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Complicity and Normative Control

ABSTRACT

A distinctive non-consequentialist argument for criminalisation and punishment claims that the citizens of a state that did not criminalise serious mala in se perpetrated in its jurisdiction would be complicit in their commission. However, one objection to such an argument is that such citizens cannot be complicit because they play no causal role in the commission of the offence. Against this objection, I argue that causal contribution is unnecessary, and that one way in which a secondary agent can become complicit in a principal's wrongdoing is if they allow that wrongdoing to be carried out in a domain over which they have authority, and with their permission. As a result of giving permission, the agent shares in the principal's blameworthiness.

1. Introduction

Can we be morally at the mercy of others?[1] That is, can our moral liabilities be determined, not by our own agency, but that of another? If such vicarious responsibility is possible, under what conditions and with what result? In the *Doctrine of Right*, Kant makes a famous claim:

> 'Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment;

[1] An earlier version of this paper was presented to the 'Complicity: Legal and Moral Issues' workshop held at University College Dublin in June 2017, and I am grateful to the participants in that workshop for discussion. I would particularly like to thank Chris Cowley, Antony Duff, Sandra Marshall and Garrath Williams. For further comments and discussion, I am grateful to Kayleigh Doherty, Max Hayward, Holly Lawford-Smith, James Lewis and Bob Stern. I would also like to thank the editors and an anonymous referee for this special issue.

for otherwise the people can be regarded as collaborators in this public violation of justice.'[2]

Kant's claim is that, if punishment were not carried out – either in the case of dissolution or, presumably, in the day-to-day running of the polity – citizens would be 'collaborators' in wrongdoing (the German is 'Teilnehmer,' which can also mean 'participants'). Now, if we ask in which wrongdoing Kant holds that citizens would be collaborating, the most obvious answer might appear to be: the wrong of not punishing those who deserve it. However, this would be incorrect: Kant's reference to 'blood guilt' makes it clear that he thinks that the collaboration reaches back to the murder itself. With that in mind, we can further note that Kant thinks that it is not simply public officials who will be collaborating in the original murder if the last murderer is freed, but 'the people' as a whole. His view is that a failure to punish can mean that citizens, simply by virtue of their shared membership of the polity, can be seen as collaborators in the murder for which punishment is morally due but not carried out.

If Kant's claim were correct then we could have the following situation. Should public officials fail to punish when they ought to, citizens would share in the wrongdoer's guilt, even though they may have no power *as individuals* to carry out such punishment.[3] Where public opinion and public officials are not sufficiently conscientious in regard to punishing, citizens would be in a morally vulnerable position. Their moral liabilities would be at the mercy of those who decide to commit

[2] I. Kant, *The Metaphysics of Morals*, trans. M. Gregor (Cambridge: Cambridge University Press, 1991), p. 142.
[3] Assuming, that is, that Kant is taking the failure to insist on punishment to be a collective failure, and only public officials to have the power to punish.

serious wrongs; for if someone does decide on serious wrongdoing then the fact that this will go unpunished will make otherwise innocent citizens partly liable for their wrongdoing. Furthermore, if public officials will not act, there may be nothing that any individual can do to prevent such liability being accrued.

Kant's claim has often been treated as unfortunate hangover from a bygone way of thinking. According to John Cottingham:

> 'The logic of justification implied here by Kant seems heavily tied up with the Old Testament notions of sacrifice and placation. Murder involves blood guilt for which an angry God will take vengeance. If the blood of the guilty is spilled (or perhaps some alternative device— e.g., a scapegoat— is employed) the irate deity will be placated.'[4]

Nevertheless, we can find intuitive support for *something like* Kant's view. For instance, it can be appropriate to feel implicated in wrongdoing when one has not done enough to protest against it, for instance when one has continued on friendly terms with a wrongdoer rather than confronting them or cutting off the relationship.[5] Furthermore, members of a collective can feel reflectively endorsed guilt over wrongs committed by the collective, even if they themselves neither contributed to the commission of those wrongs nor approved of them.[6] By extension, then, perhaps one might feel implicated in the failure of one's collective adequately to protest against wrongdoing.

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[4] J. Cottingham, 'The Varieties of Retribution,' *Philosophical Quarterly* 29 (1976), 238-246, at 243.
[5] Jean Harvey, 'Oppression, Moral Abandonment and the Role of Protest,' *Journal of Social Philosophy* 27 (1996), 156-171
[6] See e.g. M. Gilbert, 'Group Wrongs and Guilt Feelings,' *The Journal of Ethics* 1 (1997), 65-84.

Furthermore, we might think of the criminal justice system as, ideally, an institution through which citizens *can* collectively protest against serious wrongdoing. Consider the situation before marital rape was criminalised. Or when domestic violence was treated as a private matter rather than an offence against the person. Or where racist attacks are not dealt with by the force of criminal law. The failure to criminalise can be a source of reflectively endorsed guilt feelings on the part of citizens, and not simply because the state has not done enough to deter such wrongs. Rather the thought might be that in failing to criminalise the state thereby allows such abuses to be perpetrated *with the permission* of the legal system, and hence of the citizens to whom the legal system ultimately belongs. We would then have something like Kant's conclusion: that citizens are implicated in those abuses through a failure to criminalise them. They should rightly feel guilty about such abuses, even though they themselves may be innocent, and even though they may not be able to do anything *as individuals* to prevent them. Citizens without an adequate criminal law would be in a morally vulnerable position, liable to share in guilt should a wrongdoer decide to act in a way that should be criminalised but is not.[7]

Nevertheless, such claims can give rise to criticism. They appear to conflict with the moral individualist view that one can be morally guilty only for matters that are under one's agential control. One source of such criticism concerns familiar issues about the possibility of collective action and collective guilt. Surely one can be

[7] I have made such claims myself in previous work. See e.g. my 'Punishment as an Apology Ritual' in C. Flanders and Z. Hoskins (eds), *The New Philosophy of Criminal Law* (Lanham MA: Rowman and Littlefield, 2015); 'Penal Disenfranchisement,' *Criminal Law and Philosophy* 10 (2016), 411-425; and 'How Should We Argue for a Censure Theory of Punishment?' in A. E. Bottoms and A. Dubois-Pedain (eds), *Penal Censure* (Oxford: Hart, 2019), 67-84. See also S. E. Marshall and R. A. Duff, 'Criminalization and Sharing Wrongs' *Canadian Journal of Law and Jurisprudence* 11 (1998), 7-22.

responsible in such a way as to make sense of guilt feelings only if one is part of a collective that acts wrongfully – but are collectives agents, or indeed moral agents? And even if they are, is it fair or appropriate to hold individuals liable for the actions of a collective of which they are part, even if, as individuals, they had no direct control over those collective actions? However, these puzzles about collective action will not be our central focus here. Our concern will rather be with a second source of criticism, namely the claim that it is impossible for an individual to be complicit in another's wrongdoing *without having helped that wrongdoing to come about in any way*.

Complicity is the phenomenon in which a secondary agent is blameworthy for wrongdoing committed by a principal. In other words, the secondary agent's actions *considered in themselves* may be morally innocent, yet because of the relation of their actions to the actions of the principal, the secondary agent is blameworthy *for what the principal does*. Complicity thus understood is not merely blameworthiness for a *further* wrong, such as a failure to punish, or a failure to express disapproval of the wrongdoing. Rather it involves *sharing* (at least partially) in the principal's culpability, and hence sharing in the liabilities of apology and repair incurred by the principal's wrongdoing. A key question in the literature about complicity is how to understand the relation that has to obtain between the actions of the secondary agent and the principal in order for a charge of complicity to be valid. For the purposes of our argument, and without making any pre-judgement about its nature, we can call the relevant relation the Participation Condition.

Now that we have spelled this out, we can see that, independently of concerns about the possibility and fairness of collective responsibility, individualists about moral responsibility might see a further reason to reject Kant's view. They might deny that the Participation Condition could be met in a situation in which a perpetrator commits a wrong and citizens simply fail to punish it, because in such a situation citizens would have had no causal role in the production of the offence.

However, I will claim that this second source of criticism fails. I will argue that one way in which agents can become complicit in another's wrongdoing is if a) they have normative authority over the domain in which the wrongdoing takes place, b) this normative authority consists in part in a power to determine whether what is done in that domain takes place with one's permission, but c) they do not exercise that power to withdraw permission from the wrongdoing. Where these conditions are met, the wrongdoing can be seen as having been done with the secondary agent's permission. The secondary agent is not simply blameworthy for having failed in an obligation to withdraw their permission. Rather, as a result of allowing the wrongdoing to be authorised, they share in the relevant sense in the principal's plan, and hence share in the blame for the principal's wrongdoing. It is thus in virtue of one's relation to the normative domain in which the wrongdoing takes place that one meets the Participation Condition. If this analysis is correct it would be possible to be complicit in some wrongdoing without having played any causal role in its production.

Nevertheless, I will argue, this conclusion need not be seen as inimical to individualism about moral responsibility. It is true that, having failed to withdraw

permission from such action, an agent has placed themselves in a morally vulnerable position whereby they are liable to become guilty should an actor within their domain choose to do wrong. But on this analysis, the secondary agent is in a morally vulnerable position only because of their prior failure to exercise normative control. By contrast, Kant's view adds the more radical claim that we are morally at the mercy of the public officials of our state, and their decisions over whether or not to criminalise and punish. Establishing this more radical claim would require vindicating the claims about the possibility of collective responsibility noted above. In this paper it will be sufficient work to establish the role of normative control in grounding complicity.

My target here is thus the view that being a contributing cause of the principal's action is a necessary condition of the complicity relation. Let us call this position CNP (Causation Necessary for Participation). I begin the argument against CNP in the next section by looking at cases of complicity through omission. Whether omissions cause is controversial. However, whatever the correct answer to this question, I argue that whether or not the agent who omits thereby plays a causal role is not the decisive question on which their complicity turns. Rather, once we better understand the conditions that ground complicity, we will see the possibility of complicity without causation. Even if complicity for omissions requires causal contribution, there is another form of complicity, complicity through normative control, that does not. Since, as we will see, there can be normative control with no causal contribution, CNP is false.

2. Is Causal Role Necessary for Complicity?

CNP has substantial support in the literature. John Gardner, for instance, has argued that:

> 'the difference between principals and accomplices is a causal difference, i.e. a difference between two kinds of causal contribution, not a difference between a causal and a non-causal contribution … Both principals and accomplices make a difference, change the world, have an influence. The essential difference between them is that accomplices make their difference through principals, in other words by making a difference to the difference that principals make.'[8]

Meanwhile, although Chiara Lepora and Robert Goodin's influential discussion distinguishes different forms or 'grades' of complicity, they talk of them all as 'contributory acts.' Furthermore, they claim that the wrongness of complicity is a factor of the seriousness of the principal's wrongdoing and the degree to which the secondary agent's contribution was causally essential to it. And they argue that it is only in the case of secondary agents who collaborate with principals in forming a plan to commit some wrongful action that intentions or mens rea conditions bear on the wrongness of complicity independently of the extent to which they lead to some causal contribution to wrongdoing.[9]

[8] John Gardner, 'Complicity and Causality,' in his *Offences and Defences* (Oxford: Oxford University Press, 2007), 57-76, at 58.
[9] Chiara Lepora and Robert E. Goodin, 'Grading Complicity in Rwandan Refugee Camps,' *Journal of Applied Philosophy* 28 (2011), 259-276. See also their *On Complicity and Compromise* (Oxford: Oxford University Press, 2013).

Proponents of CNP might also point to the law for support. For instance, the conditions for secondary liability set by the English Accessories and Abettors Act 1861 says that one who 'shall aid, abet, counsel or procure the commission of an indictable offence … shall be liable to be tried, indicted and punished as a principal offender.' Sanford Kadish suggests that these conditions can be reduced to 'assisting' and 'influencing,'[10] both of which appear to require that the secondary agent make a causal difference to the commission of that crime.

By contrast, Christopher Kutz has defended the possibility of 'causeless complicity':

> 'There are various ways in which one can attach oneself responsibly to another's acts, before, during, or after the fact, and complicity doctrine recognizes a limited variety of these ways. While some are causal, not all are; and while most involve physical action, speech or otherwise, not all do, for a guard can render himself complicit in a burglar's theft by doing nothing, deliberate failing to sound the alarm. What binds together all the complicity cases is the mental state of the accomplice—a mental state directed both towards the accomplice's own agency (including the agency involved in refraining) and towards the agency of the principal.'[11]

While I will agree with Kutz that CNP is false, I will dispute his claim about what *is* necessary to ground complicity. I take his comment about 'a mental state

[10] Sandford Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine,' *California Law Review* 73 (1985), 323-410, at 342-346.
[11] Christopher Kutz, 'Causeless Complicity,' *Criminal Law and Philosophy* 1 (2007), 289-305.

directed both towards the accomplice's own agency … and towards the agency of the principal' to be a reference to his well-known account of the role of 'participatory intentions' in complicity.[12] My analysis in Sections 3 and 4 will show that 'participatory intentions' are not necessary for the Participation Condition to be met.

We can begin to undermine CNP by pointing to *complicity through omission*. Let us focus on what we might call *capable but causally redundant bystanders*: those who do or should understand the nature of the wrong being committed and its significance; who have it in their power to intervene to prevent the wrong; who do nothing to prevent it; but without whose involvement the principals would have committed the wrong regardless. We could start with Kutz's example of such a bystander.[13] Say a gang engaged in robbing a house stations a guard outside the gate to alert them in case someone comes along; should the guard have been unavailable they would have gone ahead anyway; the guard does not in fact need to alert the gang because no one comes along; and the guard plays no other role in the robbery. The guard is complicit, but it appears that CNP will struggle to explain why.

Kutz can argue that, while causally redundant, the guard nevertheless shares in the gang's plan in virtue of having 'participatory intentions.' The guard clearly shares the group's plan, and it is that plan that controls his actions: the guard has an intention to contribute to the enterprise under certain conditions, even though those conditions, as things turn out, are not met. However, other cases of complicity through omission suggest that the notion of 'participatory intention' needs to be construed yet more

[12] For Kutz's account of participatory intentions in complicity, see his *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000).
[13] Cf. Kutz's discussion of 'assistance' at 'Causeless Complicity,' 295-6.

capaciously. Sometimes we can 'share the wrongdoer's plan,' and meet the Participation Condition, without having even a conditional intention to contribute to the plan. Sometimes, for instance, it is enough that one is given a sufficiently clear and easy opportunity to prevent the wrongful action, and fails to do so.

For instance, in *Rubie v. Faulkner* (1940), a driving instructor was held to be secondarily liable for dangerous driving on the basis of failing to take steps to prevent a learner driver from performing a dangerous manoeuvre. This seems intuitively the correct judgement, but what is most relevant here is neither the instructor's causal role nor their conditional intention to contribute, but rather the opportunity they had to prevent the dangerous driving and their special responsibility for doing so. In *R. v Clarkson*, two soldiers entered a room in which other soldiers were engaged in raping a woman.[14] They did not take part, but stayed to watch.[15] Because they did not explicitly encourage the rapist, the bystanders were acquitted. The fact that they gave the rapist no encouragement meant that they had no causal role in the commission of the offence. If CNP were correct then this would be straightforwardly the correct verdict (and this was indeed the court's verdict in this case). But we should feel uneasy about any such result. Again, the crucial issue is not whether the soldiers actually made a causal contribution to the outcome but rather the clear and easy opportunity they had to comply with their obligation to prevent the wrongful harm being perpetrated.

[14] *R v Clarkson* 55 Cr. App. Rep. 445
[15] Jeremy Horder, *Ashworth's Principles of Criminal Law*, 8th edition (Oxford: Oxford University Press, 2016), 439-440.

Gardner himself argues that omissions *do* cause outcomes. 'If I go away for a month,' he says, 'and leave my toddler locked in the house without food, I kill her by failing to feed her' (pp. 67-8). A full assessment of Gardner's claim would require an investigation of the nature of causation that is not within the scope of this paper – looking in particular at whether an agent's failure to act can be an event with causal power.[16] Whatever the correct answer to that question, though, I do not think that it would rescue CNP. For we don't have to appeal to the secondary's causal role to know that they are complicit. The brief discussion above suggests that in some omissions cases we can know that secondary agents meet the Participation Condition without knowing the correct answer to the metaphysical question of whether their omissions played a causal role. Rather what grounds the charge of complicity in these cases is the following: that the secondary agent was under a duty to prevent the wrongdoing; that this duty was or should have been highly salient to them; that complying with the duty was under their agential control; and that it would have cost them little to do so. We can know that the agent is complicit if they meet these conditions without knowing whether, say, the agent's having control over their compliance with duty means that they thereby caused (some of) the outcomes of their failure to do so. Furthermore, if these conditions can be met and yet the agent play no causal role in the offence then CNP would be false.

The reason that these conditions are sufficient to meet the Participation Condition is that the best explanation of the secondary agent's failure to prevent the wrongdoing is that they *share in the plan* of the perpetrator. It is not simply that the

[16] For a survey of the debate, see Carolina Sartorio, 'Causation and Responsibility,' *Philosophy Compass* 2 (2007), 749-765.

secondary agent approves of the plan, or fails in a separate duty to respond appropriately to the wrongdoing. Rather the secondary agent's failure to prevent gives us strong (though defeasible) reason to think that they have actively allied their own will to the principal's plan. However, this does not require, as Kutz thinks, an intention to participate. Rather it is enough that the perpetrator's plan dictates the secondary agent's failure to take those actions necessary to prevent the perpetrator committing the wrong. The secondary agent's failure may or may not thereby play a causal role: if omissions can be causes then perhaps it will. But even if it does, it is not their causal role that grounds their complicity. Rather their complicity lies in the way in which their failure to comply with duty results from their sharing the offender's plan.

3. Rights and Normative Control

In the above I suggested that a failure to comply with a duty to prevent wrongdoing can be sufficient to ground complicity if that duty is, or should be, highly salient, and if it is easy to comply with. I raised the possibility that in some cases of omissions these conditions might be met yet the agent play no causal role. However, even if CNP survives such apparent counterexamples, it can still be shown to be false. In this section I turn to a further way in which these conditions can be met and yet the secondary agent play no causal role. Here what is at issue is not complicity through agential control over an outcome but rather *normative control*.

In discussions of symbolic protest, it is often acknowledged that special defence needs to be given of the view that it can be sensible, let alone required, to

protest against an action that it is impossible to prevent. On Thomas Hill Jr's account, the need for protest arises from an obligation to *dissociate* oneself from wrongdoing:

> 'While committing no injustice himself, a person can nevertheless associate himself with those who do by condoning their activities; and a person can disassociate himself from a corrupt group both by acting to prevent their unjust acts and also, in appropriate contexts, by protesting, denouncing what they do, and taking a symbolic stand with the victims. "Who one is" for moral purposes – e.g. a Nazi, a racist, a Christian, a humanist – is determined not simply by substantive contributions to various good or evil causes but to some extent by what and whom one associates oneself with, and in some contexts this depends importantly on the symbolic gestures one is prepared to make.'[17]

Hill clearly thinks that 'association' is a form of complicity; and that one can have duties to engage in symbolic dissociation in order to avoid complicity. While I find Hill's reference to dissociation suggestive, and the claims about dissociation and complicity conducive to the non-consequentialist case for criminalisation and punishment mentioned earlier,[18] Hill leaves the basis of 'association' and 'dissociation' mysterious. Pursuing the case against CNP, however, I will give an account of the rationale for dissociation and symbolic protest that helps to explain what is right in Hill's view. One who has normative authority over a domain, I will claim, has an obligation to withdraw consent from wrongdoing that happens in that

[17] Hill, 'Symbolic Protest and Calculated Silence,' *Philosophy and Public Affairs* 9 (1979), 83-102, at 90.
[18] See the references in n. 6.

domain. The authority holder is complicit in that wrongdoing unless they do withdraw their consent: that is the kernel of truth in Kant's claim quoted at the outset.

Let us begin with the 1907 case of *Du Cros v. Lambourne*,[19] the decision that states the current position in English law. A conviction for dangerous driving was upheld against the owner of the car, Du Cros, despite it not being clear whether he was driving at the time, or whether he was a passenger and a Miss Godwin was driving. The court gave its reasoning as follows:

> '[W]hether he or Miss Godwin was driving the car on the occasion in question, he must have known that the speed at which the car was being then driven was very dangerous to the public, having regard to the locality and to all the circumstances of the case. If Miss Godwin was then driving, she was doing so with the consent and approval of the appellant, who was the owner and in control of the car and was sitting by her side, and he could and ought to have prevented her driving at such excessive and dangerous speed, but instead thereof he allowed her to do so and did not interfere in any way.'

The argument of the court was that a) Du Cros's conviction would be materially the same were he principal or accomplice, and b) he was at least an accomplice. The point of law underpinning a) is that, once complicity or secondary liability is proven, an accomplice is guilty of the same crime and to the same degree as the principal. Therefore the decision of the court is that complicity *has* been proven. And two possible reasons for this finding are given. One is familiar from our

[19] *Du Cros v Lambourne* [1907] 1 KB 40

discussion of responsibility for omissions in the previous section: that Du Cros could have *prevented* the dangerous driving (in the terms of our discussion in the previous section, prevention fell under his agential control); and as the owner he was under a legal obligation to have done so. However, the verdict also mentions a second point that seems to introduce a different consideration: that if Godwin was the driver, what she did was with the 'consent and approval' of Du Cros as the owner. The verdict seems to suggest that this consideration would *also* have been sufficient grounds for a finding of secondary liability. In other words, this consideration appears to be treated as ground of liability that is independent of Du Cros's duty to prevent dangerous driving. And that seems to be reflected in criminal law textbooks: for instance, Ashworth and Horder draw attention to this case as an example of the law's recognition of 'normative control' as a ground of liability.[20]

The remarks in textbooks on normative control are sparse, however, and the mere fact that English law recognises normative control as a ground of liability does not make it independently valid. Nevertheless, the fact that Du Cros was the owner of the car, and knowingly allowed it to be used dangerously, *does* seem relevant to the question of whether he shares in the liability for what was done. In interpreting *Du Cros v Lambourne*, therefore, we need to ask what it is about consent and approval that plausibly *could* give rise to complicity.

Let us start, then, with the fact that Du Cros was the owner of the car. That the law takes this to be a key feature of this case seems clear from the reasoning of the

[20] Horder, p. 440. See also D. J. Baker, *Reinterpreting Criminal Complicity and Inchoate Participation Offences* (Abingdon: Routledge, 2016).

court. However, the significance of ownership is not just that it gives Du Cros a special duty to prevent his car from being driven dangerously. Ownership gives Du Cros the right to sell or otherwise dispose of the car, to alter it, to destroy it. But it also gives him rights over what *happens* in the car. Part of this involves having claim rights e.g. that others not damage the car. And part of it involves his having a privilege to determine what the car will be used for, in the sense that others have no right to require him to use it in a certain way. But Du Cros's right over the car is also a *power*. The owner can alter his own rights in relation to the car and permit others to use the car in certain ways. Du Cros can thus determine whether what happens in the car is done in a manner consistent with his right as the owner or in violation of that right. He can make what happens in the car consistent with his right as the owner by giving his consent or permission to what happens; and he can make what happens in violation of his right as the owner by withholding or withdrawing his consent or permission. Furthermore, he can do this at will: he has control over whether to make this normative change because he can give or withdraw his consent if he decides to do so. He can therefore change the normative status of what happens in the car.

The case we are discussing is a legal case and the powers at issue in it legal powers. However, many have followed Hart in arguing that there is a case for the existence of moral rights or powers that give a person 'control over another's duty.'[21] The notions of consent and promise, as well as ownership and command, have been thought to be examples of such *normative powers* that are not restricted to law.[22] If

[21] H. L. A. Hart, 'Are There Any Natural Rights?', *Philosophical Review* 64 (1955), pp. 174-191.
[22] On normative powers, see J. Raz. *Practical Reason and Norms* 2nd ed. (Oxford: Oxford University Press, 1999), pp. 98-104; D. Owens, *Shaping the Normative Landscape* (Oxford: Oxford University Press, 2012), pp. 4-5

there are such normative powers then the issues arising in Du Cros v Lambourne have wider significance.

In order to have normative control, one needs a domain over which one has authority in the following sense. One needs claim rights against others that exclude them from doing certain things within that domain, and/or privileges that make it the case that others have no right to require you to do one thing or another with one's domain. And one needs the right, or power, to alter those claim rights and/or privileges in relation to particular people, thereby making it the case that one will not be wronged should a particular person act within that domain in a way that one would otherwise have had a right that they not act. Where one has exclusive rights over a domain in this way, one is in a position to consent to or withhold one's consent from the way that others act in that domain. As the owner, Du Cros was in the position of having a power to consent or withhold consent when Godwin started to drive dangerously. In my terms, this meant that he had normative control. And if normative powers exist, it is not hard to see that there will be many other domains over which we typically have such control.

4. Complicity and Obligations to Exercise Normative Control

According to the view I put forward in this paper, having normative control can give rise to complicity. We can see how this can come about by following the model we drew up in thinking about complicity through omission. There we said that the Participation Condition could be met if an agent has agential control over an outcome; has an easily cognisable obligation to exercise that control to prevent the outcome; could comply with the obligation without significant cost to themselves; yet

fails to comply with the obligation. In those cases, the best explanation of the failure to prevent the outcome is that the agent shares the wrongdoer's plan. By parallel reasoning, I suggest, complicity can arise where an agent has normative control over whether an action is done with their permission; has an easily cognisable obligation to exercise normative control to withdraw permission; could comply with the obligation without significant cost to themselves; yet fails to comply with the obligation. In normative control cases, the reason for thinking that the authority has made the wrongdoer's plan their own is that they have given permission for it – or, crucially, that they failed to withdraw permission when it was obvious that they should have done. In the case of normative control, the Participation Condition is met, neither by causation nor by intention to contribute, but by the exercise of normative authority.

If my interpretation of the normative basis of the law in this case is correct, it suggests that there are two possible duties that Du Cros might have violated: firstly, the duty to prevent; and secondly, the duty to withdraw consent from wrongs done with one's property. This second duty is not simply a duty to prevent one's property being used in the commission of wrongs but rather a duty not to *consent* to such use. These two considerations might come apart: that is, if one were unable to prevent, one might one still be complicit as a result of approving and consenting wrongs done with that over which one has rights. For instance, take a case, such as *Tuck v Robson* (1970),[23] in which a publican calls time but is unable to persuade some of those drinking to leave. Here the verdict was that:

[23] *Tuck v Robson* [1970] 1 WLR 741

> ‘the magistrate was entitled to draw the inference that there was passive assistance by the licensee in the sense of presence, with no steps having been taken by him to enforce his right either to eject the customers or to revoke their licence to be upon the premises, and, accordingly, he had been properly convicted.’

In this case there are again two kinds of considerations mentioned: the publican had rights over the property, and it would have been permissible for him to enforce his right that they leave his property, presumably by physically ejecting them. However, he also had normative control over the property in that he could determine who had a *right* to stay there. We can embellish this case in such a way as to press our question of what happens when these two dimensions of control come apart. We can imagine, that is, that in the circumstances of the case it was impossible for the publican physically to prevent anyone remaining on the property; or that it would have required something that would amount to serious assault to make them leave; or that it would have required him to put himself in unreasonable danger. In this situation the verdict seems to imply that the publican would still have a duty, with regard to the recalcitrant drinkers, to ‘revoke their license to be there;’ and that there would be complicity by virtue of a failure to revoke the drinkers’ permission to stay once their staying began to be unlawful. The basis of his liability would be 1) his possession of a legal or normative power, that is, a right over some domain that he could assert, waive, transfer, delegate, such that the domain is one to the use of which one can either give or withhold one’s consent or authorisation; and 2) the fact that the possession of the power is not normatively unconstrained, but rather that there are

obligations in regard to its exercise. When these conditions are met, the holders of normative powers are liable for the actions of others committed within that domain.

Say this is a good interpretation of the law. But can there be easily cognisable *moral* obligations to withhold or withdraw one's consent? There are at least two sources of such responsibilities. Firstly, since authority is not the only value, there is plausibly a range of external obligations constraining what one can do with one's authority. And secondly, authority is often possessed by agents in given roles only so that they can exercise it in order to fulfil the responsibilities of that role. A parent has rights over their children, but only so that they can use the exercise of those rights for the child's welfare. They have the power to say what will happen in their domain but only insofar as they also have a responsibility not to permit the domain in their charge to be detrimental to the child.[24] If this is the case then there will be duties that they should exercise their normative control in certain ways and not in others. Thus, to return to our example, it was incumbent on Du Cros, as the owner of the car, not to consent to Godwin's usage of the car to drive it dangerously. Du Cros was not in a situation in which something was done to his car unbeknownst to him: it is not as though Godwin stole the car and drive it dangerously while he was asleep in his bed. If this had been the situation then the question of his consenting would not have arisen. But it was not. He was in the car at the time and presumably could and should have seen that this was a situation in which the question of his consent had become salient.

[24] An example of having rights only because one has responsibilities is Joseph Raz's well-known service conception of authority. For the claim that the rationale for many rights that are held by an individual may involve the good of those other than the right-holder, see Raz, 'Rights and Individual Well Being' in his *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1995).

Importantly, then, when I say that one who has normative control over some domain has the power to change the normative status of actions that take place within that domain, this should not be understood as meaning that an exercise of Du Cros's normative control can make Godwin's action right or wrong all things considered. Normative control changes the normative situation, but it does so only by altering the directed duties that those using the car have to Du Cros as the owner. Altering such duties changes whether Du Cros is or is not wronged by Godwin in his capacity as an owner with authority over a particular domain, but not whether what Godwin does was all things considered permissible. This shows that the exercise of normative control may align or fail to align with the wider deontic situation. One can give someone permission to do something impermissible, or fail to withdraw one's permission once they start to do something impermissible. This suggests that the wider deontic situation might give rise to duties not to give consent in such situations. But it also suggests that normative control does make a difference: in determining whether or not to give permission, and hence whether or not one will be wronged by what is done in one's domain, one decides whether or not to link oneself to the wrongdoer's plan. In particular, it can make a difference because it is entirely appropriate for us to treat responsibilities to care for the domain over which we have authority as weighty. Sometimes they are weighty because, as with parenthood, important interests are at stake in that domain, and it matters that one takes its care seriously. Sometimes they are weighty because – again as with parenthood – such responsibilities can be constitutive of one's identity. Whether or not one has been an adequate steward of one's domain can therefore be highly significant, and complicity in wrongdoing in one's domain a significant part of one's moral self. Giving or failing

to withdraw permission for wrongful acts is a way to meet the Participation Condition.

Thus while I have illustrated my claims with examples of ownership rights, I take them to generalise to other domains of authority that come with a responsibility to exercise that authority within certain constraints. Some people are sceptical of the existence of normative powers and domains of authority. However, while in this paper I give no direct argument against such scepticism, it seems plausible that we have reason to ascribe normative powers to ourselves as agents insofar as doing so has explanatory power in understanding the phenomena of moral life. I have suggested that normative powers have an important explanatory role in fully understanding complicity.

5. Conclusion

We have now seen how a situation might arise that is analogous, with respect to CNP, to the collective guilt case for which Kant argues. When the publican fails to revoke the drinkers' permission to stay, he puts himself in a morally vulnerable position. He may play no causal role in their staying. He may be unable to prevent them staying through any exercise of agential control. However, because of his authority over the domain, he is liable to become guilty if they do stay. His being guilty is at the mercy of others. If, as seems likely, there are many cases in which we have normative authority over domains in which others may do wrong, this possibility of complicity will be common.

This is enough to show the falsity of CNP. Nevertheless, this possibility is not in itself inimical to individualism about moral responsibility. Complicity, on this analysis, can be traced back to something over which we have control, namely, the exercise of our normative powers. It is only through a prior failure to exercise these powers as we should that we can become complicit. This suggests that individualists about moral responsibility should not subscribe to CNP.

If, as Kant's view suggests, there can be collective moral agency, for failures in which it is appropriate to hold individuals responsible, *then* we would have grounds to deny moral individualism. We would have a way of making sense of the possibility of moral responsibility that is fully vicarious, since we could be morally at the mercy of the democratic will, or the will of our representatives and their officials. That might require, say, an argument to the effect that, in a democratic state, the authority of the state is held collectively, such that citizens collectively hold normative powers to legislate in the sphere of criminal law, and hence collectively hold powers to give or withdraw their consent from certain mala in se. But that is an argument for another paper.