., when its limitation strengthens the total system of liberties and is 'acceptable to those citizens with the lesser liberty'. (John Rawls, *A Theory of Justice: Revised Edition* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1999), p. 222).

[28] By 'fundamental rights', we refer to the set of rights that define political status, such as citizenship. A civil liberty may be lawfully restricted also when its exercise violates one of these rights, not just the subset of civil liberties – say when free expression turns into defamation or hate-speech.

require access and evaluation of the particular circumstances that prompt a general restriction in the system of liberties. This is typically the case when an emergency policy or decree shifts in the balance between liberty and security leans towards increased security. Absent proper justifications for the application of these provisos, any interference with the liberties of a person would be arbitrary, and a threat indeed to the general system of rights.

It is in the enforcement of this proviso that the right of assessment plays a pivotal role against the abuse of state secrecy because it shares with the notion of immunity, in the Hohfeldian sense, the function of protecting liberties from the legal power of the government. In this sense, the right of assessment can be described as a second-order right in the two-ply structure of civil liberties. It is 'second-order' in the sense that it depends on the enforcement of civil liberties, which are substantive rights. It is a 'right' because it is a claim correlative to the state duty to refrain from unduly altering those liberties. Yet, it is a distinctive right, because it imposes an epistemic obligation on state authorities to disclose information on the legal standing of the right-holder, when that standing is modified, and a justification for such interference.

B. Scope and Application of the Right of Assessment

We showed that the right of assessment is part of the structure civil liberties and that its protective function is relevant to the system of rights in general. However, a potential objection against the right of assessment is that, when it comes to its enforcement, its scope is limited. Interfering with the liberty of a person in a particular instance may affect her civil liberties, but does not appear to undermine the general system of rights, even when the interference is unjustified and no due assessment is provided. An example is the case of Anwar al-Awlaki, an American born US-citizen and alleged Al-Qaeda member, who was killed in 2011 by an American drone strike in Yemen ordered by the President. As the Al-Awlaki's family and civil liberties groups challenged the legitimacy of the order on the ground that the government had violated the 'fundamental rights under the US constitution to due process and to be free from unreasonable seizure', the Federal Court dismissed the charges

declaring that the officials involved acted 'in accordance with the US constitution when they intentionally target a US citizen abroad at the direction of the president and with the concurrence of Congress'.[29] While this case may cast severe doubts of constitutionality – the argument goes – it does not seem to involve concerns for the rights of law-abiding citizens. This argument is short-sighted, though: the violation of liberties and due process in one instance does affect the system of rights in general for it undermines the protective function of rights against interference in possible future circumstances that may involve even the law-abiding citizen. Due justification under the right of assessment is required to provide a safeguard against the arbitrary extension of those infringements beyond their original scope. Equality before the law, and the very idea of the rule of law, have this protective function and do not admit case-based exceptions. The Al-Awlaki controversy is exemplary of this threat to the general system of rights that results from the judicial deference to the executive power: once the constitutional powers of the president are interpreted to dismiss the liability of officials in the assassination, the very mechanism of redress is called into question, and along with it the enforceability of rights in general. This is a concern for every citizen, even when they find that a security policy is overall justified. Therefore, any exception to equal civil liberties under the proviso of general security mentioned above (iv) should only be allowed when the person is granted the right to assess the circumstances of their suspension or limitation. In order to clarify this point, let's consider three cases. They are related, respectively, to the limitation of the rights to *due process*, *habeas corpus*, and *judicial review*.

The first case is when surveillance or restriction on freedom of movement are adopted as precautionary measures even if no crime has been committed and those subjected to investigation are not informed of their legal standing. Take, for instance, the no-fly list maintained by the US Transportation Security Administration. John Graham, an ex-operative of the state department of security, was put on the list without prior knowledge.[30] No charges were leveled against him, and he was denied the right to due process. This severely curtailed not only his right to movement but –in his own

[29] See 'Drone killings case thrown out in US', *The Guardian*, April 5, 2014.

[30] John Graham, 'Who's Watching the Watch List?', *AlterNet*, July 6, 2005.

words– his right to earn a livelihood that is linked to his freedom to travel. Even assuming the measure was justified, there is no ground to judge its legitimacy. Unlike surveillance, no-fly listing does not require covert intrusions in the private sphere of the individuals (although we must assume that authorities run background checks). However, operations of this sort are still quite intrusive of people's rights, for the refusal to offer a justification, least of all to provide a notice of investigation, amounts to a violation of the ex-ante entitlement implicit in the enjoyment of the freedom of movement.

A different case, involving the violation of habeas corpus, is the despicable practice of rendition adopted by the US government post 9/11 for dealing with suspected terrorists. The notorious case of Abu Omar, an Egyptian citizen granted asylum in Italy, who was illegally abducted by CIA agents from the streets of Milan with the complicity of the Italian police and the connivance of the local government, provides evidence that secret practices cannot in principle offer a warranty for the protection of the right of assessment, thus leaving persons in a condition of uncertainty with regard to their legal standing. When the legal protection of the law is vitiated by secrecy, recognizing the original entitlement of persons to an assessment of their legal standing is the only ground one can appeal to.

The third case is when judicial review[31] is undermined by the executive branch. Exemplary is the condition of the Guantánamo Bay prisoners: still in July 2023, 30 prisoners were incarcerated in the prison, 3 of which as 'indefinite detainees', a pseudo-legal category employing which several governments may detain persons without trial.[32] Enacted by the Bush Administration during the 'war on terror', justification for this practice was found in the self-asserted

[31] 'The power of the judiciary…to determine whether the acts of other branches of the government are in accordance with the Constitution' (John Patrick, John J., Richard M. Pious, and Donald A. Ritchie, *The Oxford Guide to the United States Government*. (New York: Oxford University Press, 2001), p. 348).

[32] The list of detainees is available on the New York Times' *Guantánamo Docket* database. Out of the 30 still in custody as of July 2023 '11 have been charged with war crimes in the military commissions system – 10 are awaiting trial and one has been convicted. In addition, three detainees are held in indefinite law-of-war detention and are neither facing tribunal charges nor being recommended for release. And 16 are held in law-of-war detention but have been recommended for transfer with security arrangements to another country'. New York Times. https://www.nytimes.com/interactive/projects/guantanamo (retrieved on July 5, 2023).Indefinite detention is still enforced in the United States under the National Defense Authorization Act (NDAA) of 2012, sections 1021–1022. According to ACLU and some House Representatives, these sections suspend habeas corpus and the right to trial even for American citizens. Indefinite detention is still in force in the NDAA 2017 (Publ. L. 114–328 – Dec. 23, 2016).

assumption that courts should defer to the military in determining that an individual is an enemy combatant.[33] Although this practice has raised numerous criticisms and is now much less endorsed, the prisoners currently detained in Guantanamo are considered still too dangerous to be released and yet ineligible for trial due to insufficient evidence.[34]

C. Some Objections Considered

We argued that the scope of the right of assessment embraces the whole system of rights, and we described three cases in which it can find concrete application. When presented with these cases, however, we should consider some objections.

To begin with, one might wonder whether the right of assessment holds unconditionally or, instead, it is merely a regulative principle that democracies need not adhere to, especially when national security or public safety is endangered.[35] Once the suspension of habeas corpus and due process is considered permissible, the right to a proper justification is *de facto* overridden, without any further measure of redress, including the appeal to judicial review. One could read the refusal to indict the officials involved in the assassination of Al-Awlaki as a case of this sort.

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[33] See Paust (2003: 504, ft 4) reporting the Department of Justice's declarations in the *Hamdi v. Rumsfeld* Court of Appeal case (Hamdi v. Rumsfeld 296 F.3d). The case led to the Supreme Court Ruling *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), which established that the government had the power to detain enemy combatants, but granted the rights to due process for US citizens.

[34] See Jordan J. Paust, 'Judicial Power To Determine the Status and Rights of Persons Detained Without Trial' (*Harvard International Law Journal* 44(2) (2003): 503–607), pp. 504–505 for a thorough criticism. In a majority ruling in 2004, the British House of Lords sentenced that the indefinite detention of suspected terrorists is incompatible with the Human Rights Act and the European Convention on Human Rights. See: A(FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), 16 December 2004.

[35] It is commonplace among government and security experts to treat national or public security matters as exempted from the duty of disclosure, for instance when intelligence is required to prevent terrorist attacks. Although the argument is rarely spelled out in proper detail, the exemption seems to derive from the state's duty to protect its citizens, which overrides the epistemic entitlement. But if public security is deemed necessary to protect citizens' rights – and it is as a matter of fact – there must be an appropriate assessment, perhaps deferred in time, to prove the necessity in question. A hard case would be where only the rights of some persons are limited in order to safeguard the security of a vast majority. This is a classic case of a conflict among rights. We concede that the conflict might be resolved at the expense of a minority, provided that a due justification is provided to those at the receiving end of such policy. We do not reject the legitimacy of balancing considerations among rights or between public security and rights, but the idea that such balancing exempts the government from a duty to justify shifts in the balance.

In response to this objection, it is important to recall that the right of assessment is derived from the epistemic entitlement of rights and inherits its safeguarding function. In ideal conditions, where institutions act transparently, we assume that the epistemic entitlement is fully honored; but in non-ideal conditions, where transparency does not always (or even rarely) obtain, rights are indeed conditional: they can be limited without proper notice or ex-ante justification. These restrictions apply, however, only insofar as they are open to scrutiny. The purpose of the revised definition offered above (see CL) is exactly to encompass those circumstances in which a civil liberty can be lawfully limited. Since the right of assessment is a non-ideal transposition of the entitlement to full available information, its function is preserved insofar as it warrants the disclosure of the circumstances and procedures leading to those restrictions. Although the provision of this information is remedial, it is nonetheless the best approximation of the epistemic entitlement under non-ideal conditions. Thus, the right of assessment holds unconditionally because it guarantees the lawful application of the limiting conditions of first-order rights. This condition holds in both emergency and non-emergency contexts. It may be the case that situations exist where overarching reasons may extend the timeframe a government has to disclose information that allows a citizen to properly assess the status of her rights for instance in long term covert operations against organized crime cartels. But, despite the fact that it may be opportune in some cases to extend the due time for disclosure, it doesn't follow that there is an overarching interest against the right of assessment.

Considerations of concurrent interests might justify, on the balance of reasons, the decision not to engage with requests of disclosures. Thus, there may be exceptions that limit the right of assessment in certain circumstances. The exceptions that apply to the right of assessment are the same that apply to other civil liberties, for instance when they are aimed at preventing (the incitement of) violence or acts of espionage. It is important to note, however, that these exceptions must be temporary in order to fall within the purview of the due-time clause of the right. Thus, there might be reasonable arguments not to provide a right-on-the-spot disclosure of classified information, but only on the condition that in due time

information will be disclosed. It is crucial to clarify this aspect in order to reaffirm that the right of assessment is part of the very institution of the right (i.e. of the structure of civil liberties). While the state may have a legitimate interest in keeping information confidential, no exceptions can in principle defeat the status of the right of assessment as a right claimable under the law. For this reason, we argued that the right of assessment is a second-order right that is claimable in all instances in which first-order civil liberties can also be claimed. Exceptions and limitations, when justified, affect the time frame for fulfilling the right, not its 'claimability'.[36]

Once this aspect has been clarified, it should be clear why the right of assessment allows for an evaluation of one's legal standing and to seek the possibility of redress against arbitrary interference. Since the right of assessment creates an obligation of due justification on those who seek to curtail rights, an ex-post justification ensures that when interferences are arbitrary, a charge of culpability is brought against the violator. Undermining the right of assessment in one instance means that the right-holder can never be sure whether constitutional procedures will be followed when they fall on the wrong side of the law. And, when accountability and public scrutiny are unavailable, institutions cannot be entrusted with the protection of rights in general. The right of assessment enables public accountability by ensuring institutional transparency, that is, providing the necessary information that the government does not exercise arbitrary power and follows the constitutional procedures that have been publicly affirmed and accepted.[37]

[36] Ex-post refers, in a strict sense, to any point in time when a legitimate request of disclosure is made with regard to information. From a legal standpoint, such a point in time is the deadline by which a government has to comply with its obligation to disclose information. The legal determination of the ex-post clause varies from statute to statute, provided that a due time limit is clearly set by law. Freedom of Information acts for classified information, as well as right to a hearing in criminal and civil courts, are instances of such due time requirement. In a second, more abstract understanding, ex-post denotes the type of rights that invoke discovery of relevant facts. Ex-post, in this sense, is opposed to ex-ante requirements (for instance, age limit for voting rights).

[37] Citizens are often unaware of the complex administrative machinery of modern states and have difficulty retrieving sufficient information to hold officials accountable. It would be unreasonable to demand full transparency from this intricate machine. The right of assessment does not entail the duty of full transparency at every step in the administrative process. It entails the weaker claim that government agencies have a duty to justify in due time that they cannot discharge their duty when rights are affected. Rejections of disclosure might be justified, for instance when information is time-sensitive to prevent a crime. However, government agencies cannot appeal to secrecy privileges to deny or confirm the very existence of a requested document. Such a form of meta-secrecy, known in US law as a Glomar response, is unjustified in our view because it relegates citizens to the condition of ignorance without appeal. On Glomar responses, see Phillippi v. CIA, 546 F. 2d 1009, 1011 (D.C. Cir. 1976). See also Axel Gosseries, and Tom Parr, 'Publicity', *The Stanford Encyclopedia of Philosophy* (Summer 2022 Edition).

Moreover, ensuring a public system of accountability that is consistent with the idea of equal enjoyment of rights – under the proviso (iv) mentioned above – should recognize a right not only to the person whose right has been infringed, but also to everybody subjected to the same laws, to the public scrutiny of the legal standing of that person. Publicity of judgments grants that this condition is met, and that redress is provided to those individuals in no position to seek it. This point raises important considerations concerning the conflict of rights. Shall we say that whenever someone's rights are violated, everyone should have access to the assessment provided to the right holder? Cases of privacy appear to run against this idea. When the privacy of an individual is violated, or the person does not intend to divulge sensitive data like medical records, third parties should not be entitled to seek an assessment against the person's will. How can such conflict be resolved? A principled answer to potential conflicts between claims of privacy and public assessment can be found in the function of rights. We argued that such a function protects the right holders' capacity for autonomous choice. When a conflict arises, and the autonomy of the right-holder is undermined, the right-holder is the final authority in deciding whether information regarding her privacy or otherwise sensitive data should be divulged.

A final consideration. It can be argued that the provision guaranteed by the right of assessment is a poor remedy. After all, once rights have been violated, limited, or suspended, what would a person gain from a proper assessment of the reasons for such curtailment? The difficulty arises especially concerning the sphere of autonomy that we said is protected by rights. Thus, the question is: does knowing why this has happened compensate for the harm once autonomy has been undermined? Now, if we frame the question in terms of whether assessment is a compensatory measure for the loss of autonomy, the answer is clearly no. Harming the capacity of people to exercise their choice cannot be compensated with the same currency. While compensatory principles may rectify injustice in the acquisition of goods and resources, hardly any remedy may fulfill the loss of liberty. Sometimes remedies to unfair distribution of opportunities happen to be effective, such as when persons are reinstated in their position after being unlawfully fired. But cases of this sort are

clearly the second-best forms of compensation. Most of the time, neither means nor time can pay back unlawful restrictions of freedom. This is the case of the Guantanamo indefinite detainees cited above. On such occasions, it is hard to estimate any compensation that would be sufficient for them. Yet, although the recognition of habeas corpus and due process will indeed appear insufficient to redress the irredeemable loss of autonomy these detainees have suffered, the entitlement to judicial hearing still holds to protect the value of autonomy. We should then value those rights because we value the autonomy protected by rights. There is a universal significance in upholding the right of assessment not only for the victims of injustice but for everybody who similarly values their self-determination.

IV. CONCLUSION

We have argued that unrestrained government secrecy threatens the epistemic dimension of rights. We have defended the view that, in virtue of its epistemic features, having a right implies that its possessors are entitled to the available knowledge of the circumstances of choice protected under that right. This view holds for the notion of rights in ideal conditions. In non-ideal conditions, where civil liberties are at stake, secret interference is legitimate only when the circumstances under which it occurs are open to assessment by the right-holder. This we have called the right of assessment. It ensures the ex-post fulfillment of the epistemic entitlement under non-ideal conditions of partial compliance where full transparency is unattainable and secrecy is a fact. Secrecy precludes the very conditions on which the enjoyment of rights is guaranteed and exposes citizens to the arbitrariness of the government. It limits the citizens' ability to make meaningful choices and precludes their realization. The right of assessment shields against arbitrary interference by imposing an obligation on the government to justify any interference in the sphere of rights. Citizens can use such a right to question the state's secret policies, which threaten not only individual rights, but the enjoyment of rights in general.

The purpose of arguing for a right of assessment is to identify a criterion to discern when rights are violated under conditions of secrecy. Our purpose, though, is not to offer a ready-made solution

to secrecy abuses. When practices of secrecy become systematic under emergency legislation, violations of rights might even go unnoticed or discovered retrospectively, often too late for victims to demand justice. In such instances, one of the fundamental tenets of democracy, the possibility of self-correction, is undermined by precluding the possibility of dissent and disobedience against unjust policies. It is our conviction that absent such corrective measures, whistleblowing acts such as the NSA revelations by Edward Snowden should be acknowledged as democratic acts of dissent, at least when they are acts of last resort. Contentious[38] as they might appear, these are exemplary manifestations of the new demands of accountability against undemocratic practices of secrecy.[39]

Notwithstanding the impact of secrecy on fundamental liberties, post-9/11 the task of analyzing the impact of secrecy measures has been left mainly to civil liberty groups, think tanks and legal scholars whose efforts have brought to the public limelight the dilemmas caused by the state practices of secrecy.[40] Political philosophers have only recently taken more cognizance of this issue. The growing attention towards the role of secrecy and the threat it poses in a democracy calls for further philosophical investigation, since the questions at stake affect the value of constitutional freedoms in general, even under normal circumstances.

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[38] See Rahul Sagar, *Secrets and Leaks; Id.* 'On Combating the Abuse of State Secrecy', *The Journal of Political Philosophy* 15 (4) (2007): 404–427.

[39] Adam Moore suggests that revelations of this sort seek to alter the accountability mechanisms by 'shining a spotlight on the backroom activities of government agencies and corporations'. (Adam Moore, 'Privacy, Security, and Government Surveillance: Wikileaks and the New Accountability', *Public Affairs Quarterly* 25(2) (2011): 141–156, p. 141).

[40] The NSA revelations were instrumental in bolstering public demand for greater transparency. One of the shifts towards enhanced transparency was the acknowledgment of the need for a public interest advocate to ascertain the legitimacy of the requirement of surveillance operations in the aftermath of those revelations. See Geoffrey R. Stone, Michael J. Clarke, Richard A. Morell, Cass R. Sunstein, and Peter Swire. *The NSA Report: Liberty and Security in a Changing World. Report and Recommendations of The President's Review Group on Intelligence and Communications Technologies* (Princeton University Press, 2014).

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