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Obligatory Whistleblowing: Civil Servants and the Complicity-Based Obligation to Disclose Government Wrongdoing

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*What I have to do is to see, at any rate, that I do not lend myself to the wrong which I condemn.**

When civil disobedience and whistleblowing are discussed in the philosophical literature, the main question is nearly always 'Is it permissible?.' The important question whether one can ever have an *obligation* to engage in civil disobedience or whistleblowing – and thus if one can ever be blamed for a failure to act in these ways – is thus ignored. Regarding civil disobedience there are a few rare exceptions.[1] These, however, do not discuss our obligations to engage in civil disobedience in the context of our responsibility for collective wrongdoing, but instead found the obligation of civil disobedience on an expanded notion of political obligation. As I am concerned in this article with the obligation of civil servants to disclose secret government wrongdoing in which they are complicit, these texts are, therefore, of little help.

Political philosophical discussions of whistleblowing in general are in short supply, but when political philosophers do discuss it, they, again, limit

* Thoreau, Henry David. 1962. Civil Disobedience. In *Walden and Other Writings*, ed. Joseph Wood Krutch, 85–104. New York: Bantam Books. 92.

1 E.g., Delmas, Candice. 2016. Political resistance for Hedgehogs. In *The Legacy of Ronald Dworkin*, ed. Wil Waluchow and Stefan Sciaraffa, 25–48. Oxford: Oxford University Press; Parekh, Bhikhu. 1993. A Misconceived Discourse on Political Obligation. *Political Studies* 41: 236–251.

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themselves to the question whether it is ever permissible.[2] I know of but one example that deals with the question of a *duty* to blow the whistle,[3] but here, again, the duty is not founded on the complicity of civil servants in collective wrongdoing.

In business ethics, it is a bit more common to consider *obligations* to disclose wrongdoing, but accounts that base such an obligation on one's complicity in collective wrongdoing, are rare. Michael Davis is one of those who *do* argue for an obligation to disclose wrongdoing if one is complicit in it,[4] yet he offers no substantial account of responsibility for collective wrongdoing in which one is complicit that would help us establish if a given person has an obligation to disclose wrongdoing and, if so, how strong that obligation would be.

This article thus wishes to fill a lamentable lacuna; it wishes to establish, specifically, whether civil servants who are complicit in government wrongdoing incur a *moral obligation*[5] to remedy the injustice they have contributed to by disclosing it, and, if they do, what the nature and the strength of this obligation is. My contention will be that they do have such an obligation, but that it is defeasible, and that its strength (and thus the likelihood of its being

2 See, for example, Delmas, Candice. 2015. The Ethics of Government Whistleblowing. *Social Theory and Practice* 41: 77–105; Sagar, Rahul. 2013. *Secrets and Leaks: The Dilemma of State Secrecy*. Princeton: Princeton University Press; Scheuerman, William E. 2014. Whistleblowing as Civil Disobedience: The Case of Edward Snowden. *Philosophy and Social Criticism* 40: 609–628.

3 Delmas, Candice. 2014. The Civic Duty to Report Crime and Corruption. *Les ateliers de l'éthique* 9: 50–64.

4 Davis, Michael. 1996. Some Paradoxes of Whistleblowing. *Business & Professional Ethics Journal* 15: 3–19.

5 Note that I am here interested in *moral* (not legal) obligations, and that I wish to establish whether civil servants complicit in government wrongdoing incur a moral *obligation* (not duty) to disclose. In using the word 'obligation' instead of 'duty' here, I follow the familiar distinction between the two, known from the works of Hart and Rawls, among others: obligations are voluntarily incurred, that is, as a consequence of our own actions, whereas duties are held prior to and irrespective of the agent's behavior (see Rawls, J. (1999). Legal Obligation and the Duty of Fair Play. In S. Freeman (Ed.), *Collected Papers* (pp. 117–129). Cambridge, MA: Harvard University Press. 118; also see Hart, H. L. A. (1955). Are There Any Natural Rights? *The Philosophical Review*, *64*(2), 175–191. 179n). In other words, I am only interested in the obligation to blow the whistle, which we incur as a consequence of our own wrongful conduct, *not* in a freestanding duty to blow the whistle because it may simply be the right thing to do. The strategic reason for this is that often whistleblowing is viewed as supererogatory, due to the risks involved to the whistleblower herself. I wish to confute this view by demonstrating that, at the very least, we may have an *obligation* to blow the whistle due to our complicity in government wrongdoing.

defeated) depends on the blameworthiness of one's complicity. Accordingly, the argument will proceed as follows: first, I will argue that one is responsible for collective wrongdoing insofar as one is complicit in it. Second, I will demonstrate that civil servants can indeed be held responsible for government wrongdoing in which they are complicit, by way of the consideration and refutation of three counterarguments. Third, I will briefly establish that responsibility for wrongdoing (including collective wrongdoing) gives rise to obligations of remedy. Fourth, I will consider five possible strategies to fulfill one's obligation of remedy as a civil servant who has contributed to government wrongdoing, concluding that unauthorized disclosures generally appear to be the most effective, given that I am concerned with *secret* government wrongdoing. I acknowledge, however, that other strategies may, at times, be more effective. Accordingly, the fifth section establishes, by way of the refutation of four counterarguments, that *when disclosure is the most effective way of addressing the wrongdoing*, civil servants who are complicit in classified government wrongdoing do indeed incur an obligation to disclose such wrongdoing. This obligation will turn out to be a *pro tanto* obligation, liable to be defeated by countervailing moral reasons. In the sixth step of the argument, I will discuss two examples in order to demonstrate how we can assess the strength of the obligation to disclose. The general idea is that the more blameworthy one's complicity is, the stronger one's *pro tanto* obligation of remedy will be, and the more difficult it will be for this obligation to be outweighed by other moral considerations. Hereby, I largely follow Lepora and Goodin in viewing the blameworthiness of one's complicity as a function of (1) the badness of the principal wrongdoing, (2) the responsibility for the contributory act, and (3) the extent of the contribution. I will end by considering the case of bystanders to government wrongdoing, arguing that omissions can also be causally effective, and thus that bystanders' culpable silence may amount to complicity in wrongdoing as well.

1 One is Responsible for Collective Wrongdoing, to the Extent that One is Complicit in it

It has often been pointed out – for example in the sprawling literature concerning the duties of well-off individuals towards the global poor – that our moral intuitions seem most suitable to a type of social organization characterized mainly by small-scale and direct interactions that are by no means exhaustive of all our dealings in a globalized world. Accordingly, we tend to view acts as enjoying primacy over omissions, near effects over remote effects, and individual

effects over group effects.[6] This paper will only be concerned with the latter of these relations of primacy (and very briefly with the first): one tends to view those outcomes for which one is solely responsible as implicating oneself to a far larger degree than those with regard to which one's actions amount to but one of many contributing factors alongside the actions of a number of other agents. On the classic view of responsibility for harm, my own actions ought to be the sufficient condition of the harm in question.[7] This view poses clear problems for individual responsibility for *collective* wrongdoing, i.e. wrongdoing for which, by definition, no one agent is exhaustively responsible. This is not 'merely' a theoretical shortcoming: a significant part of contemporary wrongdoing is the product of collective action, often mediated by institutions. But if we are only responsible for the wrongdoing we bring about ourselves, as individual agents, the result would appear to be that no one is responsible for the wrongdoing we collectively cause, thus leaving some of the greatest wrongs without assignable culprits.[8] If we are to avoid this conclusion, we will need to take recourse to theories of *moral complicity*. In the remainder of this section I will briefly discuss two such theories: Kutz's 'intentional participation' theory and Lepora and Goodin's 'causal contribution' theory. I will remain agnostic as to which of these theories is most convincing regarding the *ground* of complicity, as deciding this matter goes far beyond the scope of this paper. I believe that both theories allow me to establish that civil servants can be complicit in government wrongdoing and thus to make the central argument that civil servants who are complicit in classified government wrongdoing may have a *pro tanto* obligation to disclose such wrongdoing. In other words, the main argument of the paper stands, whether one focuses on contribution to harm or on intentional participation. That said, however, I will be working with Lepora and Goodin's account of complicity for the remainder of this paper. The reason for this is that they view complicity as a function of several factors (mentioned above), allowing us to better establish *degrees* of complicity (and thus to establish obligations to disclose of varying strength).

6 Scheffler, S. (2001). Individual Responsibility in a Global Age. In *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (pp. 32–47). Oxford: Oxford University Press. 39. Cf. Singer, P. (1972). Famine, affluence, and morality. *Philosophy and Public Affairs*, *1*(3), 229–243. 232; Lichtenberg, J. (2010). Negative Duties, Positive Duties, and the "New Harms." *Ethics*, *120*(3), 557–578.

7 Lichtenberg. *New Harms*. 561.

8 Kutz, C. (2000). *Complicity: Ethics and Law for a Collective Age*. Cambridge: Cambridge University Press. 113.

According to Kutz, the '*intentional participation* in a collective venture is a basis for accountability for the harms and wrongs that result from this venture.'[9] He calls this the *complicity principle*. Rather than focusing on the causal contribution an agent has made to the wrongdoing of another, Kutz thus focuses on the content of her will.[10] Participants in collective harms are complicit in and thus accountable for the suffering such harms cause, 'not because of the individual differences they make, but because their intentional participation in a collective endeavor directly links them to the consequences of that endeavor.'[11]

Yet, critics have pointed out that by viewing a participatory intention as crucial for complicity in joint actions, Kutz risks running together co-principals and complicit agents.[12] Co-principals devise and execute a plan together (i.e., they intend to participate in criminal activity together), whereas a complicit agent 'merely' contributes to the wrongdoing of the principal. Say the President and the Secretary of Defense plan an unnecessary and unjust war together. They act as co-principals. Many in the military as well as civil servants in the executive branch will be called upon to do their part in implementing this plan of theirs, thus contributing to the co-principals' wrongdoing. When they do so knowingly, meaning that they foresee that their actions will contribute to the wrongdoing in question (the unjust and unnecessary war), they are *complicit* in the principals' wrongdoing. Lepora and Goodin thus provide the following minimum condition for being complicit in another's wrongdoing: '*voluntarily* [i.e., not under duress] performing an action that contributes to the wrongdoing of another and knowing that it does so.'[13]

But, Kutz might counter that Lepora and Goodin's causal contribution theory of complicity runs into problems when confronted with cases in which the effects are overdetermined. Consider Parfit's 'Harmless Torturers' example: whereas in the past each of the thousand torturers would inflict severe pain on one of the thousand victims by turning a switch a thousand times, now each torturer turns the switch once for each of the thousand victims: 'The victims suffer the same severe pain. But none of the torturers makes any victim's pain perceptibly worse.'[14] Each of the torturers can say that his actions

9 Kutz. *Complicity*. 164–5. Emphasis added.

10 Ibid. 165.

11 Ibid. 138.

12 Lepora, C., & Goodin, R. E. (2015). *On Complicity and Compromise*. New York: Oxford University Press. 80.

13 Ibid. 82.

14 Parfit, D. (1984). *Reasons and Persons*. Oxford: Oxford University Press. 80.

did not contribute to the harm inflicted; if one torturer had refused to turn the switch, the pain would not have been perceptibly less. Yet, we still believe the torturers' actions are wrong. It is because of such cases that Kutz proposes to abandon the requirement of causal contribution and to adopt instead the requirement of intentional participation in collective wrongdoing. On his account, the torturers are thus complicit in the wrongdoing, because they intentionally participate in a collective scheme aimed at inflicting severe harm on people.

Lepora and Goodin, instead, resort to the notion of 'counterfactual individual difference-making' to assign individual responsibility in such overdetermined cases. Consider the case of the backup assassin:[15] A plans to kill C. In case he does not succeed, he has hired B to kill C as a backup. As it happens, A's bullet kills C, and so B need not fire. Though B did not causally contribute to the principal A's wrongdoing, B could not have known this in advance. Events might well have unfolded differently (perhaps A was not such a good shot and missed C; perhaps A's bullet hit C but was not a lethal blow), in which case B *would* have contributed to the wrongdoing. Given that, as Lepora and Goodin point out, morality ought to be action guiding, its prescriptions must be informed by what the agent could have known *ex ante* rather than in hindsight. At the moment of acting, it was reasonable for B to believe that his role would be 'potentially essential' to the wrongful outcome. B is, therefore, a 'counterfactual difference-maker.'[16] In this manner, Lepora and Goodin argue, they can retain their view of complicity as contribution to wrongdoing, *and* sidestep the pitfall of running together co-principals and complicit agents, as they accuse Kutz of doing. For the remainder of this article, I will set aside the question which of the various theories of moral complicity is most convincing concerning the *ground* of complicity. Instead, my reason for working with Lepora and Goodin's account in what follows, is merely that it allows me to demonstrate how varying degrees of complicity may be established.

Complicity is not binary; rather, it comes in degrees, as does the moral blameworthiness for it. Lepora and Goodin propose to view the blameworthiness for an act of complicity as a function of (1) the badness of the principal wrongdoing, (2) the responsibility for the contributory act, (3) the extent of the contribution, and (4) the extent of a shared purpose with the principal wrongdoer.[17] The badness factor is fairly straightforward: how morally wrong is the wrongdoing in question? Is one complicit in the non-violent theft of a small sum of money or rather in the perpetration of genocide? The responsibility

15 Lepora & Goodin. *Complicity*. 56–8.

16 Ibid. 65.

17 Ibid. 98.

factor is a function of voluntariness – meaning the act was performed freely (i.e., not under duress) and not by accident –, the knowledge that one is contributing to wrongdoing, and the knowledge that the principal wrongdoing is indeed wrong. The contribution factor concerns the extent of the causal contribution one's actions make to the principal wrongdoing. The shared purpose factor, finally, states that one is more morally blameworthy if one shares in the wrongful purposes of the principal wrongdoer. I will set this last factor aside, however, as I am not convinced that sharing a wrongful purpose makes one's complicity worse. Consider the case of Adolf Eichmann: according to Hannah Arendt's account, Eichmann did not contribute to the Holocaust out of rabid anti-Semitism. He was simply an ambitious man who, furthermore, felt that it was his duty as a law-abiding citizen to unquestioningly follow orders.[18] Would we really argue that he was less morally blameworthy because he did not share the Nazis' wrongful purposes? It is not clear to me that someone who knows that there are no good moral reasons for the Holocaust but contributes to it anyway – out of ambition or a desire for monetary gain, for example[19] – is morally less blameworthy than someone who is obsessed by the idea of the 'Final Solution' and thus shares the Nazis' purposes.[20]

2 Civil Servants are Responsible for Government Wrongdoing, to the Extent that they are Complicit in it

Now that we have an idea of what makes one complicit in collective wrongdoing as well as how to measure the extent of one's responsibility for such

18 Arendt, H. (1963). *Eichmann in Jerusalem: A Report on the Banality of Evil*. London: Faber and Faber. Chapter 8.

19 Indeed, on a Kantian account, evil does not so much consist in willing evil, but in making 'the incentives of self-love and their inclinations the condition of compliance with the moral law' (Kant, Immanuel. 1996. Religion within the Boundaries of Mere Reason. In *Religion and Rational Theology*, ed. Allen Wood and Paul Guyer, tran. George Di Giovanni, 39–215. Cambridge: Cambridge University Press. Ak 6:36). This seems an appropriate description of civil servants who contribute to the drafting and execution of unjust laws and policies: the problem is not so much that they all wish to do wrong; rather, they make the satisfaction of their inclinations (to have a successful career, to have high social standing, to have a nice salary) the condition of compliance with morality's commands.

20 Indeed, it seems to me that Lepora and Goodin's own account renders the shared purpose factor irrelevant as well, since they view shared purposes as characteristic of co-principals rather than of complicit agents (a distinction they criticize Kutz for eliding). See, e.g., Lepora & Goodin. *Complicity*. 81.

wrongdoing, we can now turn to the question of *civil servants*' responsibility for *government* wrongdoing, whereby I will focus specifically on unjust laws and policies that are *secret* in nature. The reason for this focus is that no one but those in the know – i.e., politicians and civil servants with the necessary security clearance – could possibly do anything about such wrongdoing. The information being classified, citizens cannot pressure the government by protesting or hold it to account by voting it out of office, nor can the press perform its critical function, for the simple reason that both the citizenry and the Fourth Estate are unaware of the wrongdoing in question. The persistence of the unjust laws or policies is, for this reason, attributable to none but the relevant government officials and civil servants. Of these two, I will focus on civil servants as they are typically *complicit* in the wrongdoing of others, namely the government officials who act as principals, rather than acting as (co-)principals themselves.[21]

An additional reason for focusing on *classified* government wrongdoing is that, in Daniel Ellsberg's words, 'wrongful secret-keeping is the most widespread form of complicity in wrong-doing. It involves many more people both within and outside an organization that is acting wrongfully than those who give wrongful orders or who directly implement them, though it includes these.'[22] This will allow us to speak not only of those who contribute to wrongdoing directly, but also of those who do so by omission, namely through 'calculated silence.'[23]

To get a better grasp of the wrongdoing I wish to focus on, some examples may be in order. Consider the secret prisons ('black sites') in Eastern Europe during the Bush presidency, where alleged 'unlawful enemy combatants' were held and possibly tortured. Members of the civil service and the military must have been involved in this operation concerning matters of logistics, obtaining permission from the 'hosting' countries, and drafting the very plans for this operation. Consider as well Justice Department lawyers who advised the CIA, the Department of Defense and President George W. Bush on the use of enhanced interrogation techniques (such as waterboarding and sleep deprivation)

21 I do not mean to suggest that civil servants can never act as (co-)principals. Rather, I aim to establish the harder case, namely that complicit agents can be held responsible for government wrongdoing. It then goes without saying that, *a fortiori*, civil servants acting as (co-)principals can also be held responsible for wrongdoing.

22 Ellsberg, Daniel. 2013. Secrecy and National Security Whistleblowing. *OpEdNews*, January 17. Retrieved from http://www.ellsberg.net/archive/secrecy-national-security-whistleblowing.

23 Hill, Jr., Thomas E. 1991. Symbolic Protest and Calculated Silence. In *Autonomy and Self-Respect*, 52–66. Cambridge: Cambridge University Press.

that are generally considered to constitute torture. They also recommended classifying captured prisoners in Iraq and Afghanistan as 'enemy combatants' in order to be able to deny them the protections offered by the Geneva Conventions. In both these cases, it is likely that the civil servants involved did not initiate the wrongdoing; they were not its principal agents. Instead, they performed the tasks they were ordered to, which contributed to the execution of secret policies that involved wrongdoing. Due to this contribution, they are to be held (partially) responsible for the wrongdoing in question.

Yet, some might say that while it is fine to hold individuals responsible for their contribution to collective wrongdoing, the specific role of civil servants excludes such an attribution of responsibility. One reason could be that civil servants are expected to be *neutral*: they ought to serve governments of different political persuasions equally well. Their main role obligation is understood to consist in the carrying out of their superiors' commands: 'The honor of the civil servant is vested in his ability to execute conscientiously the order of the superior authorities, exactly as if the order agreed with his own conviction.'[24] Civil servants are not expected to engage in independent moral reasoning, it is said, but to be malleable instruments of their superiors' will.[25] As such, they cannot be held accountable for their contributions to government wrongdoing.

I have serious doubts that this is an adequate description of civil servants. Not only does this view greatly underestimate the discretion – and thus the independent moral judgment – that civil servants may exercise, but it is also mistaken concerning the object of their loyalty. American civil servants, for example, do not swear to obey their superiors in everything; rather, they solemnly swear to 'support and defend the Constitution of the United States against all enemies, foreign and domestic.'[26] Furthermore, the first of the basic obligations of the civil service speaks of loyalty to the Constitution, the laws and ethical principles, not of loyalty to one's superiors.[27] Neither the depiction of civil servants as mere instruments of their superiors' wills nor the identification of their central role obligation as consisting in loyalty to superiors is thus correct, allowing us to set this counterargument aside.

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24 Weber, Max. 1991. Politics as a Vocation. In *Essays in Sociology*, ed. H. H. Gerth and C. Wright Mills, tran. H.H. Gerth and C. Wright Mills, 77–128. London: Routledge. 95.

25 Quinlan offers a defense of such a view, based on his own experience in the British Civil Service: Quinlan, Michael. 1993. Ethics in the Public Service. *Governance* 6: 538–544.

26 5 U.S. Code § 3331 – Oath of Office.

27 5 C.F.R. § 2635.101 (b) – Basic obligation of public service.

A second possible argument against viewing civil servants as complicit and thus partially responsible for government wrongdoing is what Dennis Thompson has called the 'excuse from alternative cause:'[28] If I hadn't done it, somebody else would have. This is similar to the overdetermined cases discussed above, in that the civil servant who invokes this reasoning argues that her actions were not causally necessary for the wrongdoing to occur, given that someone else would have performed those same actions if she had not. However she acted, in other words, it would have made no difference to the final outcome (even if she had resigned). With Lepora and Goodin we can say, however, that her actions are *potentially essential*. After all, it is not unimaginable, viewed in prospect, that her actions would be causally necessary for the realization of the wrongdoing (perhaps others would have resigned or refused to implement the unjust policy; or perhaps they would have succeeded in convincing their superiors to change the policy), and therefore she remains a 'counterfactual individual difference-maker.'

A third counterargument states that a civil servant cannot be held accountable for her part in realizing government wrongdoing if she did not know she was contributing to wrongdoing. This argument has some merit. Given the highly compartmentalized structure of modern bureaucracies, it is indeed possible that an individual civil servant did not know that her actions would contribute to government wrongdoing.[29] She was simply doing her job. Here the relevant question, however, is whether she *should* have known. There is such a thing as culpable ignorance. If she stuck her head in the sand, because she did not want to deal with knowing an uncomfortable truth, then she is still morally blameworthy for failing to sufficiently examine the organization she works for and her role in it. In fact, given the great responsibility public servants assume towards the public, we may expect that they go to greater lengths than ordinary citizens in considering the possible consequences of their actions. Given the impact their actions have on the general welfare, we are justified in holding them to a higher standard.[30] In sum, ignorance can only function as an excuse if it is not negligible.

28 Thompson, Dennis F. 1980. Moral Responsibility of Public Officials: The Problem of Many Hands. *The American Political Science Review* 74: 905–916. 909.

29 Bovens, M. (1998). *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations*. Cambridge: Cambridge University Press. 126ff. Bovens maintains that the 'psychological distance' between a functionary performing her daily tasks and the effects of that performance results in a passivity of conscience.

30 Thompson, Dennis F. 1985. The Possibility of Administrative Ethics. *Public Administration Review* 45: 555–561. 560.

Having considered and rejected these three possible counterarguments, we may conclude that civil servants can indeed be held responsible for government wrongdoing, to the extent that they are complicit in it.

3 Responsibility for Wrongdoing Gives rise to Obligations of Remedy

In small-scale, direct interactions between people the statement that wrongdoing results in obligations of remedy requires little argument: if I am not paying sufficient attention to traffic, causing me to crash into the car in front of me, I incur an obligation to pay for the damage I have caused. If I promise to pick up my daughter at school and forget to do so, I incur an obligation to make amends (by apologizing, or taking her out for ice cream, for example). Though the wrongdoing in question, and particularly one's role in it, is less clear in the case of collective wrongdoing, we have nonetheless established in Section 1 that being complicit in collective wrongdoing results in bearing responsibility for that wrongdoing. Accordingly, contributing to collective wrongdoing also results in the incurrence of obligations of remedy.

4 The Most Effective Way To Remedy Classified Government Wrongdoing is Generally By Disclosing it

Now that we have established that civil servants may be held responsible for their complicity in government wrongdoing, as a consequence of which they incur obligations of remedy, we are presented with the rather practical question of how a given civil servant could fulfill this obligation most *effectively*. The actions that allow us to fulfill the obligation of remedy most effectively will generally be understood to be those actions most likely to bring about the end of the wrongful policy.

As a first step, one can of course address the wrongdoing internally and hope one succeeds in convincing those in charge to reform the wrongful policy. If one does succeed, this is a very effective way of fulfilling one's obligation of remedy. The wrongdoing has then ceased. The problem with this approach is that its success depends entirely on one's superiors' susceptibility to critique as well as their willingness to change course. If this course of action does not succeed, however, one could request a different assignment, arguing that one does not feel comfortable working on the wrongful policy any longer. Alternatively, one could resign from one's post entirely. Note that these two latter strategies do not so much provide a remedy for the wrongful policy as appease the civil

servant's own conscience. If requesting a different assignment and resigning does not result in remedying the wrongdoing, one may wonder if the motive of such actions is not so much the desire to remedy wrongdoing as 'simply a self-righteous desire to be, or appear, morally "pure"'.[31]

A fourth possible way of fulfilling one's obligation of remedy is by exercising what Arthur Applbaum has called 'official discretion.'[32] This does not do away with the wrongful policy, but softens its blows or makes the execution of the policy less efficient, thus doing less harm. Civil servants could, for example, withhold information or expertise necessary for executing the policy, and at the same time refuse to step aside so that others may step in to better implement the policy. Note, however, that this strategy does not result in the discontinuation of the policy either. The policy remains in place and the wrongdoing continues, though one does one's best to limit its impact. Most likely, furthermore, one's superiors will be able to discover who is obstructing the policy and find someone more willing to comply.

For a fifth strategy, recall that we are interested in cases of *secret* government wrongdoing, that is, wrongdoing that is brought about through classified policies. Recent history has demonstrated that when the press and subsequently the public at large get wind of their government's wrongful secret policies, they will apply significant pressure on the government to repeal or reform the policy in question, often with success. Thus, the fifth way of fulfilling one's obligation of remedy is by means of informing the public of secret government wrongdoing, that is, by means of unauthorized disclosures. That this strategy can be effective is demonstrated, for example, by the case of Edward Snowden. Following Snowden's revelations, Congress passed the USA Freedom Act, which introduced vital reforms to the NSA's bulk data collection program, the UN General Assembly declared online privacy to be a fundamental human right,[33] and a great public debate concerning the fundamental values of privacy, security, and transparency took place.

In sum, of the five discussed ways of fulfilling one's obligation of remedy, unauthorized disclosures appear to be the most effective. However, we need

31 Hill. *Symbolic Protest*. 52. Cf. Williams's discussion of 'moral self-indulgence:' Williams, B. (1981). Utilitarianism and Moral Self-Indulgence. In *Moral Luck* (pp. 40–53). Cambridge: Cambridge University Press.

32 Applbaum, A. I. (1992). Democratic Legitimacy and Official Discretion. *Philosophy & Public Affairs*, *21*(3), 240–274.

33 United Nations General Assembly. *The Right to Privacy in the Digital Age*. U.N. Doc A/RES/68/167 (December 18, 2013).

not make the empirically contestable claim that it is *always* the most effective method. Rather, we can more modestly conclude that:

5 Civil Servants who are Complicit in Classified Government Wrongdoing (and can thus be Held Responsible for it) Incur an Obligation to Disclose Such Wrongdoing *when Disclosure is the Most Effective Way of Addressing the Wrongdoing*

Or is this conclusion premature? After all, having established that unauthorized disclosures present the most effective way of fulfilling complicit civil servants' obligation of remedy does not yet establish the permissibility of this tactic. For instance, the Allies may have had a duty to beat Nazi Germany and Imperial Japan, and the firebombing of Dresden and the atomic bombing of Hiroshima and Nagasaki may have been the most effective way of fulfilling that duty (let us suppose), but this does not automatically mean that those bombings were, therefore, also permissible. Regarding unauthorized disclosures, one might argue that one has other obligations to *refrain* from such disclosures, thus barring one from fulfilling one's obligation of remedy in this manner. Let us consider this first counterargument, which we may call the *violation of obligation objection*.

One could argue that unauthorized disclosures are, in fact, *not* permissible, as they involve a breach of (1) promissory obligations, (2) role obligations and (3) the obligation to respect the democratic allocation of power. Regarding the first reason, we may start by noting that civil servants are often made to swear an oath to the effect that they will refrain from disclosing classified documents that they encounter in the course of their work. Unauthorized disclosures constitute a violation of this promissory obligation and are therefore wrongful. Naturally, to say that promise-making has normative consequences is not to say that one could simply promise to do anything, however reprehensible, and be considered under obligation to keep one's promise, even if to do so would involve grave wrongdoing. Yet, there is a considerable difference between promising to do a, by definition, immoral act (say, killing an innocent child) and promising to respect the classified nature of certain government information. The latter promise does not, in principle, bind one to perform morally reprehensible acts, particularly if we presuppose (nearly) just conditions.

Role obligations are a different story; they do not necessarily present us with an argument to refrain from disclosing government wrongdoing. Though it is true that civil servants' role requires them to serve different administrations equally well, and thus not to let their own political convictions get in the way

of doing their job, I would argue that a civil servant's ultimate responsibility is not to her superiors or the government in power, but rather to the democratic constitutional state as such.[34] Accordingly, a civil servant may be role obligated to implement a policy she does not agree with (e.g., a fiscally conservative civil servant may be role obligated to implement a progressive tax), but she is not role obligated to execute a policy that will have deleterious effects on the democratic constitutional state as such. Similarly, a civil servant is not bound by her role to implement policies that will result in the violation of citizens' rights or in serious harm to them or the environment. Thus, though in general civil servants' role obliges them to follow their superiors' orders – including orders to refrain from disclosing classified documents – this obligation does not hold when it would result in the abovementioned negative consequences. Role obligations do, therefore, not militate against unauthorized disclosures of classified documents demonstrating grave government wrongdoing.

Finally, the obligation to respect the democratic allocation of power: the basic thought is that civil servants who disclose classified documents usurp the power to decide what is and what is not a legitimate state secret, whereas this is properly the prerogative of our democratically elected officials. These officials have received a mandate from the people to, among other things, decide upon matters of state secrecy, whereas those engaged in unauthorized disclosures have been elected neither by the people nor by its representatives.

As Rahul Sagar puts it: 'when unauthorized disclosures occur, vital decisions on matters of national security are effectively being made by private actors, an outcome that violates the democratic ideal that such decisions should be made by persons or institutions that have been directly or indirectly endorsed by citizens.'[35]

Promissory obligations as well as the obligation to respect the democratic allocation of power thus do indeed prohibit unauthorized disclosures. However, these obligations may be defeated by the obligation to provide a remedy for one's contribution to classified government wrongdoing of public interest (a term to be clarified in a moment). Such wrongdoing can involve either transgressions of justice (roughly, a *liberal* understanding of wrongdoing) or the willful obstruction of the democratic process (which we may call *republican* wrongdoing[36]) or both. The civil servant complicit in such wrongdoing

34 Mark Bovens call this the 'civic conception of role responsibility' (Bovens. *Quest for Responsibility*. 149).

35 Sagar. *Secrets and Leaks*. 114.

36 It is on the basis of the civil disobedience literature that I name these two types of wrongdoing 'liberal' and 'republican,' respectively. According to the liberal justification

incurs an obligation of remedy – which, in general, can be most effectively fulfilled by means of unauthorized disclosures – that defeats her obligation to respect state secrecy. The latter obligation is thus a *pro tanto* obligation, liable to be defeated by other moral reasons, in this case the obligation one has to make amends for one's contribution to government wrongdoing by means of whistleblowing or leaking.

However, the obligation to disclose government wrongdoing in which one is complicit is itself *also* defeasible. One may have an obligation to disclose wrongdoing for which one is (partially) responsible, but if such a disclosure would itself result in grave harm to a third party, the best course of action may, all things considered, be to remain silent. If the disclosure would 'out' agents in the field, for example, or if the disclosure revealed sensitive military intelligence (that did not point to wrongdoing of the kind discussed), and if it is not possible to reveal the wrongdoing without causing such harm (by diligently editing the information, for example, removing all names of agents and legitimate secrets[37]), one ought to remain silent and pursue instead one of the alternative ways to fulfill one's obligation of remedy (even though they may be less effective).

Yet, some might say that the average civil servant will not be a particularly good judge of whether a secret policy does indeed involve grave wrongdoing of the types discussed above and of whether disclosure involves impermissible harm to national security or third parties. Especially lower-level civil

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of civil disobedience, violations of justice (especially rights violations) may justify acts of civil disobedience. By contrast, the republican position views civil disobedience as necessary for overcoming democratic deficits (see, e.g., Markovits, D. (2005). Democratic Disobedience. *Yale Law Journal*, *114*, 1897–1952). To clarify this distinction, consider Snowden's disclosures. The liberal argument would be that the violation of fundamental rights (to privacy, for example) revealed by his disclosures justified his actions. A republican, by contrast, could consider his revelations justified because they remedied a glaring democratic deficit: due to the secretive nature of certain surveillance programs, there had been no public debate concerning the desirability of such programs. No real democratic engagement with these matters had, therefore, taken place prior to Snowden's revelations. The latter thus had a democracy-enhancing effect.

37 Indeed, most authors view the minimization of harm as a necessary condition for justified whistleblowing: see, e.g., Bovens. *Quest for Responsibility*. 211; Delmas, *Ethics of Government Whistleblowing*. 100–1; Sagar. *Secrets and Leaks*. 131–2. This will often require collaborating with established media outlets which can help edit the information so that only the information strictly necessary to reveal the wrongdoing is made public and nothing else. For a more elaborate treatment of the justifying conditions of whistleblowing, see Boot, Eric R. 2017. Classified Public Whistleblowing: How to Justify a pro tanto Wrong. *Social Theory and Practice* 43: 541–567.

servants may not have access to all the relevant information, it is argued, necessary to make an adequate judgment. Thus, David Estlund argues that, in such circumstances, the civil servant ought to continue contributing to the contested policy, because it is the product of an institutional process with significant epistemic value. His view is that our best evidence about whether a given policy is morally acceptable is that it is the result of an institutional process that is duly looking after the question whether the policy is just.[38] Accordingly, it would, for epistemic reasons, be wrongful for a civil servant to substitute her own private judgment for the state's verdict which is the product of an institutional process with significant epistemic value.

In reply to this second counterargument (let's call it the *epistemic constraints objection*), I would firstly point out that there are many cases of relatively straightforward wrongdoing, whereby the fact that the individual civil servant does not possess all the facts is, therefore, no obstacle to adequate moral judgment. I consider Watergate, the torture at Abu Ghraib, and ordinary political corruption to be examples of such cases.

A further reply is that often a civil servant may resort to whistleblowing *precisely because* the institutional procedures that are normally followed (and that result, according to Estlund, in authoritative commands due to their 'effort and tendency to get the right answer'[39]) are set aside. An example would be an administration's decision to commit acts of war without approval from the legislative branch of government. In such cases, the counterargument would no longer apply as the very procedure which results in authoritative commands has been bypassed.[40]

Another, closely related, concern (let's call it the *reasonable disagreement objection*) is not so much that the individual civil servant may not be in a position to judge but rather that, even if she were in possession of all the relevant facts, there could still very well be reasonable disagreement over how we ought to judge the relevant facts. Informed people may still disagree over whether a given classified policy constitutes government wrongdoing or not. If so, what justifies the individual whistleblower to take her own judgment as authoritative by disclosing the policy in question?[41]

38 Estlund, David. 2007. On Following Orders in an Unjust War. *The Journal of Political Philosophy* 15: 213–234. 222.

39 Ibid. 221.

40 Indeed, Estlund himself appears to concede this point and even argues that '[s]oldiers lower down in the chain of command also have a responsibility to ask themselves whether justice is being looked after' (ibid. 226), that is, whether the institutional and procedural safeguards are functioning properly.

41 Sagar raises this worry: Sagar. *Secrets and Leaks*. 128.

Once again, I would start by replying that there are certainly cases (such as those mentioned above) that are uncontroversially wrongful. Such cases are therefore not susceptible to this third counterargument.

Moreover, reasonable disagreement does not necessarily militate against disclosure if the wrongdoing in question is republican rather than (exclusively) liberal. If an administration implements a secret policy (say, a large-scale domestic surveillance program), the problem is not (only) that some people might think it unjust, but rather that such a policy is a matter of public concern (as it impacts fundamental rights), about which the public ought, accordingly, to be informed. If what matters is that citizens form an opinion about the policy through public debate,[42] which is prevented by their ignorance about it, then reasonable disagreement concerning its desirability is not an argument against disclosure.

A further, and more substantial, reply would be to say that unauthorized disclosures may only occur if there is a strong *public interest* in learning of the classified wrongdoing. This should prevent civil servants blowing the whistle for reasons that are not publicly acceptable, taking most of the sting out of this counterargument. Indeed, many whistleblower protection laws state as one of the key conditions for justified whistleblowing that the information disclosed be of public interest.[43] They do not, however, define what the 'public interest' is. Following Brian Barry, I would argue that in judging whether a disclosure is in the *public* interest – that is, not merely in the *private* interest of any specific agent (though it may also be[44]) – we must judge whether the disclosure is in the interest of people *qua* members of a specific polity,[45] that is, whether it is

42 Of course, the government need not make all details of the policy known, as that might very well undermine the policy's functioning. It often can, however, disclose the general contours of the policy, which can be the subject of debate. Dennis Thompson refers to this as 'partial secrecy' (Thompson, Dennis F. 1999. Democratic Secrecy. *Political Science Quarterly* 114: 181–193).

43 Examples include the case law of the European Court of Human Rights (ECtHR) (e.g., ECtHR (Grand Chamber). *Guja v. Moldova*. 12 February 2008. Application No. 14277/04. § 74), the 2013 *Global Principles on National Security and the Right to Information* (*Tshwane Principles*), and the UK Public Interest Disclosure Act.

44 The thought is that a disclosure can still be in the public interest, even though it may *also* be in the private interest of the whistleblower. Disclosing Watergate was certainly in the public interest, even though personal resentment (over having been passed over for promotion) may also have played a role.

45 Barry, Brian. 1965. *Political Argument*. London: Routledge & Kegan Paul. 190.

in their interest as *citizens* rather than as *men*, to use Rousseau's distinction.[46] Unfortunately, however, Barry does not further specify what interests we share as members of the public. But I would argue that the only interests we all share as members of the public are interests in conditions that render it possible for each of us to develop and strive to realize our own values, objectives, and life plans. In other words, something is in the public interest if it is instrumental for the realization of individuals' *private* interests (so long as the pursuit of these interests does not reduce the ability of others to pursue theirs). Examples of such conditions are the rule of law, the separation of powers, fundamental rights, legal certainty, and political accountability.

Yet, this expansion of Barry's account of the public interest does not remove all problems. In particular, it remains unclear what we ought to do when different public interests are in conflict (privacy and security, for example). Here, Barry's remark that questions of interest are comparative may be helpful: "'Being in someone's interest" is at least a triadic relationship between a person and at least two policies.'[47] Accordingly, when we ask if a particular disclosure is in the public interest, we are asking whether it is *more* in the public interest than the alternative, that is, continued secrecy. Though public interests may conflict with one another, it may still be possible to judge whether disclosure or continued secrecy better serves the public interest. For example, if the benefits to privacy likely to ensue from disclosure are quite large while the detriment to the conflicting interest of national security is comparatively small, and if, conversely, the benefit to national security realized by continued secrecy is quite small while the detriment to privacy is comparatively large, then it would seem that disclosure is more in the public interest than continued secrecy. It is thus not a matter of the whistleblower simply granting primacy to her own private convictions. Rather, she concludes, on the basis of a comparative assessment of the relevant interests we share as members of the public, that the public interest is better served by disclosing a certain classified policy than by keeping it secret.

In addition, to take away some more uncertainty, the potential whistleblower may also consider what Yochai Benkler has called 'objective indicia,' which can provide a measure of proof that disclosure is indeed in the public

46 Rousseau, Jean-Jacques. 1997. Of the Social Contract. In *The Social Contract and Other Later Political Writings*, ed. Victor Gourevitch, tran. Victor Gourevitch, 39–152. Cambridge: Cambridge University Press. Bk. I, Ch. 7 [7].

47 Barry. *Political Argument*. 192.

interest.[48] Thus, if in addition to the public interest argument in favor of disclosure one can also point to specific court cases with circumstances similar to one's own, in which unauthorized disclosures have been deemed justified, even more ambiguity or disagreement concerning what is to be done, can be taken away. Therefore, though they both point out genuine difficulties facing the potential whistleblower, neither the epistemic constraints objection nor the reasonable disagreement objection show that there can be no obligation to disclose government wrongdoing.

Let us now return to our discussion of considerations of harm. Earlier we argued that harm to others may compel one to refrain from whistleblowing even though there may be a *pro tanto* obligation to disclose. But, of course, leaking or whistleblowing could also have very harmful consequences to the leaker or whistleblower herself. Doing the right thing can involve great costs to oneself and one's family. Civil servants who have spoken out have often experienced harsh reprisals, including personal harassment, dismissal, blacklisting, transfer, and criminal charges.[49] Faced with such prospects, a civil servant may understandably opt to remain silent. This brings us to the fourth argument against the statement that 'civil servants who are complicit in classified government wrongdoing incur an obligation to disclose such wrongdoing:' the *overdemandingness objection*. This objection states that it is simply asking too much of people to say that they are obligated to risk their career, their (and thus their family's) income, and possibly even their freedom.

The overdemandingness objection, then, appears to say that unauthorized disclosures are beyond duty, that is, amount to acts of *supererogation*: they are good but not required. Though supererogatory acts are understood to certainly be of moral worth, they are 'strictly optional from the standpoint of duty,'[50] and do therefore not give rise to culpability when one does not perform them. Obligations of remedy, however, are *not* optional excellences, and their violation *does* result in moral blameworthiness. Disclosing government wrongdoing is thus not a supererogatory act, but rather an obligation. An obligation, however, that is defeasible, as we have seen, and may thus be outweighed

48 Benkler, Yochai. 2014. A Public Accountability Defense for National Security Leakers and Whistleblowers. *Harvard Law and Policy Review* 8: 281–326. 312.

49 Glazer, M., & Glazer, P. (1989). *The Whistleblowers: Exposing Corruption in Government and Industry*. New York: Basic Books. For examples of such consequences see especially Chapter 5.

50 Baron, M. (1995). *Kantian Ethics Almost Without Apology*. Ithaca: Cornell University Press. 28n.

by countervailing moral reasons, such as avoiding harm to others and to national security. Similarly, harm that may accrue to one's family, for instance, as a consequence of one's disclosures – in a more or less decent state usually not physical harm, but certainly financial and psychological harm[51] – may also be taken into account. The same goes for harm to oneself (one's interests, career, and well- being, for example). Thus, if the harmful consequences are sufficiently bad, either for one's loved ones or oneself (or both), they may outweigh the obligation to disclose the government wrongdoing in which one is complicit. Recall hereby, however, that complicity is not binary but a matter of degree. As a consequence, the obligation resulting from one's complicity in wrongdoing will vary in strength as well, based on the degree of moral blameworthiness for one's complicity. Accordingly, it becomes more difficult for the obligation of remedy to be outweighed by harm considerations the more blameworthy one's complicity is and thus the stronger one's *pro tanto* obligation of remedy is.

Now, one might observe that the several elements being weighed here are not entirely commensurable. After all, how is one to weigh the harm that one might suffer as a consequence of one's disclosure, on the one hand, against the wrongfulness of the policy in which one is complicit, on the other?[52] Regrettably, this is not an exact science. Still, there are some things we can say. For example, if one is complicit in the waging of an unjust war whereby many civilians lose their lives unbeknownst to the general public, and the harm one will likely suffer upon disclosure is loss of employment, then it seems, intuitively at least, that one's obligation of remedy is not outweighed: loss of employment does not outweigh the loss of innocent lives (though it might still matter how blameworthy one's complicity is, a matter we will further explore in the following section). Conversely, if the personal cost of disclosure is increased (say, an attempt on one's life), and the wrongfulness of the act in which one is complicit is significantly diminished (say, the one-time embezzlement of a small amount of public funds), then the obligation of remedy *is* outweighed. In both these cases, furthermore, the overdemandingness objection misses its mark: in the latter case, overdemandingness is not an issue, because the obligation to disclose is outweighed by the expected harm. In the former case, the obligation stands, yet is not overdemanding. Recall that the obligation to disclose is

51 For a poignant example of the strain wrought on one's family life when one's superiors decide to retaliate as a consequence of one's revelations, see Glazer & Glazer. *The Whistleblowers*. 153ff.

52 I would like to thank an anonymous reviewer for the *Journal of Moral Philosophy* for pushing me on this point.

incurred as a consequence of my contribution to wrongdoing. It is thus not a matter of beneficence, but of justice. I am not innocent, but rather complicit in grave wrongdoing that involves serious harm to others. Quite a bit may therefore be demanded of me without the obligation becoming overdemanding. Or as Robert Goodin put it: 'a morality demanding only what is morally due can hardly be castigated for that.'[53]

Furthermore, if overdemandingness is a concern, we could take steps to make it easier for civil servants to perform their obligations: 'Changing the background conditions against which people act – through law, public policy, and the changing behavior of others – is an essential ingredient to lowering the costs for individuals to comply with norms.'[54] In the specific case of the obligation to disclose government wrongdoing, government agencies ought to make it possible to voice dissent internally in a meaningful way (i.e., if one's complaint has merit, something is done about it) and without consequences, and states could introduce comprehensive whistleblower protection legislation. In fact, one could argue that the impossibility of voicing dissent internally leads people to pursue alternatives, such as public disclosures. Similarly, the lack of protection for whistleblowers who follow the official procedure leads to people opting for leaks instead, as it is perceived to involve fewer risks. In addition to these organizational and legal changes, some have argued that a change in social ethos is required. This could best be done, it is proposed, by imposing a legal *duty* on civil servants to disclose wrongdoing. In this manner, the law would clearly communicate to all civil servants and, in fact, to the world at large that whistleblowing can be a social good,[55] thus doing away with the still common association of whistleblowers with traitors and snitches.[56]

In sum, though the various counterarguments do not prove that there is no such thing as an obligation of complicit civil servants to disclose government wrongdoing to which they have contributed, our discussion of these arguments has shown that this obligation is a defeasible obligation and that any justification of whistleblowing must appeal to the public interest.

53 Goodin, Robert E. 2009. Demandingness as a Virtue. *The Journal of Ethics* 13: 1–13. 2.

54 Lichtenberg. *New Harms*. 577.

55 Moberly, R. (2012). Whistleblowers and the Obama Presidency: The National Security Dilemma. *Employee Rights and Employment Policy Journal*, *16*(51), 51–141. 133.

56 Regarding this common association, see: Worth, M. (2013). *Whistleblowing in Europe: Legal Protections for Whistleblowers in the EU*. Transparency International. 15–8.

6 The Strength of the *pro tanto* Obligation of Civil Servants who are Complicit in Classified Government Wrongdoing to Disclose Such Wrongdoing Varies in Accordance with (1) the Gravity of the Wrongdoing in Question, (2) one's Responsibility for that Wrongdoing, and (3) one's Contribution to the Wrongdoing

Having established that the obligation to disclose wrongdoing is defeasible and may thus be 'outweighed' by countervailing moral reasons, it becomes all the more important for us to say something more about the strength – or rather the 'weight,' to stay with the metaphor – of this obligation. If the obligation is very strong, it becomes less likely that it will be outweighed. Conversely, if the obligation is quite weak, it will be that much more likely that it will be defeated by competing moral reasons. In Section 1 we already mentioned that complicity is not binary but instead comes in degrees. Accordingly, the obligation resulting from one's complicity in wrongdoing will vary in strength based on the degree of moral blameworthiness for one's being complicit. The basic idea is: the more blameworthy one's complicity, the stronger one's *pro tanto* obligation of remedy, and the more difficult it will be for this obligation to be outweighed by other (moral) considerations.

Recall that for Lepora and Goodin the blameworthiness for an act of complicity is a function of (1) the badness of the principal wrongdoing, (2) the responsibility for the contributory act, (3) the extent of the contribution, and (4) the extent of a shared purpose with the principal wrongdoer. Recall, too, that I argued to keep the shared purpose factor out of the equation.

Let us then turn to two examples of complicity in government wrongdoing so that we can see how we may assess the strength of the ensuing obligation to disclose that wrongdoing. Consider, first, the case of a lawyer (let's call her Martha) in the US Office of Legal Counsel (OLC) which argued, in the so-called 'Torture Memos,' that the 'enhanced interrogation techniques' – i.e., techniques widely regarded as torture, such as sleep deprivation, stress positions, and waterboarding – the CIA wished to employ in the aftermath of 9/11 were legal, despite their clear contravention of the Geneva Conventions and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

1. *The Badness Factor*

I believe that it is rather uncontroversial that torture is extremely bad. It is, furthermore, doubtful that information acquired through torture is reliable. But even if it *were* reliable, it is widely agreed that the prohibition on torture is an *absolute* human right, allowing for no exceptions (as

opposed to for instance the right to free speech, which may be limited in the case of hate speech, for example). The wrongdoing to which the OLC lawyers contributed – i.e., numerous violations of an absolute human right – is thus extremely morally wrong.

2. *The Responsibility Factor*

Recall that the responsibility factor is a function of voluntariness, the knowledge that one is contributing to wrongdoing, and the knowledge that the principal wrongdoing is indeed wrong. Regarding the voluntariness, one imagines that the OLC as a whole experienced pressure from both the CIA and the Bush administration to contort the law in such a way as to make torture legally possible. As a consequence, individual lawyers within the OLC may have felt under pressure not to provide dissenting legal views. Still, such pressure cannot qualify as duress. After all, the very function of the OLC is to provide *independent* legal advice to the President and the executive branch agencies. The possibility that the executive or one's direct superior in the OLC is not pleased with the advice provided may be awkward or even result in extreme unpleasantness, but that does still not amount to a situation of duress. Our OLC lawyer thus acted voluntarily.

Did Martha know she was *contributing* to wrongdoing? When the CIA repeatedly comes to the Office you work for requesting reassurances – following official Bush administration statements that the US does not mistreat its prisoners, for example – that what it's doing is legal,[57] you can be sure that your legal advice is an important contribution to the CIA's actions.

Finally, she knew the CIA was employing interrogation techniques that ordinarily qualify as torture, and, as said, the idea that torture is wrong is rather straightforward. That Martha knew this becomes apparent from the fact that she and her colleagues bent over backwards in order to be able to say that the CIA's interrogation techniques did *not* constitute torture. Still, it is possible that she knew all this, but viewed torture as a necessary evil in order to keep the country safe. Accordingly, she may have viewed the torture to be justified. This is a possible position. In the best-case scenario, therefore, she believed the torture to be a justified wrong; in the worst-case scenario, she believed the torture to be simply wrong, but provided legal advice that enabled it anyway, because of prudential

57 Cole, David. 2015. Torture: No One Said No. *The New York Review of Books* Blog, March 5. Retrieved from http://www.nybooks.com/daily/2015/03/05/cia-torture-no-one-said-no/.

reasons (concerns about her career, peer pressure, not wanting to be the only dissenting voice, and so forth).

3. *The Contribution Factor*[58]

The centrality of one's contribution is determined by (1) the magnitude of one's contribution to the principal wrongdoing, and (2) the probability that one's contribution will be essential for the wrongdoing to succeed.[59] Regarding, first, the magnitude of the contribution, the OLC as a whole provided the legal cover for the CIA's torture program. This contribution, second, was certainly essential. The fact that the CIA kept requesting reassurances from the OLC that what it was doing was legal demonstrates that it was very uneasy about its activities. Therefore, 'had *anyone* had the temerity to say no, the program almost certainly would have halted.'[60] Furthermore, judgments concerning the legality of the torture program were uniquely in the executive's hands, as the other branches of government and the public at large were unaware of its existence. As a result, 'on the question of torture the OLC lawyers were the last – and only – line of defense, since the detainees were denied all recourse to the outside world.'[61]

Let us assume that our *individual* lawyer within the OLC had been ordered to go through the relevant national and international case law concerning torture and cruel, inhuman, and degrading treatment to see if she could find any way to conclude that the CIA's interrogation methods were legal. Certainly, the OLC's final advice consisted of more than her contribution alone; other lawyers were working on the matter as well. Furthermore, had she refused to perform this task, others at the OLC would have taken her place. Her refusal would thus not likely have changed the final outcome. Still, as it is, she *did* contribute to the OLC's final advice, which was absolutely essential to the success of the wrongdoing in question. As such, she is complicit in and incurs responsibility for the wrongdoing. Her complicity, and thus her responsibility, may vary, however, according to

58 Here I will not, for reasons of space, discuss all six factors identified by Lepora and Goodin that determine the importance of one's contribution (see, e.g., *Complicity*. 106ff.), but will limit myself to the matter of 'centrality.'

59 Lepora and Goodin. *Complicity*. 66.

60 Cole. *Torture*.

61 Cole, David. 2009. The Torture Memos: The Case Against the Lawyers. *The New York Review of Books*, October 8. Retrieved from http://www.nybooks.com/articles/2009/10/08/the-torture-memos-the-case-against-the-lawyers/.

> the importance of her contribution. It is hard to quantify this exactly, but we can at least say that she is less complicit and thus less responsible if we assume that she worked on this legal advice with ten other lawyers than if she had worked on it by herself, as (1) the magnitude of her contribution is smaller in the former case. Similarly, we can say that (2) her contribution would be more essential to the wrongdoing if she had drafted the advice on her own than if she had done so with ten of her colleagues. Here, I will assume that she worked together with her colleagues, rather than by herself.

To recap: (1) the wrongdoing in question was highly wrong; (2) the contribution to the wrongdoing was voluntary, Martha knew she was contributing to the CIA's torture program, and she knew that torture is wrong, though she may have viewed it as a necessary evil; (3) she contributed to the OLC's legal advice which was, in Lepora and Goodin's terms, 'definitely causally essential' to the wrongdoing (that is, 'a necessary condition for the wrong to take place'[62]), but she was not the sole contributor to that advice, plus she could have been replaced by someone else if she had refused to contribute.

Given the severity of the wrong, and the fact that she freely and knowingly contributed to it, her complicity is very blameworthy, though it is mitigated by the fact that she did not act alone. Still, her contribution to grave wrongdoing results in an obligation of remedy that is quite strong. Accordingly, her obligation to disclose the wrongdoing will not easily be outweighed by the possible harm that will accrue to her and her family if she discloses the information to the public. We are talking about complicity in the legalization of torture, that is, severe physical harm that 'shocks the conscience.' It is doubtful that the loss of one's job, for example, or even possible disbarment weighs up against the enabling of such grossly unjust acts. Of course, in disclosing the information, one ought to still take care to disclose only the information strictly required to reveal the wrongdoing and nothing more.

Let us then turn to a second example: our OLC lawyer Martha is now a relatively low- level employee (if such distinctions exist within the OLC) who is merely asked to provide a review of the relevant case law concerning conflicts of interest in government. Subsequently, her review is used to provide legal cover for a relatively minor conflict of interest of the President. Now, though conflicts of interests are of course to be strictly avoided, the wrongdoing in question is certainly less unjust than the CIA torture program, particularly since it is a minor conflict of interest and, let us further assume, the

62 Lepora and Goodin. *Complicity*. 66.

only one. Furthermore, though Martha does know that conflicts of interests are wrong, she does not know she is being asked to contribute to providing the President legal cover for her conflict of interest, which is being diligently kept out of the public eye. Perhaps she ought to have known, but let us assume that, though it was possible to find out the true reason behind the request made to her, this would have been quite difficult. Her contribution, lastly, is very important, as she found an exemption for the President from conflict-of-interest laws. Without this legal cover, the President would divest herself of the conflicting property. Other people working at the OLC, however, could have found that exemption equally well and would have if she had not.

In this case, the blameworthiness of Martha's complicity is far less great. As a consequence, the obligation to disclose this wrongdoing (let us assume she later finds out about the conflict of interest and her role in allowing it to occur) to the public is less strong and can be outweighed more easily by considerations of the possible financial, professional and psychological harm to herself and her family.

These two examples have thus shown how the *pro tanto* obligation of remedy can vary in strength as one's complicity is judged to be more or less blameworthy, which will make it more or less difficult, respectively, for this *pro tanto* obligation to be defeated.

The (not so) Separate Question of Bystanders

Thus far we have considered the responsibility of civil servants who are complicit in government wrongdoing by actively contributing to it. But what about those who do not actively contribute, but who are aware of the wrongdoing in question? Imagine our OLC lawyer does not contribute to the 'Torture Memos,' but is aware of what her colleagues are working on, and thus, let us assume, of the CIA torture program. This is analogous to the proverbial child drowning in the pond: Martha is a bystander to wrongdoing and has the means to at least attempt to do something about it. She could disclose the wrongdoing, which could well (but need not) result in a public outcry, investigative Congressional hearings and eventually the repeal of the torture program. The question is: Does she have an obligation to blow the whistle or to leak the information to the press? Is her silence blameworthy? We have said earlier, in following Lepora and Goodin's account of moral complicity, that the obligation of remedy arises from one's contribution to wrongdoing: if I did not slam into your car and had nothing at all to do with the accident, I am under no obligation to pay to have it fixed. As a bystander, Martha did not contribute to the wrongdoing: she wasn't involved in drafting the plans to expand the permitted interrogation

techniques, she did not herself torture, and she did not draft the OLC memo providing legal cover. It would thus seem she incurs no obligation to reveal the wrongdoing.

Yet, omissions can also be causally effective: my omitting to save the child in the pond when I easily could have, certainly contributed to her death. Similarly, Martha's silence made it possible for the wrongdoing to continue. In that sense, she contributed to and is complicit in torture. For this reason, I argue, Martha *does* have an obligation to disclose the secret torture program, even as a bystander. Intuitively, however, it seems we should say that her obligation to do so is weaker than those of her colleagues who actually contributed to the provision of legal cover: After all, if two people (*A* and *B*) are equally in a position to help the drowning child, but *A* pushed the child in, whereas *B* simply happens to be standing there, it seems that *A* has the stronger obligation of the two to rescue the child. Both may have what we could call a natural duty of assistance, but only one of the two has additionally incurred an obligation to help due to her contribution to wrongdoing. Furthermore, one's complicity is greater the more central one's silence was to the continuation of the wrongdoing. If it is certain that the wrongdoing would continue even if you disclosed it, one's obligation is weaker than if it is certain that the wrongdoing would cease once (or shortly after) you disclosed it. After all, in the first case it seems one's silence is not an essential contribution for the wrongdoing to succeed, whereas in the latter case it is.[63]

63 Notice that a different understanding of the ground of complicity will not necessarily make the bystander case any easier. For example, unsatisfied with the solution provided above, we might turn to Kutz's account of moral complicity, which holds that the intentional participation in collective wrongdoing is all that is required to establish complicity. The fact that Martha in the bystander example does not causally contribute to the wrongdoing (except by viewing omissions as causally effective as well) is not relevant for Kutz, as 'causation is not necessary to complicity' (Kutz, Christopher. 2007. Causeless Complicity. *Criminal Law and Philosophy* 1: 289–305. 290). It may seem that this makes it easier to view Martha as complicit, as all that is required is that she intentionally participate. But can we view her silence as 'participation?' Kutz holds that intentional participation in collective wrongdoing requires doing one's part intentionally and viewing one's participation as part of a collective project (Kutz. *Complicity*. 138). The latter in particular is problematic, as it seems a stretch to say that the bystander always views her inaction as part of a collective project. On this, also see Driver, Julia. 2015. Kantian Complicity. In *Reason, Value, and Respect: Kantian Themes from the Philosophy of Thomas E. Hill, Jr.*, ed. Mark Timmons and Robert N. Johnson, 256–266. Oxford: Oxford University Press. 260.

Conclusion

Instead of the more common question whether unauthorized disclosures can ever be permissible, this paper set out to answer the question whether they can ever be *obligatory*. Specifically, it inquired whether civil servants who are complicit in secret government wrongdoing incur an obligation to disclose said wrongdoing. This question was answered affirmatively. It was argued that civil servants who are complicit in secret government wrongdoing are under a *pro tanto* obligation to reveal that wrongdoing (when disclosure is the most effective way of addressing it), the strength of which (and thus the likelihood of its being defeated by countervailing moral reasons) will vary in accordance with (1) the gravity of the wrongdoing, (2) one's responsibility for that wrongdoing, and (3) one's contribution to the wrongdoing. This obligation is, furthermore, not limited to those who actively contribute to wrongdoing, but extends to those who are mere bystanders, whose silence can amount to complicity when it is a causal factor in allowing the wrongdoing to continue.

This may seem to be asking quite a lot of civil servants, given the personal risks involved with whistleblowing and leaking. However, I argued that (1) responsibility for wrongdoing gives rise to obligations of remedy, which may be quite demanding, and (2) that the obligations involved are defeasible, allowing for the possibility of their being outweighed when serious personal harm would result as a consequence of one's unauthorized disclosure. A further argument against the overdemandingness objection would result from a consideration of civil servants' role obligations. Public office is a public trust, which requires 'employees to place loyalty to the Constitution, the laws and ethical principles above private gain.'[64] Thus, though we can all be said to have, at least on a Rawlsian account, a natural *duty* of justice to support and comply with just institutions that apply to us, civil servants, upon the assumption of their position, additionally incur an *obligation* to support and comply with just institutions, tying them even more tightly to those institutions.[65] We can, in other words, expect more from civil servants when it comes to upholding just institutions, which makes their complicity in wrongdoing that harms those institutions all the more blameworthy. As it is more blameworthy, it becomes less problematic that the ensuing obligation of remedy may be quite demanding.

64 5 C.F.R. § 2635.101 (b) – Basic obligation of public service.

65 Rawls, J. (1999). *A Theory of Justice* (Revised Ed). Cambridge (Mass): Belknap Press of Harvard University Press. 99–100; cf. 330. Recall the distinction between duties and obligations, expounded in note 5.

Biographical Note

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