

# Boston College Law School

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## Complicity with Evil

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# COMPLICITY WITH EVIL

M. Cathleen Kaveny

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hen asked what project I am working on while on leave at the Martin Marty Center during the 2002–2003 academic year, the short response I usually give is “complicity with evil.” That response is perfect for cocktail parties in the big city and receptions at large academic conferences. It appears to be glamorous, dangerous, sexy—and hopelessly vague. Unfortunately, like many phenomena at such parties and receptions, the surface impression is actually

quite deceptive. The issues that I actually deal with are highly specific, and can range from the riveting and heart-breaking to the sadly mundane.

The topic of complicity encompasses the following dilemma: Should Sophie Zawistowska, the title character in William Styron’s unforgettable novel *Sophie’s Choice*, have accepted the SS physician’s offer to allow her to decide which of her two young children would live (or at least have a chance at life) and which would face immediate death in a Nazi gas chamber? But it also encompasses the more everyday question: Should you lend your brother five bucks so that he can buy the cigarettes that you both know will kill him one day? While some questions of complicity have to do with sex, very few are actually sexy. For example, a fair amount of ink has been spilt in analyzing (in Latin as well as in English) whether or not a taxi driver ought to drive a customer to an address he knows to be a house of ill repute.

Braced by the cold clarity of a winter day in Hyde Park, I might offer the following, more theoretical elaboration of the problem of complicity: Suppose an agent is contemplating performing an action that will either *contribute to* or in some sense *make use of* the wrongful action of another agent or group of agents. How should one morally evaluate

her contemplated action in light of its connection with the wrongful action of another? What considerations should be involved in her decision whether or not to go ahead with her action?

The more theoretical elaboration of the problem reveals a structural similarity between the two concrete dilemmas described above. As different as they are in terms of moral seriousness and historical moment, both involve *an individual* who must make a decision whether to *contribute* to the wrongful act of another agent. But there are also cases in which the agent facing the decision is not an individual, but rather a corporate agent, such as a company or a country. Should multinational corporations have continued their financial dealings with South Africa during apartheid? What sort of economic or military aid should the United States give countries known to be guilty of human rights abuses today? In addition, some complicity problems involve individual or corporate agents who must discern not whether to contribute to another agent’s wrongful act, but instead whether to make use of its fruits. Should a single mother struggling to support her family purchase inexpensive

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*Professor Kaveny delivered this talk on April 9, 2003, at a Wednesday Lunch in Swift Common Room.*





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clothing at a discount store if that clothing was made by children in sweatshops on the other side of the world? Was the psychiatrist right in refusing to take payment for treating Carmella Soprano because it would be taking “blood money” gained from her husband Tony’s activities in organized crime?

#### THE GAPS IN MORAL CARTOGRAPHY

Once you have turned your attention to the problem of complicity, it is hard not to notice examples of it in nearly every realm of human life. Nonetheless, contemporary moralists, both religious and secular, are just beginning to give it the sustained theoretical attention it deserves. The quickest way to conjure my sense of the lacuna in the normative conversation today is by analogizing it to the MapQuest program on the Internet. The scope of MapQuest can range from the minuscule, focusing on only a few blocks, to the nearly limitless, highlighting the main arteries that transverse the continent. Much contemporary scholarship on ethical matters is clustered at either end of the spectrum. Not much attention has been given to the middle ground.

In the realm of “social theory,” on the one hand, the ethical MapQuest gauge is set very broadly. By social theory, I mean the many important discussions in theology, philosophy, and political theory that have analyzed the various structures and systems of human oppression. Marxist, feminist, and other types of liberationist theories expose and critique the dense relationship between highly flawed normative visions of human nature and human flourishing, the institutions that embody and propagate them, the “false consciousness” they generate, and the patterns of economic and social injustice they produce. The focus here is on “big picture” systemic analysis. But what should be done about the deep social problems they expose, and who should do what about them? Leaving aside nation states, powerful political parties, and large multinational corporations, it is not clear what any single individual or garden-variety corporate agent can or should do about the injustices exposed by such analyses.

There is, of course, always the possibility of joining a base community, or another community of resistance. But

such communities rarely have a direct and substantial effect on the problem, unless the challenges of collective action are overcome. Moreover, it is unlikely that everyone who can join such a community is under a moral obligation to do so. What should be the criteria used by someone discerning whether or not to join? Here, our ethical MapQuest gauge begins to constrict noticeably, but not so the “social theory” discussion.

At the other end of the spectrum falls what I will call “moral theory,” where the MapQuest gauge can be wound very tightly. One large segment of contemporary moral theory, both theological and philosophical, focuses on the question of how to evaluate the action of a particular moral agent. The basic theories are introduced to students in most first-year ethics courses: utilitarianism and other forms of consequentialism, Kantianism and other deontological approaches, rights-based approaches (which in my view incorporate consequentialist and deontological elements), and virtue theory. Moralists making implicit or explicit use of these theories devote much attention to considering what sorts of purposes agents may legitimately pursue, and/or what sorts of results they may knowingly cause. The range of agents considered is fairly broad. With respect to individual agents, moralists have asked such questions as when, if ever, it is permissible to end another person’s life by euthanasia. With respect to corporate agents, they have considered such issues as whether it is legitimate for a corporation to close a less profitable or unprofitable plant that is of great economic importance to the community in which it is located. With respect to national agents, they have paid much theoretical and practical attention to the conditions under which it is just for one nation to wage war against another.

Needless to say, the discussion of all these issues is complex and difficult. The context of the action in question, its purpose, its foreseeable immediate and remote effects, the distribution of the harmful effects, and what would count as proper authorization in light of these effects are all crucial and interrelated issues that arise in evaluating any morally controversial topic. Boiled down to its essence, however, the schema of the moral problem presented is



*We are all potential Norma Raes or Karen Silkwoods.*

fairly straightforward: Is it morally permissible for one agent, whose moral agency is in some sense considered in the abstract, to engage in the action or course of action under discussion? Despite the range of problems and of moral agents under discussion, our ethical MapQuest is very narrow in its scope.

In concentrating on the question of complicity, I hope to outline a moral cartography at an intermediate level of detail. I have decided to begin by working from the tightest setting and expanding the focus, attempting to look at a set of issues that might be grouped together under the heading “interactional morality.” These issues are important because they point to a facet of human experience that is sometimes masked by American society’s emphasis on self-reliance and individuality: no one is an island; no one makes it alone; no one goes through life without affecting the course of someone else’s life. All of our actions both build on and contribute to the actions of other people.

This sort of interdependence of agents and their actions has always been the case, of course. But in my view, certain features of the contemporary world are prompting us to pay critical attention to the way our actions interact with those of other people, known and unknown. First, a higher degree of interdependence characterizes our lives, especially for those of us who live in developed countries. We need the work of a wide variety of other persons for our food, clothing, and shelter. Second, the production chain is characterized by a great degree of anonymity. We do not know the people and institutions that are contributing to making and distributing the necessities and accessories that support our lives. Third, we are acutely conscious of a great deal of moral pluralism in our interdependent world. It is not only that some people have decided not to live by the tenets that they (and we) espouse, it is also the case that they have deep commitments to value systems that we believe to be unjust or dehumanizing. We are anonymously dependent in a deeply divided world.

Finally, I think it is fair to say that our age is characterized by an increased sense of moral responsibility. The reasons for this are complex and no doubt interrelated. I will mention

only one here: In significant ways, many of us no longer think of ourselves as limited in our responsibility by the specific roles that we play in our public and private spheres of life (although we frequently think of ourselves as being burdened with additional responsibilities because of those roles). We are all potential Norma Raes or Karen Silkwoods. To some degree, this development is a by-product of our democratic social structure. But it is also a fruit of the war-crimes trials after the end of the Second World War. “I was just following orders” or “I was just doing my job” no longer count as sufficient answers to the charge that one knowingly performed an evil action, or, as is increasingly the case, an action that one knew would significantly contribute to the evildoing of another.

#### RESOURCES AND QUESTIONS

So what sources can we draw upon to help us understand the problem of complicity in the wrongdoing of others? An interdisciplinary approach is essential. Resources in literature, particularly that dealing with the horrors of the Nazi regime, are invaluable. In very different ways, both *Sophie’s Choice* and Christa Wolf’s *Patterns of Childhood* heighten our awareness of the pervasiveness of complicity, and the painful difficulties involved in recognizing it, not to mention avoiding it, in societies permeated with gross injustice.

Historical examples are also important. The practice of usury, defined as lending money at interest, was prohibited by the Catholic Church for centuries. A set of norms developed that regulated how intimately one could legitimately be involved with the practice, and the circumstances under which one could benefit from its fruits.

Legal sources are also key: conspiring to commit a crime and serving as an accessory to a crime are themselves criminal activities. The relevant case law and provisions of the penal code are worth mining for moral reflection, because the criminal law frequently reflects the bedrock moral commitments of a community.

Finally, the work of religious thinkers can be helpful. For example, the question of complicity has been treated in painstaking detail by the “manuals” of moral theology, composed



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to further the wrongdoing of the principal agent.*

by Roman Catholic priest-moralists between the time of the Council of Trent and the Second Vatican Council. Because the manualists wrote primarily in order to guide priests hearing confessions in determining whether, and to what degree, the action confessed by a penitent was sinful, they were forced to take seriously nitty-gritty moral problems arising in day-to-day life.

What, exactly, is the matter with complicity? How should we evaluate it, drawing distinctions among its many forms? In many of the more analytical resources I have encountered, particularly the Roman Catholic manualist tradition and the Anglo-American legal tradition, the second question has received far more attention than the first. This is not surprising, since both give a prominent place to case-based, analogical reasoning. Consequently, the need to give consideration to fundamental principles is less pressing than in more systematic accounts of problems and issues.

But, given the goals of my project, I do not have the same luxury. I need to deal with the first question, “What is the matter with complicity?” in order to give a comprehensive account of the issue that hooks up in appropriate places with the narrow and broad moral MapQuest discussions already in place. But that does not mean I can leave the second question entirely to one side; there is a dialectical relationship between the two. The plausibility of my theoretical account of the moral issues involved in complicity will depend in large part on its ability to account for—or persuasively discount—the ways in which particular cases of complicity do or do not seem morally problematic. Rawls’s norm of “reflective equilibrium” is a powerful way to call ourselves to account in the realm of applied ethics, as well as in the context of political philosophy.

In the remainder of this essay, I would like to do two things. First, I would like to outline briefly the different approaches taken by the moral manualists and the criminal law to the question of how to evaluate cases of complicity. Their concrete judgments will constitute one pole of the reflective equilibrium. Second, I will sketch a few theoretical possibilities for accounting for the problem of complicity—for constituting the other pole of the reflective equilibrium.

I will suggest that two of these are inadequate, and one holds some promise for future investigation.

#### THE ROMAN CATHOLIC MANUALISTS

The manualists tended to concentrate on one aspect of the problem of complicity: cooperation with evil, which refers to those situations in which the cooperator’s action would *contribute to* (rather than benefit from) the wrongdoing of another agent (frequently called the “principal agent”). In other words, its focus was forward-looking, calling the cooperator to reflect upon how his or her action would interact with the actions of other persons. At first glance, the scholastic categories used by the manualists to parse the problem of cooperation can seem too arcane to be useful in the contemporary world. In my view, however, that superficial impression is mistaken. The manualists took seriously the complexity of cooperation cases; the framework they developed is best viewed not as a “computer program,” designed to spit out answers to complex moral problems, but rather as a guide to deeper moral discernment. What are the components of that framework?

The most important question is whether the cooperation is *formal* or *material*. Formal cooperation takes place when the cooperator intends in her action to further the wrongdoing of the principal agent. The manualists considered formal cooperation always to be wrong, because it is never permissible intentionally to perform a morally evil act, even for a good end. A clear example of formal cooperation, according to the rationale of the manualists, is an intern who cooperates in an abortion procedure in order to receive a necessary medical certification.

This judgment of complicity obviously depends upon a prior judgment about the morality of abortion that is not universally shared today. Deeper reflection on the example demonstrates that the questions of pluralism and moral disagreement are likely to be quite acute in complicity problems. First, the very existence of a complicity problem depends upon the judgment that the act of the principal agent is morally wrong. For example, the intern will not see herself as facing a cooperation problem if she does not believe that



. . . in a case of material cooperation, the cooperator foresees, but does not intend, that her action contributes to the wrongful action of another.

abortion is always morally wrong, or at least morally wrong in this particular case.

Second, the fact of deep and principled moral disagreement means that potential cooperators must consider what weight, if any, should be given to the fact that the principal agent may not understand herself as doing anything morally wrong. For example, the intern who does believe abortion to be morally wrong is likely to be confronted with the fact that both the doctor performing the procedure and the woman who obtains it take a different moral view of the matter. It would be safe to say that the questions surrounding moral disagreement did not preoccupy the manualists, who assumed the existence of an objective moral reality upon which there was a substantial consensus. But today, these issues are neither easy nor rare; think also of a request to participate in the surgical circumcision of a baby girl, or dangerous and medically unnecessary cosmetic surgery.

*Material cooperation* is defined negatively: all cooperation that is *not* formal cooperation is by definition material cooperation. In other words, in a case of material cooperation, the cooperator foresees, but does not intend, that her action contributes to the wrongful action of another. Stepping back now from their technical scholastic vocabulary, we can say that the framework developed by the manualists for evaluating material cooperation is five-dimensional in nature. Taking the perspective of a third-party observer, it looks at the overlap, in the matrix of space, time, and causality, between the act of the cooperator and the wrongful act of the principal agent. All things being equal, the greater the overlap between the two, the harder the act of cooperation is to justify.



At one end of the spectrum, cases of cooperation where the overlap is virtually complete (which the manualists called *immediate material cooperation*) were generally held to be impermissible except in cases of duress. The reasons for this judgment are not entirely clear. No doubt, one reason is that the manualists saw themselves as facilitating the work of confessors, who were charged with judging the nature and degree of a sinner's wrongdoing. In most cases,

it would be hard for an objective third party to believe a penitent's claim that she did not intend the wrongdoing in which she cooperated so intimately if there were no external force coercing her will. Consider, for example, the Patty Hearst case. Viewed from the perspective of an external observer, it looked like Hearst was intentionally facilitating the bank heist orchestrated by the Symbionese Liberation Army.

In fact, it would be very difficult for an objective third party to believe otherwise, absent a compelling case of duress.

At the other end of the spectrum, cooperation entailing little overlap or intimacy between the act of the potential cooperator and the wrongful act of the primary agent was viewed by the manualists as easier to justify, all else being equal. This sort of case (which the manualists called *remote mediate material cooperation*) would be permissible given a sufficiently important reason. For example, consider a pharmaceutical company that manufactures a drug that will be helpful to many people, knowing, however, that some people will abuse it.

As these examples suggest, the matrix of overlap and intimacy is not the only factor in the manualists' evaluation of cooperation cases. Other factors include whether the wrongful act would occur without the act of cooperation



*Under the common law, it is the agreement itself that constitutes the crime . . .*

(i.e., “but for” causality), the gravity of the evil involved (including whether it would harm innocent third parties), and the gain that the cooperator hoped to realize (or the loss that the cooperator hoped to avert). Another influential factor is the potential of the cooperator to cause scandal by her act of cooperation. In this context, the term “scandal” refers not to the hushed whispers and veiled looks of community busybodies, but instead to the potential for misleading others to believe that the principal agent’s wrongful act was morally acceptable.

Unfortunately, the manualists’ enthusiasm for categorizing an almost endless variety of cooperation problems was not matched by a similar concern to explain precisely why they were morally problematic, or to demonstrate how the matrix they developed appropriately sorted cases according to their moral seriousness. In my view, this lacuna in their analysis was an almost inevitable drawback of the genre in which they were writing. The strength of the moral manuals was that they took seriously the details of the moral problems faced in ordinary life. Their weakness was that they frequently failed to transcend those details. They were, after all, *manuals*, written for fellow priest-confessors who were assumed to be of one mind about the nature and purpose of the Christian life. I sometimes think that their authors would have responded to a request for broader reflection with much the same bemusement that the technical writers of an operator’s manual for a new car would respond to a request to justify the importance of having a car in good working order. From their perspective, the request would simply fall beyond the purview of their project.

#### THE CRIMINAL LAW

The criminal law generally prohibits behavior that society believes is detrimental to the common good—behavior that either attacks the good of one of the members of the community (e.g., criminal assault), or undermines the conditions necessary for the just and orderly pursuit of common aims (e.g., insider trading). Two areas of the criminal law deal extensively with complicity problems: the law of criminal conspiracy and the law pertaining to accomplice liability.<sup>1</sup>

A criminal conspiracy is defined by common law as “an agreement by two or more persons to commit a criminal act or a series of criminal acts, or to accomplish a legal act by unlawful means.”<sup>2</sup> The law of accomplice liability identifies “the circumstances under which a person who does not personally commit a proscribed harm may be held accountable for the conduct of another person with whom he has associated himself.”<sup>3</sup> Being indicted for either crime is no small matter, because the elements of the crime are vague and the penalties for someone found guilty can be extreme.

For example, consider the crime of conspiracy. Under the common law, it is the *agreement itself* that constitutes the crime, although some states also now require an overt act in furtherance of the agreement. Furthermore, the agreement at stake is defined loosely. It does not even require a “meeting of the minds,” to borrow a phrase sometimes used to define an “agreement” under contract law. In fact, it is possible to be in a single vast conspiracy with people one does not even know. In *United States v. Bruno*, for example, the conspiracy to import and distribute, sell, and possess narcotics was found to include both retailers in New York and retailers in Texas/Louisiana, although no communication was proven between the two groups. From the point of view of the hapless, low-level conspirator, such a scenario is highly undesirable, because it means that jail time can be racked up quickly. Under common law, the basic rule is that, first, a conspirator is guilty of every offense committed by every other conspirator in furtherance of the unlawful agreement and, second, the crime of conspiracy does not merge into the substantive offense the parties to the conspiracy were planning to commit. A defendant, therefore, can be found guilty of both conspiracy to commit a crime and the crime itself. (The Model Penal Code eliminates this “double counting.”)

From a defendant’s point of view, being indicted for accomplice liability is not much better. Here, the issue is the crime of assisting someone else to commit a crime. “Assistance,” like “agreement” in the context of conspiracy law, is defined very broadly. It encompasses “aiding, abetting, encouraging, soliciting, and procuring the commission of





Suppose, for example, you rent your house to someone who you know is running an illegal gambling operation there. Are you an accomplice?

the offense.” Moreover, an act of assistance does not need to be particularly helpful in order to qualify. “Any aid, no matter how trivial, suffices.”<sup>4</sup> Applauding someone’s criminal activities, or being a supportive presence at a crime scene in a way that encourages the principal agent, can count as sufficient assistance to make one an accomplice. Furthermore, as with conspiracy, liability has a way of ballooning for someone found guilty of being an accessory to a crime. A secondary party or an accessory is accountable for the conduct of the primary party. This accountability includes not merely the crime itself, but also the natural and probable consequences of the crime. For example, if you encourage me to rob a bank, and in the course of doing so I intentionally kill a guard, you are liable as an accessory to the crime of murder, even though you did not encourage me to commit that crime and you did not contemplate that anyone would die during the caper.

What mental state is required of the defendant charged with conspiracy or liability as an accomplice to a crime? A key issue here is whether “purpose” is the required mental state, and whether, or when, mere “knowledge” that one’s action will contribute to a conspiracy or provide assistance in a crime is sufficient. The “purpose” requirement is akin to formal cooperation. If you join a conspiracy purposefully agreeing to further its criminal goals, or if you provide assistance to the primary party of a crime with the intention of furthering that crime, well, too bad for you. Most people would say that you joined your mind and will to the criminal endeavor and deserve whatever punishment you get (provided, of course, that it meets other requirements of fairness and moderation).



The more interesting question is whether proof of mere knowledge that your action will further a crime ought to suffice for criminal liability. This realm is analogous to what the manualists would consider material cooperation. Suppose, for example, you rent your house to someone who you know is running an illegal gambling operation there. Are you an accomplice? Are you in a conspiracy? Suppose that someone comes into your sporting goods shop, buys a hunting rifle, and casually mentions that he will be using it to kill his wife. What result then? Suppose he just says that he is looking forward to freedom from that “old ball and chain”? In the context of the conversation, you are pretty sure that he meant his wife, although he did not say so explicitly. What should happen to you if you do nothing and she is murdered one week later, or one month later, or one

year later? Where is the line between doing your job while minding your own business, on the one hand, and culpable indifference to the plight of other individuals, or to the welfare of the community as a whole, on the other?

Two federal cases, both of which were eventually heard by the Supreme Court, set the legal context for much American reflection on the matter. In *United States v. Falcone*, the suppliers of sugar and other lawful materials to those operating an illegal still were indicted, tried, and convicted of conspiracy. Their convictions were reversed on appeal. In *Direct Sales Co. v. United States*, the defendant, a drug wholesaler, sold large quantities of legal drugs to one particular physician, who was illegally reselling them. In this case, the defendant’s conviction was upheld. The Supreme Court distinguished it from *Falcone* on the grounds that the goods supplied in that case were items of free commerce,



. . . *the intermingling of agency . . . is precisely what renders complicity uniquely morally problematic.*

while those in *Direct Sales* were commodities whose sale was restricted by law.

Finally, one case from the state of California has garnered some attention. In *People v. Lauria*, the operator of a telephone message service was indicted for conspiracy on the basis of the fact that he took messages for known prostitutes. Affirming an order setting aside the indictment, the California Court of Appeal identified a number of factors that could affect the outcome in a particular case: whether the purveyor of legal goods for illegal use has a stake in the venture, whether there is a legitimate use for the goods or services, and whether the volume of business with the buyer is grossly disproportionate to any legitimate demand. Finally, the court also indicated that the nature of the criminal act is also at issue: facilitating prostitution is one thing, facilitating murder is quite another.

#### ACCOUNTING FOR THE PROBLEM OF COMPLICITY

The relevant materials from sources as diverse as moral theology, literature, and law make it clear that *something* is the matter with complicity in the wrongdoing of another. But what is it? What normative account of the moral life makes sense of the problem? This is an extremely difficult and complicated question, and I can only provide the roughest guide to my thinking on this matter here.

Can a pure consequentialist approach account for the problem of complicity, including the factors that have been considered relevant by those charged with dealing with it in concrete cases either as a sin or as a crime? In my view, probably not, for two reasons. First, both the manualists and the criminal law give significant weight to the complicit party's intention or purpose in performing the action that facilitates the wrongdoing of another. This weight would be difficult to account for in a consequentialist theory, the major concern of which would not be the agent's purpose in acting, but the consequences she foresaw resulting from that action. This is not to say, of course, that foreseen consequences are irrelevant from the perspective either of the moral manualists or the criminal law. As we saw above, this

is very far from the case. Nonetheless, factors other than the causal nexus between the complicit agent's action and the wrongful act of the primary agent enter prominently into both frameworks for analysis. Second, my general sense is that a consequentialist approach would dissolve, rather than solve, the problem of complicity, whose essence is the connection between the complicit agent and the evildoing primary agent. Ultimately, I doubt that a consequentialist would be able to acknowledge the moral relevance of the fact that my action does not cause certain harmful consequences to come about directly, but only indirectly, by "running through" the agency of another person.

What about rights theory? Again, I will have to be cursory in my assessment. It strikes me that a rights-based approach would lead one to focus upon *either* the right of the complicit agent to act, on the one hand, *or* upon the right of the victim to be free of the harmful effects caused by the principal agent, on the other. The first focus would view the act of the wrongdoing primary agent as an intervening cause, relieving the complicit agent of responsibility for the harm caused. The second focus would emphasize the fact that the complicit agent foresaw the harm to the victim's rights, and deny the relevance of the fact that the harm was caused primarily by another party. From either vantage point, the fact that the agency of the complicit party and the primary wrongdoer are in some way *intermingled* in bringing about the harm at issue would not be considered relevant, let alone important, to the proper moral analysis of the situation.

Yet the intermingling of agency, and the intimacy with wrongdoing that it entails for the complicit agent, is precisely what renders complicity uniquely morally problematic. Consider, again, the novel *Sophie's Choice*. The narrator attempts to explain what was at stake for the concentration-camp physician who invited Sophie to choose which of her children would live and which would immediately be sent to the gas chamber. Entering into the Nazi physician's mind in order to describe his motivations, the narrator speculates: "Was it not supremely simple, then, to restore his belief in God, and at the same time to affirm his human capacity for evil, by committing the most intolerable sin that he was



*How close to evil can one get without being contaminated by it?*

able to conceive? Goodness could come later. But first a great sin. One whose glory lay in its subtle magnanimity—a choice.”<sup>5</sup>

What was this new “intolerable sin”? Clearly, it was not violating the rights of the child who was murdered in the gas chamber—he had already committed that intolerable sin many times over. Rather, it was conscripting Sophie’s will in the murder of her own child. The novel chronicles Sophie’s inability to deal not only with the material consequences of her choice, but also with its moral consequences for her own character. Did she betray her obligations as a mother? Sophie reflects, “In some way I know I should feel no badness over something I done like that. I see that it was—oh, you know—beyond my control, but it is still so terrible to wake up these many mornings with a memory of that, having to live with it.”<sup>6</sup> The “subtle magnanimity” of the choice lay precisely in its appeal to consequentialist reasoning: why let two children die when you can save one? The “sin” was in the deliberate deceptiveness of the choice; its attempt to equate acting to ameliorate a natural threat with acting complicitously with a human one, even for a good end. But Sophie’s anguish, I think, is not the same as that which she would have suffered had she simply chosen which child to save from a burning building.

My hunch is that virtue theory is the approach most likely to account for Sophie’s anguish, as well as the concerns of the manualists, and even a significant portion of the criminal law. The fundamental problem raised by cooperation with evil is what it does to the agent herself when she knows that in some sense her will is to be taken up into and

incorporated by the will of a wrongdoer. How close to evil can one get without being contaminated by it? What does it mean to be tainted by evil? What are the implications for the agent, for her future actions, and for the society in which she lives? In my view, these questions can only begin to be addressed with an approach that holds together reflections upon the act, the acting agent, and the normative vision of the community in which the agent’s actions are intelligible.

So I have no ending to this essay, only the beginnings for my book. I have begun to reread classical, medieval, and contemporary virtue theory, turning to Aristotle, Aquinas, MacIntyre, and Nussbaum with a very different set of questions than the ones I had when I read them in graduate school. What has been wonderful to experience, during this year at the Divinity School, has

been the joy and excitement of addressing a new set of pressing questions to texts of enduring value. □



#### ENDNOTES

1. My account of the law of conspiracy and accomplice liability is taken from Joshua Dressler, *Understanding Criminal Law*, 3rd ed., and from Wayne R. LaFare, *Criminal Law*, 3rd ed.
2. Dressler, 423.
3. *Ibid.*, 459.
4. *Ibid.*, 469.
5. William Styron, *Sophie’s Choice* (New York: Vintage International, 1992), 532.
6. *Ibid.*, 538.