# Complicity: ethical and legal issues

A workshop held at University College Dublin, 15-16 June 2017.

Venue: Harty Boardroom, first floor, Sutherland School of Law, University College Dublin (UCD)

Supported by the Society for Applied Philosophy, and the UCD Schools of Law and Philosophy.

Organisers: Christopher Cowley (UCD) and Christopher Bennett (Sheffield)

## *Revised* Programme

\*\*\* Note from 1 June: because of the withdrawal of one speaker, we have decided on 4 papers on Thursday, 5 papers on Friday, and nothing on Saturday. So please note revised times for the Thursday. Friday is in accordance with the original schedule.

Each paper has a slot of 70 minutes. Presenters to aim to speak for 30-40 minutes, thereby leaving at least 40-30 minutes for questions.

### Thursday 15 June

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| 12.45 | Welcome gathering in the Harty Boardroom |
| 13.10 | Introduction by Christopher Bennett and Christopher Cowley |
| 13.20-14.30 | Paper 1. Antony Duff (Philosophy, Stirling)**Complicity, Agency, and Responsibility** |
| 14.35-15.45 | Paper 2. Dennis Baker (Law, Surrey)**Unlawfulness’s Doctrinal and Normative Irrelevance to Complicity Liability: a Reply to Simester** |
| 15.45-16.30 | Break. Tea & Coffee |
| 16.30-17.40 | Paper 3. Sandra Marshall (Philosophy, Stirling)**Complicity: Sharing in the Bad but not in the Good?** |
| 17.45-18.55 | Paper 4. Garrath Williams (Philosophy, Lancaster)**Cooperation, complicity and social obligations to define morality** |
| 19.40 | Meet back at the Law building. We can walk to the restaurant all together.(approx. 20 minutes) |
| 20.00 | Dinner at Ashton’s restaurant |

### Friday 16 June

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| 09.30-10.40 | Paper 5. Beatrice Krebs (Law, Reading)**Oblique intent after *Jogee*** |
| 10.45-11.15 | Break |
| 11.15-12.25 | Paper 6. Mark Coen (Law, UCD)**Simpler Times: Joint Enterprise in Ireland after (and before) *Jogee*** |
| 12.30-14.00 | *Sandwich lunch in Common Room*, UCD Newman bldg.(we can all walk over together from the Sutherland Law bldg)  |
| 14.00-15.10 | Paper 7. Herlinde Pauer-Studer (Philosophy, Vienna)**Complicity in a distorted legal system** |
| 15.15-16.25 | Paper 8. David Levy (Philosophy, Edinburgh)**Condemning Complicity** |
| 16.30-17.00 | Break |
| 17.00-18.10 | Paper 9. Christopher Bennett (Philosophy, Sheffield)**Complicity, Legal Power and Normative Control** |
| 19.00 | Departure by taxis at AIB bank on UCD campus |
| 19.30 | Dinner at Chez Max, downtown |

### Saturday 17 June

Nothing happening on Saturday.

## Abstracts

(Alphabetically by surname)

### Dennis Baker (Surrey)

**Unlawfulness’s Doctrinal and Normative Irrelevance to Complicity Liability: a Reply to Simester**

Under the change of normative position theory of joint enterprise, Simester has argued that there are two wrongs to be punished (1) the joint perpetration of the crime that D jointly perpetrates (2) D’s act of joining the joint enterprise. What Simester does not explain is why D should be punished for any collateral crime that results from the joint enterprise, if she did not intend to assist or encourage it. Why use the crime label and punishment for the collateral crime to punish D for her act of participating in a joint enterprise. Would it not be fairer to enact a lesser offence to deter group criminality? D could be criminalised as follows: (1) for the joint perpetration of the underlying joint enterprise (2) for the act of joining a joint enterprise as opposed to acting singly. If D has acted singly her liability would simply be for the crime she perpetrated, but if she acts together with multiple parties that will count as an aggravating feature. The collateral crime ought not enter into the equation, unless it was intentionally assisted or encouraged. The act of acting jointly as opposed to singly per se should be criminalised and punished in proportion with the harm it causes or risks—this can be achieved by enacting a lesser offence.

Background reading:

* Dennis Baker’s full paper is enclosed.
* Dennis Baker has also written a recent monograph: *Reinterpreting Criminal Complicity and Inchoate Participation Offences*, (Oxford: Routledge, 2016)
* See *Jogee* [see ‘General background reading’ at the end]
* Simester A. (2006) 'The mental element in complicity' in: *Law Quarterly Review.* 578 [enclosed]
* *Miller v The Queen* [2016] High Court of Australia. Judgement available here: <http://eresources.hcourt.gov.au/showCase/2016/HCA/30>

### Christopher Bennett (Sheffield)

**Complicity, Legal Power and Normative Control**

It is sometimes said that complicity requires some sort of causal role in the commission of crime. The ‘conduct elements’ of ‘aiding and abetting, counselling and procuring’ might all be interpreted in such a way as to imply some act but for which the crime would not have come about (or would not have come about in the way it did). An interesting line of response to this view is whether it is not possible to be complicit through omission; and if it is, what the conditions of such complicity are (and how they relate to the causation-condition). A clear case would be where a security guard intentionally does not lock a door so that theft can take place. One variant might be a case in which the complicit person does not take reasonable steps to prevent an offence that they easily could have prevented without cost to themselves. These cases work when there is a clear pre-existing duty to take the ‘reasonable steps’ omission of which allowed the crime to take place. However, another possible case is that in which complicity comes about where one has a ‘legal power of control’ that one could have exercised but did not – for instance, where the owner of a car who is the passenger rather than the driver has the legal power to direct the driver not to drive in certain ways but does not. In this case the existence of the ‘power’ might be sufficient for complicity to be established on the basis of a failure to exercise the legal power but without any pre-existing, established (legal) duty to take the ‘reasonable steps’ to prevent the offence that its exercise would involve. Here the idea seems to be that one is complicit because of one’s failure to exercise a certain kind of normative control over the circumstances of the offences, where those circumstances fall under the jurisdiction, as it were, of one’s legal power. In this paper I will be interested in asking whether having a legal power can be sufficient for complicity in some cases, and if so what the basis for this is.

### Mark Coen (University College Dublin)

**Simpler Times: Joint Enterprise in Ireland after (and before) *Jogee***

In December 2016 the Irish Court of Appeal was asked to consider Jogee by an appellant convicted of a joint enterprise murder. The Court dealt with this matter briefly in *Director of Public Prosecutions v Kelly* [2016] IECA 404. Referring to *Chan Wing Siu*, the Court observed: "[I]t is important to realise that Irish law never took that 'wrong turning'".

While our near neighbours have grappled with the complexities, and perceived inequities, of *Chan* for over 30 years, the law in Ireland has clung to the *Anderson and Morris* test, which has been restated in a number of domestic decisions. In *Kelly* the Court of Appeal observed that s 4 of the *Criminal Justice Act* 1964, stipulating that intention is required for a murder conviction, would have prevented the adoption of foreseeability as a mental state for joint enterprise (at least in respect of murder).

This paper will outline the Irish law in relation to joint enterprise, and examine the extent to which *Jogee* brings English law in this area into alignment with the Irish position. Arguably *Jogee* is but the latest example (subjective recklessness being a previous one) where the Irish judiciary have been several decades ahead of their English counterparts in setting out simple and enlightened criminal law principles.

Background reading:

* *Jogee* [see ‘General background reading’ at the end]
* *DPP v Kelly* [2016] IECA 404 [enclosed]
* *Anderson and Morris* [1966] 2 QB 110. [enclosed]

### R A Duff (Stirling)

**Complicity, Agency, and Responsibility**

Complicity requires agency: I do not become complicit (morally, or legally, or politically) in another’s wrongdoing merely by wishing for it, welcoming it, or rejoicing in it (which is not to deny that such wishing, welcoming, and rejoicing are culpable); I must be connected to it as an agent.

My focus in this paper will be on some of the different types, and grounds, of agency in this context. I will discuss, in particular, complicity through foresight, complicity after the event, complicity by omission, and collective complicity. In each case, we will see that the ascriptions of agency on which complicity depends themselves depend on specific judgments of prospective as well as of retrospective responsibility; that those judgments are quite often contestable; and that complicity will sometimes involve taking a responsibility that I could legitimately deny.

I will mainly be discussing moral and political complicity, but will also attend to some of the ways in which they may bear on the criminal law and the criminal process.

### Beatrice Krebs (Reading)

**Oblique intent after *Jogee***

As re-stated in *Jogee*, accessory liability requires assistance or encouragement undertaken with an intention to assist or encourage the principal offender to commit the relevant principal offence. While the UKSC stressed that such intent may be inferred from what the defendant foresaw his associate might do, it did not elaborate on the meaning of intention itself, other than to clarify that it includes conditional intents (that P do x ‘should the occasion arise’). This is in line with the general law of murder where juries are rarely directed on the meaning of intention (to kill or cause serious injury). Elaboration is only given if the defendant denies that death or serious injury was the *purpose* of his actions, and the prosecution’s case is built on his having acted with *foresight* of such a consequence. In such cases, the judge may instruct jurors that they are not entitled to ‘find’ that the defendant acted with murderous intent unless they are sure that death or serious injury was virtually certain to result from his actions and the defendant appreciated this: the so-called *Woollin* direction.

Although a time-honoured formula, there remains considerable uncertainty what the *Woollin* direction actually entails. On a natural reading, it seems to suggest that there exist two substantive categories of intention, ‘direct’ and ‘oblique’ intent. The former embodies the paradigm of what it means to intend the outcome of one’s actions, in that to establish direct intent, the prosecution must prove that the defendant sought to bring about the prohibited result. In reality, however, this will often be impossible, or, indeed, the defendant may be able to prove the opposite. An oft-cited example is the fraudster who places a bomb on a cargo plane with a view to destroying the plane mid-air to defraud the insurance company. While he does not aim to kill the pilots but to destroy the plane and defraud its insurers, the pilots’ death is an almost inevitable concomitant of his plan to blow up the plane during flight. *Woollin* expresses this inevitability by the idea of ‘virtual certainty’: where the outcome (death) cannot be proved to have been the perpetrator’s aim, the jury is only entitled to find intent where the outcome was virtually certain (both in fact and to the perpetrator’s mind). On this reading of *Woollin*, outcomes foreseen as virtually certain exemplify a second, substantive category of intention, co-existing with intention as ‘aim’ or ‘purpose’.

Background reading:

* *Jogee* [see ‘General background reading’ at the end]
* Wikipedia page on the 1998 judgement R v Woollin: <https://en.wikipedia.org/wiki/R_v_Woollin>

### David Levy (Edinburgh)

**Condemning Complicity**

Benjamin Murmelstein was the last Jewish leader of the Terezín “model ghetto” or concentration camp and the sole Jewish Elder to survive the second World War. Many, including Hannah Arendt, judged him and other elders complicit enough in the Holocaust to warrant judicial execution. Murmelstein allowed that he could and should be condemned, but that he could not be judged. Elaborating this distinction between condemnation and judgment in connection with complicity is my focus. First, I describe degrees of complicity. Second, I refine two general and two particular acts in which Murmelstein could be complicit. Third, I contrast the questions “Am I complicit?” with “Is he complicit?” Fourth to make sense of these I distinguish when, in deliberation about a situation, (i) one may condemn oneself; (ii) one may consent to responsibility for being condemned. This affords a contrast with (iii) one’s judgment about the right or best action. Fifth, I argue that in situations like Murmelstein’s involving unavoidable necessities these three elements are not comparable first- and third-personally. The difference turns on the difficulty in understanding someone’s consenting to responsibility for being condemned. I elaborate this difficulty in Murmelstein’s case to illuminate the consideration of his complicity in the four acts refined above. Using the distinctions established, I conclude Murmelstein was not complicit.

Background reading:

* Here is the Wikipedia entry on Murmelstein: <https://en.wikipedia.org/wiki/Benjamin_Murmelstein>
* Film: Lanzmann, Claude (2013) *The Last of the Unjust*
* A larger selection of footage and transcripts from Lanzmann’s interviews with Murmelstein can be found on the US Holocaust Museum film archive:
<https://collections.ushmm.org/search/catalog/irn1003918>

### Sandra Marshall (Stirling)

**Complicity: Sharing in the Bad but not in the Good?**

‘The evil that men do lives after them; the good is oft interred with their bones.’

There is a well-recognised asymmetry, as far as responsibility is concerned, between the good and the bad effects of our own actions: we may be blamed (held accountable) for bad consequences, even if they are unintended, and perhaps even if they are unforeseen; but we are not praised for (credited with) the unintended good consequences. Indeed, if we are indifferent to those good consequences, this may be a ground for moral criticism.

The aim of this paper is to explore the ways in which this asymmetry carries over to complicity - to the ways in which we may share (or be held to have shared, or claim to have shared) in the bad and in the good actions of others. The focus will be largely on the way the agent's attitudes structure the asymmetry, and on the ways in which we may share in the actions not just of other individual agents but also of collective entities, such as communities, states and corporations.

### Herlinde Pauer-Studer (Vienna)

**Complicity in a distorted legal system**

In his ground-breaking study *Complicity* Christopher Kutz introduces the notion of »participatory intentions« (i.e. individual intentions whose content is collective) to deal with cases in which the individual contribution to a collective harm is marginal or makes no difference. Participatory intentions allow, according to Kutz, to hold individuals morally accountable for collective wrongs independently of their causal contribution to the wrong and ensuing harm.

In my talk I will argue that this approach fails to account for an important category of cases of individual moral accountability. Though a participatory intention of promoting a particular collective end that entails terrible harm might be absent, individuals might nevertheless be morally accountable for such a collective harm – simply by membership in the organization that is directly causally responsible for the wrong.

The example I use for illustrating and discussing such a form of membership-generated moral accountability is the case of the SS-judge Konrad Morgen. Though Morgen had no participatory intention of contributing to (the worst) criminal acts by the SS and even tried to prosecute them within the limited means of his professional role as an SS-judge, he still seems morally accountable for the collective criminal actions of the SS.

I will then suggest a possible way of dealing with the case, drawing on philosophical work on constitutive accounts of agency and normative identity. My argument is that reflecting on the constitutive standards of Morgen’s role as an SS-judge shows that he cannot define himself professionally without sharing the constitutive standards of the organization to which he belonged. Complicity thus arises by the dependence of one’s normative identity on the normative principles that make up the institution or social practice in which one partakes. Finally, I will discuss some implications of my account for conceptions of group agency and collective moral responsibility.

Background reading:

* See Kutz (2000) and Kutz (2011) in the ‘General reading’ below.
* Pauer-Studer H. and Velleman D. (2015) *Konrad Morgen; the Conscience of a Nazi Judge*, Palgrave.

### Garrath Williams (Lancaster)

**Cooperation, complicity and social obligations to define morality**

There is an obvious discrepancy between legal discussions of complicity and many moral-cum-political discussion. In the legal cases, there has to be a crime and a principal before there can be an accomplice. In many of the cases that occupy moral and political philosophers, the problem is precisely that no one is committing a clear or recognised crime. Instead, we have a pattern of (more or less) innocent actions that together create serious harms (possible example: climate change). Or alternatively, we consider actions that somehow support practices that some people hold to be seriously wrong, although others do not (possible example: factory farming).

Setting aside cases where the accomplice aids a principal without the principal’s knowledge, in the legal cases we can say that the accomplice provides “moral support,” making it more likely that the principal will perceive a crime as somehow acceptable, excusable or “called for.” (That is, if material aid is provided by the accomplice, it also has a deeper communicative significance, as the endorsement of criminality.) While the law is never going to pronounce that we have a duty to improve one another’s moral character, we at least have a duty not to incite another to crime. In the moral-cum-political cases of collective action, I want to propose that there is a parallel problem. People are providing one another with moral support, such that serious adverse outcomes are neglected as matters of indifference, or that serious wrongs are not seen as such. People act together, in a now popular term, to *normalise* immorality.

In most legal contexts, we can take for granted definitions of what counts as criminal conduct; the accomplice merely chisels at the edges, so to speak, in undermining the principal’s moral sense. What the moral-cum-political cases show, by contrast, is how significant is the collective achievement involved in defining standards of right and wrong. On the one hand, this is something that people are doing all the time, and indeed are obliged to do. On the other, communities of judgment may often go badly astray in this exercise. To understand the idea of complicity in the moral-cum-legal cases, I will suggest that we need to invoke a duty that may seem uncomfortably close to the duty to improve one another’s moral characters. We are all familiar with the Kantian idea that we cannot be responsible for another person’s will, in the sense of altering her inner motivations. Whether or not this is right, I want to highlight another side of the matter: a person’s moral sense is very much open to influence by others, because judging what morality means, here and now, is a never-ending task in which we are essentially dependent on others around us. To make the charge of complicity in these wider cases is, I propose, not just to point to the regrettable material effects of people’s actions. (As explored by many theorists, those individual actions may not “make a difference” to the harmful outcomes or to whether larger wrongs are committed.) It is also to the to invoke our duty to help one another define morality correctly – and to charge those persons with a failure to do so.

Background readings:

* Calhoun, Cheshire. 2015. Ch7 'Responsibility and Reproach.' In Moral Aims: Essays on the Importance of Getting It Right and Practicing Morality with Others (Oxford University Press)
* Martin, Adrienne. 2016. Ch11 ' Factory Farming and Consumer Complicity.’ In A Chignell,, T Cuneo, and M C Halteman. *Philosophy Comes to Dinner: Arguments About the Ethics of Eating*.

## General background reading for the whole workshop:

* Baker, D. (2016) *Reinterpreting criminal complicity and inchoate participation offences*, Routledge
* Gardner J. (2007) ‘Complicity and causality’ in: *Criminal Law and Philosophy* 1: 127-41
* Kutz C. (2000) *Complicity: Ethics and Law for a Collective Age*, CUP
* Kutz C. 'Complicity' in the Deigh and Dolinko (eds) *Oxford Handbook of the Philosophy of Criminal Law*, OUP 2011.
* Lepora and Goodin (2011) 'Grading complicity in Rwandan refugee camps' in *Journal of Applied Philosophy*, vol. 28.3 (enclosed).
* Lepora and Goodin (2013) *On Complicity and Compromise*, OUP
* May L. (1992) *Sharing Responsibility*, Chicago UP.
* Mellema G. (2016) *Complicity and Moral Accountability*, Notre Dame Press

### Jogee

Three of the papers will be making reference to the recent UK Supreme Court decision of *Jogee* [2016].

* Wikipedia page on the 2016 judgement R v Jogee (with a link to the full judgement):

<https://en.wikipedia.org/wiki/R_v_Jogee>

* *R v Jogee* [2016] UKSC 8 [enclosed]
* Here is a useful lecture by David Ormerod, all about the Jogee judgement and what it means for the UK: <https://www.youtube.com/watch?v=nhMI6akmjWE>