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The state's right to evidence and duties of citizenship

Youngjae Lee

1 | INTRODUCTION

In a remarkable passage in John Henry Wigmore's well-known treatise on evidence law (1905), he notes, "[f]or three hundred years it has now been recognized as a fundamental maxim that the public ... has a right to every man's evidence" (p. 2965). This sentence is often quoted (e.g., Allen and Mace, 2004; Amar and Lettow, 1995), but what is less appreciated is that Wigmore's defense of this "right" was primarily about its "correlative," that is, "the unquestioned duty" of "the individual to society" (p. 2968) to "give what testimony one is capable of giving" (p. 2965). Wigmore says that this is a "sacrifice ... due from every member of the community," bearing which is "a duty, not to be grudged or evaded" (p. 2967). In fact, as he sees it, civilization as we know it depends on it, as he says that "whether the achievements of the past shall be preserved, the energy of the present kept alive, and the ambition of the future be realized, depends upon whether the daily business of regulating rights and redressing wrongs shall continue without a moment's abatement ... " (p. 2968). He sternly warns that "[w]hoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit" (p. 2967).

Compare Wigmore's exhortation with the following, contemporary and very different, example, which takes it outside the context of giving testimony in a courtroom. *Saturday Night Live* has a recurring segment called "Black Jeopardy!," which uses the format of the quiz show "Jeopardy!" to illustrate, in a comically exaggerated way, the different worlds that people of different races – blacks and whites, mostly – inhabit in the United States. One of the most well-known episodes is the one featuring Chadwick Boseman as King T'Challa of the fictional state of Wakanda in *Black Panther* (Coogler, Cole, & Lee, 2018). When the question posed is what one does when "[t]he policeman says there's been some robberies in your neighborhood and asks if you have any information," King T'Challa answers: "[N]ot only do I tell this man what I know, but I also assist him in tracking down the offender. After all, our ministers of law enforcement are only here to protect us. Is this correct?" The quiz show host, played as usual with knowing affability by Kenan Thompson, responds with a chuckle, implying "no" to the question. He then adds: "I mean, it should be. But I'm thinking you haven't spent much time in America" (Tucker, Che, & King, 2018).

Finally, consider the plot of the movie *Unfaithful*, a movie about an extramarital affair, where a husband whose wife has an affair kills her lover, destroys all evidence of the crime, hides the dead body, and lies to the police when they, following a lead, come to their house to investigate (Lyne, Chabrol, Sargent, & Broyles, 2002). But later, at the end of the movie, the couple drive to a

police station, though the audience never finds out if the husband goes in or flees. Should he or should he not go in? According to Justice Antonin Scalia of the United States Supreme Court, the answer is clear. Dissenting in *Minnick v. Mississippi* (1990), a case reinforcing certain constitutional restrictions on police interrogations, he has written that “[w]hile every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offence and accept the punishment he deserves” and that “to design our laws on premises contrary” to that view is “to abandon belief in either personal responsibility or the moral claim of just government to obedience” (p. 167). Furthermore, he added that investigators should be allowed “to urge, or even ask, a person in custody to do what is right” (p. 167). Despite Justice Scalia’s invocation of the language of virtue, he is not talking about mere private morality, as he is talking about what a government is to expect from its citizens.

One might say that Justice Scalia’s attitude towards law enforcement is out of touch and that Saturday Night Live’s irreverent attitude is more *au courant*, but notice that even the cynicism of the T’Challa sketch is delivered with the suggestion that in a better world – say a just society – cooperating with law enforcement is the right thing to do (though how much cooperation is called for is not spelled out). Of course, there is no question that the fact that T’Challa’s suggestion is met with such immediate dismissive ridicule is indicative of a deep animosity between the police and the Black community. But when the quiz show host says that T’Challa’s answer would be correct in a better world, it is to be understood not just as a stinging and cathartic social criticism, but as an idea that goes back all the way to Wigmore one hundred years ago, and, according to Wigmore, three hundred more years before him. Assuming a just society, Wigmore’s argument that we all have a duty to help uphold “justice as an institution[] and from law and order as indispensable elements of civilized life” seems to generate the conclusion that “the community as a whole” can rightly demand that citizens assist in increasing the legal system’s knowledge of criminal wrongdoing. And, as Justice Scalia’s comments suggest, the moral force of this idea can be felt even with regard to the question whether to inform the authorities about one’s own wrongdoing.

Such ideas are in fact reflected in the law today in many places, most starkly in laws that criminalize various failures to cooperate with the legal system, even in situations where cooperation would lead to prosecution of oneself. In other words, we have indeed, as Justice Scalia urged, “design[ed] our laws” on the premise of “the moral claim of just government to obedience.” The purpose of this Essay is to closely examine these criminal laws and consider the proposition that citizens have an obligation to cooperate with law enforcement, including by undertaking measures that enhance the society’s knowledge of one’s own and others’ criminal activities. This Essay will defend the following propositions.

First, once we start from the assumption that there is a duty on the part of citizens to cooperate with the legal system (again assuming a just legal system), it is difficult to resist the conclusion that citizens have a duty to cooperate with law enforcement and provide information about criminal wrongdoing to the authorities, and the duty appears to extend not just to other people’s criminal wrongdoing but to one’s own.¹ Furthermore, the initial stance one adopts towards the desirability of cooperating with law enforcement makes it difficult to object to various measures the state adopts towards compelling such cooperation, including criminal enforcement.

Second, a society in which citizens understand themselves to have a moral obligation to cooperate with law enforcement is not necessarily a good society, *pace* Wigmore, King T’Challa, and Justice Scalia. The point certainly is not that people should not comply with the law as a general matter or attempt to evade legal requirements. Neither is the point to advocate for the familiar position that one is permitted, or even required, to protest and resist unjust laws and unjust applications of the law (e.g., Delmas, 2018). Rather, this Essay will argue that, in a good society, there

is a proper, even adversarial, distance between citizens and the state that requires a constant vigilance to maintain. A society that fails to enforce that space between citizens and the state would not be a good society.

It should be clear by now to most careful readers that this Essay is about the duty to cooperate with law enforcement in a just society. There is certainly much to say about one's proper attitude to law enforcement in an unjust society, and much has indeed been said about that topic (e.g., Shelby, 2016; Yankah, 2019; Gardner, 2020; Capers, 2018). This Essay, instead of rehashing those arguments, explores the issue of the proper relationship between citizens and the state in a just society, and argues in favor of providing space for resistance, even in a just society.

2 | DUTY TO COOPERATE AND THE HOLMESIAN BAD MAN

Is there a duty to cooperate with law enforcement? We might start by distinguishing between obligatory and supererogatory acts. Cooperating with the law enforcement or the state generally may be mandatory or supererogatory, and the distinction is important and is tempting as a quick solution. At the same time, while it may seem unproblematic for the state to take the view that cooperating with the state is encouraged (supererogatory) but not required (obligatory), a belief that something is supererogatory may end up serving as the basis for requiring it, a phenomenon we might call "obligation-creep." Therefore, instead of deploying the distinction to bring immediate relief and feel like we have arrived at a happy place and leaving it at that, it is important to first closely scrutinize the question whether there is a duty to cooperate with law enforcement.

So, if there is a duty to cooperate with law enforcement officers, where would it come from? Unlike, say, a duty to save a drowning baby when doing so can be done easily, which we may characterize as a natural or pre-legal duty, a duty to cooperate with law enforcement makes sense only with background assumptions about the existence of legal institutions. A duty to cooperate with law enforcement officers is not the same as a duty to obey the law, but the ideas are closely related. Therefore, it is instructive to revisit the debate over the duty to obey the law when thinking about the purported duty to cooperate with law enforcement.

Whether citizens have an obligation to obey the law is a topic with a long tradition in political philosophy. This tradition has given rise to examples of situations where disobedience is either permissible or even required. Some examples involve situations of pointless obedience – like a stop sign in the middle of a wide open desert on a sunny day with no other cars around – and some examples involve unjust laws like racist and antisemitic laws that target and persecute certain segments of the population. Such examples, though, raise the following question: how should we think about all other situations where the law in question is neither pointless nor unjust? What if one believes that one could give a good reason to have a law in existence? What should one's attitude towards it be then?

For legal scholars, a familiar starting point in such an inquiry is Oliver Wendell Holmes and his construct of the "bad man" (1857):

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience (p. 459).

Holmes further warns that because “[t]he law is full of phraseology drawn from morals,” we may “pass from one domain to the other without perceiving it,” but to do so is to “drop into fallacy” as law and morality are not the same (pp. 459–460).

Under this Holmesian construct, one’s attitude towards a law that is neither pointless nor unjust would radically differ depending on whether one acts like a bad person or a good person. A good person would do the ethical thing dictated by his or her conscience, and when the law is neither pointless nor unjust, following the law just because that is the right thing to do would be a genuine option for a good person. There may of course be times when their conscience would direct them to disobey unjust laws, but in the limited universe where the law is neither pointless nor unjust, one could easily imagine a good person, who seeks to do the right thing, complying with the law in order to cooperate, most of the time.

And the bad person? The bad person would not be like that, even assuming a world in which the law is neither pointless nor unjust. The bad person, who cares only about whether certain “disagreeable consequences by way of imprisonment or compulsory payment of money” (p. 461) will follow if they do or fail to do something, would obey the law only when doing so would advance their personal interests. Whether they obey the law or not would depend on what those interests are, and the existence of sanctions would make a difference to their behaviors by having an impact on such interests. Even if a law is a good law that is just and advances the social well-being, the bad person would not support it unless supporting it would help them in some way, such as avoiding sanctions.

When regarding the general question of how one should approach laws that are neither pointless nor unjust, then, one might approach it by asking whether to be a good person or a bad person. Put like that, the question answers itself. Of course one should be a good person. Holmes’ admonition that we not confuse law with morality has an important limitation, namely the conditional, “[i]f you want to know the law and nothing else.” That is, those who study the law should see the law from the perspective of the “bad man.” Holmes is thus not making a general argument as to how one ought to live in relation to legal obligations. Once we are released of the Holmesian bad man construct in that way, it seems that we are permitted to be “good” without worrying about “drop[ping] into fallacy.” The choice then seems clear. As a general matter, being good is good, so one ought to be a good person, the kind who “finds . . . reasons for conduct, whether inside the law or outside of it, in the . . . sanctions of conscience.”

But what does being “good” really mean when it comes to law? I suggested above that a “good person,” when dealing with laws that are neither pointless nor unjust, would comply with the law in order to cooperate, most of the time. That is, however, too simplistic.

Consider the term “obedience.” If people go around in life never killing or raping, do they “obey” the laws that prohibit such conduct? In a sense, yes, they do because they do not break these laws. On the other hand, they do not “obey” or “follow” the law; they merely behave in a way that does not involve committing an act that is prohibited. For these kinds of offenses, many people would behave the same way with or without laws that prohibit them, simply because they are good people who behave morally at all times for whom the thought of doing acts that the law prohibits is not even a live possibility or are ordinary people who may refrain from certain acts that occur to them simply because they are wrong.

Therefore, to make a link between being a “good person” and obeying the law, we would need to say something about a person who does or refrains from doing something *because of the law*. The purest instance of obedience would be the act of doing something or refraining from doing something *just because that is what the law requires*. Of course, even the Holmesian bad person acts for reasons that have to do with the law given that a bad person, being prudent, may obey

the law in order to avoid the bad consequences that follow from disobeying. And among these two types of obedient, I am merely interested in examining the attitude of doing something or refraining from doing something *because* that is what the law requires, not because of unpleasant consequences that the law imposes on disobedients.

Take the act of paying one's taxes. A Holmesian bad person would not pay taxes unless the possibility of audit and sanctions for tax evasion is real enough to be a worry. But what would a good person do? Taxation is a way of raising public revenue in order to put that revenue to public use, and the government has devised formulas to determine how much each taxpayer must contribute to the general fund. A standard position thus is that there is a moral obligation to pay one's taxes, and it would be based on a consideration like the following as articulated by John Rawls (1971):

The main idea is that when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission. We are not to gain from the cooperative labors of others without doing our fair share (p. 112).

Whether this principle of fairness embodies a correct moral principle and whether it can ground political obligations have been vigorously debated. Setting that debate aside for the time being, we might focus on the quite plausible main intuition that it is wrong to free-ride. People who cut in line benefit from others' following the rules without doing their fair share. People who litter after enjoying a nice picnic at a neighborhood garden kept clean by people cleaning up after themselves benefit from others' cooperation without doing their share of cleaning. Along the same lines, we might say that a good person pays their taxes even when the possibility of detection of tax evasion is low.

Another way to ground one's duty to pay taxes may be articulated as follows, again from Rawls (1971):

From the standpoint of justice as fairness, a fundamental natural duty is the duty of justice. This duty requires us to support and to comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves. Thus if the basic structure of society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do his part in the existing scheme. (p. 115).

For our purposes, such a natural duty to support just institutions would have to be rooted in the value of the state.² A typical definition of a state is that it is a set of political institutions organized to govern a particular territory that successfully lays claim to the monopoly of legitimate violence within the territory. (Green, 1988; Klosko, 2005). The state does a number of things, including protecting the physical safety of those within its territory from attacks from one another and from people outside the territory, operating a system of dispute resolution spanning from police force to administrative agencies to the judicial branch, solving coordination problems by establishing and enforcing conventions, such as rules of the road, and so on. So, given that the state exists, and given that it does these things, what sorts of moral implications follow? The answer is that it is morally wrongful to interfere with institutions of the state that make it possible for individuals to

live normal lives as we understand normalcy today. Wigmore's admonition seems to apply just as well here, as we could imagine him saying about paying taxes "[w]hoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit" (1905, p. 2967). Paying one's taxes then can be morally obligatory in that it is a way of fulfilling one's natural duty to support just institutions. And the answer to the question whether one has an obligation to pay taxes or not generally does not depend on whether the laws that determine each taxpayer's tax obligation get things right. A tax code can be flawed in any number of ways, but that does not absolve individual taxpayers of their obligation to pay the prescribed amounts, even if taxpayers may work towards reforming tax laws through legally sanctioned means.

3 | DUTY TO COMPLY WITH REGULATORY OFFENSES

These two grounds for political obligation – principle of fairness and duty to support just institutions – are plausible and perhaps give rise to the duty to obey the law, but the question now is whether such arguments can also ground a duty to cooperate with the state.

We have already looked at the example of the legal obligation to pay taxes. To further explore the question of one's duty to cooperate with the state, another place we might look at is regulatory offenses. Regulatory offenses are sometimes called "public welfare offenses," (*Morrisette v. United States*, 1952; Brown, 2014) as opposed to ordinary offenses. Regulatory offenses refer to a type of criminal offense that the government enacts as a way of enforcing its regulations of various aspects of our lives – air quality, food safety, environmental preservation and so on. In the United States law, typically, a statute would authorize a federal agency (or authorize the President to authorize an agency) to promulgate regulations to implement the statute and specify that certain violations of the statute or the regulations are crimes (e.g., 31 U.S.C. § 5322; 15 U.S.C. § 80b-17; Lazarus, 1995, p. 2441).

Take the prohibition on killing grizzly bears, which should be classified as a regulatory or public welfare offense. Killing grizzly bears is a crime because the law criminally prohibits anyone from "knowingly violat[ing] any provision" (16 U.S.C. § 1540(b)(1)) of Chapter 35 of Title 16 of the U.S. Code, which includes a provision that makes it "unlawful" for anyone to "violate any regulation pertaining ... to any threatened species of fish or wildlife listed pursuant to" the law that authorizes the Secretary of Interior to designate a species as an endangered or threatened species (16 U.S.C. § 1533), and the Department of Interior has designated grizzly bears as a threatened species and has prohibited "tak[ing]" of "any grizzly bear" (50 C.F.R. § 17.40).

Now imagine a person who wants to kill a grizzly bear for sport and knows that he is not allowed to do so under the law. Further consider that he lives in a remote area in Montana where it is unlikely that he would be apprehended for killing a grizzly bear. Is it morally permissible for him to kill a grizzly bear, assuming it is as a general matter morally permissible to hunt animals for sport? In order for him to answer that question, he could ask why the government has decided to protect certain species of animals from being hunted, whether it is a good thing that there is a governmental institution that regulates this area, whether the rule it has promulgated is a good rule, all things considered, and whether there are reasons to obey the rule even if the specific rule is not a good rule. So the moral ins and outs of the issues may be complicated. However, it seems plausible to deploy a combination of the fairness argument and the natural duty to support just institutions argument to generate a moral obligation to refrain from killing grizzly bears. It seems that a bad person would not have any compunction for killing a grizzly bear if it is unlikely that he or she will be caught doing so, whereas a good person would refrain, and, at least to an extent,

this conclusion does not change even if the specific law, in his view, overprotects grizzly bears as a species.

We may make similar arguments about broad swaths of regulatory offenses. Consider an entirely different set of regulations: export controls. Under the Export Administration Act, the Secretary of Commerce is authorized to promulgate a “control list” of certain items and “prohibit unauthorized exports . . . of controlled items” (50 U.S.C. § 4813). The stated purpose of such a law is “to restrict the export of items which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States” and “to restrict the export of items if necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations” (50 U.S.C. § 4811). The law declares that it is “unlawful for a person to violate” Subchapter I of Chapter 58 of Title 50 of the U.S. Code or “of any regulation, order, license, or other authorization issued under the subchapter” and specifically provides that “[n]o person may engage in any conduct prohibited by or contrary to, or refrain from engaging in any conduct required by this subchapter, the Export Administration Regulations,” or “any order, license or authorization issued thereunder” (50 U.S.C. § 4819). The law criminalizes “willful” commission of such unlawful acts (50 U.S.C. § 4819).

Now say a person is in a business that deals with certain equipment that has both civil and military uses and is considering whether to export an item that is on the control list. For instance, in a case called *United States v. Lachman* (2008), the item in question was a piece of equipment for processing metal, the export of which was permitted so long as the equipment was under a certain size but was prohibited otherwise. What is his obligation? The reasoning and conclusions would be similar to what we saw in the Endangered Species Act context. He would have to ask why the government has decided to restrict exports of certain items, whether it is a good thing that there is a governmental institution that regulates this area, whether the rule it has promulgated is a good rule, all things considered, and whether there are reasons to obey the rule even if the specific rule is not a good rule. Again, the issues may be complicated, but it is not difficult to imagine an argument in favor of a moral obligation not to export an item on the control list without a license, even if the law, in his view, overregulates.

There are yet other mechanisms of regulation. Consider for instance the requirement that those who give investment advice for compensation do so only after registering as an investment advisor (15 U.S.C. § 80b-3; 15 U.S.C. § 80b-2; 15 U.S.C. § 80b-17). Advising a person on how to invest his or her funds and accepting a fee for the advice without registering with the government does not seem harmful or wrongful, so long as no fraud is involved, the relevant parties understand the relevant risks, and so on. So what would be wrong with practicing investment advising without registering in such a situation? The answer would be that, by having a license requirement like that, we would be ensuring a healthy securities market, which in turn benefits every market participant. We could tell similar stories about driving without a license or driving a car that has skipped the last legally required inspection. These are all situations where the state imposes certain requirements on individuals in order to ensure a safe communal space for citizens to engage in certain activities, and those who participate in the activities without complying with the measures put in place in order to ensure such safe spaces would be undermining the communal setup and free-riding on the efforts of others that have made creations of such safe spaces possible.

These are different types of regulatory offenses, and it is plausible to believe that a good person would obey such regulatory directives for the common good. Of course, things are more complicated than that. Laws may be misguided, overbroad, poorly written, or any combination of those. It is implausible to posit an obligation to obey that attaches to *all* laws at *all* times in a just state,

and a case-by-case evaluation is called for. At the same time, it is also implausible to suspend an obligation to obey any time a law gets things wrong. Even just governments make mistakes and correcting such mistakes can take time. A supportive citizen would not defy the law whenever the citizen thinks the government has miscalculated.

4 | DUTY NOT TO INTERFERE WITH LAW ENFORCEMENT

Regulatory offenses illustrate situations where we enforce the duty to support the state by criminalizing violations of regulations or laws that are generally classified as public welfare offenses. Another place where we see how the law enforces the duty to support the state is when the law has criminalized interference with law enforcement.

We can start with the general obstruction of justice provision, which makes it a crime for a person to “corruptly . . . influence[], obstruct[], or impede[], or endeavor[] to influence, obstruct, or impede, the due administration of justice” (18 U.S.C. § 1503). Some laws are more specific. Disobedience of law enforcement officers can be a crime. In New York, it is a crime to “congregate[] with other persons in a public place and refuse[] to comply with a lawful order of the police to disperse” with “intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof” (N.Y. Penal Law § 240.20). In Alaska, a person commits the crime of “disorderly conduct” if “in a public place, when a crime has occurred, the person refuses to comply with a lawful order of a peace officer to disperse” (Alaska Stat. § 11.61.110). In Ohio, it is a crime to “[f]ail to obey the lawful order of any law enforcement officer engaged in the law enforcement officer’s duties at the scene of or in connection with a fire, accident, disaster, riot, or emergency of any kind” (Ohio Rev. Code § 2917.13(A)(3)).

Another obvious example where interference with law enforcement is criminalized is the crime of contempt. It is a federal crime to “[d]isobe[y] or resist[] [a federal court’s] lawful writ, process, order, rule, decree, or command” (18 U.S.C. § 401). In California, “[w]illful disobedience of the terms as written of any process or court order or out-of-state court order, lawfully issued by any court” is a misdemeanor (Cal. Penal Code Ann. § 166). It is a crime in Delaware to “knowingly violate[] or fail[] to obey any provision of a protective order issued by the Family Court or a court of any state, territory or Indian nation in the United States” (Del. Code Ann. 11, § 1271A). Closely related is the crime commonly known as “bail-jumping,” and the federal version criminalizes “knowingly fail[ing] to appear before a court as required by the conditions of release” (18 U.S.C. § 3146).

These provisions criminalize interference with the legal system in certain situations. One might defend laws like this on the following grounds: the legal system needs to employ coercive devices like criminal law and punishment to ensure compliance with the law, because otherwise the rule of law could not become reality. Of course, the fact that the legal system needs the ability to punish people in order to administer justice is insufficient to show that those who interfere with law enforcement commit moral wrongs. At the same time, the observation that the legal system crucially depends on the cooperation of those who are subject to it in order to function as a legal system can serve as the basis for a moral obligation on the part of the citizens. That is, persons have a moral duty not to interfere with workings of a legitimate and reasonably just legal system, and it is morally wrong for people to violate such duties by disobeying authoritative directives in these specified conditions.

There are also laws that prohibit certain activities not because those activities are necessarily wrong but because criminalizing certain activities helps the state combat other activities. For

example, it is a federal crime to engage in “a monetary transaction in criminally derived property of a value greater than \$10,000 [where the property] is derived from specified unlawful activity” (18 U.S.C. § 1957). The term “specified unlawful activity” covers a variety of offenses such as drug offenses, bribery, and human trafficking (18 U.S.C. § 1956(c)(7)). People who engage in these sorts of transactions tend not to be sympathetic figures. For instance, a person who uses his public office for personal gain by demanding payments from those eager to curry favor and funneling money into his personal accounts is corrupt and is in violation of his fiduciary obligations. Therefore, it may be another easy case for the good person, since a good person would not be engaging in these sorts of shenanigans in the first place, whereas a bad person would of course not hesitate from laundering dirty money to cover their tracks after profiting from illicit activities.

At the same time, we need to dig deeper to see exactly what the wrong of money laundering is. Douglas Husak (2005), for instance, has expressed some skepticism about the law by arguing that, granting that a person commits a “first” wrong by, say, accepting bribes, “it is hard to see why persons who deposit or withdraw [criminally derived] funds from banks commit a *second* wrong” (p. 67). So, what exactly is money laundering? Money laundering, as conduct, accomplishes two things. First, the possibility of money laundering makes the prospect of committing crimes more attractive to potential perpetrators, and, in that sense, it encourages criminal activities (Alldrige, 2016). Second, money laundering, by giving criminals a way to conceal proceeds from criminal activities, makes it easier for them to avoid detection by law enforcement authorities. The first wrong, then, belongs to the family of wrongs having to do with complicity; the second wrong is a form of obstruction of justice.

Money laundering, then, need not be thought of as implicating an exotic wrong at all. It is analogous to the common law crime of receiving or concealing stolen property (LaFave, 2019, p. 3). The closest offense in the influential Model Penal Code is “aiding consummation of crime,” which is defined as “purposely aid[ing] another to accomplish an unlawful object of a crime, as by safeguarding the proceeds thereof or converting the proceeds into negotiable funds” (Model Penal Code § 242.4). Money laundering is also analogous to various obstruction of justice offenses. The Model Penal Code also lists as an offense “hindering apprehension or prosecution,” which provides in part that “[a] person commits an offense if, with purpose to hinder the apprehension, prosecution, conviction or punishment of another for crime, he . . . conceals or destroys evidence of the crime” (Model Penal Code § 242.3(3)).

Thus far, then, it appears that one can start from a plausible case for a duty obey the law, from which one can derive a duty to obey various regulatory offenses and a duty to not to interfere with law enforcement. And from the existence of such duties, we can see the moral basis for criminalizing violations of the same duties.

5 | DUTY TO ASSIST LAW ENFORCEMENT BY PROVIDING INFORMATION

Various criminal provisions discussed so far may be justified as grounded in a general duty to cooperate with the government and law enforcement. And if we look generally at what the government does, gathering of information is ever present. We may roughly classify information gathering as taking place in different domains of government activity: surveillance, investigation, and adjudication. And there are many laws that impose obligations to provide information to the government in these various domains, and such laws may be grounded on a duty to cooperate with the government through providing information and enhancing the government’s knowledge about criminal wrongdoing.

We are now approaching areas where Wigmore's "fundamental maxim that the public ... has a right to every man's evidence" may apply, as an obvious example of information-giving or knowledge-enhancing is the duty to testify, which can ground various criminal provisions to assist the government. For instance, once a court issues a subpoena to order a witness to testify, disobeying it can lead to being held in contempt. Another familiar law having to do with giving information during adjudication is perjury, which is defined in federal law as a situation where a person "willfully and contrary to ... oath states ... any material matter which he does not believe to be true" (18 U.S.C. § 1621).

Of course, since perjury law controls situations whenever one testifies under oath or makes a sworn declaration, the law covers both adjudication and investigation. But one need not be testifying or declaring under penalty of perjury to be prosecuted for lying to the government. It is a federal crime, for instance, "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government," for a person to "knowingly and willfully ... make[] any materially false, fictitious, or fraudulent statement or representation" (18 U.S.C. § 1001). This crime, the crime of false statements, criminalizes lying to a federal government official conducting an investigation (Griffin, 2009).

The law also requires people to assist with government's gathering of information in some contexts. For instance, the requirement that one declare the amount of currency one is carrying abroad over a certain minimum is a way of having information about potentially suspect conduct, like running an illicit business, flow to the government (31 U.S.C. § 5316(a)). There are also many laws that require reports of signs of suspicious activities by other people, as we see in various anti-money laundering laws that bind financial institutions (Kang, 2017; Lynch, 1986; Thompson, 2009).

Are all these crimes the kinds of crimes a good person would not commit in the same way a good person pays taxes and complies with various regulations that are designed for the common good? More specifically, is there a duty to cooperate and enhance the government's knowledge of criminal wrongdoing by providing information about criminal activities to the government? In answering this question, as I've been noting throughout, it is important to keep in mind that this Essay asks whether there is a duty to cooperate with law enforcement in a reasonably just state. Assuming a reasonably just state, then, is there a duty to cooperate with law enforcement by not violating the kinds of laws just mentioned? It does not seem patently unreasonable to think so, which is why T'Challa's answer on Black Jeopardy has some initial plausibility. However, at this point, a sense of unease might creep in (if it has not already). What explains it?

Let's return to the crime of money laundering and see what cooperation with law enforcement would look like. We noted above that money laundering is analogous to the common law crime of receiving or concealing stolen property and the crime of hindering prosecution. But what if the person who has committed the first crime and the person who is committing the second crime of money laundering is one and the same? In that case, it would be awkward to say that a good person who has committed a crime would not engage in money laundering, since a good person would not have ended up profiting from illegal activities in the first place. But we could still say that a person who commits the first wrong can change from a bad person to a good person and refrain from committing the second wrong, perhaps as the pang of conscience kicks in.

That much seems fair enough, but once we push this thought in the same direction a little further, we end up in an odd place. Say a person stabs a person to death and throws him in his car trunk where he bleeds to death. The killer buries the body in the woods that night, and the next morning he cleans the blood from his car. Or a person scores a big heist and then "lies low" and avoids major purchases in order to avoid detection would be committing new offenses. Would

both of them be committing a second wrong of interfering with law enforcement? Say a person simply goes about one's ordinary and normal routine on a day to day basis after committing a crime. If "hindering apprehension or prosecution" were a genuine moral wrong that can be criminalized, then a person who commits a crime and does not immediately turn himself in may be in continuing violation of the obligation from the moment the crime was committed. This means all of these people may be engaging in the wrong of "hindering prosecution." Should we say that is what a good person would do? Would a good person, in other words, turn himself or herself in?

A federal criminal provision that comes close to saying that is the crime of "flight to avoid prosecution," which makes it a crime for a person to "move[] or travel[] in interstate or foreign commerce with intent . . . to avoid prosecution" (18 U.S.C. § 1073). The language of the statute does not specify the meaning of "prosecution," and it could be construed quite broadly to cover situations where one simply goes from one state to another after committing a crime with intent to avoid being apprehended and prosecuted. Indeed, there are some languages in the caselaw that suggest as much. In *United States v. Bando* (1957), for instance, defendants were charged with a conspiracy to injure a witness in a pending investigation in New York and to remove one of the co-conspirators from the state in order to prevent his prosecution. The said co-conspirator was driven to Youngstown, Ohio from New York, and "[i]t does not appear that at the time [he] was driven to Youngstown, the police knew who had committed the crime," and "[n]o formal charge had been filed against anyone for the attack" on the witness (p. 837). Rejecting the defendants' challenge that there was no conspiracy to violate the flight to avoid prosecution law because no one had been "formally charged," the court said that "[t]he words 'to avoid prosecution' mean 'to avoid being prosecuted'" and that "[t]he statute does not say 'to avoid a pending prosecution'" (p. 843).

Another case of a person who was punished for failing to turn himself in is the case of Jeffrey Gafoor from the U.K. (Sekar, 2017).³ Jeffrey Gafoor was convicted in 2003 for killing Lynette White in 1988. This was not an ordinary murder case because three men known as the "Cardiff Three" were initially convicted of the same killing in 1992, but the convictions were thrown out in the same year because of the coercive nature of police interrogations. The case reopened in 2000, and DNA evidence linked the killing to Gafoor. For our purposes, the interesting part of the case is what the judge sentencing him noted as "the most serious aggravating factor in this case namely allowing innocent men to be convicted of the murder" (Sekar, 2017, p. 137). He added that it was a "very serious aggravating factor . . . that Gafoor was content to allow innocent men to be arrested, to stand their trial and be convicted of a murder he knew had committed" (Sekar, 2017, p. 129). The idea seems to be that turning oneself in to prevent a wrongful conviction is not only something a good person would do but that failing to do so is criminally wrongful and a basis for increasing one's punishment (Sekar, 2017, pp. 130).

Arguments like this make some sense if we posit a general obligation to support the state and adopt the view that it is morally desirable for people to make the state's job of apprehending criminal wrongdoers easier. However, as illustrated, this line of thinking seems to travel very far, perhaps too far.

6 | DUTY TO COOPERATE AND THE RIGHT TO RESIST

What is troubling about the argument developed thus far about the duty to cooperate is that it seems to be the case that emphasizing what citizens owe the state and adopting the view that a good person cooperates with law enforcement bring us to a place where there is something morally problematic about asserting one's rights in those cases where rights-assertions interfere with law

enforcement. Many rights that people may assert against the government can be characterized as vehicles of obstruction of justice. Refusing to consent to a warrantless search, insisting on the presumption of innocence and making the government prove one's guilt beyond a reasonable doubt, exercising one's right to a trial, exercising one's right to a jury trial, invoking the prohibition of double jeopardy, asserting the privilege against self-incrimination, refusing to answer questions without a lawyer present, and demanding not only assistance of counsel throughout but also *effective* assistance of counsel, are all exercises of rights guaranteed in the Constitution that can amount to an obstruction of the state's attempt to enforce the law.

We need to proceed carefully here, however, as assertions of these rights do different things. Consider *Powell v. Alabama*, a 1932 Supreme Court case arising from one of the most notorious American legal disasters known as the Scottsboro Boys case, where, despite substantial evidence indicating their innocence, nine young black males, ages ranging from thirteen to twenty, were convicted of the crime of raping two white women, after not having been given a fair, deliberate trial, not having been received adequate legal representation, and having been tried by an all-white jury. The *Powell* Court, after listing various procedural failures in the case, held that the defendants' convictions were unconstitutional because they were denied adequate legal representation. Rulings in cases like these show that what may appear to be "resistance" of law enforcement in fact aids law enforcement by preventing false convictions.

This feature of rights is not limited to unjust prosecutions. Even assuming a reasonably just state and law enforcement officers working in good faith, the government actors may be misguided in any number of ways: they can make mistakes, may be working with limited information that leads them astray, may have on institutional blinders that prevent them from seeing the full picture clearly, or may be pursuing prosecutions on the basis of a legal interpretation that is wrong or may be proven to be ultimately incorrect or unwise. Given these possibilities, some of the assertions of rights are not correctly characterized as "obstruction of justice." Though the empirics are obviously controversial, the right to effective assistance of counsel, presumption of innocence, and the proof beyond a reasonable doubt requirement can keep the government disciplined about its selection of cases to prosecute (Laudan, 2006, p. 218). The right to trial by jury is often defended as a form of epistemic democracy that has a better chance of arriving at correct answers than an adjudication system run by professionals and experts (Lee, 2018, pp. 1285–1287; Schwartzberg, 2018, pp. 447–448; Landemore, 2012).

But not all rights are like that, as some do get in the way of the truth. The right to refuse to search and the right against self-incrimination are both ways of denying the government access to potentially probative evidence. So, in these cases at least, would it be wrong for a person living in a good society like the one in T'Challa's mindset to assert these rights? It is, after all, one of the clichés about rights that just because one has a right does not mean that one is right to exercise it. Maybe some criminal procedural rights are like that when dealing with the state's effort to enforce the law. Or, at most, one might argue, these rights exist to protect the innocent, not the guilty. That is, a person who knows he is factually innocent would be right in exercising these rights to protect himself from misguided searches or interrogations, but a guilty person would be simply obstructing justice, one might argue. In fact, even those who believe that they know which facts the government is interested in pursuing but disagree with the government about whether the facts will turn up anything incriminating may have a duty to cooperate to help clear up the confusion efficiently and quickly.

Is this right? There are at least two theoretical paths open here. The first path has been articulated by Sandra Marshall and R.A. Duff (2016), who have argued in favor of "a civic responsibility" for a person who has committed a crime to "admit her crimes and to submit herself to the

judgment of her peers through the criminal process”⁴ (p. 43). Duff (2018) has also written that a defendant has a “civic duty” to play “an active, and honest, role in the process,” which “must encompass admitting, confessing, one’s guilt if one knows it – which is to plead ‘Guilty’” (p. 134). Not only that, Duff says a responsible citizen should also “be ready to give evidence and undergo cross-examination at her trial” (p. 134).

The first objection to this line of thinking would come out of the civil disobedience literature about resisting injustice (Delmas, 2018; Capers, 2018). Another possibility is to argue, as Tommie Shelby (2016) does, that those who are victims of systemic injustice at times lack the obligation to obey the law. He writes, “Even if the United States is reasonably just . . . , the heavy burdens that the black urban poor are forced to carry, and the length of time they have had to carry them, may justify their refusal to comply with public demands until their load is significantly lightened” (p. 219). But these arguments rely on presence of injustice to suspend the duty to obey or cooperate, which leaves open the possibility of Marshall and Duff’s position being correct in a just society. Is there another way to push back against Marshall and Duff?

One may do so by taking the second theoretical path, the one taken by Alice Ristroph (2009). Ristroph has suggested in her Hobbes-inspired account that criminal procedure rights may be more specific instantiations of a general, more fundamental right to resist stemming from the right of self-preservation that both the innocent and the guilty retain. Ristroph says that under a Hobbesian account, “punishment is so great an intrusion on human freedom, dignity, and self-preservation that the only way to respect the humanity of those we punish is to acknowledge their right to resist” and to “refuse[] to blame humans for acting on the fundamental and rational drive for self-preservation” (p. 628). This need not mean anything goes as long as one is seeking to resist punishment since some ways of resisting punishment are more harmful than others. But what we can do, according to Ristroph, is to rationalize “constitutional and statutory rights of the accused and the already-convicted as forms of legitimate, nonviolent resistance to punishment” (p. 629) and as “weaker relatives of the right to resist punishment” (p. 623). Because Ristroph’s suggestion does not depend on the right to resist *injustice* but rather depends on a person’s right of self-preservation, this right to resist account would provide an account that applies to everyone who is facing prosecution, even in a just society. This account would thus avoid the conclusion of Duff and Marshall’s duty to cooperate account without having to invoke the presence of injustice in individual cases or in the system or unjust targeting of a segment of the population.

However, Ristroph’s approach has the opposite problem. It certainly is theoretically convenient to have the right to resist manifest itself as a variety of rights that defendants already have, say, under the Constitution. However, there is no reason to expect the scope of the so-called right to resist to stay within the confines of various procedural guarantees, as the right to resist stemming from the right of self-preservation seems quite blunt as a concept. For instance, if there were such a right, it seems that various crimes against law enforcement should not exist as prohibitions. As noted above, obstruction of justice is a crime. Disobedience of law enforcement officers can be a crime. It is also a crime to disobey commands of courts, for instance, to reappear to face one’s own prosecution. It is also not clear how one’s “right to resist” can sit next to the prohibition on perjury. Wouldn’t one’s right to resist include a right to perjure oneself in a courtroom in order to avoid being convicted and punished? It is true that the privilege against self-incrimination means one need not testify against oneself in a case in which one is a criminal defendant and the privilege can be explained as a manifestation of the right to resist, but one is still not allowed to perjure oneself in order to avoid prosecution. Perhaps many of these crimes are overbroad and perhaps should be appropriately limited by invoking the right to resist, but it is still not clear how impositions of such duties, as a general matter, can co-exist with the right to resist.⁵

The list of crimes that seems to conflict with the right to resist does not end there. The federal crime of false statements, which criminalizes lying to federal agents, does not make an exception for those who lie in order to avoid being prosecuted (*Brogan v. United States*, 1988). Neither is one allowed to launder money or to fail to declare the amount of currency one is carrying in order to hide one's own criminal wrongdoing. Also, as noted above, the federal crime of "flight to avoid prosecution" has been enforced against people who leave a state after committing a crime in order to avoid being prosecuted even if the law enforcement had not even been aware of the crime at the time of the flight, so it cuts more broadly than a typical "bail-jumping" provision. This crime, too, is difficult to square with the notion of one's right to resist that stems from the right of self-preservation.

Again, perhaps these are precisely the kinds of examples that demonstrate the need for a concept like the right to resist, as some of these crimes do seem to cut too broadly (Griffin, 2009; Green, 2001). However, the problem with the idea of a "right to resist" is its seemingly peremptory nature, and Ristroph's (2009) explanation does not help us understand how such a right is to be limited.⁶ That is, the concept of the right to resist does not offer a way of taking into account the idea of a duty to cooperate with the government. True, it may be the case that recognizing the right to resist in *some fashion* would give us a reason to question the existence of a duty to cooperate and a reason to limit the scope of all these laws, but, just as Marshall and Duff's duty to cooperate account seems to travel too far in the direction of submitting to the authorities, Ristroph's right to resist account seems to travel too far in the opposite direction. It seems to me that there is another, better way.

7 | LAW ENFORCEMENT AND DUTIES OF CITIZENSHIP

Consider again the examples of "hindering prosecution" by committing crimes and engaging in apprehension-avoidance acts, some relatively passive like not making flashy purchases from a big heist, some more active like moving to a different state to avoid apprehension after committing a crime, and some even more active like engaging in money laundering by investing criminally derived funds in various ways. How should we think about such acts?

It seems to me that instead of thinking of these as moral failures characteristic of bad citizens or as justified exercises of the right to resist, we should see some of them, though not all, as free movements of individuals within a realm that the legal system ought to protect from state intrusion. While individuals do not have a right to engage in detection avoidance activities after committing crimes, their failure to turn themselves in or otherwise make prosecutions easier should not be considered a wrong but rather should be considered their privilege as free persons. And in order to preserve a sphere of autonomous living for individuals, there ought to be an understanding as to what sorts of detection avoidance activities are within "the rules of the game" that set the parameters of acceptable behavior for all the participants.

What would such "rules of the game" look like? We can start with the proposition that citizens have a duty to cooperate with the government in a reasonably just society as a general matter. It would be difficult to give a moral justification for various regulatory offenses, laws that prohibit interference with law enforcement, and laws that require cooperation with law enforcement in various ways without positing such a duty. At the same time, duties of citizenship should not automatically include rendering assistance to law enforcement. Situations where such lack of cooperation or even resistance should be allowed are not limited to situations characterized by injustice or to situations involving laws that are misguided for any number of reasons (Gardner,

2020; Yankah, 2019). There are times when the demands that the law makes of its citizens in the way it does are appropriate in that they are requests for the citizens to cooperate and serve the common good, yet a person should still be allowed to refuse to accede to such demands, because having laws that require otherwise would be unduly intrusive. In other words, the state has the power to set down all kinds of rules to make the project of living together possible, but we should recognize, when formulating the rules, the ways in which giving the state such powers can easily lead to oppression, and such oppression can take the form of the state requiring cooperation with law enforcement and criminalizing efforts to place limitations on the state's exercises of powers.

While such situations where not cooperating should be allowed can at times be characterized as individuals having certain rights, such as a right to privacy or a right to resist, the idea of rights does not always supply the most perspicacious framework. If we formulate these situations as rights, we would have to defend them as individual rights to interfere with justice, where the state represents justice, and the state enters the ring on the high ground from the get-go. And a likely consequence of looking at the issues in this way is to place strict limitations on such rights given the defensive posture one would have to assume when facing those, in T'Challa's words, who are "only here to protect us." Neither is it helpful to respond to T'Challa by simply repeating the slogan that "All Cops Are Bastards," the force of which would turn on actually demonstrating the truth of the slogan. Rather, such cases ought to be considered with an eye towards specifying the proper terms of interaction between citizens and the state even in a just state and with the goal of preserving a sphere of autonomy in which citizens can move freely and pursue their ordinary life projects free of the state's coercive interference.

As to what it all means in concrete terms, it is difficult to say, as case-by-case assessments need to be made. Perhaps the state is well-intentioned and even competent enough to know which policies to pursue to do its job of protecting the people's physical security and promoting general welfare. It may sometimes and appropriately carry out its functions with the help of criminal law. When these laws appear to overreach, our focus should not just be on whether the government is on the right track as it tackles social problems or on whether individual rights are at stake but also on the costs that are imposed on citizens when legal requirements are introduced, even if such requirements come simply from the seemingly reasonable position that people should assist or at least not interfere with the government's core functions. And in order to understand what sorts of costs are too burdensome, we need to have a baseline understanding of the realm of autonomy that needs to be protected, which can be used as a basis for thinking through the question of what sorts of duties of citizenship exist, can be legally prescribed, and can be criminally enforced.

8 | CONCLUSION

This Essay has argued that the natural duty to support just institutions and to do one's fair share as a member of a polity can give rise to a duty to obey the law and cooperate with the state. Such considerations mean that it is wrong to commit regulatory offenses and that it is wrong to interfere with and undermine workings of the legal system by obstructing justice in various ways. I have also argued that taking this thought further could lead to a situation where there may be a duty for those who have committed offenses to cooperate with law enforcement and for the guilty to turn themselves in and not assert various constitutional rights that stand in the way of the state's attempts to enforce the law through apprehension, prosecution, and punishment. One way out of this spot is to introduce the idea of the right to resist, but it has a number of drawbacks. Instead, we should think of duties of citizenship as being consistent with failures to cooperate with the state

when such failures take place within the realm of freedom that a good society ought to protect and maintain. This, it seems to me, is what is wrong with King T'Challa's answer on Black Jeopardy!, Wigmore's articulation of the public's right to evidence, and Justice Scalia's picture of a virtuous citizen. A virtuous citizen may obstruct the state, even a just one.⁷

ENDNOTES

- ¹ Thanks to Sarah Seo for prompting me to sharpen this point about the distinction between one's own and others' wrongdoing.
- ² The focus of this Essay is on the duty one owes to the state, but there is a question here as to whether the duty to obey the law or the duty to cooperate is owed to the state or to one's fellow citizens. The two duties are closely related, as one's duties to the state may derive from one's duties to one's fellow citizens and vice versa. This Essay is framed in terms of the duty one owes to the state, but the important question as to when the two duties may come apart is not something that this Essay will address. Thanks to Jennifer Lackey for raising this question.
- ³ Thanks to Hannah Quirk for bringing this case to my attention.
- ⁴ To be clear, Duff and Marshall's views are nuanced in ways that we cannot get into here, and they are certainly not in favor of a "legal duty" to assist the state that could lead to punishment for failure to turn oneself in (p. 42).
- ⁵ Ristroph (2015) acknowledges all this when she says "American law does not endorse violence against police officers, prosecutors, judges, or corrections officials," and "in various ways the law does impose duties to submit to specific exercises of state force," as "it is a crime to resist arrest, or flee from prosecution ('jump bail'), or escape from custody" (p. 1596). However, the issue of reconciling these laws with a right to resist remains.
- ⁶ In fact, Ristroph (2009) says that the Hobbesian right to resist is not even meant to be understood as a "legally enforceable claim" as the right has "no correlative duties" (pp. 617-618). If that is so, then the implications of the right to resist account for rights of criminal defendants are obscure.
- ⁷ Thanks to Morgan Cloud, Margareth Etienne, Todd Haugh, Stephen Henderson, Heidi Hurd, Jennifer Lackey, Sarah Seo, Christopher Slobogin, and Aness Webster for very helpful comments. Thanks also to Chrystal Yoo for research assistance.

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How to cite this article: Lee, Y. (2021). The state’s right to evidence and duties of citizenship. *Philosophical Issues*, 31:210–226. <https://doi.org/10.1111/phis.12198>