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Retributive justice in wicked regimes

By Dan Markel

I. Background

Over the last two years, I began a long project trying to figure out the scope of our moral obligations to the criminal law within liberal democracies. As someone with retributivist leanings, my basic take was that retributivists need to forge a cold peace with democracy; making peace with democracy, I reasoned, was sometimes harder to do for retributivists, at least on the standard conception of retributivism (manifested by Michael Moore and Doug Husak, among others).

Accordingly, even though I basically agreed there are good reasons to be parsimonious about what the criminal law should look like when occupying a legislative or voting role (that is, there are good reasons to be a negative legal moralist), there were competing and usually overwhelming considerations at play when citizens have to occupy other roles within liberal democracies.

Specifically, I argued that officials of a retributivist bent have certain pro tanto obligations toward enforcing certain kinds of criminal laws (ex post) even if such laws would not have found favor in their eyes at the legislative (ex ante) stage. Similarly, I contended that citizens had moral obligations (again, in a pro tanto sort of way) to conform their conduct to certain criminal laws even if they would have rejected such laws (on reasonable grounds) ex ante as voters. And perhaps most controversially, I also argued that citizens even have to offer reasonable assistance to law enforcement for certain kinds of criminal laws.

So what were these kinds of criminal laws that generated new moral obligations (to enforce; offer reasonable assistance to law enforcement; conform one’s conduct to?) And what was special about liberal democracies that laws that would not otherwise pass scrutiny could all of a sudden trigger these new moral obligations to enforce, conform, or render reasonable assistance?

I tried in some detail to elaborate an account of political obligation arising from liberal democratic conditions that could explain the grounds for this set of pro tanto obligations. And after doing that, I adumbrated a few categories of laws that I thought made sense in terms of trying to map these obligations. For example, I distinguished between criminal laws consistent with core liberal values (as opposed to libertarian values), and those criminal laws that were flatly illiberal. And then I addressed what I called permissibly dumb criminal laws and contrasted them with spectacularly dumb criminal laws.

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2 Negative legal moralism basically holds that it is a necessary condition for something to be immoral for it to be criminalized. Positive legal moralism is usually associated with the idea that immoral behavior provides a sufficient condition to be criminalized. One variation on both ideas would be to make these presumptive conditions; so, on this view, negative legal moralists believe that immoral behavior is presumptively required for some act or inaction to be criminalized.
Putting them together, I realized that there are vast numbers of what I call permissibly dumb but not illiberal laws, and that is a category of lawmaking that may well dominate our penal landscape, at least in liberal democracies. In other words, we have a wide array of criminal laws whose underlying value may not be about castigating behavior that is morally wrong in some institutionally independent way — think of prohibitions on guns or drug possession alone or even sitting in a park without a minor.3 And yet, we have defeasible obligations (or so I argue) to respect even misguided criminal laws, largely because there was some “moral magic” that liberal democracy could perform under the right conditions. Whether those conditions obtain right now in states like Canada or the US is a harder question. And even in liberal democracies, there are limits on the capacities of moral magic.

Indeed, with respect to limits, one of the things I spent some time working on in this project (entitled) was sentencing, and specifically the extent to which we had moral obligations to defer to the legislative branch when either that branch or others were inflicting harsh (or even light) sentences for permissibly dumb but not illiberal laws.

To summarize my views crudely, and with some examples to help illuminate the intuitions, consider the following framework.

First, a criminal ban on activities that threatened light punishments would itself be subjected to a moral version of rational basis with bite scrutiny. Accordingly, if the conduct rule could not be justified based on the moral equivalent to rational basis with bite (a term I defined in a somewhat different and more demanding way than it is used in typical American constitutional discourse), then there would be no moral obligation to conform one’s conduct to the specific law, nor would there be a pro tanto obligation for citizens to render reasonable assistance to law enforcement associated with that law, or to enforce the law from an official’s perspective (or at least most officials’ perspectives where they had substantial enforcement discretion). So, a ban on eating on the subway would pass muster here (in a well-working liberal democracy) but a ban on chess would be unlikely to survive (the moral equivalent of rational basis with bite scrutiny), even if the punishment was small.

Next, if a criminal law tied a moderate punishment to a criminal prohibition, then it would have to be justified along the basis of intermediate scrutiny (from a moral perspective). For example, my sense is that a ban on eating on the subway punishable by a trivial amount of prison would not pass intermediate scrutiny, but gun possession laws probably would. Crimes threatening substantial punishments, however, would have to survive the moral equivalent of strict scrutiny, and in this respect, I am doubtful that incarceration greater than a year would be adequately justified for drug or gun possession laws, but would be a reasonable basis for many mala in se crimes.

This framework promises a sliding scale of scrutiny for crimes based on the amount of punishment the state in question would impose. If the law did not over-punish relative to the merits of the underlying crime, then pro tanto obligations could be generated through democratic processes and that we could find ourselves laboring under obligations to conform or enforce a whole array of (permissibly) dumb but not illiberal laws. On the flip side, if criminal laws were

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either illiberal or spectacularly dumb, then they would trigger no obligations to conform, enforce, or render assistance to law enforcement.

All this leaves out over 200 pages of commentary but the gist of it is to suggest that retributivists have to learn to tolerate and even grudgingly make peace with democracy’s capacity to generate new moral obligations. This need to make peace is especially true over the battles of mala prohibita crimes.

If the preceding account (or its lengthier forbears) is correct, and there is a basis for presumptive political obligations to attach in some regimes, then what follows for regimes unsaddled by the weight and wonder of liberal democracy? My primary concern in this little essay is to try to sketch out (however incompletely) what implications there might be for wicked regimes from my more pluralist account of the intersection of retributive justice with criminal law within good liberal democratic regimes.

So let me suggest a few claims but before I do, let me begin by emphasizing that my focus is on really bad regimes: North Korea, Syria, etc. In such wicked regimes, what are the moral obligations of persons vis-à-vis domestic criminal laws?

II. Philosophical Anarchism for Everyone (Outside Liberal Democracies)?

It’s tempting to say that the moral magic performed by liberal democracies is absent in wicked regimes. On this view, states that lack the normative legitimacy to generate new moral obligations cannot expect citizens (or persons more generally) to conform to their criminal laws in ways that don’t otherwise accurately track their moral obligations. Put differently, regardless of what the actual criminal law is in those regimes, such laws don’t much reduce our moral obligations in terms of how we must act with each other. So, for example, the pre-institutional reasons I have for not murdering you ought to be compelling me not to murder you regardless of whether there’s a law on the books with adequate punishment to scare me into submission. This insistence on a free-floating set of moral norms that guide our behavior is basically consistent with the position of philosophical anarchism.

Accordingly, the fact that a law would tell us to forbear from theft or murder is of little significance because we already had excellent reasons to avoid that action, and those reasons should guide our behavior, not the mere fact that the law says so. Where the balance of moral reasons weighs in one direction, and that direction is at odds with the law, the philosophical anarchist says, so much the worse for the law. Denying that moral magic exists, the anarchist position is that the law holds no independent moral authority. Importantly, however,

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4 That said, we can always lobby or vote to re-make the criminal law in accordance with the negative legal moralism of someone like Doug Husak or Michael Moore.
5 “Philosophical anarchists maintain that we (or that most of us) have no political obligations, that all arguments purporting to establish general political obligations fail” (A John Simmons 2009 SSRN piece on associative political obligations http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1344435)
6 This stands at odds with the view I adopted in RJDDC, where I argued that in well-working liberal democracies, we have presumptive political obligations that call us to conform to (many) criminal laws that are not focused on identifying and castigating moral wrongs. Markel, RJDDC.
philosophical anarchism doesn’t require blithe indifference to the value institutions may play, even in wicked regimes. Even wicked regimes may have stop signs or traffic laws that one should conform to, at least most of the time, according to philosophical anarchists.\(^7\)

But, to use a familiar hypo, the anarchist position won’t amount to providing a pro tanto reason to stop at the stop sign in the middle of the desert when it’s clear that there’s no one around for miles. And that’s true of this viewpoint whether you’re in a liberal democracy or a wicked regime.

The question then is how should one live (with others) in a wicked regime? Do we have any pro tanto reasons to “respect” criminal laws in such regimes when the demands of those criminal laws take us beyond the philosophical anarchist position?

To ask the question is to assume, perhaps without adequate argument, that we can come to agreement over what the philosophical anarchist position would be on matters that themselves are contestable.\(^8\) Many anarchists are skeptical or downright hostile to vice crimes for example. But at the same time, philosophical anarchism is not intrinsically encouraging of “vice.” After all, I might believe that I should not pay for sex (because such activity is in tension with my view of the good life) but that others may have good and different reasons to do so, and that, on balance, the state should get out of the bedroom of its citizens. Similarly, I might not like the idea of being vulnerable to the mind-altering influence of alcohol or drugs but I could recognize that others could safely and properly enjoy these effects under the right conditions. All this is to say that philosophical anarchism cannot speak with one voice on the full gamut

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\(^7\) For example, our leading philosophical anarchist, John Simmons, writes that we “should (normally) perform as required or forbidden by law when (a) the acts in question are also required or forbidden by natural morality; (b) the acts are of general types that are not naturally required or forbidden, but where context makes them so (as, e.g., in consequence of a scheme of coordination, such as is accomplished by some traffic laws); (c) natural morality leaves open the detailed content of some moral duty, which can legitimately be filled out by agreement or social conventions (as might be true of, e.g., the duties relating to property or contracts); (d) we have good moral reason of a weaker (i.e., nonduty) sort so to act and no more weighty reasons to do otherwise.” A. John Simmons, The Duty to Obey and Our Natural Moral Duties, in CHRISTOPHER HEATH WELLMAN & A. JOHN SIMMONS, IS THERE A DUTY TO OBEY THE LAW? 191 n.5 (R.G. Frey ed., 2005).

\(^8\) For example, is there a clear position from the philosophical anarchist position on whether one should refrain from paid sex work (or paying for sex); gambling or providing a gambling house; consuming recreational drugs or providing them to others (assuming one can do so in a way that respects the autonomy and safety of others)? Some philosophers who embrace a roughly anarchical position (and they are negative legal moralists in the context of criminal law) think criminal law should not be involved in the regulation of sex between consenting adults, and some philosophers of this sort are also suspicious of other vice crimes, such as gambling, drugs, or alcohol regulation/prohibition. Consider two leading criminal law theorists: Michael Moore, consistent with his negative legal moralism and what I take to be his philosophical anarchism, is sharply critical of many criminal laws regulating sex. See Moore, Placing Blame 1997. Doug Husak has adopted a similar view, based on similar reasons, of hostility toward most drug possession laws. Husak, Drugs and Rights.
of criminalization choices available, whether in a liberal democracy or in a wicked regime.

Still, there is much that philosophical anarchism, and its cousin, negative legal moralism, can require or prohibit (such as the easy case of murder), and when that’s the case, some crimes, particularly those in wicked regimes, will squarely stand in tension with the philosophical anarchist view. So how are we to deal with harder cases, for example, where the criminal law requires a person to act immorally? Say the state punishes persons for accessing the NYTimes from their computer and it also punishes those who fail to report others for accessing the NYTimes.¹⁰

A. Conformity Obligations

Remember, that, on my view, such laws in liberal democracies would be illiberal laws, and akin to spectacularly dumb criminal laws, they cannot command conformity because they do not generate new moral obligations. There might be prudential reasons to conform to them, or to enforce them, but they lack the character of a pro tanto moral reason for action in and of themselves. It would seem to follow ineluctably that the same categories of laws (illiberal or spectacularly dumb) can generate no new moral obligations when enacted in wicked regimes.

So what do we make of those laws in wicked regimes that, if they were in a liberal democracy, would count as permissibly dumb but not illiberal? It was my view that these laws are able to generate new moral obligations in liberal democracies because of the way in which liberal democracies can create some moral magic. Absent the moral magic performed by an account of political obligation that makes sense within liberal democracies, there would be no intrinsic value (or pro tanto reason) to conform to laws (applicable in wicked regimes) that would have to be regarded as permissibly dumb but not illiberal (within liberal democracies). So, just to use an example, if we could stipulate that criminal bans on eating on the subway (using low sanctions) would be permissibly dumb but not illiberal (within a liberal democracy), how would we view that same law within, say, Syria?

To my mind, the answer is quite clear. Such laws are not capable of generating new moral obligations on the part of citizens or subjects to that regime—at least not based on the account of political obligation I gave, which only attached in liberal democracies.¹¹

So to summarize briefly: in wicked regimes, citizens have obligations to conform to those laws that already track our balance of moral reasons. That’s

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⁹ Negative legal moralists hold that in order for X to be a criminal activity, X should be morally wrong. The moral wrongness of an activity is thereby a normatively necessary feature of criminal law. There are disputes over whether the immorality of X is a sufficient condition for criminalization, but we will leave that alone.

¹⁰ The other day, China actually banned access to the NYTimes website but they may have done this through technical not legal means (West Coast not East Coast Code).

¹¹ The account I developed was not intended to be original; rather it was quite self-consciously a pastiche drawn from, to varying degrees, contemporary theorists including but not limited to Waldron, Shapiro, Hershovitz, Christiano, and Estlund.
not different from citizens in good regimes. Conversely, they have no obligation to conform to illiberal laws or spectacularly dumb laws — just like citizens in liberal democracies. The difference is that citizens of wicked regimes cannot be said to have a presumptive political obligation. Accordingly, they have no obligation to conform to laws that in liberal democracies would be permissibly dumb but not illiberal. On the conformity front, that’s the main difference between good and bad regimes.

B. (Some questions about) Enforcement Obligations

What about enforcement obligations for officials in wicked regimes? This is a surprisingly tricky issue.\textsuperscript{12} It would help for us to distinguish between political retributivism and comprehensive retributivism.\textsuperscript{13}

The former view understands criminal law principally as a relational matter, and thus emphasizes the polity holding the offender to account through conviction and punishment in response to the offense. The latter view by contrast is not quite so relational; the focus is on whether moral wrongdoing is answered by the wrongdoer’s eventual suffering.

So, vis-à-vis political retributivism, we should bear in mind, with Antony Duff, among others, that the officials running the institutions of criminal justice are claiming an authority to hold an offender to account by virtue of his offense against the polity. A polity that cannot justify its rule because it (persistently) demonstrates cruelty and disfigurement to those under its control, however, looks just like a bunch of thugs with badges. The question that arises is whether such thugs within a wicked regime have moral standing to call offenders to account for their misdeeds?

On my view, they seemingly lack any such standing for condemning those who violate laws that in liberal democracies would be permissibly dumb but not illiberal. These laws, like illiberal or spectacularly dumb laws, have no capacity to generate new moral obligations on behalf of citizens of the polity. But what about those laws that are incontrovertibly good? Imagine there’s a murder statute that fairly apportions punishment at 35 years of incarceration, or a rape statute that assigns punishments we think are otherwise appropriate for the offense, say 15 years.\textsuperscript{14} Is it the case that even murderers and rapists cannot be punished in such a regime?

I think this is an intolerably difficult question for political retributivists like myself or Duff. I can’t speak for Duff, but one reason I would hesitate to answer this question either way has to do with the quality of procedural justice used to ascertain the guilt of the murderer or the rapist. (Normally, we assume such conditions are satisfied in liberal democracies, but if they were not, then we’d have no reason to be sanguine about the moral magic of liberal democracies.)

\textsuperscript{12} One reason is that the obligations of some officials may reasonably differ from the obligations of others. Compare prison guards’ moral obligations to police officers, prosecutors, judges, executive clemency decision-makers. I will focus primarily on those officials having discretion to seek or forego punishment. Cf. Markel, Making Punishment Safe for Democracy (section in reply to Volokh).

\textsuperscript{13} I say more about these two kinds of retributive justice in RJDDC.

\textsuperscript{14} I want to avoid, for our purposes right now, problems where the punishment is either grossly excessive or grossly lenient for the underlying offense.
So, if I could be reasonably certain that within a wicked regime the procedures for ascertaining guilt were comparably reliable, I could imagine wearing the robes of the comprehensive retributivist, who cares less about the relational dyad between punisher and punished, and more about the moral desert of the offender, and whether that offender experiences *condign* suffering (or punishment).

At its worst, the scenario I’m describing allows for the Nazis or Stalinists to punish murderers, rapists, and thieves, and to set up or maintain institutions of criminal justice so long as the institutions are respectably reliable as concerns accuracy and proportionality of punishments. In terms of providing a rationale for this position, my sense is that the perfect should not be the enemy of the minimally good. Hence, so long as the preconditions having to do with accuracy and proportionality in punishing a mala in se offense are satisfied, then the chance to inflict some comprehensive retributive justice is not to be wasted. If we can bend the arc of history toward (retributive) justice, we ought to.

Unfortunately, this view opens up many new questions that would not otherwise be opened under the rubric of political retributivism. For example, imagine a robber breaks his leg on his way out of the store he just jacked. Under traditional political retributivism principles, which emphasize that punishment should be apportioned based on the gravity of the offense, there’s no need to give him a punishment discount in recognition of his suffering that he experienced. Punishment is distinct from suffering in the political retributivism world. By contrast, in the comprehensive retributivist world, we are motivated by the principle that moral wrongdoing requires suffering as a response. The robbery was not *answered* by the broken leg, but the robber experienced suffering *through* the broken leg *after* the robbery. Doesn’t that count for something, perhaps in the same way that a parent suffers when his crime leads to an unintentional harm to his child? If the Nazi judge is apportioning punishment, and is putting aside his anti-Semitic commitments and is otherwise just focused on the punishment of the wrongdoer, do we want the official to come as close as possible to being an agent of cosmic (or God’s) justice, or do we want the punishment to still reflect something close to the (justifiable) norms of the community during that period?

One reason for caution about comprehensive retributivism among officials in wicked regimes has to do with the legality principle. For reasons elaborated elsewhere, my sense is that comprehensive retributivism is basically unable to explain or justify the norms associated with legality principles. What matters to a comprehensive retributivist is that there is moral wrongdoing and that such wrongdoing is answered by suffering. The absence of a law is irrelevant if there was culpable wrongdoing by an offender that is neither excused nor justified.

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15 Moore, Placing Blame.
16 The political retributivist is normally somewhat indifferent to the matter of suffering by an offender, because he is instead focused on the matter of punishment. See Markel and Flanders, Bentham on Stilts (2010); Gray, Punishment as Suffering (2010); Markel, Flanders & Gray, Beyond Experience (2011). Punishment can be inflicted in ways that are reasonably objective across persons, but suffering varies so idiosyncratically across persons that it’s hard to make good comparisons to implement an equal suffering principle.
17 RJDDC.
So, how would we react if Nazi (or North Korean or Syrian) prosecutors could lock people up for offenses that are, let’s stipulate, mala in se, but that these offenses were not adequately spelled out by law from the legislature, etc?

I find this line of inquiry quite difficult to address but my inclination is to think that where political retributivism is impossible because of the illiberal and non-democratic nature of the regime, the second best approach is basically one that preaches philosophical anarchism for citizens and a qualified comprehensive retributivism for officials, such that officials in wicked regimes still have a warrant to punish incontrovertibly bad behavior up to the point that liberal democracies would be morally permitted to do so.

This is different than being a full throated comprehensive retributivist because those folks would need to punish with the same knowledge that we assume God (or the cosmos) has. Accordingly, they would be able to sentence based on information about bad acts that may not even be illegal, or good acts that are ultimately irrelevant to the choice to commit the underlying crime.

C. Assistance to Enforcement Obligations

In my companion papers, I argued that persons in liberal democracies have pro tanto duties to reasonably assist law enforcement, and that these pro tanto duties are somewhat easily outweighed or cancelled by competing considerations. Still, I noted that the account of presumptive political obligation within liberal democracies was still able to generate—-with respect to incontrovertibly good (mala in se) criminal laws, as with permissibly dumb but not illiberal laws—good reasons to render reasonable efforts to apprehend offenders of such laws.

Would the same hold true for wicked regimes? No, or not entirely. By my lights, the duty to assist in the context of incontrovertibly good laws would still attach, but only inasmuch as one had faith in the reliability of the investigative and adjudicative proceedings and the substantive proportionality of the punishment. By contrast, there would be no duty to assist with: i) spectacularly dumb laws ii) illiberal laws, or iii) even those laws that would be permissibly dumb but not illiberal in the context of liberal democracies.

D. Alternative Accounts of Political Obligations

All along in this essay so far, I’ve been assuming that there is a gap between political obligations in liberal democracies and wicked regimes. The gap arises I think because of how wicked regimes are unable to avail themselves to the arguments associated with natural duty and fairness that I relied upon in sketching out the presumptive political obligation account in my companion paper. When sketched out, this account explains the bases for thinking we are defeasibly obligated to assist, enforce, or conform to a large but not inexhaustible class of criminal laws. However, as is well known to those who study the matter, one could have an alternative account of political obligation. If that account of political obligation were adequate (ie, intellectually and morally satisfactory), perhaps that alternative account of political obligation could generate some new moral obligations, perhaps even ones that differ from the tentative conclusions I’ve suggested here.

18 This isn’t to equate the crimes of the Nazis with those of the Syrians or the North Koreans, only to note that they’re all well past the threshold for terrible behavior.
Let’s tease this out and see if that’s right. There are a number of other grounds sometimes invoked to suggest the creation of a content-independent political obligation to conform one’s conduct to the law. Promise/consent is one familiar one. Associative duties are a second, and acceptance of benefit is a third.  

1. Explicit Consent/Promise

Even with wicked regimes, it is conceivable that people might pick up and move there (perhaps to watch new grandchildren stuck there?), and by their express and freely chosen actions and vows, decide that they want to take on the panoply of laws that they weren’t otherwise obligated to prior to their voluntary consent being rendered. So, if Peter Promise moves to North Korea and says, I want to throw my lot in with the Great Leader (or at least live under his rule), and I hereby accept all the laws applicable to other North Koreans, then isn’t it likely that Peter Promise’s obligations are different than someone who was kidnapped and brought to North Korea against her will, or someone who lost the birthright lottery and had the bad luck of being born in North Korea? In that sense, Peter Promise might well have subscribed to a greater basket of obligations than Katy Kidnap or Nate the Native Born Son.

Specifically, Peter Promise is now on the hook for (that is must assist, enforce, or conform to) all the permissibly dumb but not illiberal laws that North Korea’s borders might host. Importantly, however, Peter Promise still remains, on my account, free from the obligations purportedly created by illiberal or spectacularly dumb laws. Actually, to be more precise, Peter Promise is permitted but not required to conform to those spectacularly dumb or illiberal laws that are not other-regarding. But he may not assist in or enforce spectacularly dumb or illiberal laws against others. Rather he must still act with reasons that satisfy a minimal standard of scrutiny, and he must still forbear from acting in a way that would wrong others. This is because his prior promise to do X only provides a reason to do X if X is otherwise morally permissible. But a promise to do X is of no moral significance if X is itself forbidden. And on my view, it would be a pro tanto moral wrong to assist in the enforcement of or enforcing a law that is itself spectacularly dumb or illiberal.

Something like the same logic would apply even when the grounds for political obligation differ. But my sense is that the two other familiar potential grounds for political obligation – associative duties and acceptance of benefits – are inadequate to ground political obligation, and so, any duties to conform to or enforce or assist in the enforcement of permissibly dumb but not illiberal laws would have to be created by a separate grounds for obligation, mostly likely, consent and/or promise. My skepticism toward associative duties and acceptance of benefits as a grounds for political obligation is something I’ll only

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19 [Say something about Raz and why I’m not addressing him].
20 This would overcome the traditional Humean objection observing that people are frequently just born into their regimes, and thus can’t have realistically been supposed to consent to the political authority of their lives in the presence of inadequate exit options and the absence of formal procedures of acquiescence to the political authorities.
21 Katy Kidnap is not much different than Nate the Native Born Son; the former is brought there against her will and the latter is, arguendo, stuck there against his will.
22 A murder of a person is not permitted just because one promised to do it beforehand.
flesh out briefly since the arguments against them are quite powerful and have already been rehearsed in the relevant literature.

2.

Associative duties are duties said to be created by virtue of a thick or long-standing relationship with another person or group of persons; these duties are said by their proponents to exist independently of the voluntariness associated with the creation of the special relationship that ostensibly grounds the obligation. Some think these duties arise to family members, friends, or countrymen. According to one prominent exponent: “Political association, like family or friendship and other forms of association more local and intimate, is itself pregnant of obligation.” My own quick view is that absent voluntariness or requirements grounded in reasonableness and fairness (such as the account I basically favor in the context of liberal democracy), there is no way for associative duties to generate, or to continue Dworkin’s metaphor, birth the moral magic needed to create new moral obligations that would require persons within wicked regimes to conform to those dumb but not illiberal laws that would survive scrutiny within a liberal democracy.

Some people have tried to defend associative duties by reference to the conceptual nature of what it means to be a citizen within a polity to a government (e.g., Macpherson/Pitkin), but these conceptual claims just bury normative arguments that won’t actually die; after all, we are entitled to know why citizens have these claimed obligations to polities. As John Simmons notes, it’s not as if we don’t understand the coherence of the position of rebels or anarchists and the reason we understand the coherence of their position even if we don’t necessarily embrace their position is because we understand their underlying claim that we are not invariably obligated absent a good account of what should motivate us to accept our independently created obligations.

Similarly, the claim that descriptively many people feel a sense of political obligation based on their associative duties to their fellow citizens cannot ground an answer to the normative question of whether one citizen ought to have a political obligation based on their associations with fellow citizens within a polity. Again, Simmons unearths the unconvincing assumptions in the argument (associated with Margaret Gilbert) quickly: “The mere fact that individuals refer to "our" government and have a vague feeling of indebtedness to "our" country should not, of course, lead us to believe that those individuals in fact have (or even really believe they have) political obligations. Confused, oppressed, or unthinking "feelings of obligation" are too common a feature of our moral lives to make reasonable such leaps of faith.”

A final sense in which associative duties are said to be grounded is through the development of reliance interests. If A regularly goes along with B and C to do X activity, his doing X may seem to create reliance interests that B and C can be assured of his continued doing of X. But this is too thin a reed to lean on. I may

23 Proponents of this view include Ronald Dworkin, Law’s Empire 1986 at 206; John Horton, In Defense of Associative Political Obligations, 54 Political Studies 427-443 (2006). In the criminal law context, Antony Duff has endorsed this associative duties model as a grounds for political obligation. See his response to me in Va J. Crim L. 2012.
24 Dworkin 1986: 206
25 Simmons, 2009, ssrn piece.
26 Id. at 13. (Simmons 2009).
have had an overdetermined number of prudential reasons for conforming to the law of the polity of X-esia, but at no point should continued conformity be relied upon merely because I did it before. Even if I have committed to taking a walk at 7am every morning for myself, that can’t be said to generate a reliance interest by others in my taking a walk at 7am.27

In short, accounts in favor of associative political obligations are unpersuasive even when they are situated within liberal democracies. The idea that wicked regimes should benefit from associative political obligations is even harder to accept. If persons in wicked regimes lack obligations to conform to dumb but not illiberal laws because they lack associative political obligations, then it would also follow that such persons have no associative political obligations to assist with the enforcement of those dumb but not illiberal laws. Likewise, officials would lack grounds to enforce dumb but not illiberal laws inasmuch as those grounds were tied to an account based on associative duties.

3. Acceptance of Benefits

I turn next and last to an account of political obligation based on gratitude, which I will hastily conflate with the view that obligations can arise from the acceptance of benefits. The general view by proponents of such a view is that those of us who accept benefits from the state are obligated to cooperate with those who bestow those benefits. On its face, this seems like a difficult proposition to embrace. As critics of this view pointed out, if someone throws a newspaper at my front door, even repeatedly, that should probably earn my thank you, but not necessarily my money.28 Even if the benefits are accepted willingly and continuously, and even if the benefits are not trivial, but rather are essential to one’s life, well-being, and security,29 it’s not clear why gratitude should be cashed out in the currency of conformity to law, as opposed to other ways in which gratitude can be expressed (verbal thank-you’s, baking banana bread, knitting tea cozies.)

Accordingly, proponents of the gratitude-based obligation need a story to convince us that conformity to law’s demands is the method by which we must exhibit gratitude. They should also tell us why gratitude is required as opposed to permitted or encouraged; after all, on their view, the lack of gratitude becomes a wrong-type of the sort that could land one in prison when that ingratitude is manifested by someone unwilling to abide by a dumb but not illiberal law. In other words, normally, when someone is ungrateful for having willingly received a benefit, we wouldn’t think that is the kind of unreasonable behavior that would warrant criminal punishment. We might think that person is a lout, and perhaps should be avoided at parties or perhaps gently rebuked, but rarely do we think an ingrate is someone who, by dint of their ungratefulness, needs condemnation through conviction and the hard treatment of fines or prison.30

Ok, so, if a gratitude based theory can’t ground political obligations for adhering to dumb but not illiberal laws, that doesn’t mean that those who are grateful to the state, even the wicked state, cannot choose to conform to these laws. They can. And they might choose to do so based on a view that they are willing to

27 Again, the argument of this paragraph is inspired by Simmons’ 2009 piece, which addresses the argument made by Gilbert.
28 NOZICK, Anarchy, State & Utopia at 90–95.
29 A point Klosko raises in response to Nozick.
30 By contrast, the kind of unreasonableness associated with flouting
conform through some form of consent/promise. But in this context of gratitude, it’s a bit hard to stomach the view that an evil regime can earn fidelity and respect for its dumb but not illiberal laws simply by, say, providing clean water and maintaining traffic safety. In the personal context, for example, a mobster might give turkeys to the poor or to politicians around Thanksgiving, but it doesn’t translate that those groups should do the bidding of the mobster or even not impede the actions of the mobster out of a felt sense of gratitude. Even if the mobster gave a turkey (or even a house) to his drycleaner, the drycleaner should be free from moral reproach if he decides that he doesn’t want the mobster’s laundry to wash (which we can analogize as similar to a person in a wicked regime choosing not to conform to those dumb but not illiberal laws that are relatively costless to conform to).

Finally, I note that if gratitude cannot generate new obligations for conformity to criminal law, then it similarly cannot perform the moral magic needed for citizens to be defeasibly obligated to offer reasonable help in the enforcement of dumb but not illiberal laws. What’s more, officials could not use gratitude as a basis to enforce such dumb laws against others, since, like promises, gratitude based duties cannot create a moral requirement to do something that would otherwise be morally dubious, like enforcing a dumb criminal law against someone who doesn’t otherwise have a real grounds for fidelity to that criminal law.

Conclusion

I should close by providing a potential avenue of optimism for despots. If it turns out that the offender (our earlier example of Peter Promise is a good illustration) has voluntarily accepted the yoke of the despot’s dumb but not illiberal laws and the official tasked with punishing Peter Promise is someone who has voluntarily thrust himself into a position to punish (modestly and based on strong and reasonably secured evidence), then both parties (in this admittedly stylized example) have viable grounds for political obligation to each other even if they are outside a liberal democracy.

Those are probably rare cases. More frequently, I suspect, we have situations in wicked regimes where in fact there is little grounds for thinking citizens have pro tanto moral obligations to conform to the dumb but not illiberal laws of their polity. Similarly, there will be grounds for skepticism toward the view that officials should, as a matter of pro tanto moral obligation, enforce these DBNI laws against their fellow citizens, notwithstanding any oaths they may have taken.

In any event, the main thing I have shown (or at least tried to sketch) is that one’s moral obligations vis-à-vis criminal laws in wicked regimes need to be filtered through more general accounts of political obligation, and this has ramifications as much for citizens as it does for officials.