

Complicity and Business Ethics

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Individuals in business organizations are frequently unclear about moral issues that arise when they play a role in the wrongdoing of another. The law specifies guidelines regarding being an accessory before the fact, aiding, abetting, and being an accessory after the fact. But what is morally wrong does not coincide exactly with what is unlawful. In the moral sphere a person can be blameworthy for playing a role in the wrongdoing of others, depending upon the nature of the role, and people in business organizations seem to display a lack of confidence in identifying which of these roles are morally blameworthy and to what degree they are morally blameworthy. Little has been written about the moral issues involved in being complicit in the wrongdoing of others, and, given the communal nature of modern society and the intricacies in the dynamics of decision making in modern corporations, this is unfortunate.

In this paper I shall make an initial attempt to shed light on the moral aspects of complicity, and the discussion will be slanted in the direction of complicity in business organizations. Sanford Kadish, a legal scholar, has proposed a taxonomy of ways in which a moral agent can be complicit in the wrongdoing of another. I believe that this taxonomy can provide the basis for an examination of the moral issues involved in complicity, and I believe that such an examination can provide concrete advice for those in business organizations who are called upon to decide how to behave when the temptation arises to assume the role of an accomplice. In the second half of this paper I present four areas where such advice can be identified.

Frequently this temptation takes the form of influencing others to engage in wrongful behavior, and this is reflected in the taxonomy provide by Kadish. The taxonomy consists of ten categories: Advising, persuading, commanding, encouraging, inducing, procuring, instigating, provoking, soliciting, and assisting (Kadish, 1985, pp. 343-4). Some of these categories apply to situations where someone else has already embarked, or decided to embark, upon a wrongful course of behavior, and these would include advising, encouraging, and assisting. The others are various ways in which one influences another to wrongful behavior (Kadish freely admits that these categories overlap one another; there are not hard and fast boundaries separating them). When another has already committed wrongdoing, the category of assisting can apply to efforts to cover for that person.

Kadish characterizes the categories of the taxonomy as follows. Advising involves offering an opinion in favor of a particular action (where the opinion may convey information about how to execute the wrongdoing). Persuading is a stronger concept and suggests a greater effort to influence a person. Commanding implies giving an order or directive, and it is thus a stronger notion than persuading. Encouraging involves articulating support for a course of action. Inducing means to persuade with the possibility of a certain influence beyond persuasion. Procuring goes further than inducing with the suggestion of producing a certain result. Instigating involves spurring someone to a particular action. Procuring is similar to instigating with the additional dimension of exploiting a person's sensitivities. Soliciting is equivalent to instigating in a legal sense, but in common usage it suggests nothing more than asking or proposing. Assisting, finally, can be characterized as helping, aiding, or abetting.

Suppose that the CEO of an investment firm has decided to offer insider information to certain select clients of the firm. If another senior level executive who approves of the plan suggests particular names to the CEO, and the CEO follows this advice, that person is guilty of advising. If the CEO orders a broker to contact a client and provide the insider information, the CEO is guilty of commanding. If, on the other hand, the CEO strongly suggests to a broker that this be done, he or she is guilty of persuading. If a fellow broker praises the broker for contacting clients in this fashion, he or she is guilty of encouraging.

One of the clients contacted is now deciding whether to act on the insider information and sell her shares of the firm's stock. If her husband strongly suggests that she do so, and she does, he is guilty of inducing. If he promises to take her on a cruise if she sells, he is guilty of procuring. If he appeals to her sense of greed, he is guilty of provoking. If he suggests that she sell her shares of stock, he is guilty of instigating, whereas if he simply asks her to do so, he is only guilty of soliciting. Finally, if he helps her through the process of liquidating her shares, he is guilty of assisting.

Kadish emphasizes that legal significance rarely attaches to the difference between these categories (with the exception of assisting), but in the moral sphere the situation is different. The difference between commanding and persuading, for example, can be quite significant from a moral point of view. The same is true of the difference between procuring and instigating, the latter being a milder form of complicity. Accordingly, the word "guilty" in the preceding two paragraphs should be interpreted in terms of moral rather than legal guilt (though, of course, legal guilt potentially attaches to all of the persons in these examples).

From a moral perspective the taxonomy of Kadish seems a bit incomplete. Occasionally the failure to act seems capable of rendering one complicit in the wrongdoing of another. When a five-year-old picks up a loaded revolver and points it at another child, then one ought to attempt to prevent the shooting of the child, assuming one is in the proximity of the children. If one makes no attempt to do so, and the second child is shot, one should be regarded as morally complicit in the shooting. American criminal law does not recognize inaction as capable of rendering one complicit in the wrongdoing of another (Smith, 1991, p. 35). If a person knows that his neighbor is harboring a wanted fugitive and makes no effort to alert the police, he is at most guilty of a misdemeanor, misprision of felony. But in the moral realm, inaction is recognized as capable of rendering one complicit in another's wrongdoing.

Suppose that a co-worker is paying bribes to overseas officials in violation of the 1977 Foreign Corrupt Practices Act, and for this reason he is responsible for selling a high volume of the firm's products. If you learn of his activity, then you should report it. If you notify a supervisor that he is offering bribes, you have presumably done what is morally expected of you. If, on the other hand, you fail to notify anyone in a position of authority, then you are morally complicit in his wrongdoing. As such, you are not as blameworthy for your silence as he is for paying bribes to overseas officials, but you are at least minimally blameworthy from a moral point of view.

In the remainder of this paper I turn to consider practical advice for persons in business organizations that can be extracted from the foregoing discussion. First, Kadish has shown that there are many different ways in which one can be complicit in the wrongdoing of another, and they differ significantly in the moral culpability borne by the complicit agent. Persons in business organizations can easily be tempted to think that engaging in mild forms of this behavior is acceptable, for all practical purposes, and not something for which feeling remorse is necessary. Nevertheless, it is vital to recognize that all of the categories in Kadish's taxonomy are forms of complicit behavior, and all are morally blameworthy to some degree or other.

Recall, for example, the broker who praises his fellow broker for supplying insider information to select clients of the firm. He could regard his words of praise morally acceptable and easy to justify or rationalize, but the truth is that encouragement is a form of complicit behavior, and we must recognize that, as such, it is morally blameworthy. The same is true of someone who merely suggests to a co-worker that he or she engage in wrongdoing. On their lunch break away from company premises a technician produces a flask of whiskey and offers it to a co-worker. The co-worker helps himself, and thereby violates company regulations. In this scenario the technician may feel that he has done nothing wrong, since he did not imbibe any whiskey himself. But one of the lessons to be learned from the taxonomy of Kadish is that one is guilty of soliciting if one merely suggests wrongdoing to another who thereby acquiesces in wrongdoing. Accordingly, the technician is complicit and morally blameworthy in the wrongdoing of the co-worker.

Kadish makes clear that someone can legally be complicit in the wrongdoing of another even when doing so unintentionally, as long as the agent's actions are characterized by recklessness or negligence. He cites a 1926 decision (*State v. McVay*) in which someone knew that a boiler was defective but nevertheless encouraged someone else to fire it up (Kadish, 1985, p. 347). When the boiler exploded and killed a person, the man who knew it was defective was judged complicit in the death and found guilty of manslaughter. In other cases, people who have allowed others, who were intoxicated or underage, to drive their automobiles have been found complicit in the ensuing accidents, even though their role as accomplice was purely unintentional (Smith, 1991, p. 40).

In the moral sphere it is likewise possible for one to become complicit in the wrongdoing of another unintentionally when recklessness or negligence play a role, and this is a lesson that persons in organizational settings should embrace. Suppose that access to a firm's highly classified documents is only given to employees who have been granted security clearance. A senior level manager grants security clearance to a co-worker and neglects to check background information regarding the co-worker, information that would have raised many red flags concerning the person's discretion. Months later it becomes evident that the co-worker has divulged secret information to the editor of a trade journal. In this situation the senior executive is complicit in the co-worker's wrongdoing even though what he did was completely unintentional. It was his negligence that rendered him complicit.

The discussion of Kadish reveals in addition that a person can legally be complicit in the wrongdoing of another, depending upon the circumstances, when the wrongdoer acts differently from what was agreed upon. Suppose I supply a knife to a burglar with the intent that he use it to stab my annoying next door neighbor. The burglar decides to break into a different neighbor's house, and he uses my knife to stab an inhabitant of that house. While courts have struggled to identify clear criteria concerning whether complicity is preserved in situations of this kind (Smith, 1991, pp. 206-7), this particular example appears to be one where it is. If so, am complicit in the stabbing of my neighbor, even though the burglar stabbed the wrong neighbor.

Recall the example in which the CEO of an investment firm orders a broker to provide insider information to a particular client of the firm. Suppose that the broker becomes confused as to which client he has been ordered to contact, and he contacts the wrong client. We can reasonably judge that, although the broker contacted the wrong client, the broker still engaged in wrongdoing, and the CEO is still complicit in the broker's wrongdoing. As such, they are both morally blameworthy for the dissemination of insider information. The lesson to be learned from examples of this type is that one cannot escape from the charge of complicity merely because another person does something different from what was originally stipulated.

When a would-be accomplice attempts to influence someone to engage in wrongdoing, he or she is not always complicit in the wrongdoing the person goes on to perform. If the wrongdoing is vastly different from the wrongdoing that was initially proposed and it was not reasonably foreseeable, then the would-be accomplice is not in fact an accomplice. This was the judgment in a court made (*State v. Lucas*) in a case where one man persuaded another to assist him in the robbery of a business. When a security guard appeared, the first man robbed him. An attorney for the second man argued that he should not be judged an accomplice in the robbery of the guard, for that was neither part of the plan nor reasonably foreseeable, but only as an accomplice in the robbery of the business, and the court agreed (Kutz, 2000, p. 212).

A final area in which legal issues surrounding complicity can provide guidance for those in organizational settings concerns knowledge of an accomplice's participation. Ordinarily if someone is complicit in the wrongdoing of another, the wrongdoer is aware of that person's involvement. But in some interesting legal rulings courts have held that such awareness is not a necessary condition of being complicit, and the same appears to be true in the moral realm.

One case involved two brothers, the Skelton brothers, who planned to murder someone. Someone else arranged for a telegraph to be sent to the intended victim, warning him of the situation. A fourth person, Tally, arranged to have the message aborted, and the victim was murdered as originally planned. The Skelton brothers knew nothing of the warning message or Tally's involvement in aiding their endeavor, but the court's verdict (*State ex rel. Tally*) was that what he did nevertheless rendered him complicit in the murder of the victim.

A second case, which took place in New Zealand, involved a man named Larkin who overheard two other men discussing their plans to hold up a liquor store. He decided to assist them in their endeavor by serving as a look-out to warn them of the arrival of law enforcement authorities. Unfortunately, when he arrived at the scene the store had already been burglarized by the other men, and policemen had already arrived. When he saw the policemen he ran and was apprehended. Subsequently, he confessed that his original intent was to assist the burglars. When his case reached trial (*Larkin v. Police*) the defense argued that he had nothing to do with the burglary and that the burglars knew nothing of his plans to assist him. Nevertheless, the court ruled that he was complicit in the burglary of the liquor store (Kutz, 2007, p. 295). The moral court of law would render a similar verdict in cases of this type. Suppose a person in an organizational setting decides to assist a co-worker in wrongdoing without informing the co-worker, and harm results.

Suppose in addition that no one knows that the person assisted or intended to assist the co-worker. Then it would be easy for that person to assume that she bears no blame for the resulting harm.

Thus, imagine that her role consists of lying to a supervisor when questioned about the co-worker's suspicious actions, and as a result the co-worker is not suspected of causing the harm. She might not see herself as complicit in the co-worker's wrongdoing on the grounds that the co-worker had no idea that she did anything to assist in the wrongdoing. But she lied to protect the co-worker, and she did so with the intent that the co-worker successfully engage in wrongdoing. Hence in the moral court of law she can be judged complicit in the wrongdoing of the co-worker. And if she is complicit in the co-worker's wrongdoing, she can also reasonably be judged at least somewhat blameworthy for the resulting harm.

I will now summarize the main points of the discussion. In an effort to shed light upon the moral dimensions of complicity in another's wrongdoing, I have used the work of Kadish as a point of departure. Kadish presents a taxonomy of ten ways in which someone can be complicit in the wrongdoing of another. The taxonomy is quite comprehensive except for the fact that in the moral sphere a person can sometimes be complicit in the wrongdoing of another through silence or through the failure to prevent, or to attempt to prevent, the wrongdoing.

Practical advice for those in business or professional organizations can be derived from the work of legal scholars such as Kadish. First, some of the items in the taxonomy represent mild forms of complicity, but people need to realize that they are still complicit in the wrongdoing of others when they engage in these types of behavior. Second, People need to be aware of the possibility that they can be complicit in the wrongdoing of another even when they have no intention (*mens rea*) that the other commit wrongdoing or produce harm.

Third, People must realize that they can be complicit in the wrongdoing of another, depending upon the circumstances, even when the wrongdoer acts differently than what was initially established or agreed upon. Finally, people should recognize that someone can be complicit in the wrongdoing of another even when the wrongdoer is completely unaware that the person is attempting to aid his or her cause. As legal scholars are aware, complicity in wrongdoing can take many forms, some of them unexpected, and it is important for people in business organizations to understand how their own moral status can be affected by their decisions regarding these issues.

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