

## **Legal versus Moral Complicity**

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### **Abstract**

*Since the publication of Kadish's article 'Complicity, Cause, and Blame' in 1985, legal scholars have taken great interest in the notion of complicity and have produced a significant number of publications on the subject. With the exception of Christopher Kutz, these scholars have largely ignored the moral, as opposed to legal, aspects of complicity. In this paper I make an attempt to compare the moral and legal notions of complicity. I will argue that, unless one takes a position of strict consequentialism, the moral notion of complicity casts a wider net than the legal notion. This is a point of no small importance. People need to realize that if they skirt the boundaries of legal complicity, their behavior might well still qualify as complicity on moral grounds.*

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1. Since the publication of Kadish's article 'Complicity, Cause, and Blame' in 1985, legal scholars have taken great interest in the notion of complicity and have produced a significant number of publications on the subject. With the exception of Christopher Kutz, these scholars have largely ignored the moral, as opposed to legal, aspects of complicity. In this paper I make an attempt to compare the moral and legal notions of complicity. I will argue that, unless one takes a position of strict consequentialism, the moral notion of complicity casts a wider net than the legal notion. This is a point of no small importance. People need to realize that if they skirt the boundaries of legal complicity, their behavior might well still qualify as complicity on moral grounds.

2. Strict consequentialism is the view that acts are wrong when the consequences of the act are morally unfavorable, all things considered, and right otherwise. The agent's motives or intent has no bearing as such on whether the act is right or wrong. A strict consequentialist might therefore view complicity in the wrongdoing of another as follows: A person is complicit in the wrongdoing of another if and only if the consequences of what the person does, relative to the other's wrongdoing, are morally unfavorable. Thus, on this view, if my friend breaks into someone's house and I accompany him, and if he steals something and I do not, then I am not complicit in his wrongdoing, for nothing unfavorable results from my actions (assuming that my presence does not cause him to act differently than otherwise).

For the purposes of this paper I will assume that the view of complicity described in the previous paragraph is inadequate. At least some of the time one's motives or intent can be a factor in whether or not one is complicit in the wrongdoing of another. If I accompany my friend because I wish to lend him moral support, and if I am happy that he has stolen from the owners of the house, I may well be complicit in his thievery from a moral point of view. The law recognizes that intent can be a factor in whether one can be judged complicit in the wrongdoing of another, as when conspiracy is present (Smith, 1991, p. 218), and hence this strict consequentialist view of complicity does not comport well with the legal notion of complicity. In what follows I will argue that if intent is an ingredient in what counts as complicity, then moral complicity encompasses significantly more actions or states of affairs than legal complicity. I will proceed by examining several different areas of criminal law until a rather obvious pattern emerges of moral complicity casting a wider net.

3.1. The first area to be investigated is that of omitting to act when another commits wrongdoing. In American criminal law one is not judged to be complicit in the wrongdoing of another simply because one does nothing to prevent the wrongdoing or report the wrongdoing to authorities (Smith, 1991, p. 35). If I know that my neighbor is harboring a wanted fugitive and I do nothing to contact authorities, I am at most guilty of a misdemeanor, misprision of felony (Feinberg, 1968, p. 684). An interesting case in Allegan County, Michigan, vividly illustrates this phenomenon. A man named Troy Tyo was murdered in December, 2007 by Kris Thompson, the husband of his ex-wife, in a custody dispute. The sister of Kris Thompson, Lori Lathrop, knew that her brother planned to hurt Tyo months before the murder occurred.

Moreover, Lori's husband, Scott Lathrop, drove Kris Thompson to the murder scene, and Lori knew of this as well. But Lori never contacted authorities before or after the murder. Authorities realized that her inaction as such did not constitute legal grounds for establishing her as complicit in wrongdoing. Later, however, they proved that she gave her brother a cell phone three days after the murder, allegedly to assist him in avoiding apprehension by law enforcement authorities, and she received a fine and six month jail sentence for being an accessory after the fact. Already in the thirteenth century moralists have recognized that inaction can render a person morally complicit in the wrongdoing of another. Thomas Aquinas ( *S.T.*, Pt. II-II, Q. 62, 7) distinguishes nine ways in which complicity can take place: By command, by counsel, by consent, by flattery, by receiving, by participating, by silence, by not preventing, and by not denouncing (where flattery can be interpreted as encouragement, and receiving refers to covering for another after the fact). The last three comprise complicity by inaction. I can be morally complicit in another's wrongdoing by remaining silent, by doing nothing to prevent it, and by doing nothing to denounce it (a special case of silence).

Although Aquinas places restrictions on the conditions under which these can render one complicit in wrongdoing, it is evident that in this area of human life moral complicity outstrips the bounds of legal complicity. If Lori Lathrop had not given her brother a cell phone, she could still be judged morally complicit for her silence. Consider a different example. You observe a distraught teenage girl place an infant child in a garbage dumpster, and there are no other witnesses. Surely you ought to make every effort possible to prevent the child's death in the dumpster. The failure to take action would be morally reprehensible, even though in the eyes of the law you are not considered an accomplice in the teenager's wrongdoing. In the sphere of morality you are complicit in her wrongdoing and, as such, blameworthy for the child's death if you do nothing.

3.2. A second area in which moral complicity goes beyond the bounds of legal complicity is that of taking action after someone has committed a wrongdoing. As already noted, a person can be prosecuted for being an accessory after the fact, but in American criminal law such activity is not regarded as complicity in wrongdoing. In the moral realm, by contrast, one can be complicit in the wrongdoing of another by covering for another who has already committed the wrongdoing, by engaging in what Aquinas calls receiving. This difference is more than terminological in nature, for one can be morally complicit in ways that do not qualify one as being an accessory after the fact. Suppose that instead of giving her brother a cell phone, Lori Lathrop had baked her brother a cake and praised him for murdering Troy Tyo. From a moral perspective this is perverse behavior, but it would fall short of anything that could qualify as making her legally an accessory after the fact. A strict consequentialist would find this behavior morally acceptable if it encouraged no future wrongful behavior, but if her intent was to make her brother feel affirmed for what he did, she is morally blameworthy to at least a small degree. Her behavior would qualify as what Aquinas calls flattery.

3.3. When a person is complicit in the wrongdoing of another, normally the wrongdoer is aware of the person's involvement in the wrongdoing. But this is not always the case, and herein lies another set of circumstances in which legal complicity is more tightly circumscribed than moral complicity. I will present two court decisions which illustrate that sometimes a person can be legally complicit even when the principal (the wrongdoer) is unaware of the person's involvement. These decisions are relatively rare, however, and in general moral complicity outstrips legal complicity in this area of the moral terrain. One case involved two brothers who made plans to murder a particular person. Someone learned of these plans and arranged to send a warning telegraph to the intended victim. A man named Tally managed to persuade the telegraph operator not to send the message, and the victim was murdered exactly as planned. The brothers were unaware of plans to send a warning message, and they knew nothing of Tally's efforts on their behalf. Nevertheless, the court ruled (*State ex rel. Tally*) that Tally was complicit in the murder the brothers committed.

A second case involved a man in New Zealand named Larkin. He overheard two men making plans to hold up a liquor store, and he decided to help them by looking out for the police. However, by the time he arrived at the store the robbery had already taken place, and the police were at the scene of the crime. He made the unwise decision to run from the police and was apprehended. In due course he admitted his plan to aid the burglars. His defense, when the case reached trial (*Larkin v. Police*), was that he had no involvement in the burglary and that the men who burglarized the liquor store had no knowledge of his intent to aid their endeavor. However, the ruling of the court was that he was complicit in their wrongdoing (Kutz, 2007, p. 295). In paradigm cases of legal complicity the wrongdoer and the accomplice conspire together to accomplish wrongdoing, and court rulings of the type just indicated are less common.

But these two court rulings comport well with what moralists have to say about complicity. If I know that you are engaging in wrongdoing, and if I make efforts to aid your endeavor with the intent of making it more likely that you succeed, then in the moral court of law I might well be complicit. Whether or not you have knowledge of my efforts makes no difference. Nor, for that matter, does it make a difference whether my efforts prove to be causally efficacious (once strict consequentialism is set aside).

3.4. A fourth area in which legal complicity is more restrictive than moral complicity embraces situations where the wrongdoer acts differently than what was understood or agreed upon by the accomplice. This is a notoriously difficult area of criminal law, and courts have struggled to create consistent guidelines in this regard for determining under what circumstances would-be accomplices should be judged actual accomplices (Smith, 1991, pp. 206-7). There is general consensus that if the wrongdoing is quite different than what was agreed upon, and if the wrongdoing was not reasonably foreseeable, then the would-be accomplice is not an accomplice after all. In *State v. Lucas* one man persuaded another to help him rob a business. A security guard appeared during the course of the robbery, and the first man robbed him. The court was called upon to decide whether the second man was complicit in the robbery of the guard. Since robbing the guard was neither part of the original plan nor reasonably foreseeable, the court ruled that he was complicit in the robbery of the business but not complicit in the robbery of the guard.

Once again morality offers a different perspective, one that assigns complicity a more expansive area of operation. Suppose that in the previous example the accomplice in the robbery strongly desires that his companion rob the security guard, this is exactly what happens, and they proceed to rob the business. Here a strong case can be made that, by virtue of his motives and intent, he is morally complicit in the robbery of the guard as well as complicit in the robbery of the business. This point deserves a bit more clarification. Recall that for Aquinas silence is one form of moral complicity. Perhaps we can distinguish between approving silence and non-approving silence. In the example where my friend breaks into a house and steals something, my failure to reprimand him is due to my approval of what he is doing. In other situations my silence in the face of another's wrongdoing might be due to fear or indifference. Other things being equal, approving silence as a response to another's wrongdoing is more blameworthy than disapproving silence. In *State v. Lucas* the court ruled that the second man was not complicit in the robbery of the guard, but suppose that the accomplice in the robbery of the business responded to the robbery of the guard with approving silence. Some might question whether silence in and of itself is enough to render a person complicit in the wrongdoing of another. But if the silence in question is an approving silence, that provides good non-consequentialist grounds for judging that he is morally complicit.

3.5. A fifth and final area which can be addressed in comparing legal with moral complicity is that of someone who unintentionally aids another in wrongdoing. Someone can be legally complicit in another's wrongdoing, when doing so unintentionally, provided the person's actions are reckless or negligent. In *State v. McVay* a person, knowing that a boiler was defective, encouraged someone to fire it up. The boiler exploded and killed a person who was in the vicinity. The person who knew the boiler was defective had no knowledge or intention that these events take place, but nevertheless he was judged complicit and found guilty of manslaughter. In some cases individuals who have allowed others to drive their vehicles have been found complicit in accidents that have resulted, although their role was totally unintentional (Smith, p. 40), especially when they have entrusted their vehicles to intoxicated or underage persons.

There are limits to legal complicity in situations of this type. Suppose that I am the legal owner of many firearms, they are housed in a shed on my property, and I keep the shed locked. I am aware of the possibility that thieves could break into the shed, steal weapons, and be harmed by them, but I dismiss this as highly unlikely. If this unlikely event were to take place, it is equally unlikely that a court would find me complicit in the wrongdoing of the thieves. Still, it is possible that I be morally complicit in a situation of this type. Suppose that one afternoon I hear thieves breaking into my shed. Walking in the direction of the shed, I observe two ten-year-old boys helping themselves to weapons. They are handling the weapons in a shockingly reckless manner, I think of shouting a warning, but I keep silent in the hopes that one of them will be injured. Suddenly one of them is shot as a result of the recklessness of the other, and the uninjured boy flees. I take a perverse delight in the boy's injury, feeling that he totally deserves it, and I do nothing to come to his aid. The injury of the thief was not intentional on anyone's part, but because of my response to his injury I can reasonably be judged morally complicit.

4. Five areas of criminal law have been examined, and a rather obvious pattern has emerged: What the law considers complicity in the wrongdoing of a principal actor is more tightly circumscribed than what morality considers complicity to be (unless strict consequentialism is true). In some cases, such as being an accessory after the fact, the difference is partially terminological. But even here the moral notion of complicity is more expansive, for one can be morally complicit in the wrongdoing of another that has already taken place in a manner that falls short of being an accessory after the fact.

Those who wish to avoid becoming complicit in the wrongdoing of another would do well to be aware of the discrepancy between what the law regards as complicity and what morality regards as complicity. Someone who manages to avoid being complicit in the wrongdoing of another in the legal sense might well be guilty of complicity in the moral court of law. As far as I am aware, this is a point that has not previously been made in the literature, but I hope to have suggested that it is a point worth being heeded.

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