

Carlos Nino's Consensual Theory of Punishment

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Dedicated to my late wife

Joanna Helen Buchan

(1957-2007)

Abstract:

This thesis is an exegesis and evaluation of Carlos Nino's Consensual Theory of Punishment. Nino (1943-1993) first published 'A Consensual Theory of Punishment' in 1983. There has been little engagement with Nino's theory, and this makes it an appropriate subject for study.

For Nino the purpose of the institution of punishment is consequential: a reduction of future harm in society. But there is a side-constraint: only those individuals who consented to the legal-normative consequences of their wrong-doing may be punished, i.e. only those who committed a crime voluntarily and knowingly. Children and the mentally handicapped cannot give valid consent. Equally, individuals who were coerced into wrong-doing cannot be said to consent to the legal-normative consequences of their acts. And Nino's theory also presupposes the offender's knowledge of the law. An individual who does not know that there are legal-normative consequences attached to their proposed act, cannot be said to consent to these normative consequences.

The criminal does not consent to being punished, but rather to a change in her normative status. By committing a crime, the wrong-doer consents to the legal-normative consequences, which are necessarily attached to it: liability to punishment. This brings about moral-normative consequences for society/the state: it is now permissible to punish the criminal.

Nino's central claim is that the wrong-doer, by committing an illegal act, changes her normative status. The normative default position for everyone is: immunity from punishment. By committing a crime the normative status changes from being immune from punishment to being liable to punishment.

If caught and convicted, this 'assumption of liability' would be decisive for the justification of punishing an offender; and at the same time society is not using the offender as merely a means to an end. Nino is concerned not to violate Kant's Humanity Formula of the Categorical Imperative in his justification of punishment.

For Nino the institution of punishment is side-constrained by principles of justice which are operative in a fair legal-framework. These principles limit the unqualified pursuit of that aim and they constitute safeguards against using individuals as mere means to an end. The requirement of consent to the legal-normative consequences of wrong-doing, before the imposition of punishment, is one such safeguard.

In the process of giving an exegesis of Nino's theory and of evaluating critical responses to Nino, I suggest additions/clarification whenever Nino himself does not provide an answer. Apart from explaining and evaluating Nino's theory I also defend and develop it.

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1: Introduction

Carlos Nino

Carlos Santiago Nino (1943–1993) was an Argentinian legal scholar who suggested a new solution to the problem of punishment: 'A Consensual Theory of Punishment' (1983). The offender, by committing a crime, at the same time consents to the legal-normative consequences of crime, which are necessarily attached to it. She does not consent to the punishment, rather, she consents to change her normative status. Before the crime the offender enjoyed immunity from punishment. By breaking the law she consents to a loss of immunity from punishment. For Nino this consent gives the state a moral licence to punish.

Nino completed a DPhil thesis (on the topic of criminal law adjudication) in 1976 under the direction of Tony Honoré and John Finnis. Apart from legal issues Nino also wrote about moral philosophy (*The Ethics of Human Rights* [1991b]) and about political philosophy (*The Constitution of Deliberative Democracy* [1996a]). When Argentina elected a democratic government in 1983, Nino was legal advisor to the President Raúl Alfonsín. Nino taught law at the University of Buenos Aires and was regularly a visiting professor at Yale University.

Nino first formulated his theory as part of his DPhil thesis. Seven years later he published it in *Philosophy and Public Affairs*. And subsequently he included his theory of punishment as a chapter in *The Ethics of Human Rights* (1991b), with some minor stylistic changes and brief responses to Larry Alexander and Thomas Scanlon.

Nino's theory of punishment has not been widely discussed, neither in the Anglo-American world nor in the Spanish speaking world, although some of the commentators recognise its merit (Honderich 2006: 48): 'a more clear-headed and less speculative theory'. This undeserved neglect in the literature is my reason for choosing Nino's theory of punishment as my topic.

What is missing in the literature on Nino is a thorough exegesis of his theory as well as a critical evaluation of his overall theory – most commentators focus on particular

objections², and there is also an element of mis-interpretation present. My aim in this thesis is to defend and develop Nino's theory.

The problem of punishment

Visiting individuals with some form of harm is seen as morally wrong. And the practice of punishment is just that: selectively inflicting harm on some individuals. Therefore, it is a practice which requires justification.

One can roughly distinguish two strands in the justification of punishment: consequentialism and retributivism. The consequentialist is usually characterised as forward-looking. She is concerned with what results from punishment. One prominent consequentialist theory is utilitarianism. In its classic formulation (i.e. Bentham, 1996 [1789]) the justification of punishment is that it minimises pain and maximises pleasure. The consequentialist looks at good and bad consequences, or at harm and welfare. Some of the (positive) considerations, which come into play when the consequentialist assesses punishment, are: special and general deterrence, protection through the incapacitation of the wrong-doer, satisfying the victim, vindicating the law and thus reassuring the public, and reforming and rehabilitating the wrong-doer.

Consequentialism in punishment theory is faced with the demand to provide evidence for the claim that punishment reduces harm in society, or that the positive consequences of punishing warrant the negative ones (i.e. inflicting harm on offenders). Secondly, the consequentialist theorist might be asked whether there are any alternatives to punishment, which also achieve the aim of harm reduction, but which produce less harm (whether to the punishee, to society or to both).

The retributivist is usually characterised as backward-looking³ - to the crime. We have a duty to punish, regardless of the consequences. Kant is a proponent of such a view. We have a duty to punish the last murderer in prison, even if the polity is about to dissolve – i.e. even if nothing resulted from it. In the retributive view wrong-doing requires a response from the state. The criminal must (re-)pay, from the Latin:

² Ted Honderich (2006) is an exception; although relatively short, his account of Nino's theory is the best in the literature so far.

³ But see Finnis (2011), 173: 'The retributive shaping point of punishment (...) is forward-looking.' A balance needs to be restored.

retribuere, for what she has done. And it is often said that the guilty *deserve* to suffer punishment.

Because of human fallibility, sometimes not only actual wrong-doers are punished but also perceived wrong-doers. This is a problem for all theories of punishment. The rationale for this is presumably that the good of having the institution and practice of punishment outweighs concerns that sometimes the innocent are punished. This means that even retributivism will include at least this consequentialist element. Claims that only the guilty deserve punishment, or that the punishing institution must strive to eliminate punishing the innocent by mistake, do not remove this concern. It does appear then that society accepts that sometimes certain individuals (the innocent) might be used for the benefit of others – viz. for those who believe (and this includes the innocent) that having the institution of punishment is more important than sometimes getting it wrong.

Both justificatory strands in penal policy presuppose a theory of the state and of state authority. Punishment is inflicted by representatives of the state, who are authorised by the state to do so. This acknowledgement puts certain demands on the plausibility on a punishment theory. Michael Philips (1989: 394) explains:

Indeed, the moral justification of punishment by the state is obviously importantly connected to the moral justification of the state's authority to begin with. Unfortunately few philosophers of punishment appear to realize this; in any case, they do not realize its importance. Accordingly, most philosophical discussions of punishment proceed as if the justification of punishment can be understood independently of political philosophy. Partly as a result of this, a good deal of the discussion of punishment consists in exchanges of intuitions between deterrence theorist and retributivist theorists that leave each side unconvinced.

It follows that particular conceptions about the purpose of the institution of punishment will be influenced by particular conceptions of the state. The liberal conception of the state, which is also Nino's, aims to secure the freedom and rights of individuals. As a result the institution of punishment is concerned with minimising

harm (resulting from crime) to society through the deterrent effect of punishment. But the aims of the institution are constrained by the rights people might have. The liberal aims to punish only to the degree which is sufficient to deter effectively (this is true for both Nino and Hart). Consequently, the liberal is also concerned with minimising harm resulting from punishment.

For Nino (and Hart) punishment is permissible rather than obligatory. The utilitarian must punish if there is positive utility, just like the retributivist must punish (because the offender deserves it). The liberal consequentialist might forego punishment, if there are other considerations, which are deemed to be more important than inflicting punishment.⁴

Developments in the 19th and 20th century

In the 19th century, because of the influence of utilitarianism (Bentham), retributivism became less and less important – both in theory and in practice. John D. Mabbott, writing in 1939 (p. 152), in his influential essay on punishment, states that among philosophers the retributive view is one 'which has been definitely destroyed by criticism' and practical men 'have welcomed its steady decline in our penal practice. Instead, reform⁵ and deterrence were the dominating theories in the justification of punishment. Although Mabbott's essay was apparently⁶ an attempt to revive retributivism, it did not succeed – or, if it did, it took a long time. Deterrence and reform remained the dominant justifications until the early 1970s, and it looked like retributivism was only of marginal importance, both for practitioners and for theorists.

But in that decade there was a resurgence of retributivism as the preferred justification for punishment, at least in the Anglo-American world. And this movement is still going strong. Although, since the middle of the 20th century, we also find so-called

⁴ For example, an amnesty for wrong-doing which occurred under a military junta might be one way of protecting a young democracy.

⁵ Hart (1959: 25) argues that reform cannot be the general aim of punishment. If it were, we would 'subordinate the prevention of first offences to the prevention of recidivism.'

⁶ Mabbott argues for the purely formal legal principle that the infliction of punishment is justified, whenever there has been a violation of the law (or of a rule). This seems close to Hart's Retribution-in-Distribution principle (Who may be punished? Only an offender for an offense!). But, as I will argue in the Hart chapter, this is only retributive in a minimal sense. And I believe that the same holds for Mabbott.

mixed theories of punishment - presumably inspired by Hart's essay on punishment (1959). Mixed theories work by distinguishing the aim or purpose of the institution of punishment from the grounds for inflicting actual punishment. Usually, the justification for the institution of punishment is deterrence and the justification for the infliction of punishment is retribution. Rawls (1955) and Hart (1959) are taken to be proponents of mixed theories.⁷

The mixed theory has also been used to re-interpret long held views about certain thinkers, for example Kant's account of punishment. Since Don Scheid's (1983) paper on Kant's retributivism, Kant was not seen as a pure retributivist any more, but as a mixed theorist.⁸

In the 1980s the communicative justification of punishment gained ground (Antony Duff and Andrew von Hirsch are the most prominent representatives). The purpose of punishment is to communicate justified censure, and this is achieved through hard treatment. The communicative theory is essentially retributive (the offender deserves censure), but other (prospective) values also come into play. It is hoped that the infliction of punishment will result in the offender agreeing with the censure, in repentance and perhaps reform – this is the communicative element. Thus, the offender could be reconciled and re-integrated into society.

However, one could question whether the process of punishment is genuinely communicative. It looks like the 'communication' is mostly one-sided: charging, trial, sentencing and punishment. Admittedly, during the trial there might be an opportunity for the accused to say something in her defence, but the scope of when and where the offender is given a voice during this process is limited. And this illustrates another problem: there is an imbalance of power within this so-called communication, because the types of responses from the offender as well as their scope are often limited (e.g. 'Guilty!' or 'Not guilty!') as well as pre-determined by the institution of

⁷ This is a mistake in the case of Hart as I will argue in the respective chapter. Mabbott might also belong in this category, because he separates the question of having a system of law, and the question of which laws, from justifying actual instances of punishment. The former is justified on utilitarian grounds, the latter supposedly on retributive grounds.

⁸ The institution of punishment has a preventive function. By doing so it safeguards the freedom of individuals. Sharon Byrd (1989) follows Scheid by arguing that for Kant general deterrence is the aim of threatening punishment and the principle of retribution determines the degree of punishment.

punishment and its representatives. The institution also determines when/at which point in the procedure the offender might have a say.

The offender might, of course, show remorse during the trial (or at a later date), which could count as a genuine element of communication. But this is not important; even if punishment does not result in remorse, repentance and reform, it is claimed that the representatives of the institution of punishment are 'communicating' with the offender. Punishment (Duff, 1986) is seen as an intrinsically appropriate form of response to wrong-doing – it is not just contingently linked to the communicative purpose.

However, the biggest problem for such theories is that the strongest form of censure is normally expressed through words⁹ (cf. Hart 1963: 66). It may be true that wrong-doers deserve to be admonished, but do they also deserve to be punished? There is a gap between justified censure and justified punishment and this gap needs to be bridged.

Thus, looking back at the developments in the 20th century, it appears that there was a realisation that there is no *one* answer to the question of justification of punishment. And H.L.A. Hart will probably have to be credited with this insight. There is a plurality of values which are important for the institution and practice of punishment. For this reason we have seen the rise of mixed/hybrid theories which incorporate retributivist as well as consequentialist ideas.

Punishment and political theory

The standard justifications for punishment (deterrence and retribution) have been attacked on certain moral grounds. Binder explains (2002: 321): 'the problem of justifying punishment is presented as a key battle-ground in the war between utilitarian and deontological ethics.' This approach is not satisfactory, because it does not deal with the assumptions which we make when we subscribe to the institution and practice¹⁰ of punishment. These assumptions are logically prior to a moral evaluation of punishment. Matravers states (2000: 8): 'much punishment theory does

⁹ Not through raising one's eyebrows.

¹⁰ By that I mean the actual infliction of punishment.

not succeed because it fails to take sufficiently seriously the need to integrate a justifying account of punishment with a larger political and moral theory'.

Before we judge in a traditional way whether a justification for punishment is morally acceptable or not, we must investigate what is presupposed by the institution and practice of punishment. Binder (2002: 322) writes: 'The legitimacy of punishment is bound up with the legitimacy of the norm it enforces and of the institutions promulgating the norm, imposing the punishment, and inflicting it.' In the literature it is often taken as a given that the institutions which generate the norm are legitimate and that the norm which punishment enforces is also legitimate. But even if that is so, one may ask: Is there an obligation to obey the law (the norm)?

I believe that the problem of punishment must be addressed as a problem of political theory first and only later, once the institution of punishment is grounded, as what can be called a problem of ethics. This is clearly understood by Antony Duff (2001: 35):

A normative theory of punishment must include a conception of crime as that which is to be punished. Such a conception of crime presupposes a conception of the criminal law – of its proper aims and content, of its claims on the citizen. Such a conception of the criminal law presupposes a conception of the state – of its proper role and functions, of its relation to its citizens. Such a conception of the state must also include a conception of society and of the relation between state and society.

Theories of punishment usually presuppose that the state has the right and duty to set up threats which are linked to punishments. It is assumed that everyone, including the would-be criminal, is under an obligation to refrain from wrong-doing. This obligation is usually taken to be the obligation to obey the law. And this means that such a justification for punishment must be grounded in a theory of political obligation. It must establish that the would-be criminal somehow acquires political obligations and, among them, the obligation to obey the law. But very few theorists of punishment explicitly address this issue.

The institution of punishment and the role of the state

One virtue of Nino's theory is that it does not see the justification of punishment in isolation from political theory. Nino's justification of punishment has a social aim: reduction of harm in society. But the social aim is itself instrumental: to facilitate the exercise of autonomy in society. For Nino (1991b, Chapter 5) autonomy means that individuals can choose and follow their own plans of life and conceptions of the good. And the principle of autonomy is intrinsically valuable for Nino. Crime is thought to diminish the autonomy of individuals (primarily the autonomy of victims). One of the functions of the state is to foster the autonomy of individuals. By having the institution of punishment, the state aims to reduce harm in society and consequently to enable a greater exercise of autonomy by its citizens.

For Nino the institution of punishment is side-constrained by principles of justice which are operative in a fair legal-framework. These principles limit the unqualified pursuit of that aim and they constitute safeguards against using individuals as mere means to an end. The requirement of consent to the legal-normative consequences of wrong-doing, before the imposition of punishment, is one such safeguard.

For Nino (1991b, Chapter 5) the most important moral principle is the principle of autonomy. It implies that we view individuals as separate and independent. Nino derives another moral principle from this: the principle of the inviolability of a person. This second principle forbids the curtailment of the autonomy of an individual for the sole reason of enhancing the autonomy of others – we must not use others as a mere means to our ends. Nino believes that to ground a liberal society he needs a third principle: the principle of dignity of the person. The third principle (Nino 1996a: 52) 'permits one to take into account deliberate decisions or acts of individuals as a valid sufficient basis for obligations, liabilities, and loss of rights'. The third principle (dignity of the person) allows limitations on the second principle (inviolability of the person) and may cancel the limitation which the second principle places on the autonomy of the person (Nino 1996a: 52.). For Nino these three liberal principles are moral principles. They are necessary for establishing a liberal society and for grounding a set of fundamental rights which become part of a constitution.¹¹

¹¹ I will say more on this in the chapter on 'The Forfeiture View'.

The obligation to obey the law

Suppose we were given the following explanation: the reason for punishing an offender is because she voluntarily broke the law, although she could have kept the law. Such an explanation would be lacking, because something else is required. It needs to be established that the offender had an obligation (political or moral), or duty to keep the law, or that there is some other good reason to obey the law.

A plausible theory of punishment needs to explain satisfactorily why individuals have an obligation to obey the law (e.g. a social contract theory), or why we can do without the need to show that individuals have political obligations (e.g. Warren Quinn's theory of punishment: 'The Right to Threaten and the Right to Punish', 1985¹²). Nino's theory, apart from being a novel solution to the justification of punishment, represents the latter approach.

The obligation to obey the law is one species of political obligation, probably the most important one. The other political obligations are good citizenship and loyalty to one's country/sovereign. Thus, assessing the morality of punishment ought to be linked to the political theory surrounding the institution and practice of punishment.

Establishing that individuals have political obligations, and among them specifically the obligation to obey the law, has been an enduring problem in political philosophy. One merit of Nino's theory is that (he claims) his theory does not require that it be demonstrated that citizens, including the offender, have an obligation to obey the law. Nino (1983: 305) writes about his theory:

The thesis does not involve the hypothesis of a social contract in any of the varieties defended by political philosophers. It does not rely on an explicit or implicit acceptance by the citizens of the criminal laws imposing obligations or stipulating penalties for non-compliance. It does not assert that every case of punishment is like the case of the punishment of the volunteer who deserts, consequently violating obligations he has previously voluntarily assumed. The

¹² Quinn's (1985: 360) solution to the problem of punishment is to show that the 'right to the threat implies the right to punish.' Quinn tries to circumvent the link between punishment and political obligation by grounding the right to punish in the right to threaten, which in turn is justified in our

grounds on which the obligations that the offender violates can be justified are irrelevant to this thesis: they may be either consensual or independent of the consent of the people subject to them;

Nino's three liberal moral principles, as grounds for a theory of the state, explain why it is permissible for society to impose punishment.

However, Nino's main contribution to the debate about punishment is to do with bridging a gap in the justification of punishment. There is a gap between recognising that individuals have moral or legal obligations and between being entitled to enforce such obligations (or to apply sanctions for their violation). It is the same gap I mentioned earlier with regard to communicating censure. The move from recognition (of wrong-doing) to enforcement (of penal sanctions) needs a moral justification. Carlos Nino provides a plausible account of how this gap may be bridged.

A brief outline

I begin my thesis by giving a preliminary characterisation of the Consensual Theory of Punishment. I proceed with a discussion of the nature of consent in general and how it applies in Nino's theory. Then I contrast Nino with H.L.A. Hart, because it has been suggested by Nicola Lacey (1988: 48) that Nino might be a Hartian. By contrasting these two thinkers I wish to bring out in how far there is agreement, as well as what the respective merits and weaknesses of their theories are.

A substantial part of my thesis is concerned with objections to Nino's theory in the literature. The first objection I discuss is one which Nino put forward himself and which arises out of Robert Nozick's seminal paper on the nature of coercion from 1969. The remaining objections which I discuss were put forward by Larry Alexander, David Boonin, Thomas Scanlon and Ted Honderich.

In the process of giving an exegesis and of evaluating critical responses to Nino I suggest additions/clarification whenever Nino himself does not provide an answer. I

conclude my thesis with an overall evaluation of the weaknesses and merits of Nino's Consensual Theory of Punishment.

The reader will notice that I often quote Hart to illuminate a point in Nino. The justification for this is, as just indicated, that there is a considerable degree of overlap between their theories of punishment. Furthermore, H.L.A. Hart is the foremost (liberal) legal philosopher of the 20th century – and Nino is a liberal theorist himself. Nino's principal supervisor, Tony Honore¹³, has confirmed to me that during Nino's time in Oxford 'Hart and Nino saw a good deal of each other.' And it turned out that Hart was tasked with examining Nino's thesis. Furthermore, in his DPhil thesis Nino states (1976: 117): 'The view here put forward is close to that of Professor Hart'.

¹³ The other supervisor was John Finnis.

2: A Preliminary Characterisation of Carlos Nino's Consensual Theory of Punishment

When it comes to the justification of punishment, we are faced with the following dilemma, according to Nino: either we base it on moral desert, like the retributivist, or we accept that some individuals, selectively, have to bear certain burdens for the benefit of others. From Nino's liberal stance neither option is attractive. Nino suggests another solution. He wants to prevent harm to society (through crime), but this social aim needs to be restricted by a safeguard, so that we don't use individuals merely as means to an end but also as ends in themselves. This limitation on the unconstrained pursuit of the social aim is: the offender's consent to the normative consequences of her act.

State punishment normally means visiting something harmful upon a wrong-doer. Nino (1983: 289) writes: 'Punishment is one species of the large family of measures involving intentional deprivation of a person's normally recognized rights by official institutions, using coercive means if necessary.' These, normally, unpleasant measures which the state inflicts on its citizens are prohibited outside of the context of state punishment: a citizen must not incarcerate another or take away the other's property, for example. Thus, if the state does something to its citizens, which is normally prohibited, then it would need a powerful justification for doing so. If this justification were to contain, in some form, a consensual element by the wrong-doer, it would seem to be more likely that this justification would meet with acceptance within a liberal theory of the state. Note that the wrong-doer does not consent to punishment¹⁴, rather, she consents to change her normative status, which, according to Nino, would make punishment permissible.

Let us see how Nino defines punishment. Referring to the writings of Anthony Flew and H.L.A. Hart, Nino (1991b: 257) states that 'the typical case of punishment has these features:

¹⁴ Larry Alexander (1986: 178) seems to succumb to this misinterpretation.

- (i) it involves the deprivation of certain normally recognized rights, or other measures considered unpleasant;
- (ii) it is the consequence of an offence;
- (iii) it is applied against the author of the offence;
- (vi) it is applied by an organ of the system that made the act an offence.'

And Nino (1991b: 259) adds that 'the suffering involved in punishment is an intentional effect'.

Nino (1983: 291.) objects to a 'justification of punishment based solely on social protection'. Because such a conception of punishment (1983: 293) 'necessarily implies an unfair distribution of burdens and benefits among members of society.' Nino elaborates in *The Ethics of Human Rights* (1991b: 267): 'It is necessarily inflicted on a limited group of individuals for the sake of providing for others, without correlative burdens, a protection against harm.'

Note that for many contemporary thinkers, Nino included, punishment is a matter of distributive justice, rather than a matter of corrective justice. Whereas Aristotle, in the *Nicomachean Ethics* (2002, Bk 5.2.1130b30), thought that the former was concerned with 'distribution of honour, or money, or the other things to be divided up among those who are members of the political association'. And the latter was concerned with restoring an equilibrium which was disturbed by a particular, voluntary or involuntary, transaction (i.e. forms of wrong-doing, which would now fall into the realms of contract law, tort law and criminal law). Thus, for Aristotle punishment belongs to corrective justice.¹⁵ For Nino punishment is a burden to be distributed, and the theorist needs to determine why some will have to bear this burden and others will not.

Consent as a safeguard

Nino's theory presupposes a fair legal framework. But if the legal framework is fair, doesn't the right to threaten punishment entail the right to punish? One might ask, like Antony Duff (1996: 13):

¹⁵ Similarly Aquinas.

if the state is justified in attaching [such] "normative consequences" (liability to punishment) to breaches of the law, it is no doubt justified in actualizing those consequences against anyone who nonetheless breaks the law (although given that prior justification, I am not clear why we must appeal to the agent's supposed consent to justify actualizing such consequences).

Duff suggests that the role of consent might be superfluous in Nino's account of punishment.

For Nino diminishing overall harm within a society by selectively harming some of its citizens would be unfair (1983, 291f.): 'Such measures are condemned by the Kantian injunction against using men only as means and not as ends in themselves.'

However, if such a non-egalitarian distribution were – in addition to serving the aim of social protection – based on consent, it would be fair. Consent serves as a side-constraint to prevent a (e.g. utilitarian) distribution which would allow using some individuals for the benefit of all.¹⁶ This is why Nino's consent requirement is not superfluous.

Nino stresses that there are important similarities between entering into a contract (as well as certain features in the law of torts) and committing a crime. By highlighting these similarities, Nino brings out the consensual element in the actions of the offender, even if she does not consent to any presumed obligation to obey the law, nor to the institution of punishment, nor to being punished. The offender does not consent to the punishment, but rather to the liability to punishment, according to Nino.

In his discussion of the nature of consent in contracts, Nino explains that it would be a mistake to suppose that consenting necessarily means to expressly state: 'I consent to this'. Consent can also be shown (Nino 1983: 294):

¹⁶ See also Lacey (1988: 47).

by the performance of *any* voluntary act with the knowledge that the act has as a necessary consequence the assumption of the duty or responsibility in question. For instance, the act can be to sign a document, to take a taxi, to lift a hand in an auction, all of which may have as consequence [*sic*] having incurred the obligation to pay for something.

It is not clear to me what kind of document Nino has in mind here. Signing a document, say, a contract or a will, would normally constitute express consent, because the document/contract would normally expressly state what is being consented to – unless Nino means that the word 'consent' does not need to appear in a contract. Perhaps one could use a word like 'agree' instead.¹⁷

Three types of consequences

Nino does not elaborate on the tripartite distinction of consequences, but I think it would be important to do so. Nino stresses that two things are important. The act implying consent must be voluntary¹⁸ and the agent must be aware of the consequences of the act (i.e. the obligations or liabilities she is assuming). Nino (1983: 296) distinguishes between the 'factual', 'legal-normative' and 'moral-normative' consequences of an act.¹⁹

That act may have some factual consequences, such as the risk of suffering harm which the volunteer who enlists in the army or the gambler who places a bet or the person who accepts a lift from a drunken driver brings upon himself. (...) the knowledge that a factual consequence may *possibly* follow from an act is not a morally relevant reason that justifies placing the legal burdens attached to that consequence on an individual. Specifically, consent to run the risk of some harm does not necessarily imply consent to suffer that harm. But the act can also have legal normative consequences.

¹⁷ Perhaps the document is something like a score-sheet, which needs to be signed or initialled by the judges in a sports competition. Each judge would then confirm (consent to) the accuracy of adding up the scores by the other judges. Or Nino might envisage simply something like signing/initialling the additions/changes to a contract.

¹⁸ Note that voluntary includes the notion of being uncoerced for Nino. More on this below.

¹⁹ This distinction about the consequences of an act (crime) was suggested to Nino by Joseph Raz. See Nino (1983: 296, FN 12).

In his DPhil thesis Nino (1976: 113/3) is a little more explicit about the relationship between legal-normative and moral-normative consequences:

When that legal consequence of a voluntary act is known by the agent we may say that he²⁰ has consented to it. And it is that consent which is taken to be morally relevant and to justify enforcing the normative consequence in question against the person who has consented to it. Another way of describing the situation is to say that the consent to certain legal normative consequences involves moral normative consequences.

I will attempt to clarify how Nino understands this tripartite distinction of consequences. Factual consequences are contingent – they might or might not come about. A factual consequence of breaking into a jewellery store could be the possibility of the alarm going off, of getting injured (while climbing up the drainpipe), of being caught, or of suffering harm (through punishment). The criminal cannot be said to consent to the factual consequences, because they are only *possible* consequences; they do not necessarily follow from her act (unless she explicitly says so in advance of any factual consequences occurring – which would be highly unusual). Furthermore, factual consequences do not normally require consent, or are 'consentable'. Only the risk to some factual consequences might require consent.²¹

According to Nino, we cannot justify punishment by arguing that a factual consequence of crime is punishment. The knowledge of factual consequences (here: harm through punishment) would not morally justify enforcing these consequences. Furthermore, and this is something Nino neglects to point out, we would end up in the following – circular – justification: A possible factual consequence of crime is punishment, therefore, we punish.

The reason why the burglar can be subjected to the enforcement of the legal-normative consequence of her crime, i.e. why she can be punished, is, because she consented to assume²² a liability to punishment. She consented to change her legal-

²⁰ Nino uses the masculine personal pronoun 'he', I will use the feminine pronoun 'she'.

²¹ E.g. accepting a lift from a drunk driver.

²² Throughout I will use the words 'assume' and 'assumption' in the sense of 'taking on certain burdens' or 'consenting to something' (e.g. 'assume liability' or 'assumption of risk'), rather than in the sense of

normative status: The legal-normative consequence of crime is loss of immunity from punishment (Nino 1983: 297). Before an agent commits an illegal act she is immune from punishment. Citizens who obey the law have an immunity from punishment – this is the default position. This means that officers of the state do not have the right to punish law-abiding citizens.

Nino, most likely, refers here to Hohfeld's (1913 and 1917) classification of rights (claim, privilege, power and immunity). Hohfeld writes (1913: 55): 'immunity is the correlative of disability ("no-power"), and the opposite, or negation, of liability.' In Nino's context of crime the former would be the lack of authority to punish and the latter would be the liability to punishment. According to Hohfeld (1913: 55), 'an immunity is one's freedom from the legal power or "control" of another as regards some legal relation.'

By committing a crime voluntarily²³ and knowingly the offender consents to the legal-normative consequences, which necessarily follow from her act. Her consent alters the state's disability (no-power) with regard to punishment into an ability/power to punish. The offender is now liable to punishment. This consent makes it morally permissible for the state to enforce the legal-normative consequence of the act. The consent to the legal-normative consequence (liability to punishment), at the same time, brings about a moral-normative consequence.

Note that the moral-normative consequence of the act applies primarily to the state/punisher. The moral-normative consequence makes it permissible for the state to punish the offender. However, the moral-normative consequence also applies to the wrong-doer, but in a secondary sense. The offender is presumably aware that her consent to a loss of immunity from punishment also brings about these moral-normative consequences. Nino (1976: 113/3) writes that 'the consent to certain legal normative consequences involves moral normative consequences.'²⁴

an intellectual presupposition - unless I state otherwise.

²³ Understood by Nino as acting from your own free will, without being coerced or pressured by circumstances. The question of whether we have free will is an ancient question in philosophy and is still being debated vigorously. Because of the practical constraints imposed by a PhD thesis, I will bracket the issue of free will for the purpose of this thesis. Instead, let us assume, as most modern legal systems do, that there is such a thing as acting from your own free will.

²⁴ One critic misconstrues the normative consequences of an act. David Boonin (2008: 159) assumes that they are either legal or moral. He does not realise that for Nino there are distinct legal-normative as

But how exactly is this to be understood? When we consent to something in the non-criminal context we commit to the undertaking of an obligation or of a liability. If the consent is valid (Furner 2010: 70), 'it always gives another specific person a correlative right.' That specific person in the context of crime is the state/the punishing institution.

What Nino does not spell out in his writing is the following: two out of the three consequences of a criminal act apply to the offender (factual and legal-normative) and the third consequence (moral-normative) applies mainly to the punishing institution.

Distribution of burdens based on consent

Because the wrong-doer, by committing a crime, consents to a loss of immunity from punishment, the state may impose an unequal distribution of burdens on its citizens: the imposition of punishment on wrong-doers.

Nino writes (1983: 299):

My contention is that insofar as the agent's consent to forgo his immunity against punishment is required before that punishment is imposed, the gap in the moral justification of the practice, left by pure considerations of social protection, can be bridged. When the protection of the community requires necessary and effective punitive measures involving lesser harms than the harm feared, the consent of the recipient of those measures makes an appeal to an equitable²⁵ distribution of those burdens out of place.

I take this to mean the following. The institution of punishment aims at the protection of the community. If it is justified by 'pure considerations of social protection', then society is using some individuals as mere means for its ends. Some individuals would bear greater burdens than others. And this is morally problematic for Nino, because he invokes the Kantian principle that individuals must never be treated merely as means to an end (Nino 1983: 306). What is missing, is a moral justification for meting out

well as moral-normative consequences which ensue from committing a crime.

²⁵ For equitable read 'equal'. I will say more on this below.

punishment, which involves treating the offender as an end. For Nino the offender provides that moral justification by consenting to assume liability to punishment. By committing a crime the offender assumes the legal-normative consequences (loss of immunity from punishment), and this assumption also brings about moral-normative consequences for the punisher/the state – it bestows moral permissibility on the enforcement of the legal-normative consequences.

For Nino this is analogous to the justificatory structure of enforcing contracts in cases of breach of contract. The contractors consented to a certain distribution of burdens (and benefits), specified in the contract, and if there is a breach of contract, the state may enforce this distribution; the state may enforce the legal-normative consequences of the contract. The burdens are placed on the consenting party in contract law. And this principle sometimes also applies in the law of torts.

Nino might be making two different moves here: either, the fairness (and analogous structure) of certain widely accepted principles of contract law supports his claim that a Consensual Theory of Punishment would be fair; this would amount to the following: *what is fair in contract law (and in the law of torts) must also be fair in criminal law*. Alternatively, Nino might point out that fairness according to consent is the hallmark of a liberal society, and this is the principle underlying the practice of punishment; the analogy to contract law (and tort law) would simply illustrate the wide application of this principle.²⁶

Consent or acquiescence?

One could object: Is this really consent or just acceptance of some negative consequences of a voluntary act (i.e. acquiescence)? For Nino the criminal is not just assuming a risk, and consequently acquiescing to the upshot of that risk (punishment). There are actually three justificatory strands to which a Consensual Theorist could appeal: 1. consent to the legal-normative consequences of the act (loss of immunity from punishment); 2. consent to a risk (of punishment); 3. acquiescence to the factual consequences following from wrong-doing (actual punishment). However, Nino only wants to rely on the first strand, although strands 2. and 3. would give additional

²⁶ I will say more on this in the chapters on Hart and on Honderich.

support to his theory. Nino believes that the second strand, consent to a risk, is too weak a principle to justify punishment.²⁷ The third strand is even weaker, because it refers to the factual consequences of an act, and these are contingent. Here, the criminal accepts, or acquiesces to, a factual consequence, namely the possibility that she might be caught, successfully tried and punished – hoping, of course, that it will never come to this.

When committing a crime, the offender is (Nino 1983: 299) 'performing a voluntary act with the knowledge that the relinquishment of his immunity is a necessary consequence of it'. If other courses of action are open to the offender (i.e. live options), and in spite of this, the offender goes ahead with the crime, then the criminal brings about a change of legal-normative status: she is now liable to punishment. This is the most important strand for Nino.

Before I go on, I would like to discuss the notion of 'live options'. In Hume's (1979: 263) counterexample to Locke's conception of tacit consent²⁸, staying on the ship is a reluctant acceptance of circumstances – which were brought about by others rather than by the alleged tacit consenter:

Can we seriously say, that a poor peasant or artizan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day by the small wages he acquires? We may as well assert, that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean, and perish, the moment he leaves her.

Jumping into the water is not a viable course of action if one cannot swim or if one is far away from the shore. David Hume is trying to say that emigration (or swimming) is not a live option – options which are too difficult and too costly are not 'live options'. And this would also apply to the would-be offender. Compliance with the law must not be too difficult or costly.

²⁷ But this principle is strong enough to justify the distribution in tort law when we have a consenting injured party. More on this below.

²⁸ Note that Nino does not employ a conception of tacit consent, as wrongly assumed by Boonin. I will say more on this below.

To relinquish one's immunity from punishment (i.e. legal-normative consequences) is the consensual element which brings about moral-normative consequences for the state: it is permissible for to enforce penal laws. It gives the state a licence to do so. The state may punish, if this would promote the purpose of the institution of punishment, and provided that the institution is legitimate. Note that punishing, for Nino, is not obligatory. This has advantages over the retributivist position, where the state must punish.

The consequentialist, can forgo punishment, if it clashed with other important principles, e.g. the principle of equity, or if an important political good were at stake. I will illustrate the latter with an example from Nino's life: When Nino was legal advisor to the newly elected President of Argentina, Raúl Alfonsín, the question arose, whether to punish all military personnel involved in the 'dirty war'. It was decided to restrict punishment from the top down to the rank of captain. Everyone from lieutenant and below was not punished for fear of putting the young democracy in jeopardy.

An inequitable distribution of burdens and benefits

By consenting to the loss of immunity the offender also consents to (Nino 1983: 293) an inequitable distribution of burdens and benefits, with respect to who is immune from punishment and who is not in society. Note that Nino's use of the adjective 'inequitable' might cause confusion, because he is using it in a special way, without making this explicit. When using 'inequitable' Nino must mean 'unequal' (rather than 'unfair' or 'unjust') *and*, for this reason, apparently/at first glance 'unfair'. He writes (1983: 299): 'When the protection of the community requires necessary and effective punitive measures involving lesser harms than the harm feared, the consent of the recipient of those measures makes an appeal to an equitable distribution of those burdens out of place.' Nino is saying here that the unequal distribution of punitive burdens, which at first glance would seem unfair (because it is unequal), is fair, because it is based on consent. If Nino intended 'equitable' to mean 'fair', he would be making the following (contradictory) claim: *The unfair distribution of punishment is fair, because it is based on consent.* I submit that he is making this claim instead: *The apparently unfair distribution of punishment is fair, because it is based on consent.*

My interpretation is supported by the following passage (Nino 1983: 293): 'Appeals to an equitable distribution of benefits and burdens are out of place when the individuals concerned have consciously acquiesced²⁹ in a balance which is not egalitarian.'³⁰

It might have been clearer if Nino had said that the distribution of punishment is 'unequal', rather than 'inequitable', as is suggested by the phrase 'not egalitarian' in the above quote.

Nino (1983: 293) calls this allocation of burdens 'distribution according to consent'³¹ – it is fair, because it is based on consent. For Nino this is similar to the case of contracts (and sometimes in torts), where a contractor consents to take on certain burdens, and the state is justified in enforcing those burdens. In the case of torts³²: If I, being sober, accept a lift from a drunk driver, then the burdens of the tort will not be borne solely by the drunk driver, but also by myself.

This means that Nino operates with the following principle: under suitable conditions, the consent to a certain distribution of burdens and benefits, even if this distribution is not egalitarian, makes the enforcement of the burdens fair.

Contracts and torts

Nino (1983: 293) argues that certain features of his theory of punishment are analogous to certain features which we encounter in contracts (and also in the law of torts):

One obvious category of cases (...) in which we accept what could, but for its origin, be considered an unfair distribution of goods, is that of contracts. The

²⁹ 'Consciously acquiesced' is an awkward phrase and Nino, most likely, means 'consented'. More on this below.

³⁰ See also (Nino 1991b: 289): 'when a free choice intervenes, distributions of benefits and burdens which do not satisfy other criteria of fairness, such as egalitarian ones, can none the less be accepted as fair.'

³¹ Nino (1983: 293) is here picking up on Tony Honore's phrase 'justice according to choice'. See Honore's paper 'Social Justice' from 1962.

³² Generally, a tort is a private wrong, rather than a public wrong (i.e. a crime). And a tort does not have to result in a court case, whereas a crime is usually prosecuted (by the state). The injured party (Billy who was pushed off the slide by his friend Mary and, as a result, broke his leg) might just be satisfied by a sincere apology. Scott Hershovitz (2012: 99) explains: 'we might say that tort empowers those who suffer certain sorts of injuries or invasions to seek remedies from those who brought about those injuries or invasions.' And for Nino the following notion is of interest: anyone who consents to

scope of social relationships recognized as permissible objects of contract could vary greatly, but the validity of such contracts, apart from this, is not dependent in any legal system on whether or not they represent a perfectly equitable distribution of burdens and benefits among the parties; the validity basically depends instead on whether those parties have freely consented to the distribution involved.

Nino (1983: 295) states that consenting to a contractual obligation (within a fair legal system) 'provides at least a prima facie moral justification for enforcing it.' The similarity between criminal punishment and a contract consists in the following: the contractors freely consent to change their legal-normative status. This consent justifies enforcing the terms of the contract – it provides the moral-normative justification to coerce the contracting parties to fulfil what they consented to. Note that a (positive) subjective attitude is neither required for the consent of a contractor (i.e. the intention to fulfil the terms of the contract) nor for the consent of the criminal to liability to punishment.³³

Furthermore, it is not a necessary condition of the latter consent that the offender agree with the legal-normative consequences of law breaking, or even with the legal framework.³⁴ In fact, it is most likely that the offender resents the legal framework as well as the legal-normative consequences of her act and intends to evade their enforcement.

Even if the distribution of burdens and benefits laid down in a contract is not perfectly equitable, the consensual element makes this distribution fair. This distributive feature is also present in the law of torts, in cases of voluntary assumption of risk, e.g. accepting a lift from a drunk driver. Here, 'the burdens that follow from a tort are placed on the consenting injured party.' Thus, just like in contracts and in the law of torts, in punishment we have (Nino 1983: 293) 'fairness according to consent'.

Three conditions for the imposition of punishment

the risks inherent in a tort must usually share some or all of the burdens which result from the tort.

³³ I will say more on this in the Consent chapter, but see also Honderich, (2006: 49f).

³⁴ The legal framework must be justified independently of the offender's consent, according to Nino. More on this below.

According to Nino (1983: 299), a penalty can only be imposed if certain requirements are met: 1. 'the person punished must have been capable of preventing the act to which the liability is attached' and 2. 'the individual must have performed the act with knowledge of its relevant factual properties.' and 3. 'he must have known that the undertaking of a liability to suffer punishment was a necessary consequence of such an act. This obviously implies that one must have knowledge of the law, and it also proscribes the imposition of retroactive criminal laws.'

Nino calls this basic attitude which is required before the imposition of a penalty: 'assumption to punishment'. The phrasing of the first requirement is a little unfortunate. Nino seems to suggest that an individual should have been able to interfere (i.e. prevent the act) with her own actions as if she were a third person. But it is clear from other passages that the first requirement only stipulates the existence of an alternative course of action – obviously one which is viable, or what I have earlier called a 'live option'. Note that often we are faced with several live options. Having had the option of keeping the law allows the state to presume the voluntariness of the act in question.³⁵

What Nino is trying to say in the first requirement above is that the criminal must have freely chosen to perform the act – it was not accidental, the agent was not intoxicated, nor coerced, etc., into acting in this way. This establishes the voluntariness of the act.

The second requirement stipulates that the offender must have performed the act with the knowledge that the proposed act is classed as a crime. Note that in his DPhil thesis Nino's (1976: 117) second requirement reads: 'he must have consented to perform the act which involves a liability to suffer punishment'.³⁶ Throughout his DPhil thesis Nino talks about offenders consenting to perform the prohibited act. Nino must have realised, by 1983, that this is a conceptual error. The criminal cannot be said to consent to the crime, because it is not something one can consent to. Crime is, by

³⁵ Similarly Michael Corrado (1994: 1557): 'there is indeed a voluntary act requirement, and . . . the essence of it is that the actor must have been able to avoid choosing to break the law. She must have been able to control her choice.'

³⁶ Conditions one and three in his DPhil thesis are, apart from some minor stylistic variations, equivalent to the respective conditions in the 1983 paper.

definition, a wrongful act, and consent is neither required nor effective in this context. I will say more on this in the chapter on the Explicit Denial Objection.

The third requirement is about knowledge: the criminal must be aware that certain legal-normative consequences necessarily follow from performing the proscribed act. Children under a certain age, for example, are not considered to be culpable. We can derive the following explanation for this from Nino's theory: children (apart from other reasons) are not culpable because they cannot be said to be (fully) aware of the legal-normative consequences of their actions. Therefore, they cannot be said to consent to the legal-normative consequences of their acts.

Strict liability offences and criminal negligence

The three requirements above do not sit well with the idea of strict liability offences and with the idea of criminal negligence. Nino mentions these issues only in passing in the 1983 paper and similarly in *The Ethics of Human Rights* (1991b), but he does refer the reader back to his PhD thesis. In the former this may have to do with the strictures of a journal article, in the latter this may have to do with the focus of Nino's topic.

In offences of strict liability the wrong-doing is unintentional and individuals may have done everything that can reasonably be expected to avoid committing such an offence. Jules Coleman describes the unfairness of strict liability (2010: 10): 'Individuals who are free from blame and who are justified in what they have done may nevertheless be required to shoulder the costs their activities impose on others.'

Nino gives the following example in his DPhil thesis (1976: 113/6):

A person who sells adulterated milk knowing that strict liability attaches to the selling of adulterated milk does not consent thereby to a liability to punishment for selling adulterated milk if he thinks that the milk is not adulterated. He may indeed know that punishment is a possible or probable consequence of his action, and this may justify the inference that he consents to run the risk of being held liable in punishment, but from this consent nothing whatever follows about his consent to the liability to punishment itself.

If the agent is aware that the law creates such offences, she can be said to consent to a risk of being held liable, but not to the liability to punishment. Since the principle of assumption of risk does not justify the imposition of punishment in the context of crime, it follows that this also applies to what are known as strict liability offences.

However, Nino also writes (*ibidem*): 'a person, who, for instance, commits without knowing an offence of strict liability, being aware that the law creates this sort of offence and that, consequently, a liability to punishment may be a possible consequence of his act, does not necessarily consent to assume that liability.' The important phrase in this passage is 'not necessarily'. It suggests that under certain circumstances (when?), that person might be said to consent to assume a liability to punishment.

Nino's vagueness in this context is not satisfactory, but I don't think it threatens the core of his theory. After all, he is concerned with giving a justification for criminal punishment.

What about criminal negligence? Here the agent neither consents to produce harm nor to undertake a risk from which some harm might ensue (1976: 203). Nino writes (1976: 120): 'my own justification calls for a particular account of negligence and possibly for a partial rejection of it as a basis of criminal responsibility.' Nino states (1976: 202): 'I would like to distinguish between different cases of negligence and to argue that there is no objection in principle to punishing some of them.'

Nino distinguishes between acting in a way which may be described as creating a specific danger and between (1976: 204) 'adopting and maintaining a practice, habit or way of acting knowing their generically dangerous³⁷ character.'

Nino gives this example for creating a specific danger (*ibidem*):

³⁷ I will adapt Nino's distinction of negligent behaviour in my discussion of ignorance of the law.

a driver who has already in front of his car a passer-by, and while still able to avoid injuring him by slowing his car down, he presses on intending to adopt, instead, the risky procedure of circumventing the obstacle. In this [last] situation the agent consents to generate an imminent [sic] and specific danger even though he by no means consents to harming the victim.

The following illustrates a generically dangerous activity (1976: 203f.):

A man who drives at excessive speed in heavy traffic is normally aware that his driving is risky, but he may not foresee that at some particular moment a person will attempt to cross the road in front of his [204] car and that, possibly, he will not be able to stop his car.

In the first example the agent creates a specific danger. In the second example the agent creates a generic risk (1976: 204) 'which could materialize in multiple and foreseeable ways.' Although Nino does not say so, he seems to suggest that the former case might warrant a lesser punishment (or perhaps no punishment?) compared to the latter case. Nino talks of gradations of punishment between negligent behaviour. He explains (*ibidem*):

I submit that what can be ascribed to the agent in a crime of negligence is not, of course, the production of the resulting harm, not even the generation of a concrete risk on a particular occasion, but the conscious performance to which he has consented of an activity, practice or habit which is generically risky. What the individual has consented is [sic], let us say, the negligence itself.

The idea of 'consenting to negligence itself' is a little mysterious. But J.L. Mackie may shed some light on the issue - Nino says that his account of negligence does not differ much from Mackie's. Mackie (1977: 184) states that if the agent 'is only vaguely and generally aware that harm of a certain sort could result from his carelessness, so that he knows that he is being negligent in that respect, it would be more accurate to say that his negligence itself is obliquely intended, but not its results.' For my interpretation of Nino I take this to mean: knowing that one is acting negligently is to consent to negligence itself.

It is not clear to me why one should treat creating a particular danger differently from acting in a generically dangerous way, if both result in harm. I also suspect that this distinction is prone to collapse. If a driver does not slow down, when a passer-by crosses the road, then her activity is generically risky, regardless of what she does next.

To sum up, what Nino says about strict liability and criminal negligence is not convincing. Both of these notions are notoriously problematic for legal theorists and Nino is no exception. I suggest we bracket these issues and concentrate on the core of Nino's theory.

The burdens of compliance with the law

If we want to ascertain whether the individual's 'assumption to punishment' is freely chosen, we need to look at the consequences of the alternative choice (i.e. compliance with the law). According to Nino (1983: 303) we must apply the following principle:

a liability, burden or obligation can only be justified on the basis of the consent of the agent when the alternative course of action open to him either does not involve any liability, burden or obligation, or, if it does, those consequences can be justified, without recourse to the fact that the individual has chosen this alternative. The idea behind this principle is, obviously, that the choice of a certain action is not free when the alternative one implies relinquishing rights that the agent would otherwise enjoy; this is not the case when the burdens attached to the alternative action are burdens that the individual ought to assume, whether he consents to them or not.

The choice to assume the liability to punishment is only free, if the alternative (i.e. keeping the law) either carries no burdens for the agent, or, if there are burdens, these are grounded independently of the agent's choice to comply with the law, or if the alternative action does not involve relinquishing recognised rights.

For Nino there are burdens which the agent 'ought to assume'; these are presumably the burdens which are part of living in a liberal society (with a fair legal framework):

e.g. respecting the rights of others. Nino's examples (1983: 304) are that we have an obligation not to kill, steal or rape. But we, presumably, have many more such moral obligations and the criminal law, on the whole, tends to track these moral obligations.³⁸

We could imagine a society where some are starving and others have plenty, and in such a society complying with the rules would be onerous for the starving. However, in our liberal societies, which are not wholly just³⁹, but which aim at justice, complying with the rules is normally easier and within the capacity of most individuals than assuming liability to criminal punishment. Hart (1997: 171f.) writes: 'What such rules require are either forbearances, or actions which are simple in the sense that no special skill or intellect is required for their performance. Moral obligations, like most legal obligations, are within the capacity of any normal adult.'

I will give an example to illustrate this point. Caring for one's children can be seen as a burden, but a burden which one ought to assume – it is a moral obligation which one acquires by bringing a child into the world, and most people have the capacity to fulfil this obligation. Failure to care for one's children could result in the children being taken away by the state and the parents might be prosecuted for child neglect. Thus, to care for one's children would be a 'just' requirement of the state (reflecting our moral obligation), because a breach of this requirement would jeopardise the rights of the children. And secondly, this particular burden does not involve (Nino 1983: 303) 'relinquishing rights that the agent (i.e. the parent) would otherwise enjoy'.

Choosing to comply with a law does not confer consent – and by implication justification – onto that law; the justification for a law must be independent of the choice of the individual. Such an independent justification also grounds the penalties which are attached to non-compliance (Nino 1983: 305).

This is similar in the context of conscription. Nino writes (1983: 304):

³⁸ See also Hart (1997: 171): 'In all communities there is a partial overlap in content between legal and moral obligation'.

³⁹ Presumably because of human fallibility.

If conscription and the specific duties and burdens that it involves (as opposed to the penalties attached to the violation of these duties) are at all justifiable, they must be justified on grounds other than the consent of the individual. This justification is, in its turn, necessary for justifying the penalties attached to the evasion of conscription and the violation of the military duties, in addition to the requirement that the agent had consented to make himself liable to those penalties.

The would-be criminal has to accept it as a *brute fact* that one ought not to kill, rape or steal; it is justified independently of the criminal's consent to liability to punishment. If the legal framework is just, then its prescriptions are justified, and they are justified independently of the consent/dissent of any offender. The prohibitions of the law reflect (Nino 1983: 303) 'burdens that the individual ought to assume, whether he consents to them or not.'

Of course, sometimes, the prohibitions of the law may reflect burdens, which at a later date, are deemed to be unjust. This then (ideally) results in a change of the law. For example, homosexual acts between consenting adults used to be against the law, but not anymore. I will bracket this problem, because a fair legal system (in a fair society) has mechanisms in place to adapt to changing attitudes in society. Furthermore, this is not a problem which is specific to Nino's theory, but which plagues all legal systems which are designed and administered by (fallible) humans.

A fair legal framework

We have the institution of punishment in order to protect the rights of individuals. Violating the rights of others causes harm in society. In Nino's theory of punishment it is the 'fairness' of the legal framework (reflecting our moral obligations), which obviously incorporates the institution of punishment, combined with the consent (to the loss of immunity from punishment) of the offender, which justifies punishing people. The fairness of the legal system seems to be a necessary (background) condition, whereas the consent to the loss of immunity gives the state a licence which would justify the imposition of a particular act of punishment.

If the legal system were not fair, the punishment – even if based on the consent to assume liability to punishment – would not be fair either. This is a principle which Nino adopts from his principal supervisor Tony Honoré (1962: 94), who writes that the offender's choice is not 'conclusive of the fairness of the punishment. Despite the fact that the offender has chosen to act as he did, the infliction of punishment may not be fair because the rule prescribing the punishment may itself not be fair (...).'

Interestingly, Honoré (1962: 94) does not allow the offender to complain about unfair punishments deriving from unfair rules. 'The most we can say is that the offender who has had a fair choice is not entitled to criticise the punishment as unfair so far as he personally is concerned.' This means that for Honoré the offender's action cannot make breaking an unfair law 'right'. She is not entitled to criticise the punishment as unfair, *because* of her choice.⁴⁰

Nino's position, presumably, amounts to this: it may well be that there are some unfair laws, but, in spite of this unfairness, the criminal can, by consenting to assume liability to punishment, be justifiably punished. After all, she had a fair choice to keep the law. However, if the legal framework as a whole were unfair, then 'criminals' could presumably criticise their punishment (and the legal system) as unfair.

The justification for the institution of punishment (and its rules) is separate from the justification for the distribution of punishment (i.e. the question: Who gets punished?). This allows us to distinguish fair rules from fair distribution of punishment. Although, the distribution of punishment rests on the premise that the institution of punishment and its rules are fair.

In his 'Consensual Theory of Punishment' Nino does not elaborate on the fairness of the legal framework as a whole or how it could come about. Rather, he intermittently states principles which he takes to be part of a fair legal framework and (most of) these principles obtain in existing (liberal) legal systems: 1. Laws must not be retroactive. 2. Penal laws (Nino 1983: 302f.) 'should not be, for instance,

⁴⁰ An exception to this would be instances of civil disobedience, where the object of committing an illegal act is to highlight the unfairness of a particular law, rather than gaining a prohibited advantage, which is what criminals normally attempt to do.

discriminatory or should not proscribe actions that people have the moral right to do'. 3. People must not be punished for something over which they have no control, e.g. the colour of their skin. 4. A law which punishes the individual for whatever choice he makes (i.e. the state must not penalise both an act and its omission) is unjust (Nino 1983: 303). Because in both instances (penalties based on skin colour and penalties based on the commission as well as the omission of an act), we cannot ascribe voluntariness to the person being punished. 5. the distribution of burdens and benefits within a society must be fair (Nino 1983: 294). This statement by Nino needs to be qualified. He presumably only means distributions which are effected within the legal system (or by the state). An unequal distribution would be permissible, if the affected individual consents to it – as in the case of punishment, or in contracts. 6. Nino also invokes the Kantian principle that individuals must not be used merely as means to an end. 7. Compliance with the law must not be too difficult or costly (point 4. in my list is probably a particular instance of this principle).

The society and its legal framework is conceived as liberal by Nino (1984b: 112): 'Only the circumstance that the act at stake impedes the choice or materialization of plans of life of people other than the agent grounds the power to punish him within the framework of a liberal society.'

Nino writes that (1983: 302) 'the justification of particular distributions based on the free choices of the parties presupposes the fairness of the legal framework within which those choices are made.' And Nino (1983: 302, FN 20) explains in a footnote: 'This presupposition [i.e. the fairness of the legal framework] might create some difficulties for those who seek to justify the fairness of the legal framework itself on the basis of consent.' This means that, for Nino, consenting to a legal framework is neither a necessary nor a sufficient condition for its fairness; i.e. it is not necessary for the offender or for the law-abiding to consent (or to have consented) to the legal framework in order for it to be fair.

The fair legal framework reflects the moral obligations of individuals. And the justification for the moral obligations which the offender violates (Nino 1983: 305) 'may be either consensual or independent of the consent of the people subject to

them'.⁴¹ The fairness of the legal framework here seems to mean agreement with widely accepted legal (and moral) principles in liberal states.

Nino (1983: 305) states that his thesis

does not involve the hypotheses of a social contract in any of the varieties defended by political philosophers. It does not rely on an explicit or implicit acceptance by the citizens of the criminal laws imposing obligations or stipulating penalties for non-compliance. It does not assert that every case of punishment is like the case of the punishment of the volunteer who deserts, consequently violating obligations he has previously voluntarily assumed. The grounds on which the obligations that the offender violates can be justified are irrelevant to this thesis.

I suspect that Nino's language in the last sentence is hyperbolic. The grounds for the obligations which the offender violates *are* relevant for Nino's thesis. They enter his theory through the fair legal framework which Nino presupposes.

The grounds for the obligation, say, not to kill or not to torture, are not decisive for the imposition of punishment in Nino's theory, because these grounds (and the whole of the legal framework) are justified independently of the actions of the offender and are taken to be just. We have an obligation – a *moral* obligation – not to kill and not to torture, regardless of whether we consent to it (and/or to the legal-normative consequences of wrong-doing) or not. This proviso (i.e. the independent justification of the legal framework) would be a necessary condition for the notion of punishment. But being independently justified, as a purely formal principle, could lead to injustice. For example, the obligations which Nazi laws impose could be justified independently of the consent/dissent of the violator. They could be justified through the racial ideology adopted by the Nazis. For this reason Nino requires a 'fair' legal framework.⁴² Furthermore, the idea of a fair legal framework (presupposes that the allocation of advantages and burdens in society prior to lawbreaking is also fair).

⁴¹ See also Hart (1997: 172): Moral and legal rules of obligation and duty 'are alike in that they are conceived as binding independently of the consent of the individual bound'.

⁴² David Wasserman (1987: 377) misinterprets Nino on this point: 'Nino treats the voluntary offender as waiving any objection to the legally prescribed consequences of his actions, a waiver that justifies

Starting with Nino's three liberal moral principles might be a way of arriving at a constitution and setting up a political community. But how do we proceed afterwards, when it comes to making decisions? And, more importantly, what guides us during the setting-up process? What are the right moral principles and how should they be reflected in the constitution and in the make-up of the polity? Nino's answer is that Deliberative Democracy is most likely to deliver reliable answers to these questions. He (1996a: 107) states that his conception of Deliberative Democracy:

views these two spheres [politics and morality] as intertwined and locates the value of democracy in the moralization of people's preferences. For me, the value of democracy is of an epistemic nature with regard to social morality. I claim that if certain strictures are met, democracy is the most reliable procedure for obtaining access to the knowledge of moral principles.

For Nino the deliberative process has epistemic value. We find moral reason through moral discourse, provided that certain conditions are observed. The deliberative process must be inclusive, open, and non-coercive. We must treat others as free and equal. This means that we can arrive at a fair legal framework through deliberation about the state and about the fair society.

What primarily justifies the imposition of punishment is the choice of the offender. Nino (1983: 305) states that the focus of this thesis is on the choice to commit an offence. An individual can only incur legal-normative obligations or liabilities through an expression of consent. But one background condition must be fulfilled: the legal framework must be fair.

Summary:

In this chapter I have given a preliminary exegesis of Nino's Consensual Theory of Punishment. The default position for the law-abiding is immunity from punishment.

the imposition of these consequences provided they serve to minimize aggregate social harm.(FN) The offender, on this account, consents to being used as a means to achieving greater overall utility.' Nino's position differs from this, because the offender, through his action, does not agree to the institution of punishment, nor to a particular purpose of the institution (i.e. to minimise social harm). Nino stresses that the grounds for the legal framework are independent of the grounds for punishing people (i.e. consent to loss of immunity to punishment).

The offender, by performing a proscribed act, consents to a loss of immunity from punishment. I have also given an explication of the tripartite distinction of consequences of an act: factual, legal-normative and moral-normative. The offender's consent to liability to punishment (i.e. the legal-normative consequence of crime) at the same time brings about moral-normative consequences for the state. It is now permissible to punish. But one background condition must obtain: the legal framework must be fair.

3: The Nature of Consent

In the previous chapters we have seen that consent is the key notion for Nino's theory of punishment. Some writers (Boonin, Scanlon, Honderich) have engaged with Nino's theory of punishment, but there is no in-depth treatment of Nino's conception of consent in crime in the (Anglo-American) literature. At first glance Carlos Nino's claim that criminals consent to something when they commit a crime may appear to be implausible. After all, crime is by nature a breaking of the rules. Why would a criminal want to consent to anything?

My primary aim here is to lay out how everyday consent works, and how this applies to Nino's conception of the offender's consent. I begin with distinguishing various types of consent, and then briefly set out how Nino understands the offender's consent in the context of crime. Next, I look at the nature of consent as we encounter it in everyday situations. Consent does not have to be explicit – it is often implied. Secondly, I argue that a positive attitude towards the object of consent and/or its foreseen consequences is not a necessary condition for valid consent. Thirdly, I explain that sometimes my choice (and the consent which is present when I declare my choice) comes as a package: I may desire the operation, but not the materialisation of any risks which are involved in the operation. After the general discussion of consent I contrast the features I have identified in everyday consent with Nino's conception of consent in crime.

Types of Consent

Let us start with a definition of consent, from a venerable source (*Bouvier's Dictionary of Law*, 1856), to give us some initial guidance: 'Consent is either express or implied. Express, when it is given viva voce, or in writing; implied, when it is manifested by signs, actions, or facts, or by inaction or silence, which raise a presumption that the consent has been given.'

In spite of its age Bouvier's definition can still serve as a good working definition of consent. The idea of express consent (in writing or verbal) is easily grasped, and I will only touch upon it when it comes to contracts – it is the notion of implied consent which is much more important here.

I will distinguish three types of implied consent: 1. implied consent which is based on an operative convention (i.e. tacit consent); 2. implied consent where there is no operative convention; 3. 'direct consent'⁴³ to the legal-normative consequences of a proscribed act.

Tacit Consent

Let us define the term 'tacit consent'.⁴⁴ In ordinary usage 'to give consent'⁴⁵ means to agree to something and/or to give permission. The adjective 'tacit' means silent.⁴⁶ Strictly speaking, only inaction coupled with lack of express dissent (saying 'No!') would count as tacit consent.

Consent can come about through either an action or an omission. Keith Hyams (2005: 5) writes:

Consent is an act, an intentionally performed behaviour which may take the form of either an action or an omission. Examples of consent by action include the signing of a contract and the uttering of the words, 'I do', in a marriage ceremony. An example of consent by omission is consenting to a chairperson's proposal in a meeting by not speaking up when asked by the chairperson whether there are any objections.

Thus, in consent by omission, we can still characterise the manifestation of consent as a/n (negative) action, the doing of something, namely, not speaking up.⁴⁷ Not speaking up in this context has an observable performative character. Hyam's example is a form of tacit consent.

Simmons (1979: 80) states: 'Consent is called tacit when it is given by remaining silent and inactive'. However, other commentators (Lloyd Thomas 1995, Archard

⁴³ The term is my own and I will elaborate on this below.

⁴⁴ Furner (2010: 54), relying on the 19th century German legal scholar Friedrich Karl von Savigny, explains that tacit consent 'has its roots in the Roman law concept of a "tacit declaration of will".'

⁴⁵ Latin *consentire*: to feel together; to agree.

⁴⁶ Latin *tacitus*: silent; *tacere*: to be silent.

⁴⁷ See A. John Simmons (1976: 282): 'I have already suggested that tacit consent should not be taken by the consent theorist to be an "unexpressed" consent; calling consent tacit on my account specifies its

1998, Hyams 2005) take a broader view of tacit consent.⁴⁸ According to this broader view tacit consent requires that there exists an operative convention which is linked to performing a particular act (and this conception includes the paradigm of remaining silent in response to an invitation to object – consent *ex silentio*).

What is meant by an 'operative convention'? It is well known and understood, by all concerned, that only certain actions (or inactions) count as consent.⁴⁹ For example, putting down one's chips on the roulette table is taken to be placing a bet. Getting into a cab and stating a destination is taken to mean that one is hiring the cab. Raising one's hand at an auction is taken to be a bid for the painting. However, pulling up your trousers during an auction, for example, does not mean that you want to bid for/buy the painting – there is no such convention. According to this broad conception, one can tacitly consent either *ex actionem* or *ex silentio*.⁵⁰

Keith Hyams (2005: 17) writes: 'If an agent doesn't know that her act is specified as an act of consent, or if she doesn't know to what change her act is specified as an act of consent, then her act will not qualify as a genuine act of consent.' This is particularly important in tacit consent (one needs to be aware of the convention), but it applies equally to express consent, as well as to non-conventional implied consent (NIC from hereon).

Non-Conventional Implied Consent

We can consent through certain actions (or inactions), even though there is no operative convention in place (NIC) – and this often happens in private. Here, consent is not expressly stated and it usually concerns friends, family or lovers. Each party knows, through familiarity with each other and through past behaviour, what kind of permission is sought and whether consent is given. But if the action in question is habitually performed, and the signs of asking permission and giving consent are constant, private implied consent could be said to approximate 'tacit consent'. One

mode of expression, not its lack of expression.' See also Archard (1998: 4).

⁴⁸ Note that Locke also takes the broader view (e.g. travelling on the highway, residing at an inn), but without stressing the importance of an operative convention for tacit consent to come about; similarly Boonin (2008). And it appears that Simmons also adopts this broader view in a later paper (1998).

⁴⁹ See Lloyd Thomas (1995: 39; also Archard (1998: 8-9.)

⁵⁰ Some commentators wrongly believe that Nino is operating with the notion of tacit consent: Boonin (2008) and Finkelstein (2002). For a discussion of Boonin see Imbrisevic (2010b).

might claim that there is something like an operative convention in place, but it is not publicly known or understood outside of the group of agents (e.g., moving the soup terrine next to uncle Harry, the soup lover, may mean: *Uncle Harry, you may finish the soup.*).

However, familiarity between the parties is not always necessary. There may also be signs of implied consent between strangers. Sitting by the window on a train, without putting one's belongings on the adjacent seat may mean: *I am happy to have company.* Whereas putting one's possessions down on the adjacent seat might be a sign of non-consent: *I don't want company/I don't feel like chatting.* Note that the lack of certainty in this example arises because there is no operative convention in place. But in other instances, because of the type of situation we are in, there will be a greater degree of certainty. For example, rolling up my sleeve will be taken as a sign of NIC by the doctor who is preparing an injection. The situation in the doctor's office has a certain focus, which is lacking in my train example.

Arthur Ripstein (1999: 211) writes:

The publicity of consent does not mean that it is conventional. Although people will for the most part use conventional signs to indicate consent, the underlying idea of publicity has room for the possibility of parties reaching their own understandings in unconventional but publicly accessible ways. Consent is essentially communicative; as such it need not conform to any *particular* ritual in order to be expressed or understood. But that is just to say that there are many public ways in which consent or nonconsent can be expressed.⁵¹

There is, of course, a danger of misinterpreting the signs of NIC, which is much greater than in express or in tacit consent. However, even contractors do sometimes disagree about what was consented to in a written contract (i.e. express consent) and a foreigner to Britain, following an invitation to go to the pub, may not be aware that she is supposed to buy the next round (tacit consent).

⁵¹ Note that for 'publicity' we need to read 'observability'.

Direct Consent⁵²

Normally consent goes via the object of consent (that to which one consents) to its necessary consequences. In crime the consent is 'direct' because it does not go via the object of consent (here: the proscribed act) to the necessary consequences. Instead, the wrong-doer consents, at the point of committing a crime, directly to the legal-normative consequences.

I propose to define direct consent thus:

Direct consent arises from performing a voluntary action in the knowledge that a necessary normative consequence of the action is the undertaking of a liability (here: to punishment); and the nature of the action (here: crime) is such that no operative convention can be in place, which would allow for tacit consent (and/or which would allow for express dissent).

In his DPhil thesis (1976: 117) Nino held the view that the offender consents to perform the act (i.e. the crime) which involves the liability to suffer punishment. However, by the publication of 'A Consensual Theory of Punishment' (1983) Nino had changed his views. Nino must have realised that the criminal cannot be said to consent to the crime, because it is not something one can consent to. Crime is, by definition, a wrongful act, and consent is neither required nor effective in this context. A criminal may utter the words: *I hereby consent to the crime I am about to commit!* But this would be infelicitous – or a category mistake.

When does the offender's consent come about?

For Nino the offender foresees that legal-normative consequences necessarily follow from committing a crime. And this is most clearly expressed in *The Ethics of Human Rights* (Nino 1991: 280): 'This foresight of a consequence as the necessary outcome of a voluntary act is what I call "consent".'

Nino (1983: 299) writes that a penalty can only be imposed if certain requirements are met: (1) 'the person punished must have been capable of preventing the act to which

⁵² I have elaborated on the notion of 'direct consent' in the Spanish journal *Theoria* (Imbrisevic 2010a).

the liability is attached' and (2) 'the individual must have performed the act with knowledge of its relevant factual properties.' and (3) 'he must have known that the undertaking of a liability to suffer punishment was a necessary consequence of such an act.

The first requirement stipulates the existence of an alternative course of action – obviously one which is viable (a 'live option'). Furthermore, the criminal must have freely chosen to perform the act – it was not accidental, the agent was not intoxicated, nor coerced, etc., into acting in this way. This establishes the voluntariness of the act.

The second requirement stipulates that the offender must have performed the act with the knowledge that the proposed act is classed as a crime.

The third requirement is about a change of normative status: the criminal must be aware that certain legal-normative consequences necessarily follow from performing the proscribed act. The legal-normative consequence of committing a crime is loss of immunity from punishment (Nino 1983: 297). Before an agent commits an illegal act she is immune from punishment – this is the default position.

Children under a certain age, for example, are not considered to be culpable. We can derive the following explanation for this from Nino's theory: children (apart from other reasons) are not culpable because they cannot be said to be (fully) aware of the legal-normative consequences of their actions. Consequently, they cannot be said to consent to the legal-normative consequences of their acts.

For Nino we have the institution of punishment in order to reduce rights violations, because they normally result in harm to others. By doing so we safeguard and increase the autonomy of individuals. This (autonomy of the person) is an important moral principle for Nino, which guides the actions of the state. But consent may sometimes justify to override the protection which the autonomy of persons provides. Then another moral principle is being invoked: the dignity of the person. Because this principle (Nino 1996a: 52) 'permits one to take into account deliberate decisions or acts of individuals as a valid sufficient basis for obligations, liabilities, and loss of rights'.

The offender's consent to a loss of immunity from punishment makes it morally permissible for the state to enforce the legal-normative consequence of the act. The consent to the legal-normative consequence (liability to punishment), at the same time, brings about a moral-normative consequence for the state: it would be permissible to punish the offender.

It is the consent to the legal-normative consequences of committing a crime which is central for Nino (1991: 280): 'This foresight of a consequence as the necessary outcome of a voluntary act is what I call 'consent'.'

The Capacity to Consent

John Kleinig (1982: 94) writes that the etymology of consent (Latin *consentire*: to feel together) might suggest that to consent is primarily an attitude, a psychological state. And some authors⁵³ do indeed subscribe to the view that having a positive attitude is the most important feature in consent. However, I hope to show that another view better captures what happens in consent: the defining feature of consent is its (observable) performative character rather than any underlying psychological attitude.⁵⁴

Frank Snare (1975: 5) suggests a plausible explanation why some writers stress the importance of the right attitude: 'I suspect the prominence of invalidating mental conditions for most consent-acts does much to account for the confusion between consent-acts and consent-attitudes.' There are traditionally certain mental invalidating conditions for consent in contracts. They apply when minors are involved, or the mentally handicapped, or people who are clearly drunk, but also in instances of coercion, or when there is a serious informational deficiency.⁵⁵ Such putative consenters may all have a positive attitude to the object of consent (except when coerced), they may wish to consent wholeheartedly, but this is irrelevant, if any of the

⁵³ Stadden (1907); Hurd (1996); Alexander (1996).

⁵⁴ See Joseph Raz (1986: 81), David Archard (1998: 4), Joel Feinberg ('Harm to Self', 1986: 173) and Alan Wertheimer (2003: 144).

⁵⁵ See also Hyams (2005: 8): 'What is universally agreed is that there are certain conditions, such as coercion, mental incompetence, and certain forms of informational deficiency, which prevent consent from bringing about a change in a prescriptive system.'

invalidating conditions pertain. Also, not knowing that one is taken to be consenting, should invalidate consent.

It is not important to have a particular (positive) attitude towards the object of consent, nor to its legal-normative consequences, i.e. consenting wholeheartedly and/or sincerely. I could, for example, consent reluctantly or deceitfully (intending to flout what I consented to). But having the capacity to consent (i.e. being a competent adult, not being intoxicated, not being coerced, etc.) is a necessary condition for valid consent. And this requirement is reflected in the law by the invalidating mental conditions for valid consent.

The deficiency is not that the individual could not form a positive attitude towards the object of consent, rather, it is that the capacity to consent as such was impaired (say, through intoxication) – even though the individual, in her drunken state, might have been convinced that she wished to consent wholeheartedly.

The Essence of Consenting

In situations of consent we normally⁵⁶ have at least two parties: A requests permission from B to perform action X. And B, by granting permission, by agreeing etc, gives their consent. Monica Cowart (2004: 515) writes: 'The essential feature of consenting is the wilful granting of permission to a proposed action of which the individual asked has the right to grant or forbid and for which the requestor does not have the right to do prior to receiving consent.'⁵⁷ Action X either involves B or B's possessions – something is done to B or to B's possessions (e.g. 'May I kiss you?' or 'Can I use your car?') – or it primarily concerns A (e.g. a spouse asking: 'Is it ok if I stay late in the office today?'⁵⁸).⁵⁹ This means that with regard to the proposed action, consent can make it 'morally or legally permissible'. Consent is 'morally transformative', according to Wertheimer (2003: 119f.). But it might also affect the rights and duties of others.

⁵⁶ Nino's conception of 'consent' in crime does not seem to require another party. He concedes that crimes appear to be unilateral acts. But I will argue below that there is some form of co-operation underlying crime, namely between law maker and law breaker.

⁵⁷ See also A.J. Simmons (1979: 76).

⁵⁸ B's consent has a secondary impact on B, because B will now have to prepare dinner without any help, watch the news without any entertaining commentary, etc. Wallerstein (2009: 324) calls this 'the "passive" mode of consent since it does not involve an action on the part of the consenting agent'.

⁵⁹ There is a special case of consent involving minors. I can consent to a teacher disciplining my children. Here, I consent on their behalf, just like a judge would give consent on behalf of a ward of

Third parties may not interfere with the action to which B has consented (Wertheimer, 2003: 120).

This type of consent (granting permission) happens mostly in the private sphere and is not regulated by law. But there is another form of consent, where two or more parties agree to perform a transaction – and this is not primarily about seeking and granting permission. Instead, it is a legal transaction and involves changing the normative status of all concerned. We encounter this form of consent in contracts (say, the sale of a car or the rendering of legal advice for a fee). And contracts are regulated, formally and materially⁶⁰, by law.

Contracts are often based on express consent, but many everyday contracts are implied. The latter type of contracts are based on performing an action (e.g. taking a bottle of wine off the supermarket shelf and handing it to the person at the till; or getting into a cab and stating a destination; or putting down my chips on red at the roulette table). In all of these acts I implicitly consent to a liability: to pay for the wine; to pay the taxi fare at the destination; and to lose my chips if black wins.

Nino (1983: 301) discusses the difference between express and implied consent:

The basic difference is that in the case of explicit consent the voluntary action to which normative consequences are attached is a specific speech act performed with the intention of generating normative consequences as a means to some further end, whereas in the case of implicit consent that action is an act of some other sort performed with the knowledge that certain normative consequences will necessarily follow. Insofar as the action is voluntary and the normative effects are known, the distinctive features mentioned do not seem to have any moral relevance to the justification for enforcing contracts.

For Nino there is no morally relevant difference between express and implied consent. James Furer (2010: 57) agrees: 'In law, the form in which consent is communicated

court.

⁶⁰ Formally: e.g. two witnesses might be required; or the contract might have to be in writing. Materially: e.g. contracts involving crime are invalid.

has no general relation to the extent to which one is bound. Non-verbal acts of consent do not bind a person any more or less than their verbal equivalent.'

However, Tom Bell (2009: 5) holds a different view:

When we turn a sharper eye to consent, however, studying how it works in practice, we see that consent rises and falls by degrees.[FN] We tend to afford expressly consensual transactions more respect than transactions backed by only implied consent, for instance, which we in turn regard as more meaningful than transactions justified by mere hypothetical consent.

However, the decisions of courts do not suggest that there is a qualitative difference between express, implied and hypothetical consent. Bell (2009: 12f.) states himself: 'In tort law, physicians rendering emergency care on unconscious victims routinely win a defense against battery on grounds that the alleged victim *would have* [13] *consented* to treatment *if he or she had been conscious*.' This shows that courts consider hypothetical consent, in such a situation, to be just as potent as express and implied consent. Courts try to establish whether there was (or would have been) consent or not, and whether the consent was in any way impaired (i.e. do any of the mental invalidating conditions apply), but it normally does not matter whether the consent was express or implied (or even hypothetical).

Bell (2009: 21) considers express consent to be 'an ideal standard' and implied and hypothetical consent as 'surrogates'. It may be that, in the genealogy of consent, implied and hypothetical consent developed out of express consent. But there is no reason to think that they are now merely surrogates.

Bell may be right that there is a difference – an ontological difference – between the consent which is either express or implied and between hypothetical consent, because hypothetical consent is a fiction. But, when it comes to distinguishing the notions of implied and express consent, once a court has established that there was consent, implied consent is just as good as express consent. The main difference is that in the latter there is less room for misinterpretation.

Joseph Raz' Account of Consent

Joseph Raz (1986: 81) explains how consent works : 'The core use of "consent" is its use in the performative sense.' He states that consent changes (1.) 'the normative situation of another' and (2.) 'it will do so because it is undertaken with such a belief' and furthermore (3.) 'it will be understood by its observers to be of this character.'

The first condition explains that kissing a person with their consent changes what would otherwise be an instance of battery, and taking another's car without their consent would be theft. The second condition requires that one must believe that one is changing the normative situation of another; one must be aware of what one is apparently doing. If the putative consenter is not aware that a particular act normally counts as consent, or is not aware what exactly the scope of her consent is, then, one cannot claim that (full) consent was given. For example, some foreigners do not know that agreeing to go to the pub in the UK usually means to consent (tacitly) to buy one or more rounds. And the last condition expresses that observers (i.e. mainly the parties who are involved in the consensual act – but also third parties) need to believe that the act changes the normative situation of the consenting parties.

Normally, the act of consenting is observable/manifest so that the performative aspect of consent may succeed (in changing the normative situation of another).⁶¹

'Consenting' (say, to wed another) in front of the mirror, could be seen as a performative act, but it will not succeed as consent because it is not observable in the sense that the audience one wants to address (in order to bring about a change in the normative situation) is not present – think about the future spouse, the priest, the witnesses and the guests in a marriage ceremony. The third condition insures that there is uptake by those who are addressed in the act of consent (or any other observers).⁶²

⁶¹ Furner (2010: 63), referring to the 19th Century German legal scholar Friedrich Karl von Savigny, paraphrases von Savigny (1840, §134: 257ff.): 'A sign of the intention to alter one's legal rights and/or duties is required because, without a sign (whether verbal or non-verbal, positive active or omission), others could not act with one's permission, as they would not know it was given.'

⁶² Furner (2010: 67) writes: 'If one were to signal the intention to alter one's legal rights and/or duties in a way that did not conform to the legal rules for how the signal of such an intention is to be given (e.g., before the appropriate official), the intended legal consequences are not incurred.'

However David Boonin (2008: 166) differs in this respect from Raz: 'to consent to something is to agree to it, and whether or not a person has agreed to something cannot be a function of whether or not other people recognize this.' For Boonin consenting is a function of a person's state of mind. The performative aspect, particularly Raz' third condition, does not seem to be important for him. Boonin gives the example of Larry, who is having a meal in a foreign country, and who leaves a tip for the waiter. But Larry does not know that tipping is not done in this country. Nevertheless, Boonin believes that Larry has consented to tip the waiter. Boonin's error in this example is to equate resolving to do something with consenting. Larry may have resolved (or decided) to leave a tip for the waiter, but he did not succeed in (tacitly) consenting to leave a tip, because there is no such operative convention in that country.

The observers in Raz' third condition are supposed to rely on the consent. We use consent as a tool to make human interaction easier. By consenting, I agree to something, but at the same time I give others assurance that they can rely on my agreement. I freely bind myself to some normative consequences – other people are obviously implied and addressed in this act.⁶³ The purpose of my binding myself is so that others may rely on this, and if the normative consequences are legal in nature, then the state may enforce them. Note that such assurance is not the purpose of the criminal act, nor would it be desirable from the perspective of the wrong-doer.

The Observable Manifestation of Consent

Normally there is a match between an observable expression of consent and between, what would be, the appropriate underlying positive attitude towards the object of consent. But without the observable manifestation (be it express or implied) we could not ascertain that there is such a matching psychological state within the consenting person.

Friedrich von Savigny (1840, §134: 258) states that even if there is a mismatch between the signs of one's will/intention and the actual will/intention, we normally need to rely on the signs: 'Nun beruht aber alle Rechtsordnung gerade auf der

⁶³ This is also the case in unilateral acts of consent, e.g. conveyances of land and declarations of trust. I will come back to this below.

Zuverlässigkeit jener Zeichen, wodurch allein Menschen mit Menschen in eine lebendige Wechselwirkung treten können.⁶⁴

In the context of modern contract law this is also clearly understood by Randy Barnett. Consenting, for Barnett, is to communicate an intention to be legally bound. Barnett (2012: 651f.) writes that the subjective view of contract, as a will theory, has given way to the objective view: 'despite the oft-expressed traditional sentiment that contracts require a "meeting of the minds", the objective approach has largely prevailed. A rigorous commitment to a will theory conflicts unavoidably with the practical need for a system of rules based to a large extent on objectively manifested states of mind.' And Barnett (2012: 652) explains that 'a person's objective manifestations generally *do* reflect her subjective intentions'.

If the validity of contracts were based on the subjective states of minds of the consenters/contractors, rather than on objective manifestations of consent, then dishonourable contractors could use this as a way out of a contract which did not suit them any more.⁶⁵

We expect, assume, hope that there is a match between the outer signs and the inner state, but a positive attitude is neither a necessary nor sufficient condition for giving consent.⁶⁶ However, the observable manifestation of consent is a necessary (and jointly sufficient) condition for valid consent – provided the consenter is aware of what she is (apparently) doing, and provided the consenter is considered to have the capacity to consent. If a member of an Amazonian tribe is attending an auction for the first time, without knowing anything about the proceedings, then their act of raising a hand, because everyone else has been doing so, should not count as consent.⁶⁷

⁶⁴ My translation: 'However all legal systems are based on the reliability of those signs which make it at all possible for people to enter into a fruitful interaction with others.'

⁶⁵ This had been recognised more than 250 years ago by David Hume in the *Enquiry Concerning the Principles of Morals* (1751, M [U].2, SBN 200): 'If the secret direction of the intention, said every man of sense, could invalidate a contract; where is our security?'

⁶⁶ See A. J. Simmons (1976: 276): 'as with promising, one can consent insincerely, but not unintentionally.' Also Archard: 5: 'I do not (...) have to want or to approve of what I consent to. I can consent to P while having no view about P's desirability, or even while disliking the very thought of P.'

⁶⁷ Although it may take some effort to convince the auctioneer that the Amazonian was not aware of the conventions pertaining to auctions.

Equally, consenting to sell one's car, while visibly drunk, constitutes invalid consent.⁶⁸

Consenting with a negative attitude

I can consent reluctantly – and even without hiding my reluctance. For example, a century ago some parents may have agreed reluctantly to the marriage of their pregnant daughter, because she might have been too young, the father of the unborn child might have been deemed unsuitable, etc. Nevertheless, they consented, reluctantly rather than wholeheartedly, because at the time, the status of being an unwed mother was socially unacceptable. The parents did not desire the marriage. Instead, they desired the change in the legal status of their daughter, which their consent to the marriage would bring about.

I can sign a contract without the intention of fulfilling the contract, i.e. without a positive attitude towards my legal obligations (i.e. the normative consequences of the contract). This scenario is not so far-fetched because I might believe that the breach will not be enforced, or that I might get away with it, or I might simply be a fraudster.⁶⁹ Nevertheless, my consent is valid and any breach of contract will be enforced. Claiming that I did not have a positive attitude towards the legal obligations, which I was about to assume when signing the contract, does not (normally) invalidate contracts. Leslie Green (1988: 163) explains: 'If I sit down in a restaurant and order a meal, I consent to pay the listed price. This is so whether or not I give an explicit promise to do so, and even if my intention is to leave before paying.'⁷⁰

When we consent to something, we normally intend (desire) the action and its foreseen consequences to come about. If I lend you my car, I normally want you to use it (i.e. the action in question) and I accept that during this time I will not have use of my car. I suspect that this is the ideal scenario of consent: I intend (desire) both the

⁶⁸ This is so in the English legal system - and I suspect in many others.

⁶⁹ I might have a positive attitude towards signing a contracts insincerely though - because I enjoy deceiving people.

⁷⁰ See also von Savigny (1840: 158) who explains that there can be a declaration of one's will/intention which does not match one's will/intention: 'wenn nämlich Derjenige, welcher Etwas als seinen Willen erklärt heimlich den entgegengesetzten Willen hat.' My translation: 'in cases where someone, who declares something as their will/intention, secretly has the opposite will/intention.'

action and the foreseen consequences. But sometimes there is a disconnect between the action and the consequences. Sometimes we do not intend all of the consequences to come about.

If a patient consents to an operation⁷¹, she intends to get better, but at the same time she accepts the risks involved in the operation. She consents to the foreseen (and necessary) risks involved in the operation, although she does not intend for them to come about. One can consent to an action (operation) and some of its consequences (risk of harm), without intending for any of these negative consequences to materialise. In this example the risks cannot be uncoupled from the operation. Thus, consenting to the operation is also consenting to the possible risks. These risks are normally disclosed to the patient and discussed with the health professionals beforehand – including alternative treatments or not having the treatment or procedure.⁷²

This means that sometimes benefits can only be obtained by consenting to the inherent risks. Kenneth Simons (1987: 229f.) argues:

If I want the beneficial operation, some risks of harm are inevitable. If I have been adequately informed of those risks, my decision to have the operation may be deemed a consent to all of them. My choice is a package; if I prefer this necessary combination of benefits and risks over no operation, then my preference is sufficiently full to be a binding consent.

The Features of Everyday Consent in the Context of Crime

What does my discussion of everyday consent mean for Nino's conception of consent in crime? The consent we encounter in the risky operation is contractual in nature⁷³. Nino (1983: 295) states that consenting to a contractual obligation (within a fair legal system) 'provides at least a *prima facie* moral justification for enforcing it.' The similarity between criminal punishment and a contract consists in the following: the

⁷¹ This is an example which Nino (1991: 272) himself uses.

⁷² See Feinberg ('Harm to Others', 1984: 35): 'One class of harms (in the sense of set-back interests) must certainly be excluded from those that are properly called wrongs, namely those to which the victim has consented. These include harms voluntarily inflicted by the actor upon himself, or the risk of which the actor freely assumed'.

individual freely consents to change her legal-normative status. This consent justifies enforcing the liabilities/obligations which the individual has taken on.

Nino argues that in crime, just like in the risky operation, we encounter such a necessary combination of 'benefits' (the proceeds of crime) and undesired consequences (liability to punishment and risk of actual punishment). It is a package – one cannot be uncoupled from the other.

Nino recognises that this might call into question the voluntariness of the offender's consent, because she would prefer to uncouple the legal-normative consequences - she would prefer not to be threatened. For Nino the objection arises out of Robert Nozick's essay on 'Coercion' (1969). This issue goes beyond consent and requires a discussion of threats and offers, the coerciveness of the law as well as a discussion of the burdens of compliance with the law. Therefore, I will devote a separate chapter to these issues: 'Threats and Offers – Robert Nozick'.

Liability to punishment necessarily follows from committing a crime – it is a foreseen consequence. By performing an illegal act the criminal consents to the foreseen consequences – even if she does not desire them. Her desire is directed at the (proceeds of) crime, but this cannot be achieved without incurring a liability to punishment. Nino writes (1983: 295): 'A person consents to all the consequences that he knows are necessary effects of his voluntary acts'. Actual punishment is only a contingent consequence of crime. Being caught, tried, convicted and punished may or may not come about.

The criminal consents to the necessary normative consequences of crime (liability to punishment), although she will try to evade capture. The attempt to evade capture and ultimately punishment, which is an indication for the lack of a positive attitude to the normative consequences, does not invalidate the consent to assume liability to punishment. This is analogous to contract law and to risky operations. A contractor's reluctance or even unwillingness to perform, rather than her inability to perform (or because of recognised excusing conditions⁷⁴), does not invalidate a contract. In risky

⁷³ Think of part-payment or of private health care.

⁷⁴ E.g. going out of business.

operations the patient does not, normally, desire the risks to materialise, but this does not invalidate her consent to the risks.

The patient consents to the operation and consents to change her legal-normative status, e.g. if the operation is not (wholly) successful then the patient, normally, is not entitled to legal redress. Similarly, the criminal who is harmed by punishment, is normally not entitled to complain nor to legal redress for the harm⁷⁵.

The criminal, by breaking the law, consents to a change of her normative status (now she is liable to punishment). At the same time, and this is something Nino chooses not to stress (although it would strengthen his argument), the criminal also assumes the risk of harm (through punishment). She consents to this risk – which may or may not come about. But she does not intend to be punished; she does not want the risk to be realised.

Thus, what we have in crime is a two-pronged consent: First, the consent to be liable to punishment (this is a legal-normative consequence), and second, the consent to the risk of punishment. Nino only operates with the former but ignores the latter in his theory of punishment. In the second prong of consent (assumption of risk of punishment) there are no legal-normative consequences attached (in Nino's view) – but there could be, for example in tort law. If I accept a lift from a drunk driver, I am assuming a risk, but there are also legal-normative consequences attached to the assumption of this risk: I might not be entitled to (full) legal redress in case of injury. Some or all of the burdens of the tort might be placed on the consenting injured party.

Nino considered assumption of risk to be too weak a principle to justify punishment.⁷⁶ Nino writes (1983: 297; see also 1976: 113/3): 'We might say that a criminal brings the risk of being punished upon himself. This however, provides as little moral justification for actually punishing him as the fact that the volunteer brings upon himself the risk of dying in battle provides a moral justification for killing him in battle.'

⁷⁵ Although there is the possibility of an appeal against the conviction and/or sentence.

⁷⁶ Nino accepts assumption of risk in tort law as a principle which justifies a change of normative status, but note that in tort law it might result in denial of remedy - but this is qualitatively different from punishments.

Note that not every assumption of risk comes with legal-normative consequences attached to it. For example, by being lacklustre in my exam preparations, I run the risk of failing the exam⁷⁷. But there are no legal-normative consequences attached to this assumption of risk – I am not barred from taking the exam, for example. All of this illustrates that Nino, in his theory of punishment, only wants to rely on acts which have legal-normative consequences attached to them. This is one reason why he stresses the parallels to contract law and to tort law.

The patient's consent is directed at three domains: 1. at the operation, and 2. at changing her legal-normative status, e.g. waiving any entitlement to legal redress in case of harm, and 3. the patient consents to run the risk of harm. In crime the offender consents to a change in normative status and to a risk of punishment only (i.e. No. 2 and 3). But, as I have said, Nino does not want to rely on consent to a risk in his theory of punishment.

Does the fact that one type of consent is directed at three domains and the other only at two domains mean that the latter is not a full-bodied form of consent? No – because the grammar of crime does not allow the would-be criminal to consent to crime. Crime is a proscribed act and, therefore, it is not consentable. Furthermore, for Nino it is the loss of immunity from punishment (i.e. 2.) which makes it permissible to punish. And this is what does the work in Nino's theory.

The co-operative nature of consent

I will now turn to some other important differences between Nino's conception of consent in crime and consent in non-criminal contexts. It appears that the co-operative nature of consent, which we find in non-criminal contexts (i.e. two or more parties are negotiating whether an action may be performed, or what the terms of a contract shall be), is not present in crime. The action in crime, say theft, is not up for negotiation. It is a unilateral act.

In response to this difference Nino (1983: 300) writes:

⁷⁷ My example.

It could further be said that the consent involved in the commission of an offense is merely a unilateral manifestation of will rather than a bilateral agreement, as in the case of contracts. However, most legal systems attach normative consequences to unilateral acts involving consent (notable examples of these in English law are conveyances of land and declarations of trust), and the doctrine of assumption of risk by the injured party in the law of torts is sometimes applicable to unilateral acts.

Thus, the apparent unilateral nature of crime does not weaken Nino's position. But note, that these examples of unilateral acts in English law are addressed to others, so that they may rely on the consent which is manifested in them.

However, I would like to suggest that one could see an underlying (negative) co-operative structure in the criminal's consent to assume liability to punishment. Society is communicating the following to its members:

(S1): Certain acts (i.e. crimes) are prohibited – they are wrongful acts.

(S2): If you perform these acts, in spite of the prohibition, you will be liable to punishment.

(S3): The liability to punishment is necessarily linked to committing crimes – it cannot be uncoupled. It is a necessary normative consequence of performing certain acts.

With regard to (S2) there is an interaction between the criminal and society: committing a crime, voluntarily and knowingly, counts as assuming (consenting to) liability to punishment. We could perhaps characterise this as a negative form of co-operation.

This is analogous to contracts which rely on implied consent. Here too, a negotiation, whether an act may be performed or not, is absent. What we have instead is a standing offer (permission) to perform certain acts, on the understanding that taking up the

offer involves changing one's legal-normative status. I am now liable to pay for goods or services. By getting into a cab and stating a destination I consent to pay the fare; by taking an item off the supermarket shelf and walking towards the exit, I consent to hand over some money at the till. There is no negotiation we just take/order what we want.

Similarly, in the context of crime we have a standing offer (prohibition), in the form of a threat, by society that the performance of certain acts involves changing one's legal-normative status. By committing a crime I am liable to punishment. Both types of act rely on a prior offer (permission and prohibition respectively) in order to come about. The absence of a live negotiation does not mean that entering into implied contracts or committing a crime are wholly unilateral acts.

The Extent of the Analogy to Contracts

Let us see how far we can push Nino's analogy to contracts. Alan Wertheimer (1996: 39f.) explains that on the standard contemporary view a valid contract requires: (1) capacity of the parties; (2) a manifestation of their assent⁷⁸; (3) consideration. Thus, if we had competent adults who sign a contract, the first two requirements would be fulfilled. A consideration is that which flows (Wertheimer 1996: 40) 'between the parties to establish that an agreement or exchange has occurred (rather than a one-sided promise)' – it could be as little as a peppercorn or a penny.

Are these requirements mirrored in crime? The criminal law usually requires capacity. For Nino committing a crime is at the same time the manifestation of consent (to loss of immunity from punishment). By doing so the criminal consents to the 'terms of the bargain'. The (negative) consent of the other party involved here (i.e. society) is manifested in the declaration that committing a crime entails taking on certain burdens (liability to punishment).

One could not claim that society is 'offering' crime, because it is a proscribed act. Perhaps it would be better to characterise it as a 'negative offer': *If you decide to*

⁷⁸ I take it that Wertheimer means consent here. The difference is that assent implies a certain enthusiasm for that which one is agreeing to, whereas consent is a neutral term - it can be given reluctantly.

commit a proscribed act, you also consent to the burdens which necessarily follow from crime – liability to punishment.

Society's consideration is the wrong-doer's liability to punishment. What is the criminal's consideration? Normally it would be the proceeds of crime. But if it turns out that, say, the safe is empty, then having *taken* the liberty⁷⁹ of committing a proscribed act could be seen as the 'consideration'.

Note that retributivists sometimes say that I am liable to 'pay' for my crime, although they don't see a consensual element; rather, they conceive 'crime and punishment' as somehow naturally linked. But we also find the language of contracts in thinkers who are not retributivists, such as Hart (2008: 49) for example. He writes that the criminal 'knew that it was likely he would be punished and that he had decided to pay for his satisfaction by exposing himself to this risk'. Here Hart appears to view crime as a 'bargain' between society and the offender. But Hart differs from retributivists, who would see punishment as the payment, whereas Hart suggests, at least in this passage, that exposure to the risk of punishment is the payment. Thus, if the criminal were subsequently caught and eventually punished, that punishment would constitute another 'payment' – from a retributivist position. But since Hart is not a retributivist, the 'second payment' (i.e. actual punishment) is just the materialisation of the risk which is involved in the original payment (exposure to risk).

In Nino's account society is offering something, but it is not the option to commit crimes, rather, it is liability to punishment for performing an action which is not on offer (i.e. crime). If you choose to perform an action which is not on offer, then the legal normative consequences of crime will be enforced – society keeps up their side of the 'bargain'.

As we have seen above, in non-criminal contexts all that is required for valid consent is an outward manifestation of consent, because consenting is primarily an observable performative act.

⁷⁹ In John Finnis' retributivist account of punishment the wrong of crime consists in taking the liberty of performing a proscribed act, whereas the law-abiding citizens deny themselves such unfair advantages. See Finnis (1972: 132).

Nino's conception of consent in crime might be construed as a performative act (by committing a crime), which would normally be observable. However, the criminal's aim is usually not to be observed, whereas in acts of non-criminal consent observability is desirable, or, rather, it is important to have a manifestation of the purported consent, because the parties to the consent normally wish to communicate the consent to each other (and to third parties).

Note that in everyday consent the presence of observers is common, but it is neither a necessary nor a sufficient condition for consent. This means that we need to fine-tune the third condition in Raz' account of consent. It is the manifestation (the observability in principle) of consent which is a necessary condition for consent to come about. Observers may, at a later date, rely on the manifestation of consent – and observe it then. John might leave a note for his wife in the morning: *May I borrow the car?* And if he finds the car keys on top of his note when he returns, this is a manifestation of her consent. Similarly, when driving through the Arizona desert, I might find a note outside a shop: *Will be back soon. Please help yourself and pay the correct amount.* The shopkeeper has manifested her consent, and I, by taking some items and leaving the correct money, have also manifested my consent.

In crime, having an audience is neither desirable, nor needed, and many crimes remain undetected. But, Nino would argue, that the offender has manifested her consent through committing a crime.

Summary

In my discussion of the nature of consent I have shown that Nino's conception of consent in crime exhibits many common features of consent, which justify that it be classed as a form of implied consent. The most important of these features are:

(1) A positive attitude is not required for valid consent. Claiming that I did not have a positive attitude when signing the contract does not (normally) invalidate contracts. Equally it would not invalidate the criminal's consent or excuse her action.

(2) Crime is not a purely one-sided manifestation of an action to which normative consequences are attached. In crime we have a standing offer (prohibition) not to perform certain acts and in implied contracts we also have a standing offer (permission) to perform certain acts.

(3) Even if one saw crime as a unilateral act, a position which Nino seems to accept, most legal systems allow for unilateral acts which involve consent.

(4) A live negotiation with another party is not a necessary feature of consent.

(5) Consent can be a package, where you desire the benefits, but resent some of the negative consequences which necessarily follow from it. This applies to risky operations as well as in crime.

(6) The consent to a risky operation is aimed at three domains; Nino's conception of consent in crime is aimed at one domain (liability to punishment) only. This difference does not mark a deficiency in Nino's theory because the nature of crime, its ontology, does not allow for consent to crime.

(7) And lastly, Nino's analogy between (the consent in) contracts and crime is useful because it can be shown that many features of a contract are present in crime.

4: Is Nino a Hartian? – Nicola Lacey

In her discussion of mixed theories of punishment, Nicola Lacey (1988: 48) elucidates Hart's theory and states that it has been taken up by many writers. As an example for this widespread influence Lacey cites Carlos Nino. She gives a brief summary of Nino's theory of punishment and states that it is 'a consent-based version of Hart's limiting distributive principle.'

Nino himself is in agreement with Lacey's judgement. Twelve years earlier he writes in his DPhil thesis (1976: 117): 'The view here put forward is close to that of Professor Hart, [FN] but I take it to be different from his in some important respects which could fill certain gaps in Hart's argument.'

In this chapter I will answer two questions: In how far is Nino a Hartian? As well as: What are the merits of Nino's theory in comparison with Hart? This comparison will illustrate how close their respective accounts are, it will help us better understand Nino's theory (what is distinctive about it) and it will show why Nino's theory offers an improvement on Hart's theory. It appears that Nino did fill the gaps in Hart's argument. Lastly, it will become clear that Nino may have to exclude the area of tort law as an analog to his claims about the distributive principle in criminal punishment.

Hart's Three Questions

Hart elucidates his views on punishment in the paper 'Prolegomenon to the Principles of Punishment' from 1959⁸⁰. There he explains that, up to now, the competing justifications for punishment were promoting a single value or aim: deterrence or retribution (or reform⁸¹). But he argues (1959: 3) that there is not just one question and one answer to the question of punishment. Hart distinguishes three questions (and three possible answers):

(A) 'What justifies the general practice of punishment?'

⁸⁰ Hart's Presidential Address to the Aristotelian Society, later reprinted in Hart's collection 'Punishment and Responsibility' from 1968 (second edition 2008).

⁸¹ Hart (p. 25) argues at the end of the paper that reform cannot be the general aim of punishment. If it were, we would 'subordinate the prevention of first offences to the prevention of recidivism.'

(B) 'To whom may punishment be applied?'

(C) 'How severely may we punish?'

(A) is about the purpose or aim of the institution of punishment, whereas (B) and (C) are about the implementation of a particular punishment, about its distribution. In (A) Hart (1959: 8) asks what is the 'General Justifying Aim' (GJA from hereon) of punishment? What justifies having the institution of punishment? Hart's answer is: its beneficial social consequences (a presumed reduction in crime), which are achieved through deterrence. Thus, the answer to (A) is consequentialist.⁸²

(B) is about liability – who may be punished? Hart's (1959: 10) answer is the principle that punishment may only be applied to 'an offender for an offence'. Hart calls this principle 'retribution in Distribution'. And (C) is about the amount and character of punishment. He stresses (ibidem) that nothing follows from this principle 'as to the severity or amount of punishment; in particular it neither licenses nor requires as Retribution in General Aim does more severe punishments than deterrence or other utilitarian criteria would require.'⁸³ In the following I will focus on (A) and (B), just as Hart does, and only discuss (C) in relation to the GJA and to the retribution-in-Distribution principle.

The GJA restricts one aspect of the distribution (i.e. the amount and severity) of punishment. But note that the constraining force is not one-directional (Hart 1959: 16): 'The admission of excusing conditions is a feature of the Distribution of punishment [and it] is required by distinct principles of Justice which restrict the extent to which general social aims may be pursued at the cost of individuals.' Here the constraining force runs from principles of justice via the distribution of punishment to the GJA. This means that society may not sacrifice individuals in the pursuit of its aims, because principles of justice indirectly constrain the GJA.

⁸² Ted Honderich (2006: 168) is right to distinguish the aim of an institution from its justification. The aim of the institution of punishment is to reduce harmful acts (crimes) through deterrence. The institution is morally justified, for a utilitarian/consequentialist, if it can achieve this aim, or if it is perceived to achieve this aim. See also Armstrong (1961).

⁸³ Note that it could very well be that, for effective deterrence, utilitarian criteria might require harsher sentences than retributivism - I owe this point to Patrick Riordan.

Retribution in Distribution

The label 'retribution in Distribution' is misleading. It is not to be understood in the same way as Retribution in General Aim. And recall that according to Hart nothing follows from this principle (retribution in Distribution) with regard to the severity or amount of punishment. John Cottingham has pointed out that it is not clear what is distinctly retributivist⁸⁴ about restricting punishment to offenders for an offence. Thus, retribution in Distribution rather appears to be a principle of justice which would fit various justifications of the institution of punishment (including a utilitarian justification, according to Hart). Furthermore, the infliction of punishment has no intrinsic value for Hart – punishment is a mischief, whereas the central claim of 'classic'⁸⁵ retributivism is that punishment has an intrinsic value.

However, John Rawls' paper, 'Two Concepts of Rules', from 1955 (which Hart cites in the Prolegomenon) might explain why Hart uses the word 'retribution'. Rawls (p. 5f.) stresses that the retributivist looks to the past, to what the criminal has done. The consequentialist (or utilitarian) looks forward, to future consequences. Thus, we could understand retribution in Distribution in this minimal sense, of being backward-looking.⁸⁶

Hart's consequentialist answer to (A), the GJA, constrains and at the same time determines the amount and severity of the punishment (C). We *may* only punish to a degree which is sufficient to achieve the deterrent effect. But this also implies that, if we do decide to punish, that we *must* punish to the degree which is sufficient to be effective – otherwise the disvalue of the (insufficient) punishment is wasted and is unjustifiable. Then the state would have inflicted harm without satisfying the GJA.⁸⁷

⁸⁴ See John Cottingham's (1979: 240f.) 'Varieties of Retribution'; also Robert A. Samek (1966: 223); also John Gardner (2008: xxv). Hart's definition is close to what Cottingham calls 'the minimalist retributive position', which is: 'no one should be punished *unless* he is guilty of a crime and culpable.' or 'only the guilty are to be punished.' Cottingham doubts whether such positions, including Hart's, are really retributivist in character and blames the confusion on John Mabbott's classic paper on punishment from 1939.

⁸⁵ I take Kant to be a classic retributivist.

⁸⁶ But the utilitarian is in principle also backward-looking in this minimal sense, because she punishes for crimes committed - even if critics claim that utilitarianism could occasionally licence the punishment of the innocent. The utilitarian is interested in a reduction of wrongful acts.

⁸⁷ I owe this point to Patrick Riordan. However, Nino advises that one proceed cautiously, when first determining what the effective deterrent might be, in order to avoid more punishment that is necessary.

It appears that the GJA limits the amount and severity of punishment in the form of a permission. But the permission is itself constrained by another principle: *once it has been decided to inflict punishment, it is not permitted (i.e. it is obligatory) to punish below the level of effective deterrent.*

Hart writes (1959: 12): 'Retribution in the Distribution of punishment has a value quite independent of Retribution as Justifying Aim.' It applies to offenders even when breaking the law is not considered to be immoral, i.e. when the offender does not incur any moral guilt.⁸⁸ Moral guilt would be a necessary and sufficient condition for punishment if one were to adopt (classic) retribution as a Justifying Aim⁸⁹, whereas retribution in Distribution is merely the principle that only offenders may be punished for an offence – moral guilt does not feature here.⁹⁰

Another reason why Hart is not concerned with moral guilt is because not all crimes are violations of morality (Hart 2008: 236). Hart – or the law – is therefore only concerned with legal guilt⁹¹. In the essay *Legal Responsibility and Excuses* Hart (2008: 37) states that it is a requirement of justice 'that the offender, if he is to be *fairly* punished, must have acted 'voluntarily', and not that he must have committed some moral offence.'

This illustrates that Hart uses the term 'retribution' in two different senses. If 'classic' retribution were the GJA, or the answer to (B), then punishment would be obligatory, presumably as a response to the moral guilt/wickedness of the offender. However, in Hart's retribution-in-Distribution principle, punishment is permissible rather than obligatory.⁹² This supports the claim that there is nothing particularly retributive about the principle 'retribution in Distribution'.⁹³

See my chapter on Alexander.

⁸⁸ Crime is not always a moral offence because (Hart 2008: 236) 'there is a vast area of the criminal law where what is forbidden or enjoined by the law is so remote from the familiar requirements of morality that the very word "crime" seems too emphatic a description of law-breaking. Here the law is what it is, often because of variable and disputable conceptions of social and economic policy'.

⁸⁹ See Hart (1959: 8): 'Retribution, defined simply as the application of the pains of punishment to an offender who is morally guilty'.

⁹⁰ John Gardner states that for Hart being legally guilty does not count in favour of punishing wrong-doers, 'it merely eliminates an objection to punishing them.' (Gardner 2008: xxv)

⁹¹ Similarly Mabbott (1939: 167).

⁹² This ties in with Hart's claim (1959: 20) that we need a 'moral licence' in order to punish. Having a licence to do something makes the act permissible but not obligatory. More on this below.

⁹³ However, Morison (1988: 123f.) takes Hart's retribution in Distribution principle at face value and

Hart's and Nino's answers to (A) and (B)

Both thinkers distinguish at least two questions:

| <i>Q?</i> | <i>(A) Aim of punishment?</i> | <i>(B) Who is liable to punishment?</i> |
|-----------|---|--|
| Hart | General and special deterrence: protection of society through a reduction of wrongful acts | Only an offender for an offence, who had a fair chance of keeping the law. <u>Retribution in Distribution</u> |
| Nino | General and special deterrence: diminish future crimes and thus effect a 'minimization of social harms' (1986: 184) | Those who voluntarily and knowingly break the law and who thus consent to the legal-normative consequences of crime. <u>Distribution according to consent</u> |

For both thinkers the GJA is deterrence. For Hart the GJA is constrained by principles of justice which govern the retribution in Distribution as well as the amount and severity of punishment; for Nino the GJA is constrained by respecting the voluntary acts of individuals and, as a consequence, by what individuals consent to. Nino (1983: 291f.) writes that a purely utilitarian justification, without any side-constraints, would be 'condemned by the Kantian injunction against using men only as means and not as ends in themselves.'

Let us compare the constraints which affect the GJA. Nino does not state explicitly that he takes Kant's second formulation of the Categorical Imperative⁹⁴, the Humanity Formula, to be a principle of justice. But I think it is plausible to read him in this way. Thus, the structure of the constraints on A. is similar for both thinkers. Hart employs a practical application for the second formulation of the Categorical Imperative. He (1959: 20) states: 'each individual person is to be protected against the claim of the

charges Hart with re-introducing classic retributivist ideas through the back door. Morison sees this principle as Hart's attempt to settle the question of who deserves punishment. But this is a misinterpretation of Hart. For Hart it is not a question of desert but, rather, a question of who is liable to punishment. As a result, Morison simply speaks of 'guilt', without distinguishing, as Hart does, between legal and moral guilt. Here Hart is only concerned with legal guilt.

⁹⁴ 'Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.' (Kant, 1948 [1785]: 91

rest for the highest possible measure of security, happiness or welfare which could be got at his expense by condemning him for the breach of the rules and punishing him.' For Hart (1959: 21) it is a requirement of justice to 'forbid the use of one human being for the benefit of others except in return for his voluntary actions against them.'

Hart and Nino agree that social aims must not be pursued, without any limitation/safeguards in place. Hart (1959: 20) states that in order to punish people 'a moral licence is required in the form of proof that the person punished broke the law by an action which was the outcome of his free choice, and the recognition of excuses is the most we can do to ensure that the terms of the licence are observed.' Principles of justice require us to observe restrictions (e.g. excuses) which may apply to the distribution of punishment.

For Hart we respect principles of justice by restricting punishment to actions which are the outcome of a free choice. For Nino we respect individuals by restricting punishment to those who consented to the legal-normative consequences of their wrongful acts. Some of Hart's principles of justice are implicit in the notion of (Nino's) consent, because, for example, only competent adults can legally consent. Other principles of justice, which for Hart constrain the distribution in Retribution, e.g. excuses or in (C) mitigation, are presumably contained within Nino's theory (1983: 302) because he presupposes the 'fairness of the legal framework'.

Thus, the constraints on (A) are similar for both thinkers:

| | Constraints on (A) |
|------|--|
| Hart | (A) is restricted by Hart's application of Kant's second formulation of the Categorical Imperative as well as by other principles of justice which are operative in (B) and (C) – treating like cases alike ⁹⁵ ; excuses; mitigation. ⁹⁶ |

[429].)

⁹⁵ This principle constrains both (B) and (C)

⁹⁶ Hart (1997: 166) points out that sometimes, in our legal practice, the demands of justice take a backseat and the GJA may trump a principle of justice. Sometimes courts pass more severe sentences 'as a warning' - this violates the 'Treat like cases alike' principle.

| | |
|------|---|
| Nino | (A) is restricted by Nino's application of Kant's second formulation of the Categorical Imperative as well as by principles (of justice) which are operative in a fair legal framework. |
|------|---|

Thus far it appears that Lacey is right, Hart and Nino agree about the GJA and both use Kant's Humanity Formula as a constraint on the GJA. But they differ in their answer to (B).

Hart's principles of justice

Hart (1959: 20f.) explains that:

Justice simply consist of principles to be observed in adjusting the competing claims of human beings which (i) treat all alike as persons by attaching special significance to human voluntary action and (ii) forbid the use of one human being for the benefit of others except in return for his voluntary actions against them.

After citing the above two principles of justice⁹⁷, Hart (1959: 21f.) gives a restatement of the principles from three different points of view. Viewpoints a) and b) are restatements of the first principle and viewpoint c) is a restatement of the second principle.

Hart writes that the first principle ('punishment must be reserved for voluntary offences') can be considered from the following two viewpoints. Viewpoint a): Society is considered to be harmed by the offence, because one or more of its members were injured and/or because the crime constitutes a challenge to the authority of the law. For Hart the authority of the law is presumably the first

⁹⁷ In *The Concept of Law* Hart (1997: 159f.) is more explicit about principles of justice. Here is a, non-exhaustive, overview: 1. His application of Kant's Humanity Formula; 2. Treat like cases alike; 3. Treat different cases differently; 4. Excuses; 5. Mitigation; 6. *Nemo judex in sua causa*; 7. *Audi alteram partem*. [Note that Hart's colleague and friend at Oxford, Tony Honoré, argued that the principle *Treat different cases differently* is not implied by the principle *Treat like cases alike*. See Honoré's paper 'Social Justice' from 1962.]

safeguard for the protection of society, rather than something which needs to be maintained for its own sake. The first principle of justice secures (Hart 1959: 21) 'that the suffering involved in punishment is a return for the harm done to others; this is valued, not as the Aim of punishment, but as the only fair terms on which the General Aim (protection of society, maintenance of respect for law, etc.) may be pursued.' And Hart continues: punishment is 'justly extracted from the criminal as a return for harm done.'

Viewpoint a) has, at first glance, a (classic) retributivist flavour. Recall that the strict notion of retribution, according to Cottingham (1979: 241), is that 'punishment is due as repayment for a crime.' However, in a lecture from 1964 Hart (2008: 208) states: 'for though we must seek a moral licence for punishing a man in his voluntary conduct in breaking the law, the punishment we are then licensed to use may still be directed solely to preventing future crimes on his part or on others' and not to "retribution".' When Hart speaks of 'a return for harm done' he does not mean 'a repayment for harm done' in the retributivist way. It is more like a mechanism which kicks in when a crime is committed. But note that the mechanism can be suspended, i.e. the punishment may not be imposed, because having a license to punish means that the state does not always have to act on the license. This might happen if punishment would not further the GJA.

Viewpoint b): Society is not seen as harmed but as offering all individuals (including the criminal) the protection of the laws on fair terms. Within this framework (1959: 21) 'each individual is given a fair opportunity to choose between keeping the law required for society's protection or paying the penalty.' Hart argues that it is 'a price justly extracted because the criminal had a fair opportunity beforehand to avoid liability to pay.' It is morally permissible for society to follow through with the sanctions specified in the fair legal framework. This viewpoint does not have a distinctly retributivist flavour, but rather a semi-contractual structure: If you do A (crime), then you incur B (sanction). The criminal is now liable to the sanctions of the law – this comes close to Nino's theory. And the phrase 'liability to pay' seems to suggest that, for Hart, there are legal-normative consequences attached to wrongdoing. And if that is indeed Hart's view, one could ask: Did the offender *consent* to these consequences? It would appear that Hart's theory of punishment contains the

germs of Nino's theory. And Nino states in his DPhil thesis (1976: 117) that his theory is close to that of Professor Hart.

Let us now turn to the second principle of justice: it forbids 'the use of one human being for the benefit of others except in return for his voluntary actions against them'. Hart writes that this can be restated as follows.

Viewpoint c): Here, criminal punishment (1959: 21) 'differs from the manipulative techniques of the Brave New World (conditioning propaganda, etc.) or the simple incapacitation of those with anti-social tendencies'. Society is trying to secure desired behaviour by taking a risk. 'It defers action till harm has been done; its primary operation consists simply in announcing certain standards of behaviour and attaching penalties for deviation, making it less eligible, and leaving individuals to choose.' Hart (1959: 22) argues that this method of social control 'maximises individual freedom within the coercive framework of the law', because the individual is given an option to 'obey or pay' and, secondly, it allows individuals to plan their lives without fear of breaking the law unwittingly. Hart's emphasis here is on recognising the choice of individuals.

Nino (1983: 306) wants to 'rely on the moral autonomy of the individual, making his liability to punishment depend on his free and conscious undertaking of it'. This is in accord with Hart's viewpoint c). But Nino's practical reading of Kant means that Nino requires consent to a change in normative status to guarantee that we are not using people merely as means but also as ends. Hart, however, relies on assumption of risk, based on the *volenti non fit injuria* maxim, to justify liability to punishment – I will say more on this shortly.

In viewpoints b) and c) we find a strong affinity between Hart and Nino. In Hart's essay *Legal Responsibility and Excuses* this closeness to Nino's theory is also evident. There Hart (2008: 49) analyses crime as follows: (1) the criminal 'has obtained some satisfaction from his crime'; (2) 'he knew that it was likely he would be punished and that he had decided to pay for his satisfaction by exposing himself to this risk'.

Hart's Reliance on Assumption of Risk

For Hart punishment is only 'likely', the upshot of the risk to which the criminal exposes herself might never come about. Nino would class this among the factual (i.e. contingent) consequences of crime. Both, Nino and Hart, acknowledge that the wrong-doer is exposing herself to a risk; for Hart this is central, but Nino does not want to rely on this in his theory. However, neither of them acknowledges that the wrongdoer, by assuming a risk, is also acquiescing to the possible materialisation of that risk.⁹⁸ For Hart this acquiescence might be implied in the assumption of risk, but making it explicit would certainly strengthen Hart's justification. Thus, what we find overtly in Hart is the assumption of risk and, by implication, acquiescence to the possible materialisation of the risk of wrong-doing (i.e. factual consequences).

For Nino the offender's liability to punishment is based on the *direct* consent to change her legal-normative status (i.e. consent to a loss of immunity from punishment). For Hart the liability to punishment comes about because the offender assumes the risk of punishment first. In the Hartian view this assumption of risk has legal-normative consequences attached to it: the offender is liable to punishment because she freely chose to expose herself to this risk. The risk-taker consents in the first instance to the risk and, by implication, to the legal-normative consequences of her risk-taking.

Nino acknowledges that, apart from consenting to the loss of immunity from punishment, the offender also consents to the risk of being punished. But for Nino assumption of risk in the context of crime does not warrant imposing the upshot of that risk on the wrong-doer. And for Nino this assumption of risk, in the context of crime, does not come with legal-normative consequences attached to it, whereas for Hart the legal-normative consequences are attached to the assumption of risk.

Nino (1991b: 271; also 1983: 296) explains:

We might say that a criminal brings upon himself the risk of being punished, but this provides as little moral justification for actually punishing him as the fact

⁹⁸ See my sections on 'The Nature of Consent' and on Honderich.

that the volunteer has brought upon himself the risk of dying in a battle provides moral justification for killing him in a battle.

Nino does not give an explicit account of how crime and tort law differ⁹⁹ with regard to legal-normative consequences. But, looking at Nino's writings on these subjects, I think the following reading is plausible. Nino accepts that in tort law there are legal-normative consequences attached to assumption of risk¹⁰⁰, but this is not the case in the context of crime. There, assumption of risk does not come with legal-normative consequences attached to it – and this is the fundamental difference between Hart's and Nino's justification of punishment.

For Nino we need more to justify punishment than just exposing yourself to a risk. The difference between Hart's and Nino's account of punishment is that consent to a change in one's legal-normative status is a stronger notion than mere consent to risk. Hart relies on 'exposure to risk', which is grounded in the *volenti*-principle: *If you willingly expose yourself to risk, and the risk happens to materialise, then you have no standing to complain and/or you might have to share some of the burdens which ensue.*

However, this is a principle which normally applies in tort law. If the risk does not materialise (i.e. the drunk driver delivers the consenting party safely home), then nothing further follows from it; the legal-normative consequences of the assumption of risk don't come into force.¹⁰¹ It appears that only the materialisation of the risk, triggers the (possible) enforcement of the liability. However, the justificatory structure in tort law (the consenting injured party must share certain burdens) does not fit the context of crime, in the way Hart wishes it to fit. Note that Hart does not acknowledge that he is borrowing a principle from tort law to justify punishment.

In crime the materialisation of the risk (i.e. the offender being punished) does not trigger the (possible) enforcement of the liability – this would be circular. At the point of committing a crime, the wrong-doer consents to the liability to punishment. The

⁹⁹ Note that in early common law there was no sharp distinction between, what we now call, tort and crime. See Simons (2008: 719).

¹⁰⁰ Recall Nino's example of the person who accepts a lift from a drunk driver.

¹⁰¹ Perhaps we should characterise them as 'dormant'.

possible enforcement of the liability starts at this point, because the harm¹⁰², which the criminal laws are designed to prevent, happened when the crime was committed.

In tort law, where an individual consents to a risk, the harm might or might not occur – but, if it does occur, it is always at a later date. If all goes well, there is no harm and, consequently, no legal redress is necessary. The structure of (exposure to risk in) tort law does not explain what happens in criminal law. Imagine that the risk does not materialise: the offender is not caught, tried, convicted and punished. Then, in analogy to tort law, nothing further would follow from it.

Nino relies on consent to a change in normative status. This is independent of whether the risk of punishment materialises or not. Consent to loss of immunity from punishment makes punishing the offender morally permissible. Whereas consenting to a risk, means loss of standing to complain and/or sharing the burdens, if the risk happens to materialise. Hart's wrong-doer may not be entitled to complain, because she assumed a risk; but this still leaves the question – for Hart: is the punishing institution entitled to punish?

Furthermore, it is important to note that in tort law the remedy is not punishment. Tort law aims to provide a remedy for a private wrong, e.g. damages or an injunction, rather than punishment. The burdens which may be placed on an individual for a tort are not as severe as the burdens attached to crimes (i.e. punishment).¹⁰³ Simons (2008: 720) writes: 'Criminal law often imposes much more severe sanctions than tort law, of course: loss of liberty or even of life.' Thus, Hart's reliance on the *volenti* maxim might not do the work which Hart wants it to do in the context of crime.

However, in English tort law it is possible to award 'exemplary damages' (called 'punitive damages' in the US). These are aimed to 'punish' the wrong-doer. However, exemplary damages are rarely awarded, because they are considered to be an (Lord

¹⁰² Harm is a prerequisite for a remedy in tort law (note that injunctions are designed to prevent future harm of rights violations). But the criminal law also punishes acts which do not cause harm to others. Simons (2008: 720): 'By contrast, tort law mainly provides a remedy for harmful acts, not for acts that create risks of future harm, and not for acts that are considered immoral but not harmful.'

¹⁰³ Furthermore, there is a weaker burden of proof requirement in tort law compared to criminal law. In criminal law the standard is 'beyond reasonable doubt', in tort law it is 'the balance of probabilities' (in the US: 'preponderance of evidence'). In the former one has 'to be sure', in the latter what is alleged

Reid in *Broome v Cassell & Co Ltd* 1972 [AC 1207]) 'anomalous' civil remedy. Exemplary damages may only be awarded in a restricted set of circumstances, e.g. when the tort was committed in order to make a profit, and when regular compensation of the plaintiff would still leave the defendant with a sizeable gain. Exemplary damages would then take away that gain and award it to the plaintiff.¹⁰⁴ Here the 'punishment' is part of corrective justice (rather than distributive justice): we take from the wrong-doer and give to the victim, because it would be a violation of justice if the wrong-doer profited from the tort (See *Broome v Cassell & Co Ltd* 1972 [AC 1207]).

Furthermore, exemplary damages are sought by (and awarded to) private individuals, unlike the punishment of criminal law which is sought and imposed on behalf of the state. Another difference is that the 'punishment' of exemplary damages does not carry the stigma which is usually attached to criminal wrongs. Thus, the remedy (or denial of remedy) in tort is normally not as drastic as the punishment of criminal law.

Note that these two accounts of punishment (Hart's and Nino's) are not mutually exclusive, since Nino acknowledges that the criminal also assumes the risk of punishment – but Nino does not want to rely on this.

Nino's take on Hart's Principles of Justice

Nino would presumably subscribe to the first principle of justice given by Hart ('treat all alike as persons by attaching special significance to human voluntary action': 20f.), because his theory is in agreement with this principle; and recall that Nino assumes a fair legal framework. However, in my view, Nino would probably formulate a more sophisticated version of Hart's second principle, which reads:

'and (ii) forbid the use of one human being for the benefit of others except in return for his voluntary actions against them.'

needs to be 'more likely than not'.

¹⁰⁴ An interesting question here is: Why give the surplus to the victim of the tort, they have been compensated after all, why not give it to the state?

Hart is suggesting here that if an agent is voluntarily acting against others (presumably against their interests, or causing them harm), then society may be justified in placing certain burdens on that individual. The individual was given an option to 'obey or pay'. The latter is really the option to assume the risk of paying, and now the offender is liable to the burdens of punishment.

I submit that Nino's formulation of Hart's second principle of justice would read as follows:

and (2) forbid the use of one human being for the benefit of others except in return for assuming (consenting to) the legal-normative consequences of crime, which necessarily come about when committing a crime knowingly and voluntarily: i.e. consent to loss of immunity from punishment.

Certain factual consequences of crime are foreseeable (i.e. they may possibly occur), and this 'may justify the assertion that the agent has consented to run the risk of generating that consequence' (Nino 1983: 298). But this is not enough to justify inflicting punishment. However, if the assumption of risk is tied to a change of normative status, as can be the case in tort law, then the assumption of risk carries forward to the legal-normative consequences which are attached to it. This is Hart's account of punishment.

Let us make an interim conclusion: Hart relies on assumption of risk in his justification of punishment, whereas Nino relies on consent to a change in normative status.

A Problem for Nino in Torts

Nino (1983: 299) states that the principle of distribution which applies in crime 'is the same as that which justifies the distribution of advantages and burdens ensuing from contracts and the distribution achieved in the law of torts when the burdens that follow from a tort are placed on the consenting injured party.' That principle is (Nino 1983: 293) 'fairness according to consent'. The consent in torts (as in crimes and contracts) justifies placing the burdens of that consent on the consenting injured party.

But it would be a mistake, according to Nino, to base punishment on assumption of risk (as it applies in tort law).

Having described how Nino and Hart differ in their justifications of punishment, I would submit that Nino's position is not consistent when it comes to exposure to risk. In the above passage Nino claims that the principle which justifies the distribution of advantages and burdens in crime, i.e. fairness according to consent, is the same principle which applies in contracts and in tort law (when there is a consenting injured party). However, Nino (1991b: 271; also 1983: 296) also claims:

We might say that a criminal brings upon himself the risk of being punished, but this provides as little moral justification for actually punishing him as the fact that the volunteer has brought upon himself the risk of dying in a battle provides moral justification for killing him in a battle.

If the consent to the risk of injury in tort law justifies placing the burdens of the tort on the consenting injured party (based on the principle 'fairness according to consent'), then it is not clear why consent to the risk of punishment, in the context of crime, is not sufficient to justify placing the burdens of that exposure to risk on the wrong-doer. Making the claim that the principle of distribution is the same in crime, contracts and torts would commit Nino to accept Hart's justification of punishment, which is grounded in exposure to risk.

In order to avoid this inconsistency Nino would need to drop the claim about tort law. He could only claim that the principle of distribution of burdens, resulting from crimes, is the same in contracts – but not in tort law. Making this adjustment would leave the core of the Consensual Theory of Punishment intact.

The Application of Kant's Humanity Formula

Let us now examine how Hart and Nino apply the second formulation of the Categorical Imperative for their respective approaches to punishment.

| | |
|--|---|
| | <i>Applications of the second formulation of the CI</i> |
|--|---|

| | |
|------|--|
| Hart | Principles of justice 'forbid the use of one human being for the benefit of others except in return for his voluntary actions against them.' (1959: 20f.) |
| Nino | 'a measure diminishing the overall harm that the community would suffer at the cost of selectively harming some of its members could [like-wise] be attacked as unfair. Such measures are condemned by the Kantian injunction against using men only as means and not as ends in them-selves.' (1983: 291f.). However, '[a]ppeals to an equitable distribution of benefits and burdens are out of place when the individuals concerned have consciously acquiesced in a balance which is not egalitarian. For we recognize fairness according to consent as a separate justification of political action' (1983: 293). |

Hart (2008: 81) writes that the individual must be protected from society. '[He] should not be sacrificed for the welfare of society unless he has broken its law; his breach of the law is, as it were, a condition or licence showing us when there is liability to punishment.' For Hart we obtain the licence when an individual breaks the law (as I have argued above, the underlying principles are assumption of risk and acquiescence to the (negative¹⁰⁵) contingent consequences of wrong-doing); for Nino we obtain the licence through the criminal's consent to change her legal-normative status.

Hart (2008: 244) explains:

Kant never made the mistake of saying we must never treat men as means. He insisted that we should never treat them only as means 'but in every case as ends also'. This meant that we are justified in requiring sacrifices from some men for the good of others only in a social system which also recognizes their rights and their interests. In the case of punishment the right in question is the right of men to be left free and not punished for the good of others unless they have broken

¹⁰⁵ Enjoying the fruits of crime would be a positive contingent consequence.

the law when they had the capacity and a fair opportunity to conform to its requirements.

For Hart the demands of the Categorical Imperative can be met if society's action (punishment) is a response to the voluntary actions (crimes) of individuals which are directed 'against' society. Because Hart argues that individuals are given a fair opportunity to 'obey or to pay'.

For Nino society may only use individuals for the benefit of others if these individuals consented to this in-egalitarian distribution of benefits and burdens¹⁰⁶. Some individuals are liable to punishment (wrong-doers) and some are not (those who obey the law); the latter are immune from punishment. This is what Nino calls 'distribution according to consent'.

Hart's focus is on the voluntary action: If an individual commits a crime it would be permissible for society to override the principle which forbids the use of one human being for the benefit of others, because that individual chose to expose herself to the risk of punishment.

Hart, (2008: 49) writes:

Recognition of excusing conditions is therefore seen as a matter of protection of the individual against the claims of society for the highest measure of protection from crime that can be obtained from a system of threats. In this way the criminal law respects the claims of the individual as such, or at least as a *choosing being*, and distributes its coercive sanctions in a way that reflects this respect for the individual.

Nino's structure is similar, but he spells out that the voluntary actions of the criminal constitute consent to a loss of immunity from punishment.

¹⁰⁶ See my discussion of the distribution of burdens and benefits in the section on Honderich.

Hart's argumentative structure is: If you make move *P*, then we (society) are entitled to make move *Q*, because we (society) made you aware of this beforehand. By making move *P*, you are assuming a risk, which makes you liable to punishment. This is reminiscent of the moves in a chess game. The possible moves in response are known to the other player (the criminal) – but in crime there is usually just one permitted move in response.

Staying with the game analogy, Nino's account differs from Hart's, because Nino spells out that by entering the game (committing a crime), the criminal consents to at least one rule of the game. But Nino's theory goes outside the game analogy, because he explains why society is justified in making a certain move in response. Hart's justification stays mostly within the game and its rules: *Why is it permissible for society to make move Q? Because the game stipulates that these are the rules.* Hart's justification only goes outside of the game analogy to a limited degree, namely by maintaining that the rules of the game are fair – and they are, presumably, fair because they are constrained by principles of justice (some of which might also be employed outside of the institution of punishment).

Nino explains why certain moves are permissible – he goes beyond the Hartian explanation that we just have to accept that the game stipulates the rules. Nino's theory has greater justificatory power because his justification for certain responses (punishment) within the institution is derived from outside of the institution: 'we recognize fairness according to consent as a separate justification of political action' (1983: 293).

Why is it that we value fairness according to consent? Because consent, in Heidi Hurd's words, (1996: 124) 'constitutes an expression of autonomy'. Nino (1991b: 282) explains:

The idea of autonomy implies that each person is the only judge who can decide, sometimes irrevocably, which of his desires he must try to satisfy and which he may put at risk of frustration. In the case of punishment, the individual who decides to commit a crime embraces a project which includes both the

enjoyment of the fruits of the crime and the subjection to a normative situation which puts the agent under the punitive power of public officials.

By requiring valid consent, Nino recognises the autonomy of the offender through her choice. Note that the subsequent imposition of punishment reduces the autonomy of the offender, while at the same time preserving autonomy in society. Nino (1991b: 284) states: 'the goal of punishment is the minimization of social harm (that is, the maximization of autonomy across the society)' and Nino continues: 'consent is only a limitation on the pursuit of that goal.'

Nino assumes, like Hart, a fair (legal) framework but Nino also explains why a particular move, *Q*, is fair and therefore permissible, independently of what the institution/game stipulates. Nicola Lacey (1988: 52) recognised this *lacuna* in Hart's (and also in Rawls') theory:

I think it can be argued that a justification for institutions of punishment must include a justification for their actual use in individual cases, and that the individual question is in some ways primary: can any single infliction of punishment ever be justified? The mere fact that such an infliction is according to rules does not seem to generate any additional justification in itself.

However, it is surprising that Lacey does not recognise that Nino's theory gives us this additional justification for individual cases of punishment, while also giving us a justification for the institution of punishment. Society has a license to impose punishment, because the wrong-doer consented to be liable to certain burdens, whereas the law-abiding are not subject to these burdens.

We can conclude for now that Hart's justification for the imposition of punishment is mostly intra-institutional, whereas Nino's is extra-institutional.

The Seeds of Nino's Theory in Hart

Nicola Lacey is right – both Nino and Hart employ limiting principles which prevent using individuals as mere means and, at the same time, they ground the claim that we recognise them as ends. The institution of punishment is subject to constraints. One

constraint is constituted by Kant's second formulation of the Categorical Imperative; other constraints are certain principles of justice which are inherent to a fair legal framework, but which we also encounter outside of the law's domain (e.g. treat like cases alike, *audi alteram partem*, *nemo iudex in sua causa*, etc.).

One could view Hart's Prolegomenon paper as containing the seeds of Nino's theory. According to Hart (1959: 21) society is:

offering individuals including the criminal the protection of the laws on terms which are *fair*, because they not only consist of a framework of reciprocal rights and duties, but because within their framework each individual is given a fair opportunity to choose between keeping the law required for society's protection or paying the penalty.¹⁰⁷

One of Nino's central premises is that we need a fair legal framework – something which we also find in the above passage. Note also the word 'offering'. Nino stresses that the fairness of contracts is mirrored in his justification of punishment. In a contract A makes an offer and B accepts (consents to the legal-normative consequences of) the offer. For both thinkers, Hart and Nino, the criminal has a choice: keeping or breaking the law. For Nino the structure is (semi-)contractual¹⁰⁸.

Society is offering a life within the law, which does not involve any negative legal-normative consequences. If an individual chooses to step outside of the law, then society is 'offering' negative legal-normative consequences (i.e. liability to punishment). According to Nino, the offender's consent to the legal-normative consequences makes punishment morally permissible. For Hart (1959: 21) punishment is also permissible, rather than required. And it is 'a price justly extracted because the criminal had a fair opportunity beforehand to avoid liability to pay' – note the contractual vocabulary ('price', 'pay')¹⁰⁹. I am aware that this is also the vocabulary

¹⁰⁷ See also Hart (2008: 152).

¹⁰⁸ It might perhaps be better to see crime as a 'negative contract' because both sides would rather that it not come about, they would rather not enter into this negative contract.

¹⁰⁹ See also Rawls (1955: 11): 'punishment works like a kind of price system: By altering the prices one has to pay for the performance of actions, it supplies a motive for avoiding some actions and doing others.'

of retribution. However, incurring a debt and repaying a debt appears to be very close to a contractual obligation.¹¹⁰

Both thinkers present a side-constrained consequentialism. For Nino the criminal's consent to the legal-normative consequences of crime does the work in justifying punishment and makes punishment permissible. The Hartian position is the following: If the crime was the outcome of a free and fair choice, then society has a moral licence to punish, because the criminal exposed herself to the risk of punishment (and, I would add, at the same time acquiesced to the upshot of that risk coming about). Both, Hart and Nino, are licence theorists: punishment is not obligatory. Society can still decide to forgo punishment. Why? Perhaps it would not promote the GJA of punishment; or it might not promote justice; or it might not promote another value which is considered to be more important.

I would submit that Hart does not spell out the implications of his position: if the criminal does not choose to keep the law but, rather, chooses to break the law, then, the criminal also *chooses* (consents?) to be liable to punishment. Hart refrains from taking a step, which is obvious for Nino, namely, to recognise the structural similarity to contracts in crime, because the criminal consents to the legal-normative consequences of crime.

Take, for example, the following passage from Hart's essay *Legal Responsibility and Excuses* (2008: 44):

Consider the law not as a system of stimuli but as what might be termed a *choosing* system, in which individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways. (...) Punishment is different from a mere 'tax on a course of conduct'. What I do mean is that the conception of the law simply as goading individuals into desired courses of behaviour is inadequate and misleading; what a legal system that makes liability generally

¹¹⁰ One might ask here: Did the ancient retributivists recognise that their language ('debt', 'repay') suggests a (semi-) contractual nature of crime? Nietzsche (2006: 40), for example, claims that the moral concept of guilt ('Schuld') descends from the very material concept of 'Schulden' (i.e. debts). And the idea of punishment as retribution appears to suggest that between victim and perpetrator there is a contractual relationship of creditor and debtor. But for Nietzsche this only masks the anger of the wronged person.

depend on excusing conditions does is to guide individuals' choices as to behaviour by presenting them with reasons for exercising choice in the direction of obedience, but leaving them to choose.¹¹¹

Here Hart appears to suggest that crime has a structure which is similar to contracts, but he does not develop it.

Strictly speaking, Hart does not have a 'mixed theory' of punishment (as, for example, claimed by Nicola Lacey). Hart does not mix a consequentialist account of the institution with a 'classic' retributivist account of the distribution of punishment, because, as we have seen, for him retribution-in-Distribution means: only those who committed a crime *may* be punished – rather than *must* be punished. This is simply a principle of justice.

Thus, Hart's consequentialist account of the institution is tempered by principles of justice which either constrain the institution directly (e.g. the second formulation of the Categorical Imperative) or indirectly via the retribution-in-Distribution stage (e.g. excuses).¹¹² Nino's account is structurally similar to Hart's, but for Nino consent (to the legal-normative consequences) does the work in justifying punishment.

Summary

Nino gives a more thorough answer to the question: What grounds the moral licence to punish? Nino goes beyond Hart's position by recognising that the criminal consents to change her legal-normative status. This may result in a distribution of burdens (some are punished, others are not) which would appear to be unfair, were it not for the presence of consent. It is this consent, which makes punishment morally permissible. We could say that Nino develops Hart's mere 'Prolegomenon to the Principles of Punishment' into a theory of punishment. Nino's justification of

¹¹¹ Similarly Mabbot (1939: 161) in his seminal paper: 'Punishment is a corollary not of law but of law-breaking. Legislators do not *choose* to punish. They hope no punishment will be needed. Their laws would succeed even if no punishment occurred. The criminal makes the essential choice; he "brings it on himself."'

¹¹² This is well understood by Primoratz (1989: 137f.): 'It is a distinctive and crucial contention of Hart's theory of punishment, however, that the principles of justice or fairness which, in combination with utilitarian considerations, determine the distribution of punishment, are to be understood as [138] *different* from, *independent* of, and partly *conflicting* with its general justifying aim. And it is no accident that they conflict with it, for they are meant to limit the pursuit of the utilitarian aim'.

punishment is more powerful because it rests, to a much greater degree than Hart's, on principles (i.e. the fairness of consent) which we encounter outside of the institution of punishment and which we accept as just. Secondly, Hart's justification seems to rely mainly on the principle of assumption of risk, whereas Nino requires a change (based on consent) to the legal-normative position of the agent.

Hart's moral license to punish relies on exposure to risk only (and on the underlying *volenti* maxim). As I have highlighted above, the *volenti* maxim warrants the denial of certain remedies in tort law, but such denials of remedy are usually not as drastic as the infliction of punishment. We could say the force of the *volenti* maxim does not extend to justifying punishment (for Nino). Thus, I agree with Nino, he has filled some of the gaps in Hart's argument.

5: Threats and Offers – Robert Nozick

Nino (1983: 301) discusses one particular objection to his theory in detail. The objection arises out of Nozick's (1969) seminal paper on the nature of coercion, where he contrasts threats with offers. Nozick's discussion is important because it concerns Nino's notion of consent (to assume liability to punishment) as it applies in the context of crime, in contrast to consent in the context of contracts.

Nozick is suggesting that how the individual views the situation prior to the threat or offer is indicative for the voluntariness of acting in the threat and offer situations.

Nino (1983: 302) believes that this poses a problem for his theory:

Nozick calls our attention to the relevance of looking not only at the choice the person who received a threat or an offer has, but also at the choice he would have made about moving from a situation in which the threat or the offer had not been made to a situation to which it has been. [FN] According to Nozick, the fact that the threatened person would not normally have chosen to go from the prethreat to the threat situation whereas the person who receives an offer would normally have chosen to move from the preoffer to the offer situation is decisive in discriminating between the two cases in relation to the voluntariness of that person's action. This criterion seems to call into question the voluntariness of the assumption of a liability to punishment on the part of an offender, since he or she would not normally choose to move from a situation in which the action is not punishable to a situation in which it is.

Nino says that Robert Nozick's discussion of coercion in itself is of little interest to his own theory because it concentrates on individuals who comply with a threat, whereas Nino is interested in individuals who defy a threat. Furthermore, Nozick is focusing on individual threats (and offers), not on the threats of the law. Nino, however, is applying Nozick's analysis to the threats of the law, because Nino thinks it might pose a problem for the notion of voluntariness which his theory of punishment requires.

A point of clarification first: physical compulsion (the use of force) as well as threatening negative consequences (*Your money or your life!*), although distinct, are

both commonly regarded as forms of coercion. Harry Frankfurt (1998: 27) explains: 'We might say that in instances of physical coercion the victim's body is used as an instrument, whose movements are made subject to another person's will.' For example, I could guide someone's hand, exert physical pressure, to make them sign their name under a contract.¹¹³ In the other form of coercion, which is based on threats, (Frankfurt, 1998: 27) 'it is the victim's will which is subjected to the will of another.' The threats could be threats of violence (to use force) or threats of any other unpleasant/undesired consequences. In the first type of coercion, actual force is being used. In the second type the threat of force (violence) or other negative consequences is usually sufficient to achieve submission.

Nozick, as well as Nino, only refer to the latter type (based on threats), and I will restrict the discussion to this notion of coercion. I will use 'coercion', 'coerce' and 'coercive' in the following way: If the threat is successful in bending the will of an individual, then 'coercion' has occurred – it is an effect of the threat. That person was 'coerced' into acting against their will. The threat itself is 'coercive'; it is an attempt to bring about a result: coercion.

Coerciveness: contracts and crimes

A threat may make the consequences of a subject's actions (Nozick 1969: 447) 'worse than they would have been in the normal and expected¹¹⁴ course of events'. In an offer the consequences are better or, rather, an offer increases the range of options for an agent, without there being any unwelcome consequences.¹¹⁵ Normally, the consequences (of taking up an offer) are welcome because they are in accord with the recipient's wishes.

Nino (1983: 301) states that punishment 'is *threatened* and not *offered* to individuals who contemplate committing a crime. Furthermore, in contrast to the case of contracts, an alternative course of action open to the individual seeking to avoid

¹¹³ My example.

¹¹⁴ Nozick (1969: 447) explains that 'the term "expected" is meant to shift or straddle *predicted* and *morally required*.' I will come back to the moral course of events shortly.

¹¹⁵ Nozick sets aside the problem of decision making costs, and I will do the same. Let us assume that the decision making cost of an increase in options from which to choose is minimal.

punishment involves compliance with a legal restriction which may be perceived by that person as a burden.'

Let us also briefly characterise the nature of a contract. We could say that, essentially, a contract comes about if an offer is made by A and the terms of the offer are accepted by B.¹¹⁶ Normally, there is no element of coerciveness when a would-be contractor considers whether to enter into a contract or not. The alternative action, i.e. not to enter into a contract, normally constitutes an option which would not be seen as a burden. In such an instance we simply retain the *status quo*. The offer was, for whatever reasons, rejected by the would-be-contractor. In contracts neither the offer nor the alternative course of action, i.e. retaining the *status quo*, are normally considered to be coercive.¹¹⁷

The aim of a threat is to limit the range of options open to an individual, to make one particular option 'compelling', and all others less eligible, whereas an offer increases the range of (legal) options available.

In offers to contract, (new) burdens only arise when one enters into a contract. In threats of the law, it appears, that there are burdens in the compliance with the law as well as (new) burdens in the defiance of the law. The question is: Does the coercive character of the law unfairly worsen the position of the individual? Nino's answer would be 'No', because the would-be-criminal has a moral obligation to refrain from certain conduct (e.g. murder, torture, rape) – whether she consents to this obligation or not.

Nino accepts that a person who does not defy a threat, who gives in to a threat, may have been coerced by the threat. But he (1983: 302) argues:

It does not follow from the fact that the individual is coerced in the latter case [compliance] that he is also coerced when he defies the threat. On the contrary,

¹¹⁶ See Hohfeld (1913: 26).

¹¹⁷ Although some writers claim that there are coercive offers - see Harry Frankfurt (1998) and David Zimmerman (1981). Thomas Schramme (2004: 366) writes: 'It makes no difference that offers are proposals to better the situation of Q and threats proposals to harm Q. Therefore, it seems more likely that the essential characteristic of coercion is based on its influence on the autonomous will and not on the welfare of a person.'

one would say that when he defies the threat, the individual is resisting coercion, and that this resistance, far from being unfree, is the result of a great strength of will.

What is important for Nino is that the offender was not coerced into entering a situation where she is liable to punishment.¹¹⁸ According to Nino crimes are only punishable if the individual committed them voluntarily and knowingly. This mirrors the situation in contracts, where an agent is (normally) not coerced into entering a contract, but does so freely.

Of course one could be coerced (through threats) into committing a crime – and one could view this as a voluntary act, because there is always the (sometimes only theoretical) possibility of defying a threat. But in this context 'voluntary' for Nino includes the notion of being 'uncoerced', otherwise we could not speak of 'consent' (to the legal-normative consequences of an act). This is also clear from the previous quote: 'far from being unfree'. And this is in accord with modern legal systems. Contracts which result from coercion are invalid. Similarly, acting under duress¹¹⁹ might be an excuse in the context of crime, or it might result in mitigation.

One could say that the offender, rather than obeying the law, prefers to perform an action which, as it happens, is prohibited by law.¹²⁰ The burdens of complying with the law are normally easier to bear than the burdens which are attached to breaking the law, e.g. most people would consider it to be easier to pay their taxes than to go to prison for tax fraud.¹²¹ And among the class of law-abiding citizens we need to distinguish the sub-set of the fair-minded. For them the burdens of compliance are presumably much lighter or sometimes even non-existent.¹²² The other sub-set of the law-abiding are the pragmatically-minded. They act out of self-interest, and obeying the law is usually the better option for them.¹²³

¹¹⁸ This seems uncontroversial, but Nino considers the claim that the law might 'coerce' an individual into accepting the legal-normative consequences of crime. See my subsection: "The coercive force of the law".

¹¹⁹ I will say more on duress shortly.

¹²⁰ The motivation may be purely instrumental: I steal a car, because I will need it as a get-away car when I rob the bank. At the other end of the spectrum the motivation is that I just enjoy breaking the law for its own sake.

¹²¹ My example.

¹²² More on the fair-minded below.

¹²³ There may also be the occasional philosophical anarchist. They might obey or defy the law,

There is no certainty that the offender will be caught, tried, convicted and ultimately punished. Although the offender is normally aware that by committing a crime she is now liable to punishment, the offender sees the infliction of punishment only as a (remote) risk, hoping that the risk will never materialise. Consequently, she prefers to accept being liable to punishment – rather than assuming the burdens of complying with a particular law.¹²⁴

Thus, the analogy to contracts (let us call this the 'Parity Thesis'), which Nino wants to maintain, amounts to this: the parties to a contract prefer to enter into the contract and to consent to the legal-normative consequences which follow from the contract, just like the wrong-doer prefers to commit a proscribed act and consents to the legal-normative consequences which are attached to this act (of crime).

The pre-threat and pre-offer situation

Nozick (1969: 461) states that in order to distinguish threats from offers, we should not just look at the threat/offer situations but also at the pre-threat/pre-offer situations. Nozick calls the situations before a threat or offer is made, 'the presituation', and he calls the situations after a threat or offer is made 'the threat and the offer situations' respectively, and I will adopt his terminology.

In the threat situation we look at the choice of either submitting to the threat or defying the threat.¹²⁵ In the offer situation we look at either accepting or declining the offer. In the latter case, whatever I choose, my situation does not become worse.¹²⁶ There is, however, the chance that my situation could become better. For example, if someone offers me their guitar, to add to my collection, then my situation could become better, if the offer matches my desires. This means that the choice I face in the offer situation is normally welcome – unless it clashes with my religious or

depending on their particular outlook.

¹²⁴ Similarly Hart in his essay *Legal Responsibility and Excuses* (2008: 47): Hart writes that the would-be criminal 'can weigh the cost to him of obeying the law - and of sacrificing some satisfaction in order to obey - against obtaining that satisfaction at the cost of paying the "penalty".'

¹²⁵ Frankfurt (1998: 40) distinguishes between 'coercive threats', they compel a person to do the action - the person effectively has no choice, and between threats to which it is merely reasonable to submit. But there is a third possibility according to Frankfurt (1998: 43): 'It is also possible that a person who receives a threat should be unmoved by it, and that he should abstain from taking it into account.'

¹²⁶ Unless I desperately need the item to survive (food/medicine).

political sensibilities.¹²⁷ For example, a crusader against pornography might not appreciate the offer of a free porn channel by a TV provider. Or a republican might not welcome the invitation to tea with the Queen. But these are exceptional circumstances.

In the threat situation submitting to the threat may worsen my situation (psychologically and/or materially), but not as much as by defying the threat. Submitting is normally the (much) smaller evil. This means that the choice I face in the threat situation is normally not welcome, because both options worsen my situation.

Why is the conceptual distinction between pre-threat/threat and pre-offer/offer important? Nozick points out that, apart from considering the threat/offer situations, we need to take a step back and look at a (hypothetical) choice which is logically prior. In the pre-threat situation the choice is between moving from a situation where I am not threatened to a situation where I am threatened. In the pre-offer situation the choice is between moving from a situation where I do not receive an offer to a situation where I do receive an offer.

Nozick thinks that a rational person would, normally¹²⁸, not want to move from the pre-threat to the threat situation, i.e. she would prefer not to be threatened. And, secondly, she would not want to be faced with the choice in the threat situation. Whereas she would prefer to move from the pre-offer situation to the offer situation. And, secondly, she would prefer to be faced with the choice in the offer situation.

The voluntariness of the agent

Building on Nozick's conceptual framework, Nino (Nino 1983: 301) considers the objection that the assumption of a liability to punishment (in the threat situation) cannot be seen as 'entirely free' and (fully) consensual, because the would-be offender would have preferred to remain in the pre-threat situation. The idea is that the

¹²⁷ I will not discuss coercive offers, but see Harry Frankfurt (1998), David Zimmerman (1981) and Thomas Schramme (2004).

¹²⁸ However, I can imagine individuals who enjoy giving in to a threat or who enjoy the opportunity to defy a threat. But this would be highly unusual, if not abnormal. People usually don't like to be threatened, even if they feel that they are in a strong enough position to defy the threat.

reluctance of the agent to move from pre-threat to threat cannot confer (full) consent onto the assumption of a liability to punishment in the threat situation.

Nino's (1983: 302) response to this objection is:

However, the same can be said in the case of contracts, since a contracting party would normally have preferred to get the thing or service that he seeks to obtain through the contract without entering into it and without the correlative obligations that, in absence of the relevant legal rules (like property laws), he would not have to assume.

In the case of contracts, Nino argues, a contracting party would also prefer to remain in the pre-offer situation, they would prefer to achieve their objective, without entering into a contract and without the correlative obligations. Nino suggests that a would-be contractor would prefer to have the thing or service for free. Nino (1991b: 282) is more explicit in a later work:

the agent would have chosen not to have to choose between not committing the crime, thus preserving his immunity to punishment, and committing the crime, thus undertaking a liability to punishment. In the same way a contractor would have chosen not to have to choose between not having something and paying for it.

This line of defence, against Nozick's challenge, does not work for several reasons. If Nino's intuitions about the would-be contractor were true, then she would turn out to be a would-be wrong-doer. She would want to obtain something (take it?) without being subject to any reciprocal obligations on her part. I am assuming that we have a right to property, which also holds in the (Lockean) state of nature. Consequently, the distinction between what a would-be wrong-doer prefers and what a would-be contractor prefers would collapse – and with it Nino's line of defence.

Nino is suggesting here that the would-be contractor would turn out to be no different from a would-be criminal, by preferring to get what she wants without giving anything in return. I will argue that Nino's intuitions are not right in this context.

The law-abiding may wish to inherit a desired item or to receive it as a gift or to get it at a knock-down price, but they don't wish to obtain it just by taking it. Even if there were no contract law or property law, taking something which belongs to another would be still be a moral violation (of natural rights) rather than a legal violation.

The law-abiding, consisting of the fair-minded and of the pragmatically-minded, would not prefer to be in such a situation because everyone would be taking from everyone else. The security which contract law and property law provide would disappear. Nino is right that the would-be wrong-doer resents the legal burdens of criminal law, because they make it more difficult to achieve her (prohibited) objective. However, the would-be contractor normally values the burdens of contract law, because they make it easier to achieve her (permissible) objective. Hart (1958: 604) is illuminating on this point: 'The rules of criminal law are either obeyed or disobeyed. Other rules of the law are not coercive (marriage, will, contract) – they tell you how it is done.' They are facilitative.

Even the would-be criminal would not prefer the free-for-all situation, because she relies on others to abide by the law. Their compliance with the law helps her in pursuing her endeavour.

The Consensual Theorist

Nino's line of defence may be made to work (by making some adjustments) and it might be instructive to consider its merits. I will call the protagonist of this adjusted line of defence 'Consensual Theorist' – CT for short. Whenever the positions of Nino and CT coincide, I will refer to them jointly as 'Nino/CT'.

Here are the adjustments I want to make to Nino's line of defence. For CT the would-be contractor only resents the formal and material restrictions which contract law imposes on her, should she wish to obtain (Nino 1983: 302) 'something over which the offerer has legal power.' The object and purpose of a contract (material restriction) must be legal, e.g. selling someone into slavery is not legal, neither are contracts involving banned drugs. And the contract must meet the legal requirements formally, e.g. it might have to be in writing or two witnesses might be required. Although the

would-be contractor resents these restrictions, she accepts that she cannot have the thing or service for free (i.e. without any reciprocal obligations), otherwise she would turn out to be a would-be criminal.

This means that CT can maintain the Parity Thesis. If contracts and the underlying consent is valid, although would-be contractors would have preferred to achieve their objective without the legal constraints of contract law, then, the consent to legal-normative consequences of crime is equally valid, although the would-be criminal would have preferred to remain in the pre-threat situation, without taking on certain legal burdens.

Note that Nino (1983: 301) states that complying with the law, i.e. the alternative to crime, may be seen as a burden for the individual who is 'seeking to avoid punishment'. This is also compatible with CT's position: complying with the formal and material restrictions of contract law might be burdensome. However, declining an offer and thus avoiding to enter into a contract, is not burdensome in itself. Nothing (new) follows from declining an offer¹²⁹ – I retain the *status quo*, i.e. I don't acquire any burdens because of this.

Both acts, entering and declining to enter into a contract, are within the law. But if I decide to enter into a contract, I am subject to the burdens which ensue from doing so. I would like to classify them as follows. There are two types of burdens. The first type of burdens are the formal and material restrictions of contract law. The second type of burdens are the obligations specified in the contract, e.g. I must hand over my car in order to get £ 5000 for it.

For CT the would-be contractor in the pre-offer situation would only prefer to be free from the first type of legal burdens (i.e. the formal and material restrictions imposed by contract law) but not from the second type. Any would-be contractor who resents

¹²⁹ I am excluding the scenario of a malicious seller who gets angry because I declined the offer. The standard case is more like this: I enter a shop, browse, ignore the pushy salesperson and leave. Declining the offers does not involve incurring any legal burdens for me. Of course, if one stands in a special relationship to the offerer (a friend, a family member, one's employer) it might sometimes be awkward to decline an offer.

both types of burdens would turn out to be a would-be criminal, because acting on her preferences would constitute theft.

CT equates the legal burdens ensuing from committing a crime with the burdens ensuing from entering into a contract. But the analogy breaks down. Crime is a prohibited act. Entering into a contract is not a prohibited act, it is a permissible act. But it is subject to the constraints of contract law. In both instances burdens ensue, and only in this respect CT's analogy holds.

The 'burdens' of contract law are really only constraints¹³⁰ (limitations) on permissible acts; whereas crime is a prohibited act, and for this reason society attaches legal-normative burdens to committing a crime. The burdens of contract law are imposed in order to facilitate what the contracting parties are proposing to do. These burdens are designed to make contracting easier, more efficient, more reliable, etc. The normative burdens of committing a crime are imposed in order to reduce/prevent harmful acts¹³¹ (crimes) in society.

There is a normative difference between preferring not to be threatened for committing a prohibited act and between preferring not to be constrained by contract law (which regulates permissible acts). Should we give equal weighting to the preferences of the wrong-doer and to the preferences of the (law-abiding) contractor? Presumably the answer is 'No!'¹³² We should be guided by what the fair-minded would prefer rather than by what the would-be criminal would prefer, because the latter is in pursuit of an unfair and prohibited advantage. If we took their preferences as a guide, it would confuse our moral (and legal) intuitions of what is right and what is wrong.

The normal and expected course of events

There is another problem which Nino has overlooked. He is trying to respond to the objection that the reluctance of the agent to move from pre-threat to threat cannot

¹³⁰ To illustrate how constraints work: every member of the college may borrow books from the library. But there are constraints, i.e. limitations on this permissible act. Students may borrow up to 10 books and lecturers may borrow up to 20 books.

¹³¹ Not all crimes are harmful, e.g. certain sexual behaviour between consenting adults in private may be declared to be a crime, although nobody is being harmed by it.

¹³² Note that the offender is still owed a justification if the state harms her through punishment.

confer (full) consent onto the assumption of liability to punishment in the threat situation. If we apply Nozick's analysis to the context of crime, then we end up with the following claim: threats (of the law) make the consequences of a subject's actions (Nozick 1969: 447) 'worse than they would have been in the normal and expected course of events'. The normal and expected course of events is the baseline which helps us to differentiate between threats and offers. In most instances the normal and expected course of events is also the moral course of events, although sometimes, Nozick points out, they might separate. Nozick (1969: 450) uses slavery to illustrate this. The normal and expected course of events for the slave is not necessarily the moral course of events: i.e. being beaten by the master may be the normal and expected course of events for the slave, but it is not the moral course of events.

What would be the normal and expected course of events in the absence of the threats of the law? I see three possibilities: First, the act in question is not a crime any more (and we remain in civil society); second, we are in Nino's 'pre-legal situation'; third, we are in the state of nature, where there are no threats of the state. I will discuss these possibilities in turn.

In the first scenario the individual would prefer to perform an act, which at another time would be a wrongful act. This means that now the individual is not subject to the burdens of the law. One way in which this could come about is when a wrongful act is decriminalised. Adultery is no longer an offence in England, nor in most European countries (but it is still classed as a crime in some states of the US). Thus, in some European countries it is possible to commit an act, which was once an offence, with impunity. There are no legal-normative consequences attached to adultery in the respective countries of Europe.¹³³

There are usually good reasons for decriminalising a previously prohibited act (e.g. the social attitudes towards the act may have changed), but these reasons do not include the wrong-doer's preference not to be threatened by the law. For such wrong-doers it is 'a nice coincidence' that decriminalisation allows them to satisfy their preferences without incurring any legal burdens. In such circumstances the normal

¹³³ I am ignoring legislations where adultery is a grounds for divorce.

and expected course of events does not involve any legal burdens resulting from the act (say, adultery).

But here the normal course of events might split from the moral course of events. The consenting adults (X and Y) who have an adulterous relationship still wrong Z who is married to Y.¹³⁴ The moral course of events for X and Y (as well as for Z) is not to commit adultery. Using the preferences of X and Y as a guide would lead to moral confusion. Instead Z's perspective (her preferences) should be our guide. She is (as things stand) a representative of the fair-minded.

Similarly, if, for some fantastic reason, there were no legal sanctions for murder, torture or rape, the moral course of events would still be: not to murder, not to torture and not to rape. This means that the preferences of would-be wrong-doers with regard to the legal consequences of most¹³⁵ crimes, can be disregarded if the normal and expected course of events splits from the moral course of events. The fact that the threats of the law make the consequences of committing crimes worse for the wrong-doer does not warrant society to accede to their preferences (and to abolish any legal burdens attached to such acts), because most crimes are morally wrong.

Nino's pre-legal situation

As I have just discussed, the pre-offer and the pre-threat situations are (for both Nozick and for Nino/CT) hypothetical situations. They purport to illustrate what individuals would prefer in spite of being subject to the burdens of the law.

I will now turn to the second possibility: the 'pre-legal' situation. Nino/CT tries to strengthen his argument by introducing the pre-legal situation.¹³⁶ This is another hypothetical scenario, but there the individual is not subject to some of the burdens which the law imposes on us now. Nino (1976: 113/10; 1991b: 275) writes:

¹³⁴ For a discussion of who is wronged by adultery see Dempsey (2013).

¹³⁵ Not all crimes are morally wrong - see Hart (2008: 236).

¹³⁶ Note that this differs from Hart's idea of a pre-legal system, which is not a fully developed system of law. It has primary rules (commands backed by a threat), but it lacks certain meta-rules (secondary or power conferring rules).

[I]f we give [sic]¹³⁷ another step backwards and we look not only at the pre-offer situation but also at the pre-legal situation, that is to say, at the situation before the existence of laws which make an offer to be necessary in order to get something which belongs to another person, the individual who wants that thing would not normally have chosen to move from a state of affairs in which he could have it without having to accept the terms of the offer of the other person to a situation in which that acceptance is required.¹³⁸

When CT refers to accepting 'the terms of the offer' we need to qualify this and add: accepting the terms of the offer *as laid down in contract law*. The exchange of mutual performances is something which the parties in the pre-legal situation do envision. Otherwise, just like in my discussion of the pre-situations, there would be no difference between a would-be wrong-doer and between a would-be contractor. To put it differently, the distinction between a would-be contractor and a would-be wrong-doer in the pre-legal situation would collapse.

Although Nino only discusses the preferences of would-be contractors in the above passage about the pre-legal situation, the same would presumably apply to would-be wrong-doers. However, in order for this example to work, we must presuppose that individuals in the pre-legal situation can still violate norms, but these are based on morality and/or custom. Thus the conclusion would be similar: a would-be wrong-doer in the pre-legal situation would not normally have chosen to move from a state of affairs in which he could do the proposed act without having to accept any legal burdens (instead of facing *merely* the social sanctions for violating morality¹³⁹ or custom) to a state of affairs where she is subject to the threats of the criminal law.

This situation is 'pre-legal' because both the would-be offender and the would-be contractor are aware that they are *not* subject to certain legal restrictions/sanctions –

¹³⁷ In *The Ethics of Human Rights* (1991b: 275) 'give' has been replaced by 'take'.

¹³⁸ Note that the notion of the 'pre-legal' situation appears first in Nino's DPhil thesis (1976), but it is omitted in Nino's paper from 1983 ('A Consensual Theory of Punishment'). Neither Thomas Scanlon nor Marshall Cohen, the editors of *Philosophy and Public Affairs* at the time, can remember any details about the omission of the 'pre-legal' situation. Although Prof. Cohen, who did most of the editing, recalls that 'there was a lot of editing.' Eight years later, in *The Ethics of Human Rights* (1991b: 275), the 'pre-legal' situation is included again in the chapter on punishment.

¹³⁹ Not all criminal laws track moral or customary obligations. Some laws are far removed from this (Hart 2008: 236) 'because of variable and disputable conceptions of social and economic policy'.

in contrast to the pre-situations where they are both aware that they *are* subject to legal restrictions/sanctions.

In the pre-legal situation, I am free only from the constraints which the relevant legal rules (in the offer situation) would impose on me. But, just like in the pre-offer, there is still an obligation (not legal but moral) for a mutual exchange of performances.

If none of these restrictions of contract law were applicable, then this would mean that I could, for example, 'contract' (it might be better to say 'we come to an agreement') with a 17-year old. We could come to an agreement about selling her a property, because the relevant legal rules from the offer situation do not apply. Furthermore, the transaction (i.e. that which would have been specified in the contract) would not have to be in writing and no witnesses would be required.

In the pre-legal situation there would be no contracts. But, presumably, we would still have the equivalent of contracts, or perhaps we should call them 'agreements', 'exchanges', 'swaps', 'commercial transactions', or even 'alienations of possessions'. These would not be subject to legal restrictions. The law would not interfere in this realm.

How should we imagine such agreements? It would be analogous to our everyday promises, which are normally not regulated by law.¹⁴⁰ Everyone knows what a promise is and knows how to make a promise – without there being any legal restrictions on our everyday promises (e.g. *I promise to come to your birthday party.* or *I promise to help you with your homework.*). But it is conceivable that the law could apply to the practice of promising.¹⁴¹

¹⁴⁰ I am not suggesting that such agreements are promises. Promising just serves as an example for a social institution which is not regulated by law. But note that an influential recent take on the nature of a contract is Charles Fried's (1981) 'Contract as Promise'. According to Fried a contract is an exchange of promises. For a critical view see Patricia Smith (1998, Chapter 6) and Randy Barnett (2012).

¹⁴¹ For example, breaking an engagement (i.e. breaking the promise to marry another) is something which is regulated by German law, and it could result in a liability for reputational and/or financial losses; although this is on the wane now.

Thus, just like in promises, agreements in the pre-legal situation would still involve burdens/obligations. I am still expecting the 17-year old to hand over the money, and I am expected to vacate my house.

If such agreements were not regulated by contract law, then, presumably, there could be no legal enforcement of the obligations ensuing from the agreement. I would only face social sanctions, if I were to break such an agreement. However, this would mean that a would-be-contractor, contrary to Nino, would not prefer to be in the pre-legal situation, whereas a would-be wrong-doer would prefer to be in the pre-legal situation.

Thus, if I am right that the would-be contractor would not prefer to be in the pre-legal situation, the same would hold in the pre-offer situation. Although the formal and material requirements of contract law may sometimes be seen as a nuisance, they are designed to give effect to the intentions of the contracting parties and, most importantly, they also help with securing a remedy when there is a breach of contract.

The law serves some important functions when it comes to conducting transactions. Hart (2008: 34) writes that a legal system provides us with 'legal facilities whereby individuals can give effect to their wishes by entering into certain transactions that alter their own and/or others' legal position (rights, duties, status, &c). Examples of these civil transactions (acts of the law, *Rechtsgeschäfte*) are wills, contracts, gifts, marriage.'

I submit that fair-minded (as well as pragmatically-minded) people would welcome the legal burdens imposed by criminal law as well as the legal burdens imposed by contract law. Nino's intuitions about the preferences of individuals in either the pre-situation or the pre-legal situation are only right when applied to would-be wrong-doers. CT's position, which is restricted to what would-be contractors would prefer, is equally implausible. Without the constraints of contract law there can be no (legal) enforcement and there is no guarantee for a remedy in case of breach of agreement – the would-be contractor may only rely on social sanctions.

Although Nino does not do so, let us consider the pre-legal situation with regard to threats of the law. Would individuals prefer the pre-legal situation to being threatened by a criminal statute? In the pre-legal situation, although there are fewer legal restrictions¹⁴², there might still be moral/customary restrictions, or restrictions which might ensue from the (Lockean) law of nature.¹⁴³ The pre-legal situation differs from the state of nature in that there is still a legal system, but it is much reduced. There is, for example, no contract law and some acts which would be crimes in the threat situation are not classed as crimes. I am assuming here that either moral/customary restrictions and/or the law of nature would apply in some contexts where there are no legal restrictions. For example, it would be wrong to break your promise¹⁴⁴ to pay me a sum of money for moving into my house, after I have moved out. Equally, moving into my house during my absence, without my prior permission, does not make it right. You may expect me to try to evict you, and if necessary by (personal) force.

Thus, in the pre-legal situation the pool of options does not increase (significantly) – for fair minded people. It is still not permissible to break a promise or to take someone's property or to kill another. Here we will not face legal censure, but social censure instead. The reason why we do not escape censure in the pre-legal situation is because there are certain moral/customary obligations, and obligations which spring from the law of nature), which persist in the pre-legal situation.

I believe it is plausible that the fair-minded would not prefer the pre-legal situation to the threat or offer situation. To them it doesn't make much of a difference with regard to their moral/customary obligation. But they would presumably prefer the security which the legal burdens in the threat (and offer) situation provide. It is only the would-be wrong-doer¹⁴⁵ who would prefer the pre-legal situation, because it would be easier, in some instances, to evade (natural) justice.

¹⁴² E.g. tort law might be in force.

¹⁴³ For the sake of argument, let us assume that there is such a thing as 'the state of nature' and that within this state we have natural rights.

¹⁴⁴ 'Promise' here stands for a legally unregulated agreement (a social convention), just like our everyday promises (*I promise to pick you up from the airport!*) now, which are normally unregulated by law.

¹⁴⁵ But see Glaucon's argument in Plato's Republic (Bk. II, 359-360). Glaucon's tale of the ring of Gyges is supposed to illustrate that everyone, the just as well as the unjust, resents the constraints of justice. And if the just could get away with it they would also act unjustly.

The state of nature

I will now turn to the third possibility: the state of nature. Even in the (Lockean) state of nature there are (natural) rights – although they are not as secure as rights are in the civil state. In the state of nature we would experience the threats of natural law. There, we would have very few restrictions, save for those which arise out of the law of nature. But even there we would encounter the threats – threats arising out of natural law.

Locke writes in the *Second Treatise of Government* (1980, Bk. II, § 7: 9):

And that all men may be restrained from invading others rights, and from doing hurt to one another, and the law of nature be observed, which willeth the peace and preservation of all mankind, the execution of the law of nature is, in that state, put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree, as may hinder its violation (...)

An attacker will be aware that the victim has the natural right to hit back. There is no escaping the threats of the (natural) law. Here, just like in the pre-legal situation, the fair-minded as well as the pragmatically-minded, would prefer to be in a situation with a legal-system where their rights, and those of others, are more secure.

My question was: What would be the normal and expected course of events in the absence of the threats of the law? Whether in civil society, in Nino's pre-legal situation or in the state of nature, in most instances there would be a moral course of events, which splits off from the normal and expected course of events. The wrong-doer would still face (social) sanctions, resulting from moral wrong-doing (or perhaps from infringing customs).

As long as the moral course of events separates from the normal and expected course of events, there is no reason to accede to the preferences of would-be wrong-doers by removing the threats of the criminal law. Even without the threats of the criminal law, they will still, most likely, be violating moral and/or customary norms. Furthermore, it seems plausible that the fair-minded (as well as the pragmatically-minded) would prefer to be in the threat/offer situation, because here their rights are more secure.

The coercive force of the law

Let us return to Nino's (1983: 302f.) defence of the Parity Thesis:

If an offender might claim that the law coerces him into assuming a liability to punishment should he want a certain prohibited advantage, a contracting party might also claim that the law coerces him into accepting the terms of an offer should he want something over which the offerer has legal power. In the case of contracts we do not allow such a claim when the relevant laws are considered just; the justification of particular distributions based on the free choices of the parties presupposes the fairness of the legal framework within which those choices are made.[FN] The same can be said in the case of the criminal law: a particular distribution of punishment can only be justified on the basis of the consent of the recipients when the legal prohibition of the act to which punishment is attached is just (it should not be, for instance, discriminatory and should not proscribe actions that people have the moral right to do).

Nino equivocates here in his use of the verb 'to coerce'. The threats of the law are designed to coerce us into obeying. However, an offender who claimed 'that the law coerces him into assuming a liability to punishment should he want a certain prohibited advantage' is not being *coerced* by the law – here Nino equivocates. What he means is that committing a crime is a package, where the benefits (the fruits of crime) cannot be uncoupled from the burdens (the legal-normative consequences). The burdens necessarily follow from committing a crime.

It is usually not too difficult to obey the law (in Western liberal democracies) and it is within the capacity of most people¹⁴⁶. The fair legal framework, which Nino demands, presupposes that this is so. Normally, there is a viable alternative course of action open to the would-be offender (i.e. conforming to the law). Thus, she cannot claim that she is 'coerced' (here: pressured by circumstances¹⁴⁷ rather than by threats) into assuming liability to punishment, should she want a prohibited advantage.

¹⁴⁶ See Hart (1997: 171f.).

¹⁴⁷ Note that English law has recently [*Willer* (1986) 83 Cr App R 225] begun to recognise the defence of 'duress of circumstances', in addition to the long standing 'duress by threats'. Most early cases

However, if complying with the law were too onerous, then the offender could claim that the circumstances (say, danger of starvation¹⁴⁸) combined with the prohibition (theft is a crime) *compelled*¹⁴⁹ her into breaking the law. In a just legal system this would be a candidate case for pleading the necessity defence.¹⁵⁰ The offender acted out of necessity rather than because of coercion by threat.¹⁵¹ Acting out of necessity would, just like complying with a threat, call into question the voluntariness of the choice.

If the circumstances are such that obeying the law is not too onerous and within the capacity of the offender, then we should characterise the situation as follows: The prohibited advantage cannot be had without liability to punishment, because this legal-normative consequence is necessarily attached to it. Choosing a prohibited advantage is a package deal. It comes with a liability to punishment attached. We might say that the criminal law is set up in such a way that the would-be offender assumes a liability to punishment (because there is no opt-out clause), should she want a prohibited advantage – but the law does not 'coerce' her into it. On the contrary, the threats of the law aim to coerce the would-be wrongdoer into obeying the law. If the coercive force of the law went both ways (obeying as well as defying the law), the law would be self-contradictory and confusing for the population; it would soon lose its effectiveness.

Pressure of circumstances and offers

For the would-be contractor the equivalent to obeying the law would be living without (Nino 1983: 302f.) 'something over which the offerer has legal power', i.e. not taking

involved traffic offences, but also the possession of firearms. In duress by threats we have an individual who effectively says: *Do this or else*. In duress by circumstances nobody is issuing a threat, instead there is an objective (or natural) danger (see Lord Hailsham in *R v Howe* [1987] AC 417 at 429). This defence is only available if there is a danger of death or serious injury. Thus, I might be compelled to drive away at speed from a burning building.

¹⁴⁸ For example, if I find myself stranded in the Canadian wilderness, I might break into a log cabin and help myself to the food in the cabin.

¹⁴⁹ 'Compelled her' in the sense of 'moved her' or 'motivated her', but not in the sense of 'by physical compulsion' or 'by threats'.

¹⁵⁰ In a fair legal system the necessity defence might apply, where we have an overwhelming urgency and the harm through law-breaking is minor. Although Lord Denning would probably disagree: 'if hunger were once allowed to be an excuse for stealing, it would open a way through which all kinds of lawlessness would pass' (*Southwark London Borough Council v Williams* [1971] 2 All ER 175).

¹⁵¹ My example looks like a case of 'duress of circumstances' and Smith & Hogan (1996: 252) write that duress of circumstances is 'simply an instance of necessity.'

up an offer. Are the burdens of doing without so great that she is *pressured* (rather than 'coerced' as Nino writes) 'into accepting the terms of an offer should he want something over which the offerer has legal power.'? In my view this is not normally so.

There may be cases, however, when one is in such a vulnerable or desperate position that one is compelled to accept the terms of an offer, terms which one would not normally accept. The circumstances could be such that there is no other viable option available to me. One possibility is that there are impersonal forces (say market forces¹⁵²) at work: e.g. I need a particular drug to control my illness, but it is so expensive that I have to sell all my possessions in order to get it. Here it is questionable whether my consent to sell my possessions and to buy the expensive drug is the type of consent which we normally value.

The other possibility is that somebody knowingly and intentionally exploits my vulnerable situation. The resulting contract may be considered unconscionable¹⁵³. Consider the famous case of *The Port Caledonia and the Anna* [1903]. A vessel, the *Port Caledonia*, was in distress and asked a nearby tug for assistance. The tugmaster demanded £ 1000 or no rope. The captain of the *Port Caledonia* agreed to the terms. But the court refused to uphold the agreement. Instead it awarded the tugmaster £ 200 for assisting the *Port Caledonia*. Here the judge asked (as quoted in Waddams 1976: 385) 'whether the bargain that was made was so inequitable, so unjust, and so unreasonable that the court cannot allow it to stand.' The court concluded: 'This was an inequitable, extortionate, and unreasonable agreement'. The tugmaster exploited the vulnerable situation of the captain of the *Port Caledonia*. In such a situation the captain could not give meaningful consent.

Normally, a would-be contractor can do without a certain item. But if the circumstances are such that there is no viable alternative, then a contract resulting from this might be declared invalid.

¹⁵² Note that from a Marxist perspective these forces are not impersonal, because they represent individuals who own the means of production.

¹⁵³ Murphy (1981: 92): i.e. a contract 'agreed to in circumstances unfair to one of the parties'.

The legal-normative consequences are part of a package deal

The law does not 'coerce' me into accepting liability to punishment/accepting the terms of a contract. Rather, these are the necessary consequences of choosing to act in a certain way. Nino states that such claims of 'coercion' would not be allowed if the relevant laws are considered to be just. One important aspect of the fairness of laws, as well as of the legal system as a whole, is that obeying the law is within the capacity of most people and it is not too onerous. With regard to contracts, we can often do without the object of a contract, and if we do not like the terms – we wait for a more agreeable offer. And sometimes we could try to re-negotiate the terms of a contract or we could choose to contract with someone else, who will agree to better terms.¹⁵⁴

The situation is similar for would-be-criminals: it is normally possible to live life without committing a crime, but, more importantly, crimes have been declared wrongful acts, because they (normally) harm society. We can normally live our lives without the need to intentionally harm others and/or violate the rights of others.

Even if we ignored for a moment that crimes are wrongful acts, it is within the capacity of most people to abide by the law, and it is normally not too difficult. Thus, it is a conceptual mistake to claim that the would-be criminal and the would-be contractor are 'coerced' into accepting liability to punishment/the terms of a contract. What Nino really means is that there is no alternative to accepting the (undesirable) consequences of the package deal, if the individuals desire the benefits. One cannot opt out of the normative burdens which the criminal law or contract law imposes on us. However, this lack of an opt-out is not an instance of coercion.

Furthermore, Nino seems to say here that even if it these individuals are 'coerced' by the law, we can dismiss their claims because the legal framework is just. However, Nino being a lawyer, would know that contracts obtained by duress¹⁵⁵ are voidable

¹⁵⁴ But note that since the beginning of the 20th century we have the standardised mass contract. There is hardly any scope for negotiating terms in such contracts (e.g. insurance contracts, employment contracts, contracts with utility companies, etc.). And we all need electricity and gas.

¹⁵⁵ Our everyday term 'coercion' roughly corresponds to what the law calls 'duress'. The *Oxford Dictionary of Law* (2003) defines *duress* as: 'Pressure, especially actual or threatened physical force, put on a person to act in a particular way. In law the term 'coercion' has a restricted application. Coercion is a 'defence available only to married women who have committed a crime (other than murder, attempted murder or some forms of treason) in the presence of, and under pressure from, their husbands. Its scope is unclear but may be wider than that of duress in that it may cover economic and

and that duress can also be a defence to a criminal charge. In such circumstances claims of 'coercion'/duress would not be dismissed, by simply arguing: *The legal framework is just!* Thus, Nino uses the word coercion (although there is no coercer present who is issuing a threat) in this context to mean: *when deciding to act in a particular way, in order to obtain some (in the case of crime: prohibited) benefit, then the individual must also accept the normative consequences of doing so.*

Could individuals complain about being 'compelled' to accept the package deal? Nino's short answer is 'No!'. Such claims would not be allowed, because the legal framework is just.

Why attach legal-normative burdens to certain acts?

I will try to unpack Nino's short answer. The state may justifiably attach legal-normative burdens to certain acts, in order to protect individuals from harm (both in crime and in contract law). In contracts there is an additional purpose (of attaching legal constraints), and that is to make it easier to give effect to the intentions of the contractors. The constraints of contract law facilitate the enforcement of the terms of a contract in case of breach. And they allow for a remedy, if strict performance is not possible.

Western liberal societies value the freedom of contract, because it is a proven way to give effect to the intentions of the contracting parties. And what is considered to be the acceptable terms and conditions of contracts has been shaped over centuries, and it is constrained by what we consider to be fair, reasonable, and equitable.

It is widely agreed that the threats of the law are coercive. And coercion is a phenomenon which normally requires a moral justification. But we accept the coercive character of the law, because its threats are aimed at promoting justice, by discouraging us from doing things which violate the rights of others – and thus reducing harm in society. Attaching liability to punishment to crimes is justified for

moral as well as physical pressure'. Coercion as a defence to married women is a relic of the past, but it has recently been invoked, (unsuccessfully) by the wife of, former MP and cabinet minister, Chris Huhne.

Nino because we wish to reduce harmful acts in society (and thus preserve the autonomy of individuals).

However, the structure for the above two claims (the law 'coerces' me into being liable to punishment/the law 'coerces' me into accepting the terms of a contract) is different. First of all, these are not cases of coercion, as I have argued above. These are cases where an advantage – *P* – can only be had in conjunction with legal-normative consequences/legal constraints – *Q* -. Thus, we don't need a moral justification for the alleged coercion, because there is no coercion. However, we need a (moral) justification for attaching legal burdens (i.e. legal-normative consequences/legal constraints) to certain acts. Nino's justification, which I have just unpacked, is the reduction of harm in society.

The state attaches legal-normative consequences/constraints to gaining prohibited advantages as well as to gaining rightful advantages. I submit that part of such a justification is that the alternative course of action (obey the law/do without the object of a contract) is a live option, i.e. it is within the capacity of most people and not too onerous. This is important because of a widely accepted principle of justice: we hold people responsible for their choices. If there were no alternative course of action available, we would be reluctant to apportion (full) blame/responsibility for their actions.¹⁵⁶

Conditional proposals

If we focus specifically on threats of the law, rather than threats in general (as Nozick does), then, there is a further aspect which Nino has overlooked. There is no straightforward equivalent to an offer in the threat situation. In the threat situation the would-be criminal encounters legal burdens, just like we encounter legal burdens in offers to contract. But there is not really an offer of the kind: *You may do/have X*.¹⁵⁷ What we have is an attempt to restrict our options: *You may not do/have X*. This does not even look like a 'conditional proposal'¹⁵⁸ as we know it from contracts: *You may*

¹⁵⁶ Another aspect is the value of choice. Thomas Scanlon has elaborated on this in the Tanner Lectures ('The Significance of Choice', 1986) and in 'What We Owe to Each Other' (2000). I will say more on this in the section on the Forfeiture View. For a critical view see Gerald Dworkin (1982).

¹⁵⁷ This is one reason why crimes are not consentable acts.

¹⁵⁸ There seems to be agreement in the literature that both (individual) threats and offers (except altruistic offers) are conditional proposals. See Anderson (2011).

have my car, if you pay me £ 5000. A conditional proposal would only be a fit description for the threats of a gunwoman who says: 'Hand over your money or I'll shoot you.'

When the law presents its threats, they don't come in the form of a choice (or in the form of a conditional proposal). There is only one option, one thing, which the law wants me to do (or not), and that is to obey. The threats of the gunwoman come in the form of a conditional proposal. If I want to avoid harm to myself, I need to hand over the money. The alternative option is to keep my money, but risk being harmed. I suspect that the reason for this difference is that only the law has (or claims) the authority to declare one option to be a crime. The gunwoman lacks this authority, and therefore she presents the victim with a choice. Whether the victim can effectively choose to defy her threat is another question.

It would not even make sense to call the threats of the law 'negative conditional proposals', e.g.: *If you do X, which is prohibited, you will be punished.* Because doing X is not an option which is being offered to the individual. The structure of threats of the law is more like this: *Don't do X!* with the addition: *But if you do X, you will be punished.* The first part is a command rather than a proposal, and the second part is an add-on – it is a threat or perhaps a warning¹⁵⁹.

Hart (1997) is right to criticise John Austin's command theory of the law, because not all laws are commands backed by threats¹⁶⁰. However, I believe that Austin had an important insight, but we need to restrict this insight to the criminal law. And Hart (1997: 27) himself recognises that the command theory of law bears a strong analogy to the criminal law and its sanctions. A criminal statute is not a conditional proposal (and the individual is not presented with a choice of two or more options), rather, it is a command¹⁶¹ backed by a threat.¹⁶²

¹⁵⁹ I don't think I need to decide this question now.

¹⁶⁰ Some laws are facilitative, e.g. in contract law.

¹⁶¹ We don't need an Austinian sovereign to issue commands, this works perfectly well in modern legal systems: *You must not drink (over a certain limit) and drive!* I cannot enter into a discussion of democracy theory here with regard to the question: Are citizens commanding themselves when they are involved in the political process? But see the footnote below about Kant and Rousseau on co-legislating.

¹⁶² It is interesting that when Hart analyses power-conferring rules, they look like conditional proposals: *If you want to do P in a legally binding way, you need to do Q.* I will give an example to illustrate this: If you wish to make a binding will, then you need (among other things) two witnesses to

Some conceptual clarification is in order. Up to now, when speaking about 'the threats of the law' I was using it as a metonymy (i.e. one part/aspect of something standing for the whole). The expression stood for: *the criminal statutes and the threatened negative consequences which are attached to them*. As a consequence of the above discussion I understand criminal statutes to be commands, which usually have threats attached to them. I will continue to use 'threats of the law' metonymically. Whenever necessary I will explicitly distinguish the commands from the attached threats.

The threats of the law are long-standing

In criminal law the performance of a certain act is declared to be wrong, forbidden, etc. The whole point of this is that the performance of this act is *not* on offer. But note that even though the threats of the law aim to restrict our options they, in fact, do not *decrease* our pool of options (so there is no parity in this sense either. Offers increase our options – I may have/do something which previously I could not. Threats of the law do not decrease our options, because the act in question (the crime) is normally¹⁶³ not offered by society and then taken away (through criminalisation¹⁶⁴ and the accompanying threats). There is no decrease of my options, because I was never given a choice (i.e. offered to commit a crime) by society/the law in the first place. Why? Because the threats of the law are, normally, long-standing¹⁶⁵.

What is missing, and what destroys the parity Nino wishes to maintain, is that there is no equivalent change (an increase or a decrease) in my pool of options when it comes to the threats of the law.

From birth, although I am not aware of it yet, I find myself confronted with the threats of the law. Murder, torture, rape or theft are never options which are permissible, which are on offer. Occasionally a new statute and accompanying threat is added (criminalisation); occasionally a statute and the respective threat is removed (decriminalisation).

sign it. This means that the threats of the gunwoman and power-conferring rules (laws which facilitate entering into certain legal relations) exhibit a similar structure.

¹⁶³ Exceptions are changes in criminal law.

¹⁶⁴ Not all acts which are decriminalised are consequently morally permissible. See my earlier comments about adultery, but this would also apply to attempted suicide, for example.

¹⁶⁵ Nozick does not see this distinction either.

One of the virtues of the law is that it is normally stable over time.¹⁶⁶ Changes to the criminal law are not that frequent – they are exceptional¹⁶⁷. Nevertheless, I will consider whether this exception threatens my argument. What is important is that after a law change the subsequent generations are not faced with a choice (to do or not to do what was once a crime, but isn't anymore – and vice versa), but only with a brute fact. Changes in the criminal law briefly disturb the *status quo*, but after they are implemented, we arrive at a new *status quo*.¹⁶⁸ Furthermore, changes in the criminal law can, presumably, be justified on moral grounds. These are normally changes for the better – like the decriminalisation of homosexuality. Thus, any professed preference for returning to 'the good old days', by those who experience a law change, could be rejected – on moral grounds.

Would-be wrong-doers consider illegal acts as part of their set of options. They count them in.¹⁶⁹ They have (give themselves) more options than the law-abiding (or the fair-minded).

Individual threats

There is an important difference between the threats of the law and between individual threats, which neither Nino nor Nozick discuss. If, one evening, I encounter a gunwoman in a dark alley and she threatens to shoot me unless I hand over my money, then, I am faced with a new option (in the form of a conditional proposal). It is not of my own choosing, but externally imposed (just like the threats of the law are externally imposed¹⁷⁰). We could also view this new option imposed by the gunwoman as a 'negative' offer – negative, because it aims to restrict my options.

¹⁶⁶ Wigmore (1943: 570): 'Law is the quality of being uniform and regular in a series of events, whether in human or in external nature.'

¹⁶⁷ They usually occur because of social changes or because of technological changes (e.g. offences related to the internet).

¹⁶⁸ Sometimes there is a transition (grace) period, before a law comes into effect.

¹⁶⁹ We are back to the issue of whether the views/preferences of the wrong-doer should count as much as the views/preferences of the fair-minded. In some respects the answer is 'Yes' (society needs to give them a justification for how it treats them), in other respects the answer is 'No', otherwise our sense of what is right and wrong may become confused.

¹⁷⁰ This is so notwithstanding Kant's claim (in the *Metaphysics of Morals*, 1991 [1797]: 144 [335]) that the noumenal being is a 'colegislator' (similarly Rousseau who claims that in spite of the constraints of the law we are free because we chose the constraints). I would submit that the man on the Clapham bus is not involved in co-legislating. What we could say is that the laws are drawn up and promulgated on behalf of the citizens. If Kant were right, there would be no need for promulgation. Perhaps one could claim that citizens (in a liberal democracy) are also 'law-makers' in an indirect or metaphorical sense,

However, some threats (e.g. the threats of the gunwoman) only nominally increase my pool of options, but perhaps not effectively. Other threats could be defied without the fear of losing your life, and I suspect that most threats would fall into this category.

It is true that I never wished, nor did I expect to be faced with this particular choice/threat¹⁷¹ presented by the gunwoman; I would have preferred the pre-threat to the threat situation. And this is so, even if I were able to resist going along with the threat – as Nozick (1969: 460) acknowledges. Things are different when we are faced with the threats of the law. Here the fair-minded (and the pragmatically-minded) would presumably prefer the threat situation, but the would-be wrong-doer would prefer the pre-threat situation.

The gunwoman's aim is to coerce me into doing her bidding, to make my *ex ante* options less eligible. At first glance it looks like she is decreasing my pool of options. But her threat adds one more option to my pool of choices (handing over my valuables to the gunwoman).¹⁷² Resisting the threat here is a theoretical but not a practical possibility – unless you are a martial arts expert or if you carry a gun yourself. And there is, as Frankfurt (1998: 43) points out, the third possibility of being unmoved by the threat. But this most likely applies when the threats are not deadly.

When facing the gunwoman, submitting to the threat is advisable, but most of the threats we encounter are probably not about losing your life or about serious physical harm. If my employer introduces a dress code and threatens dismissal for non-compliance, I might resist the threat on principle, or I might just be unmoved by the threat (and continue wearing shorts in the summer¹⁷³), because it does not matter to me whether I keep this job or not.

insofar as they are involved in the political process.

¹⁷¹ Unless I like to live dangerously and routinely visit crime ridden areas.

¹⁷² Ian Carter writes (2012, Chpt. 5): 'Consider the coercive threat "Your money or your life!'. This does not make it impossible for you to refuse to hand over your money, only much less desirable for you to do so. If you decide not to hand over the money, you will of course be killed. That will count as a restriction of your freedom, because it will render physically impossible a great number of actions on your part. But it is not the issuing of the threat that creates this unfreedom, and you are not unfree until the sanction (described in the threat) is carried out.'

¹⁷³ Or imagine a ban on displaying religious symbols at work.

In this respect there is parity between individual threats and between offers, because individual threats, just like offers, increase my pool of options (although some do so only nominally, i.e. when threatened by the gunwoman). But if we compare the threats of the law with offers there is no parity. The threats of the law are long-standing and don't normally change (increase or decrease) my pool of options.

Sometimes offers are unexpected, just like in the threats of the gunwoman. A friend might say: 'I am selling my guitar. Are you interested?' Other offers we actively seek, and I suspect most offers are like this. I might have a wish to sell my house or to buy a red 1965 Ford Mustang. My wishes remain wishes unless I encounter a matching offer. I know that there are many house buyers out there, but they may not be interested in my house. And I know that there are Ford Mustangs for sale, but there might not be a red 1965 Ford Mustang on offer right now. Thus, any wishes I might have only turn into choices for myself if I encounter a matching offer. A lack of matching offers does not limit my options, because I did not have that option to begin with – all I had was a wish. Actual offers increase my options. Actual threats – individual threats, rather than threats by the law – aim to reduce my pool of options by making one (new) option appear to be 'compelling' and the option of defiance (or from an *ex ante* perspective: to act as I please in this particular context) to be less eligible. Nevertheless, a new option (submitting to the threat) is on the table, thus increasing my pool of options.

How compelling is an individual threat? It will depend on the interplay between the nature of the threat and between the psychological make-up of the individual. Frankfurt (1998: 40) distinguishes between 'coercive threats', they compel a person to do the action – the person effectively has no choice, and between threats to which it is merely reasonable to submit. I take it that the threats of the gunwoman would be coercive for Frankfurt and that complying with the dress code of my employer would be reasonable.

However, it appears that English law is not entirely in tune with Frankfurt's insights. Although the law allows for the defence of duress (and coercion for married women), the defence does not apply to murder, attempted murder and to certain forms of treason. Thus, if the victim of a threat is pressured to commit murder or certain forms

of treason, the law apparently takes the view that she had a choice – i.e. the option of defying a threat was on the table.¹⁷⁴

To sum up, we need to distinguish three circumstances. Offers increase my pool of options. They facilitate (through contract law) what the parties are proposing to do and provide security in case of breach of contract. For all these reasons – and contrary to Nino (and contrary to the Consensual Theorist) – we prefer to move from the pre-offer to the offer situation, even though we may sometimes resent being subject to the constraints of contract law.

Threats by individuals (e.g. the gunwoman), although they are designed to make one option most compelling, nevertheless increase my pool of choices. But we would prefer not to be threatened. Whatever we choose, defiance or submission, the consequences are always negative. There are two reasons for this. Firstly, defying the threat would result in negative consequences for myself (i.e. through that which is threatened). Secondly, when I encounter a credible threat, I am made aware of an imbalance of power, underlying the threat, between myself and the threatener. The threatener is trying to use this (real or only perceived) imbalance of power to make me do her bidding – to bend my will to hers. By submitting to a threat I experience psychological harm (e.g. my self-esteem, my pride, my wish to be a self-directed agent, my sense of autonomy, etc. all suffer) and possibly material losses as well.

Threats of the law do not change my pool of choices, they stay more or less the same. Threats of the law do not introduce new circumstances, as in my encounter with the gunwoman, rather, I am usually faced with a long-standing set of legal options. An increase in the pool of options might occur though, if a wrong-doer adds what is forbidden to her existing legal pool of options. But this is not equivalent to an offer. Changes to the law may temporarily change my pool of choices.

Is the law like the gunwoman writ large?

¹⁷⁴ Hobbes (1994, Chapter 27: 198 [157]) takes a different view: 'If a man, by the terror of present death, be compelled to do a fact against the law, he is totally excused, because no law can oblige a man to abandon his own preservation. And supposing such a law were obligatory, yet a man would reason thus: *If I do it not, I die presently; if I do it, I die afterwards; therefore by doing it, there is time of life gained.* Nature therefore compels him to the fact.'

Having had a wish for something means that I would prefer the offer situation to the pre-offer situation, as Nozick rightly points out. But even without a prior wish, offers might still be welcome, because they might induce me to develop such a wish. Whereas in the gunwoman scenario, I would prefer the pre-threat situation. I did not have a wish for the threat situation to come about.

But we need to ask: Is the state, in demanding compliance with the law, like the gunwoman who is demanding my money? Is the law merely (Hart 1997: 7) 'the gunman situation writ large'?

In the *Appendix on Anarchism* at the end of *The Ethics of Human Rights*, (1991b: 306) Nino asks: How much of a burden is it to be faced with the threats of the law? Nino's answer is:

It is true that there does not seem to be a moral obligation to obey an unjust law, and that, when the law is just, it is superfluous for the moral man. But a just law is not superfluous for the immoral man and he has a moral obligation to obey it even when he does not recognize that obligation.¹⁷⁵

Note that here Nino distinguishes between the fair-minded ('the moral man') and between the would-be wrong-doer ('the immoral man'). And it is clear that Nino is viewing the acts of the immoral man through the eyes of the moral man. This means that the reasons I put forward to meet Nozick's challenge (i.e. the perspective of the fair-minded is most important) are compatible with Nino's views about the burdens of the law for the moral and for the immoral individual. Thus, the threats of the law are not the threats of the gunwoman writ large.

The burdens of the law in a fair legal framework

Is there any substance to the complaint of the offender and of the contractor that the law is 'coercing' them to consent to the legal-normative consequences of their

¹⁷⁵ Similarly St. Thomas Aquinas (2008 [c.1225–1274]) in the *Summa Theologica* (1a2ae q96,5): 'a man is said to be subject to a law as the coerced is subject to the coercer. In this way the virtuous and righteous are not subject to the law, but only the wicked. Because coercion and violence are contrary to the will: but the will of the good is in harmony with the law, whereas the will of the wicked is discordant from it. Wherefore in this sense the good are not subject to the law, but only the wicked.'

proposed act (crime) or to consent to the burdens which contract law imposes? As I have discussed above, in this context Nino equivocates and instead of 'coerced' we need to read: *The law is set up in such a way that individuals must accept certain normative burdens, if they want to go ahead with their proposed acts.* It is a 'package deal', because the normative burdens cannot be uncoupled from their proposed acts.

In the case of the offender such a complaint would only have merit if the burdens of compliance with the law were considerably greater than the burdens or defiance of the law, or if the burdens of compliance were unjust or difficult to bear (e.g. starvation). If this were indeed the case, then such a defiant 'choice' could not be considered to be fully voluntary. In the case of the contractor, such a complaint would only have merit if she were in dire circumstances, and the other party were exploiting this by imposing unreasonably terms and conditions. But, as I have discussed above, a just legal system has remedies for such instances.¹⁷⁶

Let us consider the normative burdens of the law in more detail. The criminal law has a *coercive character*, because it aims to restrict our options through threats. However, in an unjust legal system, there could be acts, contrary to law, which are not wholly voluntary because the alternative course of action (obeying the law) is too onerous for the individual to bear. Within a fair legal framework, complying with the law is, normally, within the capacity of individuals and the burdens are not too onerous to bear.¹⁷⁷

As I have argued above, the structure of a criminal statute is not disjunctive. It does not present us with a choice: *You may do A or B; but if you do B you will be liable to legal sanctions.* Rather, the law presents us with a command: *Don't do B!* and a threat or warning is attached to it: *If you do B, you will be liable to legal sanctions.* In contrast, the structure of the constraints of contract law is disjunctive: *If you wish to do P and you do Q at the same time, P will be legally binding. If you wish to do P and you omit to do Q, P will not be legally binding.* In the latter case (Hart 1997: 28) 'it

¹⁷⁶ This still leaves us with the individual who has to sell all possessions in order to get the life-saving drug. But this seems more like a failure of (a just) society than a failure of a fair legal system.

¹⁷⁷ Hart (1997: 171f.) writes about the overlap between moral and legal rules: 'What such rules require are either forbearances, or actions which are simple in the sense that no special skill or intellect is required for their performance. Moral obligations, like most legal obligations, are within the capacity of any normal adult.'

will be a "nullity" without legal "force" or "effect".' The only way for contractors (and offenders) to avoid the package deal, to avoid the legal burdens, is to refrain from the proposed act.

Within an unfair legal framework we could have laws which make compliance with the law difficult to bear, for example the Nazi legislation which was designed to take away rights from Jews which they had previously enjoyed, but which the rest of the population was still enjoying.

Thus, the criminal statutes of a fair legal framework may justifiably be coercive, if compliance with the law is not too onerous for citizens, and if it is within their capacity.

Nozick (1969: 451) writes that the normal and expected course of events is 'to be used as a baseline in assessing whether something is a threat or an offer.' However, it may not always be clear what the normal and expected course of events would be, particularly if it diverges from the moral course of events. Nozick (1969: 451) explains that if the normal and moral course of events diverge, we need to go with the preferences of the recipient of the action (i.e. threat or offer). But the preferences need to be viewed from *ex ante*, according to Nozick (1969: 462).

Nino applies Nozick's general discussion of threats (i.e. threats by individuals) to the threats of the criminal law. But he overlooks that this will lead to counter-intuitive results. Nino's error here is to follow Nozick in taking the preferences of the recipient of the threat (here: the would-be criminal) in the pre-situation as a guide to what is the normal or moral course of events. There may be a normal course of events for the criminal, but there is no moral course of events in criminal behaviour (from the criminal's perspective).¹⁷⁸ Although there is a moral course of events from the perspective of the law-abiding, specifically the fair-minded, when regarding the actions of the offender.

¹⁷⁸ There might be something like 'honour among thieves' though.

Nino's theory is an attempt to articulate that moral perspective, and I take it to amount to the following. In the first instance it addresses the wrong-doer: *By performing prohibited acts you are harming society/violating the rights of individuals. By punishing you, we (society) are not doing anything wrong or unfair, because you consented to change your normative status.* In the second instance, Nino's theory is also addressed to the law-abiding: *It is fair to make wrong-doers, but not others, bear certain burdens (liability to punishment), because they consented to take on these burdens.*

However, Nino has failed to point out the following: The weight I give to preferences in the pre-situation is not normatively neutral. What the fair-minded would prefer has more weight than what the would-be wrong-doer would prefer. Certain normative standards – i.e. standards which we derive from the perspective of the fair-minded and which are conducive to the promotion of justice – are important in assessing the preferences in pre-situations. Committing an act which we consider to be wrongful does not normally promote justice. On the contrary, it promotes injustice.¹⁷⁹

Assuming, as Nino does, that we do have moral obligations not to kill, torture and rape, then those who are not fair-minded (would-be wrong-doers) are coerced by the law – and they resent it.¹⁸⁰ The pragmatically-minded are also coerced by the law, but they prefer the threat to the pre-threat situation, because it safeguards their interests. Although the pragmatically-minded are on the whole law-abiding, we cannot rely on their intuitions/preferences, because they might sometimes discard the moral course of events, when it would suit their interests. The features of a fair legal-framework should be guided by the intuitions/preferences of the fair-minded, rather than by the intuitions/preferences of would-be wrong-doers. Thus, the claim by some individuals that they are missing out, because defying the law is an option which comes with heavy burdens attached to it, loses its force.

Summary

¹⁷⁹ Similarly, the Nazi would prefer laws which favour the 'Arian race' and which disadvantage, what in her view are, inferior races. But her preferences would promote injustice rather than justice.

¹⁸⁰ See the earlier quote from Nino about the moral and immoral man and the burdens of the law.

The challenge arising out of Nozick's account of coercion disappears, if we use the preferences of the fair-minded, rather than the preferences of the wrong-doer, as a guide to what is the normal or moral course of events.

There is no convincing reason to accede to the preferences of individuals who seek an unfair and prohibited advantage. Consequently, the challenge for Nino which arose out of Nozick's essay loses its force – but not for the reasons which Nino put forward.

Nino opted for a different, and ultimately unconvincing, route to defend his theory. I suspect that Nino chose to ignore the intuitions/preferences of the fair-minded as a guide, because his concern is not to violate Kant's Humanity Formula. Taking into account the preferences of would-be wrong-doers seems to be one way of doing this.

6: Proportionality – Larry Alexander

Three years after the publication (1983) of 'A Consensual Theory of Punishment' in *Philosophy and Public Affairs*, Larry Alexander (1986) responds to Nino in the same journal – and Nino replies in the same issue. Alexander's interest in Nino's theory stems from having written a paper ('The Doomsday Machine', 1980) which pre-dates the publication of Nino's theory by three years. Alexander claims that in 'The Doomsday Machine' paper he already identified one problem for the consensual theorist of punishment: that there is no proportionality limit. Alexander's critique of Nino in 1986 constitutes the first scholarly engagement (in the Anglo-American world) with Nino's theory of punishment. I argue that Alexander's objection rests on a misinterpretation of what the offender's consent can authorise.

Alexander's objection: no proportionality limit on punishment

Alexander (1986: 179) presents the following objection to Nino's theory:

The problem is that consent not only substitutes for desert as a justification for punishment, but it also overrides desert as a limitation on the severity of punishment. Put differently, the Consensual Theory of Punishment justifies any punishment, even if the punishment is severely disproportionate (in terms of the actor's deserts) to the severity of the crime. There is no proportionality limit to consensual punishment.¹⁸¹

Alexander employs a retributivist criterion (the proportionality of punishment reflects moral desert) to judge Nino's theory. Moral desert is to be understood as (Alexander 1986: 178) 'the worth of one's moral character reflected in one's acts.' Alexander assumes that moral desert is a good (the proper?) justification of punishment and, secondly, that proportionality is to be understood in terms of desert.

But one could take a different view, take Hart (2008: 80), for example:

¹⁸¹ Duff raises the same objection a decade later (1996: 13f.)

Some punishments are ruled out as too barbarous or horrible to be used whatever their social utility; we also limit punishments in order to maintain a scale for different offences which reflects, albeit very roughly, the distinction felt between the moral gravity of these offences. Thus we make some approximation to the ideal of justice of treating morally like cases alike and morally different ones differently.

For Hart it is social utility combined with moral gravity (i.e. how grave is the moral violation) which guides us in imposing a particular punishment. There is no attempt to inquire about the worth of the moral character of the offender. The underlying principle of justice is to treat like cases alike and different cases differently.

For Nino the proportionality of punishment does not have to be understood in terms of desert; he understands it in terms of *minimum protective function* (i.e. deterrence). Roughly, lesser crimes would require less severe punishments to deter and more serious crimes would require more severe punishments to deter.

Consequentialist and retributivist proportionality

Let us ask: What are, if any, the limits to punishment? A retributivist like Kant (of the *lex talionis* persuasion – return like for like) would demand the death penalty for murder – only this would be the right match. Here the limit is at the same time the harshest punishment possible.¹⁸² A liberal consequentialist (of Nino's or Hart's persuasion) would demand only as much punishment as is sufficient to achieve the deterrent effect. The retributivist cannot go below what she deems to be proportional in terms of desert, nor above it.¹⁸³ Any deviation would constitute an 'injustice'. Because in one instance we would give the offender less than she deserves, in the other instance we would give her more than she deserves.¹⁸⁴ Whereas for the consequentialist it is not necessary to ascertain what the offender morally deserves with regard to the quantity and quality of punishment. Rather, it is important to

¹⁸² I am assuming that exile from the polis or years of torture are not available as punishments.

¹⁸³ I am ignoring one major problem for retributivism here: how to match crimes and punishments. For the purpose of my argument, this is not important, and I am assuming that the retributivist has solved this problem. See Hart's discussion of the issue (2008: 162f.).

¹⁸⁴ But see Finnis (2011: 178) who states that punishment requires 'determinatio' by a judge: 'There is no "natural" measure of punishment'.

ascertain what level of punishment would have the minimum protective (deterrent) effect we aim for.

If we applied the retributivist's proportionality principle (based on moral desert) as a template for assessing the quality and quantity of consequentialist punishment, then, we notice a degree of flexibility which is missing in retributivism. In lesser crimes it would be possible, for the consequentialist, to go below or above of 'what the offender deserves'. In serious crimes, e.g. murder, the consequentialist is constrained (just like the retributivist) by the natural limits of punishment – we cannot go (punish) beyond the death penalty. But here the consequentialist has the option to punish below the level 'which the offender deserves'. In my example this means we do not have to impose the death penalty for murder, if the lesser punishment is deemed sufficient for deterrence.

Assuming that most people are deterrable, we can say that the liberal consequentialist is more likely to inflict less harm through punishment (than the retributivist) when it comes to serious crimes. A punishment which effectively deters might well be below the level of punishment which the desert of the retributivist specifies.¹⁸⁵ In lesser crimes it is conceivable to punish both less severely or more severely than the retributivist would.¹⁸⁶

But what about the undeterrable? Ideologically committed terrorists, for example, should *prima facie* not be punished, because they are unmoved by (the threat of) punishment. However, the consequentialist could argue that their example will deter others, perhaps other committed terrorists? If not, then their example would still be a general deterrent. It would demonstrate to would-be wrong-doers, as well as to the law-abiding, that the threats of the law are credible.

If there were no side-constraints to the consequentialist justification of punishment, we would be using some (the deterrable as well as the undeterrable) for the benefit of

¹⁸⁵ A ten-year sentence might be just as effective as a fifteen-year sentence.

¹⁸⁶ The decision would depend on our sensitivities towards certain minor offences. If public nudity is not seen as particularly offensive, then we can go below the retributivist standard, and vice versa.

others (the law abiding). Nino overcomes this objection by stressing that wrong-doers consent to the legal-normative consequences of their acts.

But remember that in the above comparison I have applied the retributivist view of proportionality as a measure to judge the consequentialist way of punishing. But it is not obvious that this is the correct standard to be applied, unless one is a retributivist.

The Eighth Amendment to the US constitution forbids 'cruel and unusual' punishment. In his earlier paper ('The Doomsday Machine') Larry Alexander (1980: 219) reads this as a retributivist proportionality constraint. But it could equally, and coherently, be interpreted as forbidding punishments which violate human dignity, involve gratuitous harm or punishments which deviate from our past or recent standards – independently of what the offender might 'deserve morally'.¹⁸⁷

Alexander's interpretation of 'cruel and unusual' as a proportionality constraint seems to erode the retributivist stance. If punishment is a response to moral desert, then cruel and unusual punishment might sometimes be the right response.¹⁸⁸ Kant, for example, proposes castration as a punishment for certain sex crimes. However, for Kant proportionality is constrained by human dignity (1991 [1797]: 106 [333]); human dignity constrains what we may do to others. Consequently, torturing someone to death, as a way to inflict the death penalty, would be wrong for Kant.¹⁸⁹

The liberal can often point to constraints within the constitution (e.g. no cruel and unusual punishment), which exclude certain types of punishment. However such constitutional constraints seem to be in conflict with the retributivist stance, notwithstanding Alexander's claim that they are compatible with it (or even part of it?). Nino (1996a: 134), for example, is against the death penalty because it excludes

¹⁸⁷ In *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Brennan (of the US Supreme Court) interpreted cruel and unusual punishment thus: 'The primary principle (...) is that a punishment must not, by its severity, be degrading to human dignity. The paradigm violation of this principle would be the infliction of a torturous punishment of the type that the Clause has always prohibited.'

¹⁸⁸ Richard Lippke agrees (1998: 36): 'It might be claimed that the state fails in its duty to vindicate the rights of victims of heinous crimes if it declines to impose inhumane or degrading punishments on the perpetrators of such crimes. After all, if proportionality is what we seek, humane and non-degrading punishments, even if they last for the rest of heinous offenders' lives, seem insufficiently respectful of victims' rights. Maybe what we should impose on heinous offenders is something proportional to what they imposed on their victims.'

¹⁸⁹ One could of course ask Kant: Isn't castration a violation of human dignity?

that individual from the process of moral discourse. But, more importantly, the death penalty extinguishes the autonomy of a person (the autonomy of the person being one of Nino's three liberal moral principles).

Contrary to Alexander, moral desert only limits the quality and quantity of punishment as it applies to a particular crime. But it is not a general limitation, e.g. it does not exclude the death penalty *per se* (i.e. something which is usually the liberal position). And it does not exclude cruel and unusual punishment *a priori*; on the contrary, it might be required. The retributivist is more likely to require more severe punishment than the liberal consequentialist would deem necessary to be effective. Contrary to Alexander, the offender's consent does not authorise the tariff which the law attaches to crime. This is justified independently of the choice of the offender.

No liberal argument against severe punishments

Let us now look at Alexander's criticism of Nino (1986: 179) in more detail:

The point is simple enough. If the law imposes capital punishment for overparking, then one who voluntarily overparks 'consents' to be executed. Execution is therefore not unfair. And deserts by hypothesis do not matter. The liberal who embraces the Consensual Theory of Punishment has no 'liberal' argument against severe punishments for minor crimes.

Alexander misinterprets Nino here. The criminal does not consent to the punishment and therefore she does not consent to be executed, she only consents to change her legal-normative status. For Nino it is a different question, whether it is morally permissible to attach a particular punishment to a particular crime. This needs to be grounded independently of the criminal's consent. And this would be part of Nino's requirement that we need a fair legal framework – this is the place to settle the question of tariffs.

Let us unpack the implications of this proviso (a fair legal framework) with regard to proportionality. It implies that there must be some principle or rule (minimum protective function) at work when the state attaches tariffs to wrong-doing. And this principle must be justifiable to the population and/or would be largely shared by the

population. In addition principles of justice (e.g. treat like cases alike; treat different cases differently) will be operative in the fair legal framework. Furthermore, human dignity is a constraint which is often enshrined in liberal constitutions¹⁹⁰. Another constraint would be the present or recent practice in punishing. It is hard to see how attaching 'monstrous' penalties to petty crimes could be shared by the population and could be a sign of a just society – or of a fair legal framework.

In his response to Alexander, Nino (1986: 184) states: 'It is doubtful, however, that an enterprise of prevention can be justified if it provokes more harms than those it prevents.' For Nino, creating more harm than one is averting is self-defeating (1976: 106, see also 1983: 290f.):

if social protection were the sole justification of punishment, we would be authorised to employ extremely harsh measures in order to prevent the social harm involved in any offence; to hang a motorist, for instance, would be a much more effective way of preventing parking offences than to impose on him a moderate fine. [FN] This argument is clearly absurd: if one accepts the scale of values crucial to the argument (that the death of one person is worse than a congested traffic flow), the measure in question would, on any rational view of social protection, be self-defeating.

Nino does not accept the scale of values that the argument presupposes. Thus, contrary to Alexander, Nino does have an argument against severe punishments for minor crimes (it would be self-defeating) – and not just one, as I have just explained with regard to the fair legal framework.¹⁹¹

Take Hart, another liberal, for example. As I have discussed in the chapter on Hart and Nino, principles of justice constrain the quality and quantity of punishment. Hart (1959: 23f.) explains:

¹⁹⁰ See the German Basic Law, i.e. constitution [Art. 1 Abs. 1 GG]: 'Die Würde des Menschen ist unantastbar.' (My translation: The dignity of man is inviolable [literally: untouchable].)

¹⁹¹ But, as we will see below, Nino also has an argument for (exceptionally) allowing severe punishments for minor offences.

The guiding principle is that of a proportion within a system of penalties between those imposed for different offences where these have a distinct place in a common-sense scale of gravity. This scale itself no doubt consists of very broad judgements both of relative moral iniquity and harmfulness of different types of offence: it draws rough distinctions like that between parking offences and homicide, or between 'mercy killing' [24] and murder for gain, but cannot cope with any precise assessment of an individual's wickedness in committing a crime (Who can?) Yet maintenance of proportion of this kind may be important: for where the legal gradation of crimes expressed in the relative severity of penalties diverges sharply from this rough scale, there is a risk of either confusing common morality or flouting it and bringing the law into contempt.

Often the moral gravity of an offence is related to its harmfulness. In order to deter an offender from crime (from bringing about a certain level of harm), a certain level of harm (through punishment) must be threatened. If the harm threatened is trivial, then it will fail in its deterrent function. If the harm threatened is much greater than the harm through crime (e.g. the death penalty for parking offences), it will fail in the purpose of reducing harm in society.¹⁹² Thus, both the moral gravity and the harmfulness of an offence can serve a guide in the severity of the punishment.

Hart (2008: 172) also points out that treating like cases alike and different cases differently expresses 'respect for justice between different offenders'. If we imposed the death penalty for overparking as well as for murder, we would be violating this principle of justice. At the same time we would be creating more harm than we would be averting.¹⁹³ In this context the underlying scale of values (which Nino mentions in the earlier quote) is that one life is not worth more than all acts of illegal parking.

For Nino, legal punishment constitutes a 'public' measure which requires (1986: 186) 'some proportionality between harms caused and harms averted. This is so because when objects or mechanisms are created by the state they must be justified on the basis of their net social benefit.'

¹⁹² I am assuming, like Nino, that the death of a person is a greater harm than the harm resulting from parking violations.

¹⁹³ Similarly Hart (2008: 76) - writing about the utilitarian justification of punishment: 'Clearly it is part of a *sane* utilitarianism that no punishment must cause more misery than the offence unchecked'.

A non-aggregative reading of Nino

Thus far we have considered an aggregative reading of Nino, i.e. we looked at the sum of the harms averted and compared it to the sum of harms imposed by punishment. But Alexander writes (1986: 180): 'Even if one treats the harms averted and imposed by punishment non-aggregatively¹⁹⁴, however, Nino's consensual theory can be used to justify harsh punishment. That is so because consent appears to obviate any need to make punishment justifiable on a cost-benefit basis.'

In Alexander's non-aggregative reading of Nino's theory, he again employs the retributive principle of moral desert to judge whether a punishment is harsh (meaning 'morally disproportionate'). Let us instead use Hart's criteria of the (moral) gravity and harmfulness of the offence, and let us assume that past practice in punishment roughly reflects these criteria. Thus, if we were to impose punishments which deviated from past practice by being much harsher, we could call this new policy disproportionate. We are then judging the new measure by applying past practice as a standard.¹⁹⁵

Alexander (1986) gives several examples to illustrate his point – all taken from his earlier paper 'The Doomsday Machine' (1980). A burglar phones his intended victim and tells him that he knows that the victim is going out tonight and that he plans to come and steal his valuables. The burglar also tells the intended victim about his heart condition. If the valuables were too difficult to find he might suffer a heart attack from all the exertion and anxiety in searching for them. So he asks for the valuables to be left in plain sight. The intended victim hides the valuables and, when he returns, he finds the burglar, who has died from a heart attack. Alexander (1986: 180) asks whether this is: 'Excessive punishment for a non-violent burglary?' Other examples he gives are throwing one's watch into a shark tank to keep it safe from a would-be thief, or hiding jewels on top of an unscalable cliff. In all of these hypotheticals Alexander believes that the criminal consented to the harm, which he¹⁹⁶ suffered as a result of his wrongdoing.

¹⁹⁴ I take this to mean: by punishing one individual, we avert more potential harm from this particular individual.

¹⁹⁵ Of course our moral sensibilities might have changed or might be in a transition period. Thus, calling a punishment harsh or disproportionate might be misguided.

¹⁹⁶ Alexander's criminals are all male.

This is a conceptual mistake, as I have discussed in the chapter on Hart. One can only be said to consent to a risk, but not, normally, to the materialisation of that risk, because there is no certainty that the risk will materialise (an exception to this is Alexander's *Doomsday Machine* – there, the harm is certain to materialise). The consent to the risk is really a consent to any legal-normative consequences (e.g. in tort law) which are attached to assuming a risk. The consent of the risk-taker is important, because their legal-normative status determines what burdens may, or may not, be placed on them in case the risk comes about.

But the outcome of the risk-taking, the distribution of harms and benefits, might be fair for Nino, if it originated from the consent to assume a risk. And, presumably, Nino would require certain constraints on assumption of risk which would be contained in a fair legal framework; e.g. protective devices which are designed to kill or maim wrong-doers would not be permitted. Strangely, Alexander calls the harm which befalls the wrong-doer when the risk materialises: 'punishment'.¹⁹⁷

In his reply, Nino states that the examples are structurally dissimilar to punishment. Because (Nino 1986: 184) 'they are not examples in which someone causes a harm to another person. Neither the owner of the valuables who hides them from a thief with a heart condition nor the owner of the penny who puts it in a cave surrounded by sharks *causes* the death of the would-be thief.' Here the harm which befalls the wrong-doer was the result of the risks involved in the pursuance of the crime. Punishment (by the state) is something which occurs long after a crime was committed (following the acts of detection, apprehension, trial and sentencing), but not in the pursuance of the crime.

Alexander's examples are structurally similar to any other risks which are part of committing a crime: falling off the roof, triggering the alarm, getting bitten by the

¹⁹⁷ Hobbes (1994, Chapter 28: 204 [162]) states that punishment is inflicted by the authority of man, rather than by natural events or through risk taking (these might count as 'divine punishments'): 'Sixthly, whereas to certain actions, there be annexed by nature divers hurtful consequences (as when a man, in assaulting another, is himself slain or wounded, or when he falleth into sickness by the doing of some unlawful act), such hurt, though in respect of God, who is the author of nature, it may be said to be inflicted, and therefore a punishment divine, yet it is not contained in the name of punishment in respect of men, because it is not inflicted by the authority of man.'

guard dog, getting injured while running away from the scene of the crime, etc. Whereas in cases of punishment the harm is caused by officers of the state. Alexander's examples constitute a 'private' measure – but even here, there are constraints by the law. There are limits (in law) to the measures one can take in defence of home and property, particularly when it comes to the use of deadly force. Punishment by the state constitutes a 'public' measure (i.e. legal punishment) which requires (Nino 1986: 186) 'some proportionality between harms caused and harms averted. This is so because when objects or mechanisms are created by the state they must be justified on the basis of their net social benefit.'¹⁹⁸ Alexander's examples are cases, where a private individual has taken preventive measures to make committing crime more difficult and/or more risky. They are not cases of punishment but cases where (Nino 1986: 185) 'somebody voluntarily causes himself a harm through a device set up by a third party'.

Alexander's mistake is to believe that burdens which result from the voluntary assumption of a risk are 'punishments' and, secondly, that the offender consents to these 'punishments'. Furthermore, Alexander reasons (by analogy) that the fairness of the outcome of risk-taking in private preventive measures would also apply to instances of state punishment. He, wrongly, believes that the fairness of the former negates any injustice which might be involved in state punishment, if this were based on a Consensual Theory of Punishment.¹⁹⁹ However, consenting to a risk is too weak a principle to justify the imposition of punishment for Nino (- but not for Hart).

Would a non-aggregative reading of Nino lead to counterintuitive results? Nino (1986: 183) states that 'the goal of punishment is the minimization of social harms, and that consent is only a limitation on the pursuit of that goal. But, as we have seen above, there are other limitations, operative through the fairness of the legal framework, which would inhibit the application of harsh punishment. This would apply regardless of whether we employ an aggregative or a non-aggregative reading of Nino's theory.

¹⁹⁸ And the state must also require the principle of proportionality for cases of self-defence, according to Nino.

¹⁹⁹ Similarly Bedau (1987: 1430).

Making fair gambles riskier

Alexander (1980: 217) asks: 'But may we alter the world to make some fair gambles riskier than they would otherwise be? Yes, if the gambles are wrong to undertake in the first place; and most criminal acts are gambles that are wrong to undertake.' Here Alexander endorses the very position which he attacks six years later in his reply to Nino's theory. He endorses a disproportionate response (making 'some fair gambles riskier') to crime (Alexander 1980: 217): 'if the wrongdoer receives worse under the enterprise of prevention than he deserves under the enterprise of retribution by having undertaken a poor but fair gamble, what he receives is just under the principles of justice.' But note that in Alexander's position prevention is only limited by the notice principle (the offender must be aware of the threatened harm) and by the wrongful act principle, before we are entitled to create risks for wrong-doing.

However, there is a third principle of justice in play for Alexander. He writes that (1980: 216) 'the enterprises of retribution and prevention may be related under a higher level principle or principles.' And this principle, a principle of justice for Alexander, is respect for autonomy:

I believe that a further explanation can be provided, one that subsumes both the enterprise of retribution and the enterprise of prevention under more general *principles of justice*. The principles of justice include respect for autonomy. Respect for autonomy in turn requires that we allow fully competent adults to renounce, give away, contract away, *or even gamble away* that which they deserve, [217] retributively or distributively, because of their acts/character.

This would mean that giving the offender what she deserves retributively, based on (Alexander 1986: 178) 'the worth of one's moral character reflected in one's acts', is ultimately grounded in respect for the autonomy of the offender: we give her what she deserves (to be harmed through punishment). In the preventive enterprise we respect that the offender gambles away something which she deserves: certain rights (not to be harmed). But notice that in the latter Alexander employs the word 'deserve' in a strange way. In the former enterprise desert is based on the worth of one's moral character as reflected in one's acts – a wicked character deserves to be punished. In

the latter enterprise desert is based on certain rights we have: the right not to be harmed (in tort law). Is Alexander right to say that we 'deserve' these rights?

In the enterprise of prevention Alexander might want to say that the distribution of burdens (and benefits) resulting from a wrongful act is *deserved* because the wrong-doer took a risk. But this would mean that Alexander is judging the resulting distribution retributively. What if the risk did not materialise? Would the resulting distribution (enjoyment of the fruits of crime) be *deserved*?

In tort law the resulting distribution for the risk-taker (the consenting injured party) is not *deserved* (nobody deserves to be maimed by the guard dog), rather, it is *fair* because it is based on the *volenti-non-fit-injuria* maxim.

Because of Alexander's misuse of the word 'deserve' I doubt Alexander's contention that (1980: 216) 'the enterprises of retribution and prevention may be related under a higher level principle or principles': the principle of respect for autonomy.

Furthermore, in his attack on Nino Alexander is blurring the distinction between tort law and criminal law. In tort law assumption of risk may lead to a *fair* outcome, but not to a *deserved* outcome. It is an outcome about which the injured party is not entitled to complain.²⁰⁰ However, it would be wrong to classify this as punishment, as Alexander does. The justification of the distribution of harm in risky gambles is based on the 'volenti non fit injuria' maxim – it is not punishment. Interestingly, Alexander does not mention the maxim.

Contrary to Alexander, his examples are not similar to instances of state punishment, but are structurally similar to self-defence measures. The aim of the latter is not punishment, but preventing violations regarding my body or my possessions. And if I happen to catch the wrong-doer, while exercising my right to self-defence, she would subsequently be subject to punishment for her crime by the state. If we adopted

²⁰⁰ Note that the outcome may still be unfair, if, for example, the social conditions are unfair. One way of getting a college education in the US is through the GI-Bill. Enlisting in times of war, to get a college education later, is a gamble. But it is not a fair gamble, if those who are economically better off can get a college education without the need to enlist. But notice that enlisting is also a contractual obligation and not merely an assumption of risk.

Alexander's view, this would constitute a second 'punishment', the first being my preventive measures (which might have caused harm to the wrong-doer). Under Alexander's view of punishment this would lead to seriously disproportionate outcomes. If the wrong-doer is maimed (the first 'punishment') by the sharks who are protecting my possessions, she would then still go to prison for the attempted theft (the second punishment).

In Alexander's counterexamples the assumption of risk of the perpetrator justifies the harm. For Nino, in cases of state punishment, the severity of a particular punishment is not authorised by the consent of the perpetrator; the penalty which we attach to a particular crime is justified independently of the offender's consent. For Nino this is to be decided within the fair legal framework. Alexander's confusion originates from his belief that the consent to a risk, which justifies the harm in Alexander's preventive hypotheticals (and which in fact is based on the *volenti* maxim) also authorises the severity of a punishment in Nino's Consensual Theory of Punishment – but this is not so.

Nino puts forward another, indirect, defence of his position which perhaps is lacking in focus. Nino states that in current legal practice we sometimes do accept disproportionality: for example (1986: 186) 'the current acceptability of penalties such as long terms of imprisonment for deeds like theft'.²⁰¹ For Nino the harm resulting from theft does not warrant a long prison sentence.²⁰² It is not entirely clear what Nino is trying to say. Perhaps something like this: Either, such disproportionate punishment is the result of retributivist sensibilities, but not what the liberal consequentialist would require, and/or it is not the retributivist who is trying to get such disproportionality of tariffs changed - it is the liberal consequentialist. Be that as it may, nothing hangs on this line of defence - Nino does not need it.

Allowing severe punishments for minor offences

Nino's consequentialism is flexible enough to allow for the possibility of a relatively harsh penalty for a relatively petty offence – viewed aggregatively. I suspect, that

²⁰¹ Note that the mandatory minimum sentence is a practice which also promotes disproportionality between crime and punishment. See Fish (2008: 69f.).

²⁰² Andrew Ashworth (2013) expresses similar views in a recent publication by the *Howard League for Penal Reform*.

such a policy could be adopted because our sensibilities might have changed²⁰³, or because the petty offence is on the rise (causing much more harm than previously). Nino (1986: 186f.) states that if we wanted to adopt such a policy three conditions must obtain:

First, the costs-to-benefit ratio is correct, which implies that the application of the respective criminal law prevents more harm than it causes for the whole society aggregately considered. (In coming to this conclusion we must take into account that there is a rule of thumb which advises us to maintain some proportion between the harm involved in *each* penalty and the harm involved in the respective crime, given the usual uncertainty about the number of crimes and penalties that may occur.)

I take this to mean the following. We should be guided by getting the costs-to-benefit ratio right. The uncertainty about how many crimes might occur and how many penalties might need to be imposed would require caution when deciding on the tariffs for wrong-doing. Otherwise the harms inflicted on offenders may be considerably greater than the harms prevented. Nino suggests that we would start off with a less severe punishment, and could then increase the penalties, if necessary.

The second condition requires that (Nino 1986: 187.) 'the assumption of punishment²⁰⁴ by the individual is really voluntary and conscious (which is doubtful, given some principles of rationality, when the harm he brings upon himself is far greater than the benefit he sought, taking into account the probability of each).'

This condition seems underdeveloped and, I must admit, that I am not certain that I have fully grasped what Nino means to say in the second condition. I take Nino to argue that, for example, a driver who parks illegally, and the penalty for this being 20 years of imprisonment, may not be culpable, because his rationality might be impaired. Nino also seems to suggest that the probability of getting caught for a petty crime is higher than for more serious crimes (– this may be true for my example of

²⁰³ For example our attitudes towards littering and spitting in public.

²⁰⁴ Note that 'assumption of punishment' is shorthand for Nino's 'consent to assume liability to punishment.'

illegal parking, however, I am not sure that this principle holds in general). Therefore, again, committing such a petty crime suggests an impaired rationality. Nino seems to argue that an enormous disproportionality between wrong-doing and punishment would be self-defeating; we would have to assume that (most of?) the offenders could not be punished due to their impaired rationality.²⁰⁵

Imposing disproportionate penalties for petty crimes would (mostly) catch out people whose judgement is impaired. Presumably, they could therefore not be punished, according to Nino. However, surely, there would be offenders whose judgement is not impaired. Either because one could easily commit a petty offence by accident (like being mistaken about the parking regulations), or one could commit them intentionally and fully aware of the consequences. In the former (i.e. accidentally committing petty offences) the harm of punishing would far outweigh the benefits of prevention (this would strengthen Nino's position with regard to the first condition, but he does put it forward). Nino seems to discount the latter possibility, i.e. nobody in their right mind would park illegally and risk 20 years imprisonment, particularly, if the conviction rate for petty offences is high. I doubt that this would be the case (assuming that I have understood Nino correctly). I can imagine some people – 'risk takers' – whom I would consider to be rational, who would commit petty crimes even if severe penalties were attached to them.

Furthermore, the *three-strikes-and-you're-out* legislation in California (but also in other US states) is effectively attaching a severe penalty (25 years imprisonment) to the third crime – in some instances a petty crime like shoplifting.²⁰⁶ The continued use of this regulation seems to contradict Nino's intuitions in the second condition.

²⁰⁵ Interestingly, Alexander made a similar point six years earlier in 'The Doomsday Machine' (1980: 218): 'Will not punishments in excess of retributive desert, even if imposed only on wrongdoers who undertake fair gambles, fall selectively on the foolhardy sub-class of the class of wrongdoers, those wrongdoers prone to underestimate risks? This objection appears at bottom to amount to a denial that either fair gambles or the autonomy presupposed by fair gambles exists where wrongful acts are concerned. It is similar to the argument regarding akratic behavior that one cannot act autonomously and at the same time realize the wrongfulness of his act - that all immorality is really ignorance. If one assumes to the contrary that undertaking a wrongful act in the face of a risk of punishment *can* be a fair gamble, the objection dissipates.' I fail to see why, by making different assumptions, the objection dissipates. For the objection to dissipate one would have to show that the original assumptions about akratic behaviour were wrong.

²⁰⁶ 'Sixty-five per cent of those imprisoned under three-strikes-rule in California were convicted of non-violent crimes; 354 of them received 25-years-to-life sentences for petty theft of less than \$250.' as reported in *The Guardian*, by Dan Glaister, 'Buried alive under California's law of "three strikes and you're out"', Monday March 8th, 2004.

However, in the present California prison population (Taibbi 2013: 3) 'some 40 percent of three-strikers are either mentally retarded or mentally ill.' This seems to support Nino's point, however the remaining 60 percent are presumably not mentally impaired. In 2012 the Californian three-strikes law was reformed. A life sentence will only be imposed if the third felony is violent or serious.

The last condition excludes (Nino 1986: 187) 'some penalties (like capital punishment) which are in themselves objectionable.' One reason, according to Nino (1996a: 134), would be: 'capital punishment should be banned on the grounds that it excludes somebody from the process of moral discourse'.²⁰⁷ This is another safeguard against disproportionality in punishing.

And Nino (Nino 1986: 187) concludes his reply to Larry Alexander with the rhetorical question: 'Given all these conditions, why should we ignore an individual's free decision to sacrifice himself by suffering a greater harm than the one he causes, when this sacrifice produces a net benefit for society as a whole?' It is clear from this passage that Alexander's moral desert principle is not the criterion Nino adopts for judging the fairness of a particular punishment.

If an individual voluntarily and knowingly committed a crime, if the purpose of the institution of punishment is just – and if it is constrained by principles of justice (through a fair legal framework), if the harmful measures are effective in preventing greater harm than they cause – without there being alternative measures, equally effective, which would cause less harm, then, a severe penalty could be justified according to Nino.²⁰⁸

²⁰⁷ See also Hart (2008: 80): 'Some punishments are ruled out as too barbarous or horrible to be used whatever their social utility'. I take it that Hart's objection to such punishments is grounded in principles of justice which limit using some people for the benefit of others.

²⁰⁸ Haag (1987: 1417) gives an alternative explanation. He argues that the offender's assumption of risk prevents him from claiming that an injustice was done to him, if the punishment attached to the respective crime is disproportionate: 'The punishment he suffers - be it proportionate to his crime or not - cannot be unjust to him, because he volunteered to risk it. After all, the offender knew that his offense was punishable, and approximately what punishment he risked. We may feel compassion for him. But no injustice was done to him.' For Haag it is a different question, obviously to be decided by the law-abiding, whether it is right (i.e. proportionate) to attach certain punishments to certain crimes. Honoré (1962) holds a similar position.

However, this would be exceptional rather than the norm. Recall that Nino's answer to Alexander's charge is that an aggregative interpretation of harms and benefits would not lead to an enormous disproportionality between the gravity of the crime and the harm of punishment, if certain conditions are met.

Even if Nino's second condition fails, conditions one and three seem to be (jointly) sufficient to protect against disproportionate penalties for petty offences. Furthermore, Nino's requirement of a fair legal framework (and the principles of justice which are operative in it) is another safeguard against disproportionate penalties. But, interestingly, Nino did not stress this in his reply to Alexander. Nino (1986: 183) only refers to it indirectly when he states: 'Let me set forth rather dogmatically some of the presuppositions of my thesis: legal punishment is a state action, and the state and all its acts are justified only insofar as they seek to secure the rights of people to the greatest degree possible'. One way to secure the rights of people is obviously to rely on a fair legal framework.

Summary

In this chapter I have argued that Nino's theory contains safeguards to minimise harsh punishments. Furthermore, Alexander's attack on the Consensual Theory of Punishment is based on a confusion. It originates from his belief that the consent, which justifies the harm in Alexander's examples of excessive 'punishment' (and which is actually based on the *volenti* maxim) also authorises the severity of a punishment in Nino's Consensual Theory of Punishment.

7: Ignorance of the Law²⁰⁹ – David Boonin

David Boonin, in his book *The Problem of Punishment* (2008), assesses a wide range of justifications for state punishment. His overall aim is to find out whether the state is morally permitted to harm wrong-doers, because the intentional infliction of harm onto others is *prima facie* morally wrong. After considering consequentialist and retributivist solutions to the problem of punishment, Boonin concludes that both are unsuccessful in justifying punishment and that the defender of punishment has only a few options left (2008: 155). One of them is Nino's Consensual Theory of Punishment. Boonin presents two major objections to Nino. I will deal with them in this chapter and in the following chapter respectively.

Boonin's (2008: 160f.) first objection is that ignorance of the law precludes consent (to assume liability to punishment) and would thus be an excuse. In the following I will discuss two aspects of ignorance of the law: ignorance of illegality (including mistaking the law) and ignorance of the penalty; and I will look at the implications for natives, for tourists and for immigrants. I will argue that a Consensual Theory of Punishment needs to rely on two premises in order to justify that (claiming) ignorance of the law is no excuse. The first premise explains why individuals are presumed to 'know' current laws. The second premise explains why individuals are presumed to 'know' new legislation.

I will argue that the principle *Ignorantia juris non excusat* does not derive its force from utilitarian justifications (e.g. 'If we didn't do so, it would lead to all kinds of lawlessness!') or from the assumption that individuals have so-called 'duties of citizenship', but rather from the insight that individuals are, normally, sufficiently equipped to work out, what the (criminal) law requires and do indeed work it out. In the last part of this chapter I ask: When ought a liberal state accept ignorance of the law as an excuse? And I propose an answer.

In Nino's (1983: 299) Consensual Theory of Punishment a penalty can only be imposed if certain conditions are met:

²⁰⁹ I have published an earlier version of some of the material in this chapter as: 'Why is (Claiming) Ignorance of the Law no Excuse?' in *The Review Journal of Political Philosophy* (Imbrisevic 2010b).

First, the person punished must have been capable of preventing the act to which the liability is attached (this excludes the rare case of punishing an innocent person that pure social protection might allow). Second, the individual must have performed the act with knowledge of its relevant factual properties. Third, he must have known that the undertaking of a liability to suffer punishment was a necessary consequence of such an act. This obviously implies that one must have knowledge of the law, and it also proscribes the imposition of retroactive criminal laws.

A problem arises here: it seems that ignorance of the law would have to count as an excuse for a Consensual Theory of Punishment.

When we talk about ignorance of the law there are two possibilities which we need to consider.²¹⁰ First, the offender might not have known that the act in question was against the law. Second, she might have been mistaken about the law in two distinct ways. The offender might have been mistaken in applying the law (e.g. how much force can one use in self-defence) – this would be equivalent to ignorance of illegality and thus might excuse her. There is, of course, a conceptual difference between not knowing the law and mistaking it, but in practice this distinction is usually disregarded.²¹¹ The second way of being mistaken concerns the tariff which is attached to the crime. The offender might have been mistaken about the penalty for breaking the law; she might have envisaged a lesser punishment. It seems that she would then only be liable to the lesser punishment. The same would hold for envisaging a more severe punishment.

Ignorance of new laws

Let us consider how far Nino's theory can deal with these possibilities. In modern democracies, or in liberal societies, if a new law is introduced, there might be a consultation period, discussion in the media and, most importantly, before the law comes into force, the public is informed about it (i.e. promulgation). New laws are

²¹⁰ See also Boonin (2008: 160ff).

²¹¹ 'Generally the institutional writers and the courts have treated these two concepts as synonymous.' See: Matthews (1983: 179).

normally well publicised, particularly if they carry severe penalties and/or if they affect many people (e.g. the prohibition against using one's mobile phone while driving). Thus, one unstated premise for Nino's theory must be the following:

P1: *For any individual, living in society, it is a requirement of prudence to keep reasonably well informed about changes in the law.*

If the individual does not do so, she runs the risk (i.e. consents to the risk) of suffering harm through punishment without knowing when and where she will incur this liability.²¹² This requirement of prudence – needs to be sharply distinguished from any alleged duties of citizenship²¹³, duties to others or to the state. The prudential requirement, of keeping reasonably well informed about changes in the law, can be achieved, without great cost to the individual, by reading a newspaper, watching the news or just by interacting with friends, family or work colleagues. It is not something that the individual need actively pursue. One could stay abreast of new legislation (which is immediately relevant to individuals) through the everyday interactions one has in society. What is actively required for living within society is *not to shut oneself off from society*; one should not act like a 'hermit' if one is living in society.²¹⁴

In the *Leviathan* Thomas Hobbes (1994 [1651], Chapter 27: 198 [156]) states that 'the law whereof a man has no means to inform himself is not obligatory. But the want of diligence to enquire shall not be considered as a want of means;'

So, for new laws, which affect most citizens in their everyday lives, ignorance is no excuse, because normally they have been properly publicised. This, combined with the prudential requirement, should be sufficient to inform citizens about changes in

²¹² This would be similar to playing Russian roulette, but not as deadly.

²¹³ Andrew Ashworth claims that acquainting yourself with the law, whether current law or new law, is a 'duty of citizenship' (Ashworth, A., *Principles of Criminal Law*, Clarendon Press, Oxford 1991: 209). But we are then faced with the problem of establishing that we have duties of citizenship. For a critical discussion of Ashworth see Husak, D.N., 'Ignorance of Law and Duties of Citizenship' in *Legal Studies*, Vol. 105, 1994, pp. 105-115. If Ashworth were right, it would also lead to certain oddities as Oliver Wendell Holmes (1923: 48) had explained much earlier. We would not only be commanded to abstain from certain acts, but also be commanded to find out that we are so commanded. 'For if there were such a second command, it is very clear that the guilt of failing to obey it would bear no proportion to that of disobeying the principal command if known, yet the failure to know would receive the same punishment as the failure to obey the principal law.'

²¹⁴ But even a hermit who is re-joining society, after having lived in the forest for 20 years, would try to find out how society (including the legal system) has changed.

the law which might affect them. Thus, they would most likely find out if the alcohol limits for drivers were about to be changed. But legislation about some issue in corporate tax law would probably not be discussed much in the media, and thus most citizens would not be aware of it. Being ignorant about this issue in corporate tax law would only be detrimental to corporate tax lawyers but not to the majority of the population.²¹⁵

Ignorance of 'old' laws

What about 'old' laws? Most of them were publicised before the individual was born. Could ignorance here be an excuse?

Judges and courts, normally, do not accept ignorance of 'old' laws as an excuse. Why? Because everybody is presumed to know the law of the land. This presumption relates primarily to *mala in se* – which always carry the most severe punishments. *Mala in se* are wrong in themselves and considered to be the most reprehensible crimes in society (e.g. murder, torture and rape). Individuals are inculcated from an early age with moral knowledge. Part of this moral knowledge is learning about *mala in se*, which is a relatively small corpus of knowledge. Whereas learning about (the multitude) of *mala prohibita*, acts which are wrong because they have been prohibited by the state, might not be part of this moral education – the individual usually learns about them at a later age.

It is actually impossible, even for legal scholars, to 'know' all *mala prohibita*, because this legislation is vast. But this is not as troubling as it seems at first glance. Citizens, usually, do not live in fear of breaking the law by accident, and large numbers of them are not routinely punished for unwittingly committing illegal acts. Why is this?

Because individuals acquire the ability to work²¹⁶ out what might be a *malum prohibitum*. Furthermore, only a fraction of all possible *mala prohibita* would ever be relevant to an individual. It might therefore be prudent to acquaint oneself with such *mala prohibita*. For example, an individual who sets up business as a (private) day trader, ought to find out about the relevant legislation, particularly the legislation

²¹⁵ In most legislations the rules of their profession would require employees, such as corporate tax lawyers or accountants, to stay abreast of the relevant legislation. I will come back to this issue shortly.

²¹⁶ Hart (1961: 39) writes: 'the members of society are left to discover the rules and conform their behaviour to them; in this sense they "apply" the rules themselves to themselves'

against insider trading. This is, again, a requirement of prudence but it might also be required by the rules of one's profession²¹⁷. And lastly, ignorance of the law is more likely to be accepted as an excuse for *mala prohibita*, particularly if it is clear that there was no intention of wrong-doing.

Ignorance of current laws would not count as an excuse because an individual is normally socialised by their parents, through attending school and through interacting with other people. Thus, by the age of culpability²¹⁸, an individual is normally aware of which acts are morally most reprehensible in society (and there is a large overlap between committing such acts and between 'illegal acts' which carry the most severe penalties in law).²¹⁹ And, secondly, she would have acquired a (basic) grasp of what the law prohibits (or what types of actions the law might prohibit²²⁰). So, a further unstated premise for a Consensual Theory of Punishment must be:

P2: Growing up in society, normally, provides the individual with knowledge of what is/might be morally wrong and what is/might be legally wrong, as well as with the ability to work this out.

At the age of culpability the moral knowledge would (ideally) be comprehensive, whereas the legal knowledge can only be expected to be basic – but it will expand in time.

²¹⁷ According to the Austrian Penal Code (§ 9) you are duty bound to acquaint yourself with the pertinent regulations of your profession (and/or by consulting a lawyer): 'Der Rechtsirrtum [ignorance of wrongfulness] ist dann vorzuwerfen, wenn das Unrecht für den Täter wie für jedermann leicht erkennbar war oder wenn sich der Täter mit den einschlägigen Vorschriften nicht bekannt gemacht hat, obwohl er seinem Beruf, seiner Beschäftigung oder sonst den Umständen nach dazu verpflichtet gewesen wäre.'

²¹⁸ Note that there are wide variations in the age of culpability between modern legal systems. Scotland: 8 years, England/Switzerland: 10, Germany: 14, Argentina/Spain/Portugal: 16; and Iran distinguishes according to gender – girls: 9 and boys: 15.

²¹⁹ Thomas Scanlon argues that there must be safeguards in place to protect individuals from doing something which has been declared illegal by the state. Because such a choice would lead to harm (through punishment) for the individual. Some of the safeguards are 'education, including moral education' and 'the dissemination of basic information about the law'. Note that Scanlon only requires 'basic' information about the law (in the Tanner Lectures from 1986), presumably, because a lot of the work is done by (moral) education. However, in *What We Owe to Each Other*, the word 'basic' has been deleted; presumably, because the individual is inculcated with more than a basic grasp of the law by society. Nevertheless, Scanlon does not seem to require expert knowledge of the law. (Scanlon 1986: 202; Scanlon 2000: 264).

²²⁰ An individual who is aware that carrying a knife is prohibited, can reasonable be expected to conclude that carrying a screwdriver with a (deliberately) sharpened tip must also be prohibited.

However, there is a problem for Nino's theory, which he does not address. The age of culpability and the age of (full) consent often diverge. The reason for this is that there is a difference between knowledge of wrong-doing – young individuals may have this knowledge – and between knowledge (and comprehension) of the legal-normative consequences of one's act. Young individuals are unlikely to have a full grasp of the latter. This difference is reflected in the penal practice of some legal systems (e.g. Germany). Individuals who have reached the age of culpability (14 in Germany), are treated differently by the law. They would normally receive a lesser sentence, compared to an offender who is of age²²¹. And if the sentence is custodial they would be put in facilities, which are designed for young offenders. This means that the Consensual Theory of Punishment, as presented by Nino, applies to offenders who have come of age. Young offenders need to be treated differently, and Nino could accommodate this in his theory by arguing that they, although culpable, are not able to consent fully to the legal-normative consequences of their acts.

It is presumed that the combination of these two elements (i.e. moral and legal knowledge) sufficiently equips a person to work out which actions might be against the law, so that they will not accidentally suffer harm through punishment. J.R. Lucas (1979: 38f.) writes: 'Law is not simply something the sovereign tells his subjects to do, but is rather something that the subjects themselves work out in their daily lives. It is a social phenomenon, part of their way of life.'

The individual also knows that any act, which is (either morally and/or legally) wrong, might carry a penalty. When in doubt, it would be a requirement of prudence to find out, whether something is illegal (e.g. what is a tax loophole, what is tax avoidance and what counts as tax evasion).

However, there could be acts, prohibited by law, which are not well known to the public. But since the respective laws are either obscure (and rarely enforced) or the acts are clearly wrong, they would not pose a serious threat to Nino's Consensual Theory of Punishment. Such acts have presumably become obscure because

²²¹ Note that the German legal system discriminates between the following age groups. Under 14s, 14-18, 18-21 and 21 years of age.

violations are either not being prosecuted any more (e.g. blasphemy in English²²² or Scottish law²²³) or they would only affect very few people (at present the British monarch cannot marry a Catholic).²²⁴

With regard to acts which are clearly wrong, David Boonin (2008: 162) gives an example from the Martha-Stewart-Trial in the US, in which it became apparent that most Americans did not know that there was a law against lying to a federal agent, even if not under oath. Boonin believes that this example of ignorance of the law shows up a weakness of Nino's Consensual Theory of Punishment.

However, it is important to distinguish two different contexts here. It may well be that many Americans did not know this. All that this illustrates is that most people only have an incomplete grasp of the law. But had they been in Martha Stewart's shoes they ought – and would – have worked out that they were about to do something which was seriously wrong.

Martha Stewart, in a case about insider trading, was convicted of making false statements to a federal officer. Presumably she knew that lying is normally wrong. But, more importantly, she could have worked out – and perhaps did – that lying to an officer of the state, who is investigating a possible crime, is more serious than lying in the private sphere.²²⁵ In the former context lying constitutes an obstruction of justice. She could have worked out that her lying might have legal-normative consequences. And, if – genuinely – in doubt, she should have sought legal advice.

In general people are ignorant of the law in many respects when it does not immediately apply to them. But they can normally work out and/or (when in doubt) find out what the law requires in instances when it applies to themselves directly.

²²² Note that the blasphemy law was repealed in England in 2008. It is deemed to have been superseded by the *Racial and Religious Hatred Act* (2007).

²²³ The last successful prosecution in Scotland was in 1907.

²²⁴ Prince Charles, presumably, is aware of this.

²²⁵ The prosecutor, Karen Patton Seymour, addressing the judge said (Hays 2004): 'citizens like Ms. Stewart, who willingly take the steps to lie to officials when they are under investigation about their own conduct, should not expect leniency.'

However, it needs to be acknowledged that even legal experts (judges, lawyers, academics) are sometimes not certain about a point of law, or that they get it wrong. This is reflected in the institution of the law itself – it allows for appeals of a decision.²²⁶ I suspect that such uncertainty or misinterpretation of the law plays a greater role in civil law, rather than in criminal law. It does, of course, occur in criminal law but this would be a problem for all justifications of punishment. But, more importantly, neither the law-abiding nor offenders are routinely complaining about the lack of clarity in the criminal law.

There may, occasionally, be cases where the defendant appears to have sufficient moral and legal knowledge to work out the legality/illegality of an act, but, nevertheless, the defendant claims ignorance of the law.²²⁷ Here the defendant appears to stop short of the last step in our everyday intuitions about applying the law: she claims not to have worked out that her actions were or might be illegal. Unless the defendant suffers from some psychological defect, courts would presumably class such claims as instances of 'wilful blindness'. Here 'a defendant claims a lack of knowledge' and 'the facts suggest a conscious course of deliberate ignorance'.²²⁸

Ignorance of foreign laws

Let us consider tourists visiting other countries. Any reasonably well informed (or properly socialised) person would know that the legal systems in other countries might differ from one's own legal system. Therefore, in analogy to 'Premise 1' (keeping reasonably well informed about changes in the law of one's own country), it would be a requirement of prudence for the tourist to find out about any important differences in the law of the country she is about to visit. It seems reasonable, before going on a driving holiday to the US, to find out how the rules of the road differ (e.g.

²²⁶ But the appeals process is finite, meaning that eventually there will be an authoritative ruling, which cannot be overturned any more.

²²⁷ The defendant is familiar with life in society, i.e. she was not brought up by apes in the jungle or abducted at an early age and held captive in a dungeon, etc. And there is clear evidence that the defendant had, prior to the law-breaking, exercised the ability to work out what morality/the law may require.

²²⁸ See *United States v. Coviello* (1st Cir. 2000) quoted in *United States v. Anthony* (1st Cir. 2008) <http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=07-1670P.01A>. Similarly in English law, see *Westminster City Council v Croyalgrange Ltd* (1986) 83 Cr App R 155, where knowledge on the part of the defendant could be based 'on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from enquiry because he suspected the truth but did not want to have his suspicion confirmed.' (As quoted in Ashworth: 192).

to acquaint yourself with the prohibition to overtake school buses while they are stopping).

Furthermore, friends, family, work colleagues and/or the travel agent would presumably also warn the person that, for example, in Arab countries a different code of conduct is required. Often the differences are well publicised. For example, before Singapore imposed the ban on importing chewing gum (even for personal use), this was widely reported; and there was a transition period, before the ban was enforced.

If a tourist is visiting a country which is known for a strict code of conduct (say, Iran), this requirement of prudence takes on more urgency. When visiting a country with a similar legal system, it might not seem necessary to find out more about their legal system, and most people do not do so. If there is an infraction, ignorance of the law might lead to punishment (or a fine), but this is unlikely to be severe, because the infraction would not be something which is morally reprehensible (e.g. jaywalking in the US). Therefore, there is also the likelihood that the other legal system might treat the tourist with some leniency (for jaywalking). The law breaking of the tourist, if it concerns *mala prohibita*, might be treated as a 'mistake of fact' rather than 'ignorance of the law', and thus would be excusing – in a liberal society.

In such cases the imposition of a minor punishment/fine might be considered to be just, because the tourist did not bother to become acquainted with the other legal system. The tourist calculated (i.e. assumed a risk) that, the legal systems being similar, she might not commit any offences unwittingly, or, if she did, the legal sanctions would not be severe.

With regard to the tourist's wrong-doing it is important to distinguish two types of activity. Some acts are harmless: looking both ways and, if there are no cars, crossing the road (i.e. jaywalking in California). Other acts are potentially dangerous²²⁹ to others and to yourself: driving in another country without knowing how the rules of the road differ. In the former case, this could be treated as ignorance of fact and would be excusing (in a liberal society). If a penalty is imposed, the grounds for this would

²²⁹ Another problem arises: this dichotomy between 'harmless' and 'dangerous' will become blurred, because many activities will fall somewhere in between.

presumably be: consent to a risk (by not inquiring about differences in the law before visiting the country).

What about the ignorant road user? If this potentially dangerous activity leads to harm (e.g. a car crash), then I see two ways to justify the imposition of punishment. Just like in the case of a harmless activity it could be: consent to a risk. However, the more plausible justification would be: negligence. According to the *Oxford Dictionary of Law* (2003: 327f.) negligence is the 'failure to do something that a reasonable man (i.e. an average responsible citizen) would do.'

But note that here it is not the driving of the tourist as such that is negligent, it is the failure to find out how the rules of the road differ. Thus, we would encounter the same problems which Oliver Wendell Holmes (1923: 48) highlighted in his criticism of the idea of a duty to acquaint yourself with the law²³⁰: 'the failure to know would receive the same punishment as the failure to obey the principal law.'

But perhaps these problems could be overcome if we could show that the negligence of the Tourist, who engages in potentially dangerous activity, without getting acquainted with the foreign legislation, is akin to professional negligence. If a person must perform a particular activity (as part of a profession), then this person is expected to have the skill of an average member of her profession, and this skill includes knowledge of the pertinent rules and regulations of their profession. Perhaps one could argue that a tourist driving abroad has a duty of care to other road users, which means that apart from being able to operate their car they need to know the rules of the road. This would be analogous to the professional duty of care of a chauffeur.

What if the tourist unwittingly committed an offence for which the punishment were severe, even in a country with a similar cultural/legal background (say, the US)? The first person to do so would suffer indeed, and one could see an element of injustice in this. But such a case would presumably be well publicised, and subsequent tourists would know and/or be warned about the severe penalty for this particular act.²³¹

²³⁰ As I mentioned above with regard to Ashworth's 'duties of citizenship'.

²³¹ One could, for example, imagine that there are still countries in which drink driving, although an

The prudential requirement for tourists to become informed about any differences in law holds *a fortiori* for immigrants to another country. Martin P. Golding (2002: 154) states: 'Especially immigrants, who are aware of the many discrepancies between their original culture and their new home, should make the effort to find out the legalities and illegalities of what they propose to do.' If they don't become informed, they assume the risk of being liable to punishment.

However, if the immigrants come from a society with a fundamentally different conception of 'the law' (say, a tribal society), or with fundamentally different mores²³², then the state has a 'duty of care' to the immigrants/refugees – and to its own citizens. In such exceptional circumstances the state ought to educate the newcomers with regard to the law/the legal system and the different mores of their new home beforehand.

The problems for Nino so far

I would like to take stock, before I continue. Recall that assumption of risk is too weak a principle for Nino to justify punishment. The hermit, the tourist and the immigrant consent to a risk, if they don't bother to find out how the law has changed or differs from their home country. This would most likely concern *mala prohibita*, rather than *mala in se*. Thus, Nino would have to treat the hermit, the tourist and the immigrant differently from the native population, and accept assumption of risk as the ground for punishment – claiming that their situation is closer to that of the consenting injured party in tort law. And if a member of any of these groups were pursuing a potentially dangerous activity (i.e. driving), rather than a harmless one, then negligence might be given as the ground of punishment. Alternatively, Nino could exempt members of these groups from punishment altogether. But this would

offence, is so widespread that it can be seen as socially acceptable. If a tourist from such a country were to visit China, where the death penalty can be imposed for causing death through drink driving, the tourist could be faced with the most severe penalty. But could the tourist claim that she did not know that driving under the influence can cause death, and is therefore morally (and legally) wrong? And could she claim that in her country drink driving is not a serious offence and therefore the harsher penalty in China would be unjust? I don't think the ignorance rule would apply in this case. Furthermore, the country in my example, China, could at present not be seen as a liberal state, which means that it would be prudent to become informed about the Chinese legal system before travelling there.

²³² For example the practice of bride kidnapping among the Hmong (refugees from Laos to the US). Several members of the Hmong community in the US have been prosecuted for sex crimes.

only make sense if the individual were pursuing a harmless activity (crossing the road), then their ignorance could be treated as mistake of fact. However, injuring others because one is not familiar with the differing rules of the road would not (and should not) be treated as mistake of fact – and be excused.

I suggested that ignorance of foreign laws should be treated in analogy to ignorance of new legislation: it is a requirement of prudence to keep/get informed. Failure to do so might result in punishment because the individual consented to the risk of harm (through punishment). But it is conceivable that a native just missed out on all the information about a new law (e.g. they were on holiday at the time and neither of their friends and family mentioned the new legislation). Did they consent to a risk? Perhaps. If so, we might need to add 'the oblivious native' to the list of hermit, tourist and immigrant.

My list is getting longer and it seems implausible to give a different ground for punishing members of these groups, compared to well-informed natives. And an exemption from punishment would only make sense if the individual were pursuing a harmless activity, which then could be treated as a mistake of fact, but a wholesale exemption for all members of these groups is not an attractive option either, because what we want from a theory is consistency and generality.

Ignorance of penalties

Let us consider differences in penalties between countries. If the act in question is clearly wrong, even in the home country of the tourist (or immigrant), but carries a harsher penalty in the other country, ignorance of the penalty would not be an excuse. For example, if the penalty for drink driving is harsher in the country the tourist is visiting, she cannot argue that the lesser penalty of her home country should apply to her because she was ignorant of the difference in penalties. Performing an illegal (or immoral) act in another country, means that one is consenting to two things. Firstly, one is consenting to be liable to punishment; secondly, one is assuming (i.e. consenting to) a risk with regard to penalties: the risk that the penalties in the other country might be harsher than in one's home country. Thus, the tourist is acting – doubly – imprudently in going through with the illegal act.

Boonin (2008: 162) mentions another, general, problem for the consent solution: many natives 'do not know the penalties for the illegal acts they knowingly perform.' They are not just mistaken about the tariff attached to an illegal act, they do not know what the tariff might be in the first place. Thus, such individuals cannot be said to consent to their punishment.

Boonin (Boonin 2008: 163, FN6) is right that in such cases one could not say that the offender consented to the punishment, because she did not know what the punishment would be. But this does not correctly reflect Nino's position. The offender does not consent to a specific punishment, she consents to the loss of immunity from punishment. Thus, being certain about which tariff is attached to an illegal act, is not a necessary condition for the imposition of punishment in Nino's theory. The justification for punishment would be the same as for tourists who knowingly commit an illegal (or immoral) act in another country.

Furthermore, for many illegal acts the law allows for flexibility in the imposition of punishments (say a fine between £1 000 and £10 000; or imprisonment between 5 to 10 years). A lot of sentencing is discretionary. Thus, very often, the offender cannot know what the exact punishment for her will be. It is the legal-normative consequences of an act which the offender consents to, rather than to a particular punishment.²³³

In cases where the offender does not know at all what the scope of penalties for the offence might be, the offender, in addition to consenting to change their legal-normative status, is assuming two distinct risks. First, the risk of being punished; second, the risk of not knowing how harsh the penalty might be. This is, again, an act of folly. And Boonin (2008: 163) acknowledges this himself: 'A person who knows that the drugs he buys are illegal but doesn't bother finding out how severe the penalties are is foolish.'

Knowledge of the law

²³³ See Honderich (2006: 51).

The adjudication in criminal law suggests that, generally, knowledge of the law (primarily relating to *mala in se*) is presupposed by the judges. But 'knowledge of the law' does not mean to know all of the law or to have the near perfect grasp of a legal scholar. It means, having comprehensive moral knowledge combined with a (basic) grasp of the law.

To 'know the law' does not mean the ability to recall facts about the law. If that were so, we would have children learn the law by rote, just like the times tables. Rather, 'to know the law' means the ability to work out if an act might have legal normative consequences.

Hart states in *The Concept of Law* (1997: 38f.) that the members of society 'are expected without the aid of intervention of [39] officials to understand the rules and to see that the rules apply to them and to conform to them.' For Hart this is a way of maximising freedom (1997: 38f.):

What is distinctive of this technique, as compared with individuated face-to-face orders which an official, like a policeman on traffic duty, might give to a motorist, is that the members of society are left to discover the rules and conform their behaviour to them; in this sense they 'apply' the rules themselves to themselves, though they are provided with a motive for conformity in the sanction added to the rule.

It is presumed that individuals are capable of working out what the law, in broad terms, might require. This view seems to be an accepted practice in liberal societies. For this reason children, the mentally handicapped and the insane are not seen as culpable.²³⁴

However, a complete grasp or knowledge of the law is only a theoretical possibility. Justice Maule (1846) stated:

²³⁴ The law distinguishes ignorance from nescience of the law. An infant, for example, does not have the capacity to know the law and is thus nescient.

There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so ... If there were not [such a thing as a doubtful point of law], there would be no need of courts of appeal, the existence of which shews that judges may be ignorant of law.²³⁵

Even though nobody can be said to 'know' all of the law, ignorance of the law is normally not an excuse, because citizens are presumed to have sufficient moral knowledge and/or sufficient legal knowledge to be able to work out for themselves which actions might be in agreement or contrary to the law.²³⁶

Robert Goodin (2008: 13) writes that 'by and large we simply surmise what is a crime, at law, from what we know about what is wrong, morally.' If the (criminal) law did not track morality, then one could be prosecuted for actions, which one did not know to be 'wrong'. Then, one would have to strive to know all the law, because morality would not function as a guide to required standards in society, nor to the particular requirements of the law (Goodin 2008: 15). In such a situation, ignorance of the law would presumably be a much more frequent occurrence and would indeed be costly.

Goodin (2008: 16) writes:

For people to have good epistemic access to the content of the law, what is needed is:

- 1) A way for people to intuit, without detailed investigation, what the law is for most common and most important cases of their conduct;
- 2) A way for people to intuit when their intuitions are likely to be unreliable, and hence that they need to investigate further what the law actually is.

Society normally does equip the individual with the tools to have good epistemic access to the content of the law: comprehensive moral knowledge combined with (basic) legal knowledge. Thus, the unstated premises (P1 and P2) in Nino's theory

²³⁵ Justice Maule in *Martindale v Falkner* (1846) 2 C.B. 706, as quoted in Matthews: 186.

²³⁶ Matthews (1983: 185) points out that the 'apparently random way in which the maxim [ignorantia juris non excusat] has sometimes been applied and sometimes not suggests a simple *ad hoc* approach to each offence: does the mental element for the particular crime include knowledge or appreciation of the law, and, if so, to what extent?' This means that sometimes ignorance is accepted as an excuse, a

justify that the default position of courts is: *Ignorantia juris non excusat*. However, it would be better and clearer to say: *Claiming ignorance of the law (rather than being ignorant) will, normally, not count as an excuse for reasonably informed and socialised natives.*

When Would a Liberal State Accept Ignorance of the Law as an Excuse?²³⁷

When it is impossible to know the law (or when the error about wrongfulness was unavoidable²³⁸): for example, if there is a change in the law in England while a ship is at high seas in the 18th century – the ship's crew will find out about the law change two months later, when they return to port.²³⁹ Thomas Hobbes, who is not known to be a liberal, writes in the *Leviathan* (1994 [1651], Chapter 27: 198 [156]): 'The want of means to know the law totally excuseth: for the law whereof a man has no means to inform himself is not obligatory.'

Second, when the defendant: 'relies on a judicial opinion, administrative judgement, or other official interpretations of the law that subsequently proves to be erroneous.'²⁴⁰

Third, 'in cases in which the accused is misled by ambiguity in statutory or other governmental language.'²⁴¹

Fourth, a person 'who has had no opportunity to consult counsel, should be excused for ignorance'.²⁴²

practice which is in agreement with Nino's theory.

²³⁷ I don't claim this to be an exhaustive list of reasons for allowing ignorance of the law.

²³⁸ According to the German penal code (StGB, § 17): 'Fehlt dem Täter bei Begehung der Tat die Einsicht, Unrecht zu tun, so handelt er ohne Schuld, wenn er diesen Irrtum nicht vermeiden konnte.' My translation: 'If the offender, when committing the act, is not aware that it is a wrongful act, then he is not culpable if the error was unavoidable.' An example would be a foreigner whose flight is re-directed to Germany, and who is not aware that openly wearing the swastika symbol is against the law (although it is not an offence in other countries). The foreigner could not know that his plane would unexpectedly land in Germany.

²³⁹ Note that in a famous case an English court did not accept ignorance as an excuse for the captain who performed an act which had become illegal while he was at sea. Presumably, the judge thought that the law had to be upheld at all cost (Bailey [1800] 168 ER. 657). Incidentally, Nino cites this case in his PhD thesis (1976: 78)

²⁴⁰ Model Penal Code [American Law Institute Sect 2.04(3)] as quoted in Husak : 115.

²⁴¹ Houlgate (1967: 33) argues: 'The error of law such ambiguity invites is certainly one for which the state rather than the individual should be held responsible.'

²⁴² This is a principle from Roman civil law. Keedy (1908: 81) explains: 'By the Digest [D. 22. 6. 9.] it is indicated that one, who has had no opportunity to consult counsel, should be excused for ignorance'.

Fifth, when the state imposes retroactive legislation. According to Nino (1983: 299), knowledge of the law entails that there must not be any retroactive criminal provisions. Why? Because it would be impossible to have knowledge of the law, if certain acts were to be criminalised retroactively.²⁴³ In such an instance ignorance of the law would be an excuse (– from the perspective of a just legal system), based on the principle *nullum crimen sine lege*.

And lastly, the law must not be in a permanent state of flux, because it would make it difficult to ascertain what the law requires.

I would suggest that we can derive a general principle from all of this:

Ignorance of the law is to count as an excuse only if it is impossible or difficult to know the law, or if the error about wrongfulness was unavoidable or if the individual does not have the capacity to work out what the law might require. The maxim (ignorance of the law is no excuse) might also sometimes be overridden, or its legal-normative consequences mitigated, in the case of mala prohibita, if done unwittingly – and if it were reasonable to act in a certain way (particularly for the ever expanding regulatory legislation).

I submit that Nino would subscribe to this principle. In answer to Boonin's reservations, in these instances ignorance of the law would be an excuse.

The maxim *ignorance of the law is no excuse* does not derive its force from considerations like 'the law must be upheld at all cost, because this will maximise justice overall', or, 'if we did not assume the maxim, criminals would go free' (we presume that most people professing ignorance are lying, and we accept that occasionally genuinely ignorant people are punished²⁴⁴), or, 'it would be difficult and costly' to ascertain what people knew about the law²⁴⁵, or, 'it would encourage

²⁴³ An exception would be laws which clashed with the moral intuitions/knowledge of society, introduced by a regime of terror in order to make their murderous activities appear to be 'legal' (or just). In such a case the subsequent retroactive legislation would serve to make the state a 'Rechtsstaat' again.

²⁴⁴ Chief Justice Ellenborough stated in 1802: "Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in most every case". (Bilbie vs. Lumley [1802] 2 East 469).

²⁴⁵ Note that this does not seem to be a worry in the South African legal system, where ignorance of the law may be an excuse. See Amirthalingam (1995).

ignorance of the law', or, 'it would establish idiosyncratic interpretations as law'. The weakness of such justifications is that they shut off the plausible intuition that sometimes ignorance of the law ought to count as an excuse, because only the morally blameworthy²⁴⁶, i.e. those who knowingly and voluntarily committed a wrongful act (and who, by doing so, consented to assume liability to punishment), should be subject to punishment of the criminal law.²⁴⁷

Such justifications disregard the difference between committing a proscribed act knowingly and committing it unwittingly (i.e. without intention or inadvertence), where it would be unreasonable to blame the individual for her ignorance²⁴⁸. If ignorance of the law were never allowed as an excuse it would mean that the law would be treating cases alike, which nevertheless exhibited a relevant difference between them. And treating such cases alike would lead to injustice, because one individual is morally blameworthy, but the other is not.²⁴⁹

Such justifications do not address the individual and her ends – and this is what a Consensual Theory of Punishment aims to do – and what a liberal society ought to do.

Summary

I have argued that the default position is that people are presumed to know the law. But this notion of 'knowledge' is wider than mere factual knowledge. It includes the ability to work out what is/might be against the law. The maxim, ignorance of the law is no excuse, derives its force from the premises P1 and P2, rather than from any utilitarian²⁵⁰ or reverence-for-the-law type considerations. Lastly, I have suggested

²⁴⁶ George Fletcher (1978: 510) argues that a person must have a fair opportunity to avoid the wrongful act. If someone is reasonably mistaken or reasonably ignorant of the law, then this person is not morally blameworthy.

²⁴⁷ Note that there is a liberal justification for allowing ignorance of the law. Matthews (1983: 191) refers to 'the true Roman law approach, as demonstrated by [the German scholar Karl] Binding. (...) After all, a person who acts in non-negligent ignorance of the law, and who would have acted differently had he known, is hardly a great social danger.'

²⁴⁸ As in the case of the ship's captain at sea, who could not know that the law had been changed (Bailey [1800]).

²⁴⁹ Tony Honoré (1962: 94) writes: 'It is unfair to inflict a punishment on someone for breaking a law of which he did not or could not know'.

²⁵⁰ Note that one could give a utilitarian ground for accepting ignorance of the law. John Austin (1885: 481) writes that in genuine cases of ignorance of the law (where there is a lack of intention and inadvertence) 'it is impossible that the sanction should operate upon his [the agent's] desires.' However, Austin would allow ignorance of the law in 'matters of fact' but not normally when it concerns 'the state of the law'. And there is a utilitarian justification for this (Austin 1885: 484): 'In ordinary cases, the admission of *ignorantia juris* as a ground of exemption would lead to interminable inquiry.' But we

instances when ignorance of the law should be accepted as an excuse. But one problem remains for Nino: how to treat the oblivious and/or imprudent: the native, the hermit, the tourist and the immigrant. Could their punishment be based on assumption of risk, or even on negligence? My answer is 'No'.

could also put forward another utilitarian argument: to punish the morally blameless would undermine respect for the law.

8: The Explicit Denial Objection²⁵¹ – David Boonin

David Boonin (2008: 164) put forward another weighty objection against Nino's theory: The would-be offender could deny consenting to any liability to punishment. We allow for such denials of consent in non-criminal contexts; why should we not accept them in criminal contexts? The objection had been raised much earlier by Nicola Lacey (1988: 48) and by Dudley Knowles (1999: 39), but neither discuss it in much detail.

Boonin gives two examples to illustrate how the explicit denial objection arises. The first example is of a doctor, whose pager is going off, while he is standing at a roulette table. The doctor puts his chips down (on red) in order to get his pager out of his pocket and announces at the same time that he is not placing a bet. Thus, one cannot claim that the doctor placed a bet after the ball comes to a rest. Similarly, if someone gets into a cab and explains that she has no money to pay the fare and is just asking for a favour, the cab-driver cannot claim at the destination that the passenger consented to pay.

I will argue that explicit denial of an act or its legal-normative consequences can be successful in the non-criminal context, because these are permissible acts and the option of explicit denial is on the whole desirable for society.

Tacit consent?

Boonin (2008: 164) says: 'The problem arises because, when we believe that voluntary actions can amount to tacitly consenting to something, we always believe that the presumption of consent can be overridden by an explicit declaration to the contrary.' Because of this, Boonin (2008: 164) concludes that Nino needs to add a further requirement before an act can count as (tacit) consent: 'for an act to count as tacit consent, it must not be accompanied or preceded by an explicit declaration that one is not consenting.'

²⁵¹ I have published an earlier version of some of the material in this chapter as: 'The Consent Solution to Punishment and the Explicit Denial Objection' (Imbrisevic 2010a).

Boonin is highlighting two aspects of tacit consent. First, the concept of tacit consent requires the possibility of express dissent – otherwise actions which appear to be instances of tacit consent could never be overridden. And, secondly, an action can only count as tacit consent, if it is not accompanied or preceded by express dissent. Boonin's requirement prevents unacceptable consequences in the examples of the doctor and the cab passenger. However, it would be detrimental for a consent-based theory of punishment, because would-be offenders could always announce that they do not consent to be liable to punishment.

The question is: Does Nino's theory need this additional requirement? Note that Nino does not characterise the would-be criminal's consent as 'tacit' consent.²⁵²

As I have argued in the chapter on 'Consent', one can distinguish three views of tacit consent. In a strict interpretation of tacit consent only inaction coupled with lack of explicit dissent (e.g. saying 'No!') would count as tacit consent. If the chairperson says to the other board members: 'I will finish today's meeting early, unless anyone has any objections.', then, their silence is taken as consent. But even Locke (1980 [1689], § 119: 64), an early tacit consent theorist, accepts that certain actions, while being on the territory of a state (like travelling on the highway or staying at an inn), are forms of tacit consent.²⁵³ Furthermore, for Locke, express dissent (e.g. 'I reject any presumed obligations to the state!') while staying on the territory of the state would still count as 'tacitly consenting' to such obligations, because one is still enjoying benefits. One could only dissent implicitly (tacitly?) by leaving (i.e. emigrating) the country – or by declaring war. Thus, the strict interpretation of tacit consent (in the chairperson example) limits the situations in which tacit consent could occur, whereas the Lockean view is counter-intuitive because express dissent (bar a declaration of war), while on the territory of the state, would still count as tacit consent. One could say that anything you do (including inaction), bar emigrating, is an instance of tacit consent for Locke.

²⁵² Claire Finkelstein (2002: 17) also imputes tacit consent to Nino.

²⁵³ For Locke, any form of enjoying benefits seems to be the criterion for tacit consent. Thus, simply being on the territory of the state means one is enjoying benefits and consequently one is tacitly consenting to obey the laws of that government. See also Simmons (1993: 83 and 87; 1979, pp. 89-93).

But there is another conception of tacit consent which is more plausible. This conception requires that there exists a convention which is linked to performing a particular act. And this includes the paradigm of remaining silent in response to an invitation to object – consent *ex silentio*. David Lloyd Thomas (1995: 39) explains that an individual can only tacitly consent if there is an 'operative convention' in place; i.e. it is well known and understood, by all concerned, that only certain actions (or inactions) count as consent. In the example of the chairperson closing the meeting, there is a recognised convention in place, which stipulates that silence in such a context counts as consent. In another context, where such a convention is missing, there is no consent. For example, if the interrogating officer says to the suspect: 'I take it that you are guilty and that you deserve to go to prison.', then, the suspect's silence cannot be taken as consent.

Similarly, one can bid for a painting at an auction by raising one's hand. There is an operative convention in place according to which raising one's hand means 'I wish to bid for/buy this painting'. However, pulling up one's trousers at an auction is not a recognised way of bidding; there is no operative convention in place with respect to pulling up one's trousers.²⁵⁴ Whenever there is a convention in place, it is possible to consent tacitly – or to express dissent (i.e. one can explain that one's action is not to be interpreted in the conventional way).

Crime is by nature a breaking of the 'rules' and for this reason there is no (cannot be an?) operative convention attached to committing a crime²⁵⁵. Thus, Nino's conception of consent in crime does not rest on the notion of tacit consent.

As I have discussed in the chapter on consent, Nino does not characterise the consent to assume liability to punishment as 'tacit' consent. For Nino it is implied consent instead, i.e. a form of consent which does not rely on an operative convention.

Nino stresses that two things are important here. The act implying consent must be voluntary and the agent must be aware of the (legal-normative) consequences of the

²⁵⁴ Although a bidder who wants to stay anonymous could agree this as a sign of 'private tacit consent' with the auctioneer beforehand.

²⁵⁵ There might be conventions which are operative among criminals though.

act, i.e. the obligations or liabilities she is assuming. We can say that Nino distinguishes between express consent ('I take XY to be my lawfully wedded wife') and between implied²⁵⁶ consent through the performance of an action which necessarily has legal-normative consequences.

The common factor between consent through action in contracts and consent to assume liability to punishment is not that the actors tacitly consent, but that both the contractor and the criminal consent to assume a liability. One consents to be liable to pay for goods or services, the other consents to be liable to punishment. Non-verbal contracts, which rely on performing an action, are based on tacit consent (e.g. placing a bet, hiring a cab). And putative contractors can always expressly dissent. Whereas the criminal's consent is not tacit, because there is no (and presumably cannot be an) operative convention in place.

Tacit consent is simply a device to make commonly accepted actions in society run more smoothly – we do not have to state expressly 'I do consent to this'. Crime is not a commonly accepted action in society, and for this reason there is no operative convention attached to it – crime is not supposed to run smoothly.

It appears that in tacit (but also in explicit) consent there is normally another (involved) party present. This is the 'audience' for whose benefit the consent is given, so that they may rely on it: the cab driver, the croupier, the auctioneer. The other party normally has the power to declare the attempt to consent to be unsuccessful, to be a misfire. In crime another party, an audience, is not desirable, which further weakens Boonin's claim that we are dealing with tacit consent. Although an audience is possible in crime. 'This is a bank robbery!' is an explicit statement that a crime is being performed. Adding 'I do not consent to assume liability to punishment.' would be an attempt to uncouple the legal-normative consequences (which necessarily follow from performing the prohibited act, according to Nino) from the crime. I will say more on this shortly.

A Kantian argument

²⁵⁶ I use the opposing pairs *express - implied* and *explicit - implicit* interchangeably.

I have rejected Boonin's claim that Nino is working with the notion of tacit consent. Instead, what we have is 'direct consent', i.e. a form of implied consent which does not rely on an operative convention. But this does not remove the explicit denial objection. Even if it is direct consent, perhaps the offender could still dissent from being liable to punishment?

One could put forward another argument, Kantian in spirit, to discount the idea that criminals could expressly dissent from assuming a liability to punishment. Criminals, normally, do not announce that they dissent to assume liability, because crime is by nature a breaking of the rules; for this reason crime is usually done clandestinely. If a criminal, either before or while committing a crime, did profess dissent from liability to punishment, she would be making the following claims:

A: I am not playing by your rules (i.e. I am committing a crime) and

B: I do not want to be subject to the (necessary) consequences of not playing by your rules (i.e. I am expressing dissent about liability to punishment) and

C: But I want you (society) to apply a rule, which normally applies in non-criminal contexts (the right to express dissent), to my breaking of the rules.

There would be an inconsistency in the criminal's refusal to play by the rules, while asking at the same time to be exempt ('I want to 'play' by some other rules.') from the (necessary) consequences of rule-breaking (i.e. liability to punishment). In 'C' the criminal is asking for an exception, namely, the right that another (excusing) rule ought to be applied to her law breaking; even though the excusing rule (i.e. the possibility to express dissent about the [necessary] legal-normative consequences) does not, normally, apply to the context of crime, but to contexts where there are operative conventions in place, or in other contexts of non-criminal behaviour.

Committing a crime would be the first breaking of the rules and expressing dissent (from liability to punishment) would be the second breaking of the rules, because it normally applies to non-criminal contexts only. But, perhaps, such an inconsistency is not a strong enough reason to discount the possibility of expressing dissent?

Why does the offender's explicit denial not work?

For Nino the legal-normative consequences of certain acts are 'irrevocable', i.e. one cannot (expressly and successfully) deny liability to them. Nino writes (1983: 298): 'This consent to assume a legal liability to suffer punishment is, as in the case of contracts and in the voluntary assumption of a risk, an irrevocable one'. Nino does not explain why this is so, and I will suggest an explanation, why the legal-normative consequences are irrevocable/cannot be uncoupled from the act in question.

Even if Boonin is wrong in his interpretation of Nino as a tacit consent theorist, he has nevertheless pointed to an important issue for most justifications of punishment (not just for Nino's theory): 'Why can't the criminal simply deny liability to punishment?' After all, the criminal was not necessarily involved in framing the laws, i.e. she was neither involved in proscribing certain actions nor in attaching certain penalties to the proscribed actions.

Let us re-visit the Kantian argument – perhaps the offender has a legitimate claim to a 'pick-and-mix' approach to the rules of society. After all, we allow such an approach for non-criminal behaviour. It is sometimes possible to uncouple/opt out of the legal-normative-consequences of an act. We have seen that this is possible in cases of tacit consent (the doctor who is not betting, the cab passenger who is not hiring the cab). It is important for the agent to have the option to explain (i.e. to express dissent) that the act is not to be interpreted in the conventional way, and thus to uncouple the legal-normative consequences of the act.

Is it possible to opt out of the legal-normative consequences of an act, if it is a case of express consent? Yes – although it would be unusual or self-contradictory. I could sign a contract and add the following line to my signature: '... does not agree to the terms of the contract'. Or, I could say 'I do' at the wedding ceremony and at the same time hold up a placard which reads 'I don't want to get married – just kidding!'

In these cases the agent is adding an action which invalidates the act of express consent. The actions of the agent are self-contradictory. It is an express denial of what

one is (seems to be) expressly doing. We can say, to borrow an expression from John L. Austin (1975: 16), that the act 'misfires'.

Austin explained that when we try to do things with words, i.e. perform speech acts, something can always go wrong. Certain conditions must be fulfilled, for example (Austin, 1975: 15): 'The procedure must be executed by all participants, both correctly and (...) completely.' If the purser, rather than the ship's captain, performs the marriage ceremony then the act in question (Austin, 1975: 15) 'is not successfully performed at all'. The act misfires – it does not come about.

In my above examples the act in question does not come about. In the wedding ceremony I am expressly denying the act itself, and thus it does not come about – I am not married. In the contract example I am expressly opting out of the legal-normative consequences of the act, and for this reason the contract does not come about – there is no contract.

One could ask: could not the criminal do the same, i.e. opt out of/uncouple the legal-normative-consequences of her (illegal) act? She may try to do so – if she has an interest in Nino or in legal philosophy – but the difference here is that the act in question (the crime) does come about. The attempt to uncouple the legal-normative consequences fails. The criminal cannot claim that there is no crime (just like there is no contract) – because there is no 'misfire'.

Why is there no misfire? In non-criminal contexts there is the other (involved) party which one wants to address. It functions as an 'audience' to the act one is trying to perform, because the act (which involves the bringing about of a change of the normative situation) is performed for the benefit of the other party/ies – so that they may rely on it. This audience normally has the authority to invalidate the attempted action, or what appears to be the attempted action. The cabbie, for example, could say: 'Ok, you don't have to pay the fare. I will take you to your destination.'

Nino (1991b: 281) briefly discusses the explicit denial objection (without calling it that). He asks the reader to consider a 'person who takes a taxi and tells the driver that he has no intention to pay: the *act* of expressing that intention (and not the intention

itself) has, generally, the normative consequence of exempting the agent from paying.' Nino (1991b: 281) then explains the importance of addressing the right audience:

What really matters is not the intention or the desires of the agent but whether an act performed by him – which may well be, as in the example of the taxi, the expression of an intention – is the antecedent of a normative consequence. The proof of this is that, in that example, the agent will not be exempted from the obligation if he communicates his intention not to the driver but to other people. Even if (because of that communication or any other evidence) we and the driver are sure that the passenger has no intention to pay, that does not change the fact that he has consented to undertake the obligation to pay.

In non-criminal contexts of consent we have at least two parties who are negotiating whether an action may be performed or not. The other involved party, which one is addressing, can respond in three ways: A. either consent (and thus validate that the proper procedure has been followed); B. dissent (either implicitly or explicitly); or C. invalidate the attempted action (i.e. declare it to be a misfire). I will give some examples to illustrate the three possible responses.

The other party/ies, the audience one is addressing, in such contexts of consent has the authority to: A. consent (the cabbie saying: 'Kings Cross it is!') or to B. reject a fare ('Sorry, my shift has come to an end.') or to C. void an attempt to a free ride ('Sorry, I am not a charity.'). The croupier could A. accept a bet, B. reject a bet ('Rien ne va plus!') or C. void a bet ('You placed your chips after the ball has come to a rest – this is against the rules!'). The bride/groom could A. consent ('I do!'), B. change their mind ('No, I don't!'), or C. invalidate the ceremony (after reading the placard) in various ways: walking out of the church, hitting the bride/groom over the head with the placard, etc.²⁵⁷

In order to express dissent/to deny liability in non-criminal contexts one needs an audience/authority which could invalidate/void the action. This audience/authority

²⁵⁷ The official conducting the ceremony, the witnesses and the wedding guests would most likely also declare that the attempted wedding misfired.

can prevent the act in question from becoming actual (as in the above examples) – such an audience/authority is not present in crime.²⁵⁸

It may seem odd that direct consent does not allow for express dissent (of the liability to punishment), which is the hallmark of all non-criminal forms of consent. Three things, presumably, justify Nino's contention that we are dealing with a form of consent: first, the voluntary nature of the action is also present in non-criminal consent and is important for the consent to the consequences to come about; second, it is the presence of another party (the audience which one is addressing) in non-criminal contexts which allows for explicit denial – and this audience is missing in crime. And, thirdly, in crime one cannot consent to the action, but only to the legal-normative consequences. In non-criminal contexts explicit denial of consent to the action is possible/desirable, whereas in crime it is not possible to *consent* to the action (of crime) – one can only *perform* a crime. Thus the criminal cannot (successfully) claim: 'I am not doing what I seem to be doing', whereas this is possible in non-criminal contexts.

Performing an action (of crime) and denying its legal-normative consequences does not cancel out the performance of the crime. Thus, the act of crime cannot misfire through explicit denial of the legal-normative consequences, because it always comes about. It is the logical structure of crime which makes it impossible for the criminal to bring about a misfire in this particular way.

In other (non-criminal) areas of the law we find a similar structure. If the state or an individual attaches (justifiably) legal-normative consequences to an undesirable act, then, explicit denial does not make the act misfire. When someone is crossing a condemned bridge, which bears warning signs ('Danger! Condemned bridge. Cross at your own risk!'), that person could try to leave a note at one end of the bridge, denying liability, but this would not be successful. The act in question (crossing the bridge at your own risk) did come about, in spite of leaving a note. There are clear warning signs, and by going through with the act, the legal-normative consequences were consented to – they cannot be uncoupled from the act. The act did not misfire.

²⁵⁸ Criminals usually try to avoid having an audience (witnesses) and sometimes even try to 'eliminate' the audience.

The municipality which condemned the bridge cannot be liable for any injury the person might suffer – the person consented to assume the legal-normative consequences of the act: i.e. consented that she, not the municipality, is liable in case of an accident.²⁵⁹

If an act of consent is commonly accepted or desirable the state will usually not get involved (e.g. Jack consents to meet Jill at the pub). However, some desirable acts of consent are regulated by the state (e.g. the institution of marriage or contracts) in order to facilitate their use and to minimise disputes as well as to provide for a resolution if a dispute arises. For these reasons the state attaches legal-normative consequences in the latter cases but not in the former. Crimes, however, are undesirable acts and the state attaches legal-normative consequences to such acts for the protection of society rather than for facilitative/regulatory reasons.

In cases of civil disobedience the offender is denying the rightness/morality of a particular law. The morally-motivated offender does not deny that she is committing the prohibited act, nor does she try to uncouple the legal-normative consequences of the act.²⁶⁰ She defies the law openly, sometimes announcing it in advance, and accepts the (liability to) punishment, in order to highlight the unfairness of the law. The morally-motivated offender expresses dissent about the fairness of the law (e.g. black people not being able to congregate outside of public buildings in the 60s in the US), as well as expressing, either explicitly or implicitly, that the legal-normative consequences of breaking this law would also be unfair.²⁶¹

Boonin's objection fails because he has misconstrued the nature of consent in performing crimes. In non-criminal contexts it is possible to opt out of the legal-normative consequences. The doctor at the roulette table can explain that he is not placing a bet. The putative husband does not get married, if he holds up the placard at the wedding ceremony. In instances of non-conventional implied consent (the dating

²⁵⁹ Similarly, private individuals may put up warning signs on their property ('Dangerous dog! Enter at your own risk!' or 'Private Land! Trespassers will be prosecuted!'). Shouting out: 'I am not consenting to any risks/liability!' before or during entering the property would not result in a misfire.

²⁶⁰ She accepts the (liability to) punishment like Martin Luther King in the Birmingham jail. The morally motivated offender (in liberal societies) may expect leniency in sentencing though, because of her moral stance.

²⁶¹ An exception would be to protest against harsh penalties. Here the proscription of the law is accepted, but the tariff is undergone unwillingly.

couple; the traveller with the empty seat next to them) one can only deny the imputed consent, and nothing else, since there are no legal-normative consequences attached. In the former paradigms (tacit consent and express consent respectively) the act in question does not come about. In contexts of tacit consent one can explain that the convention does not apply. In contexts of express consent, one can sabotage the act in question by either denying the act itself ('I don't want to get married – just kidding.') or by denying the legal-normative consequences ('... does not agree to the terms of the contract'). Either way the act does not come about – it misfires.

Once a contract has come about, once a risk (in tort law) has been assumed, the legal-normative consequences normally cannot be uncoupled. In non-criminal contexts one can prevent the act in question from becoming actual, by sabotaging the act or by denying the legal-normative consequences.²⁶² But once the act has become actual (contract, marriage, a successful bid) the legal-normative consequences are irrevocable.

Note that some act may appear to have come about, but once an infraction of the correct procedure comes to light – the putative act collapses. For example, if the ship's captain enters the room just as the purser says: 'I now pronounce you man and wife.', then the captain (or anyone else present who realises that the person conducting the marriage ceremony is the purser) could invalidate, what had appeared to be a wedding ceremony: 'This woman is a fraud. She cannot marry you!' This putative act collapses, not because of an explicit denial of the legal-normative consequences, but because the act itself was never successfully performed.

According to Nino, the irrevocability of the legal-normative consequences of an act, which we encounter once a contract has come about or once a risk has been assumed (in tort law), is also present in crime. Furthermore, in criminal contexts one cannot prevent the act in question from becoming actual, by attempting/attempting to sabotage the act or by denying the legal-normative consequences, because there is no audience

²⁶² Note that the assumption of risk (as in the condemned bridge) in non-criminal contexts cannot be made to misfire by explicit denial.

or other involved²⁶³ party who has the power to validate/invalidate the act in question prior to or during its performance.

The conventionality and/or the (in-)validating audience (the official and the bride/groom at the wedding, the croupier, the cabbie, the auctioneer etc.), for acts which have legal-normative consequences in non-criminal contexts, is missing in crime, because crimes do not have a conventional character, rather, they are by nature undesirable acts. And society does not make provisions (by providing an audience/a representative of the state for acts of crime) to validate or invalidate crime. Equally, society does not make provisions to allow would-be-offender to send expressions of dissent before the commission of crimes to the Crown Prosecution Service with the aim of getting 'pre-lapsarian immunity'.

In contexts of express or tacit consent there is a prior revocability and (often) revocability *in actu*, but once the act has come about the legal-normative consequences are normally irrevocable (wedding, contract, auction etc.).

However, it is possible to suspend or mitigate the legal-normative consequences of crime *post factum*. In such instances the act did not misfire – a crime was committed, but the legal authorities (rather than the perpetrator) could decide that the circumstances do not warrant to proceed in the normal way. If, for example, the perpetrator has not reached the age of culpability, if the perpetrator is mentally handicapped, if the perpetrator was coerced, if there was a mistake in fact²⁶⁴ or if there are other excusing factors²⁶⁵. Or think about a presidential pardon (e.g. Richard Nixon) or an amnesty. And Nino (1991b: 282) points out: 'There are some situations in which an ulterior act of the person who committed an offence cancels the liability to punishment for that offence (for example, if the agent collaborates in identifying an accomplice, or in some legal systems, if the rapist marries his victim).'²⁶⁶

²⁶³ 'Involved' in the sense that they have an interest in the act *and* its legal-normative consequences to come about - similar to all the parties to a contract. In crime there are no other involved parties present who have an interest in the crime *and* its legal-normative consequences to come about and who could in/validate the act in question. If a criminal has partners in crime, they only have an interest in the crime to come about, but they have no interest in the legal-normative consequences to come about.

²⁶⁴ I leave a restaurant and take somebody else's umbrella, mistaking it for mine – this would be an excuse in law.

²⁶⁵ Breaking down a door constitutes criminal damage to property, but breaking down a door in order to save the life of a person in a burning building would be an excuse to the charge of damage to property.

²⁶⁶ In my view, such a cancellation of liability in the rapist's case does not any more (perhaps it never

Thus, in non-criminal contexts, where the acts in question are desirable and therefore often exhibit a strong conventional nature, society allows for prior revocability and (sometimes) for revocability *in actu* by the agents involved. However, in criminal contexts²⁶⁷ society does not allow for prior revocability, nor for revocability *in actu*, nor for revocability *post factum* by the agents. The nature of crime does not allow for such revocability. Rather, in the interest of justice, society reserves the right to suspend or mitigate the legal-normative consequences of crime *post factum*.

Summary

I have shown that Nino's conception of consent in crime is not a form of tacit consent – it does not rely, and cannot rely on a convention. The offender's consent is 'direct' because it is consent to the legal-normative consequences of an act only, rather than to the act itself. Crime is by definition a wrongful act and for this reason the practice of consenting does not apply here. I have also elaborated on Nino's irrevocability claim. In contrast to some non-criminal contexts, the would-be offender cannot uncouple the legal-normative consequences of crime by bringing about a misfire of the act of crime. Regardless of any explicit denials, by going ahead and/or by going through with the forbidden act, the crime still comes about. Thus, Boonin's Explicit Denial Objection collapses.

did) serve the interest of justice. Patrick Riordan pointed out to me that there are cases of statutory rape, however, in which the age of the woman, and not any force or coercion, is what qualifies the action as rape. Perhaps Nino had something like this in mind?

²⁶⁷ But also if an action has been declared undesirable by the state or a private individual, without being classed as a crime (e.g. the condemned bridge or trespass).

9: The Forfeiture View – Thomas Scanlon

In his book *What We Owe to Each Other* (1998) Thomas Scanlon presents his account of how to judge the legitimacy of outcomes of institutional policies, particularly if they result in harm to some individuals. He contrasts his Value of Choice account (VoC from hereon) with the Forfeiture View (FV), which he ascribes to Carlos Nino.²⁶⁸ Scanlon writes (1998: 399): 'The idea expressed in the Forfeiture View is stated with particular clarity by Carlos Nino in 'A Consensual Theory of Punishment.'

In the following I will set out and contrast the VoC account with the FV, and I will discuss in how far Nino's theory and current legal practice fall short of the VoC account. Nino is not an exponent of the FV, as it is understood by Scanlon. It turns out that Nino's theory is wholly compatible with Scanlon's VoC account and Scanlon's rejection of the FV is not a threat for Nino's Consensual Theory of Punishment.

The Value of Choice account

The VoC account explains the role of choice in the justification of moral principles (Scanlon 1998: 257). We want outcomes to depend on the way we respond when we are presented with alternatives. The Value of Choice theory (Scanlon 1986: 186) 'starts from the idea that it is often²⁶⁹ a good thing for a person to have what will happen depend upon how he or she responds when presented with the alternatives under the right conditions.' Scanlon explains that the basic idea was presented by H.L.A. Hart in the essay *Legal Responsibility and Excuses*.

Scanlon (1998: 258) states:

According to the Value of Choice account what matters is the value of the opportunity to choose that the person is presented with. If a person has been placed in a sufficiently good position, this can make it the case that he or she has no valid complaint about what results, whether or not it is produced by his

²⁶⁸ However, in a conversation I had with Professor Scanlon (at the Constructivism Workshop in Sheffield in 2009) he indicated that he was not sure any more that Nino was a forfeiture theorist. Thus, the views I impute to Scanlon are the ones he expressed in *What We Owe to Each Other* (1998) and in the *Tanner Lectures* (1986).

²⁶⁹ Scanlon explains that sometimes it is better for others to choose for me, e.g. if I am not familiar with the exotic foods on the menu.

or her active choice. On the Forfeiture View, on the other hand, it matters crucially whether an outcome actually resulted from a conscious²⁷⁰ decision in which the agent intentionally passed up specific alternatives.

In the VoC account, placing people in a sufficiently good position might mean that the individuals concerned are not entitled to complain about the outcome, regardless of whether this outcome was produced by their choice or not. If the state does all that can be reasonably expected to protect its citizens from a particular harm (say, environmental contamination), including warning them to take precautionary measures, then they have no 'valid complaint' about the outcome. This is so even if they forgot about the warning and were thus exposed to the harm (I take it that this, i.e. forgetting, would be an instance of not being an 'active choice', according to Scanlon).

Scanlon (1998: 261) explains: 'One important virtue of the Value of Choice account is that it allows the various conditions under which a choice is (or could be) made to be taken into account separately from the fact of choice itself, and to be given the independent significance appropriate to them.'

The Forfeiture View

The FV makes us believe that the fact of choice, while passing up alternative options, is most important for the moral legitimacy of a/n (bad) outcome (1998: 260), 'because it is the last justifying element to be put in place.' For Scanlon the FV is misleading. Because we direct our attention at the choice (in the FV), we lose sight of something else (ibidem): 'The conditions which must already have been in place in order for the choice to have this force recede into the background, or seem important only insofar as they affect the 'voluntariness' of that choice.' For Scanlon the right background conditions can sometimes be sufficient to make the outcome morally legitimate, regardless of the choice of an agent.

²⁷⁰ Scanlon talks about 'conscious choice' (1986: 192 and p. 204; 1998: 22 and p. 269), 'active choice' (1998: 258) and 'conscious decision' (1998: 258). These look like pleonasm, but I suspect that he wants to stress the deliberate aspect of a choice/decision. See (1986: 200): 'the degree of conscious and deliberate control which the Forfeiture View would require'; (1998: 258) 'a conscious decision in which the agent intentionally passed up specific alternatives.'

It would perhaps be better and clearer for Scanlon to say that the outcome is 'unobjectionable' or that the individual has no grounds to complain about the outcome, rather than to talk about 'legitimacy'. Nevertheless, I will continue to use Scanlon's expression ('legitimate') in order to avoid confusion.

On the FV it matters whether something resulted from an 'active choice' (a 'conscious decision'), while, at the same time, passing up alternative options.

The FV amounts to this: The outcome of your choice is legitimate, because you *knew what you were getting into* (Scanlon 1998: 257).

Value of Choice in the hazardous waste example

Scanlon's guiding question in this particular context is: What role does warning people and thus giving them the choice of avoiding danger play in making it the case that they (the injured) cannot complain of the outcome?

Scanlon (1998: 256) describes a scenario where town officials have to deal with hazardous waste disposal. This is to illustrate the role of choice for individuals and the role of the city officials (society) as protectors of individuals. The city officials have to take precautions to minimise the risks to the residents. The officials need to find a safe disposal site, build a high fence around the new site as well as around the old site, put up large warning signs, and so on. Scanlon explains that despite of all the efforts by the city officials some people get exposed. Some of these people were not aware that they were particularly sensitive to the chemical and suffer lung damage as a result. Scanlon stipulates that with regard to all who were exposed the officials did everything that could be reasonably expected in order to warn and protect them.²⁷¹

Scanlon (1998: 258) concludes that in this respect the casualties cannot complain about what happened.

²⁷¹ Andrew Williams (2007: 252) finds it problematic that Scanlon does not give any specific guidance to the question: At what point can we claim officials did everything that could be reasonably expected to protect the citizens? Scanlon's answer is presumably that any measure which could reasonably be rejected by the population, including and especially those who were exposed, would be the guiding principle. For example, having city officials visit each household prior to the waste disposal could be rejected because it would take too much time (creating the danger of exposing more people) and be a drain on resources (creating more harm elsewhere).

Scanlon introduces four individuals to illustrate the VoC account. For ease of reference I have named the people as follows: OBLIVIOUS did not get the message despite the warnings; CURIOUS climbed over the fence to get a closer look; DELIBERATE decided it was worth the risk; FORGETFUL was informed but simply forgot.

Scanlon (1998: 258) writes that 'what matters is the value of the opportunity to choose that the person is presented with.' The city officials increased the value of choice for everyone to a point where everyone was/would have been in a sufficiently good position to choose. For this reason the outcome of their policy is legitimate for all four individuals, even for OBLIVIOUS and FORGETFUL, neither of whom made a 'conscious' choice to expose themselves to the toxic waste. They cannot complain about the outcome of the policy because the policy was based on principles which nobody could reasonably reject. CURIOUS and DELIBERATE have only themselves to blame, because of their choice.

The outcome of the policy is legitimate because of the background conditions provided by the city officials, not because of the 'conscious' choice of CURIOUS and DELIBERATE. The city officials have done enough to protect the citizens from harm. This is often²⁷² a sufficient condition to make the outcome legitimate. This means that Scanlon distinguishes having grounds to complain about an outcome, i.e. the legitimacy of the outcome, (none of the four people in the hazardous waste case have grounds to complain) from blaming someone for an outcome (CURIOUS and DELIBERATE have only themselves to blame).

The hazardous waste example under the FV

I will apply the FV to the hazardous waste example in order to highlight how it differs from the VoC account.

Scanlon (1998: 259) writes:

²⁷² Except in cases of obligation- or liability-creating institutions where consent is required, e.g. contract or promise.

What lies behind the Forfeiture View is thus not a notion of desert, according to which people who behave wrongly or foolishly cannot complain about suffering as a result. The idea is rather that a person who could have chosen to avoid a certain outcome, but who knowingly passed up this choice, cannot complain of the result: *volenti non fit iniuria*.

It is the fact of choice that matters in the FV, not the faultiness of choice, according to Scanlon (1998: 258). Choosing foolishly or wrongly does not mean that the individual deserved the outcome; it means that she only has herself to blame. She cannot complain about the result of her choice. The principle in the above quote – to the willing, no harm is done – is most often applied in tort law and is characterised as *voluntary assumption of risk*.

Let us consider how the FV would deal with the hazardous waste scenario. CURIOUS and DELIBERATE voluntarily assumed a risk, i.e. they deliberately passed up other available options. Under the FV they have only themselves to blame and Scanlon implies that the forfeiture theorist wrongly concludes from this that they also have no grounds to complain about the outcome (regardless of whether they were in a sufficiently good position to choose). To put it differently, the question of whether someone has grounds to complain (i.e. were they in a sufficiently good position to choose), under the FV, is (wrongly) provided with an answer to a different question: *Who is to blame?* The answer: *You have only yourself to blame!* is erroneously taken to be the answer to both questions. This is one reason why Scanlon rejects the FV.

How would the FV apply to OBLIVIOUS and FORGETFUL? Neither OBLIVIOUS nor FORGETFUL made a choice. This means that they are not to blame for the outcome. Do they have reason to complain about the outcome? If the city officials had done enough, the answer is: No (just like in the VoC account). If the city officials had not done enough, the answer would be: Yes (just like in the VoC account). Because there is always the possibility that OBLIVIOUS and FORGETFUL would not have been oblivious and forgetful on the day, if the city officials had done enough. This possibility cannot be excluded *ex post*, even though it appears that these two individuals tend to be oblivious and forgetful.

The weakness of the FV is the following: it might suggest that since OBLIVIOUS and FORGETFUL are not to blame, then nobody is to blame for the bad outcome. There is nothing we could have done, because OBLIVIOUS and FORGETFUL are just oblivious and forgetful. But this would be wrong, according to Scanlon. OBLIVIOUS and FORGETFUL would be entitled to complain about the bad outcome, had the city official not done enough.

Scanlon distinguishes the conditions under which a choice is made from the choice itself. The actual choice of an individual is not the decisive factor in assessing the moral legitimacy of an outcome, rather, it is the conditions under which the choice was made.

The scope of the VoC account and of the FV

Note that the scope of the FV (imputed to Nino by Scanlon) is much wider than just the criminal context, or rather, it refers primarily to the non-criminal context – this also holds for Scanlon's Value of Choice account. However, I will focus on the criminal context, because it appears that Scanlon's rejection of the FV is at the same time a rejection of Nino's theory of punishment.

To further illustrate the VoC account Scanlon (1998: 263f.) applies it to the justification of criminal punishment. He contrasts what the city officials did (dealing with the harms of hazardous waste disposal) in the civil realm with the harm of punishment which may ensue in the realm of the criminal law. The equivalent safeguards in the latter realm, i.e. enhancing the value of choice as a protection, would be (Scanlon 1998: 264):

education (including moral education), the dissemination of information about the law, and the maintenance of social and economic conditions that reduce the incentive to commit crime by offering the possibility of a satisfactory life within the law. Restrictions on entrapment by law enforcement officers also belong in this category of safeguards, as do provisions which excuse from punishment those who, because of mental illness or defect, are unable to regulate their conduct in accordance with the law. Without safeguards of these kinds, the value of choice as a protection would be unacceptably low.

The criminal law, as it is usually applied in liberal societies, requires something which is equally important for the FV: the subjective element of a conscious choice. In Anglo-American legal terms this requirement is called *mens rea*²⁷³. H.L.A. Hart (2008: 36) explains that '*mens rea* is an intention to commit an act that is wrong in the sense of legally forbidden.'²⁷⁴ The presence of *mens rea* is presumably the most important factor when we assess the justice of a sentence. In Scanlon's terms this is the question of whether we can attribute responsibility ('attributability') to the agent.

Scanlon (1998: 248f.) distinguishes two types of responsibility: *responsibility as attributability* and *substantive responsibility*. According to the former, to 'say that a person is responsible (...) for a given action is only to say that it is appropriate to take it as a basis of moral appraisal of that person.' This is the question of 'whether some action can be attributed to an agent'. And the FV is presumably primarily concerned with this question.

According to the latter type of responsibility, 'judgements of responsibility express substantive claims about what people are required (or, in this case, not required) to do for each other. So I will call them judgements of *substantive responsibility*.' In this context Scanlon (1998: 249) is particularly concerned with 'the way in which a person's obligations to others and his claims against them depend upon the opportunities to choose that he has had and the decisions that he has made.'²⁷⁵ The VoC account is primarily concerned with substantive responsibility.

However, in Scanlon's characterisation of the FV (exemplified by Nino's Consensual Theory of Punishment) he ignores that the law does consider, whether the wrong-doer was put in a sufficiently good position to choose. But this is secondary. The primary

²⁷³ Offences of strict liability are an exception to this requirement. Hart (1959: 19) explains that in such offences 'it is not necessary for conviction to show that the accused either intentionally did what the law forbids or could have avoided doing it by use of care: selling liquor to an intoxicated person, possessing an altered passport, selling adulterated milk [FN] are examples out of a range of "strict liability" offences where it is no defence that the accused did not offend intentionally, or through negligence, e.g., that he was under some mistake against which he had no opportunity to guard.'

²⁷⁴ Hart (2008: 36) explains that 'the expression *mens rea* is unfortunate (...) because it misleadingly suggests that, in general, moral culpability is essential to a crime.' Hart states, quoting a judge, that 'the true translation of *mens rea* is "an intention to do the act which is made penal by statute or by the common law".'

²⁷⁵ See also Scanlon (1998: 290).

issue in the law is *mens rea*. Whereas in the VoC account the primary issue is whether we have put agents into a sufficiently good position to choose. This can make the outcome of an institutional policy legitimate, if it can be justified to others (particularly to people who as a result of the policy suffered harm) as something which is based on a principle which they cannot reasonably reject. The fact of a (conscious) choice, which is stressed in the FV (and in the criminal law), is neither a necessary nor sufficient condition in the VoC account for an outcome to be legitimate.

Nino's response

In *The Ethics of Human Rights* (1991b: 289) Nino refers in a footnote to Scanlon's characterisation of the FV (as presented in The Tanner Lectures from 1986). There Nino writes that, contrary to Scanlon's characterisation, he does recognise the independent weight of the conditions of choice. But Nino still believes 'that there is a scope not eliminated by the justification of those conditions, within which choice has actual 'deontic force' to cancel reasons grounded on the inviolability of the person, and thus to make operative again reasons based on the maximization of aggregative autonomy.'

Nino is saying the following: When it comes to crime the choice of the wrong-doer can override (it has the 'deontic force') reasons which protect the inviolability²⁷⁶ of the person (we don't normally harm [punish] people). The aim of the state is to maximise aggregative autonomy, and this can make it fair to take the choice of the wrong-doer (consent to liability to punishment) as a reason to override the principle of inviolability of the person.

The principle of distribution underlying the imposition of punishment is based on the consent of the criminal to be liable to punishment. Nino (1991b: 273) writes: 'this accords with the principle of the dignity of the person, which limits the principle of the inviolability of the person, thereby lifting the restriction that this latter imposes on the principle of the autonomy of the person.'

²⁷⁶ More on this below.

The most relevant aspect of the inviolability of the person in this context is immunity from punishment. Although Nino acknowledges the importance of the conditions of choice (by requiring a fair legal framework), in the context of crime the fact of (responsible²⁷⁷) choice is primary in authorising the protection of society through the imposition of punishment – and thus maximising autonomy. The conditions of (responsible) choice, in the context of crime do have some weight. They can be considered as mitigating circumstances in the sentencing process. But they do not absolve the wrong-doer completely.

The conditions of choice are, however, not always primary for Scanlon, viz. in obligation-creating institutions: e.g. contracts or promises. These require some form of consent (be it explicit or implicit) to the obligations one is undertaking. The presence of valid consent makes the outcome legitimate – presumably, in addition to sufficiently good conditions of choice. For Nino the presence of valid consent (to be liable to punishment) makes the outcome, if it results in punishment, fair.

Scanlon is posing the following question: What does (most of) the work in legitimising an outcome? Is it the voluntary choice or choosing under the right conditions? Scanlon's VoC account stresses that the outcome can only be legitimate if the person was put in a sufficiently good position of choice. Given this, it does not matter (in the hazardous waste example – but not when it comes to agreements) whether the person made 'a conscious choice' or not – the outcome is legitimate according to Scanlon.

If the warnings of the city officials had been minimal or half-hearted, then the citizens would not have been put in a sufficiently good position of choice and, consequently, the outcome would not have been legitimate – regardless of whether anyone chose an action which resulted in exposure. As it is, the city officials did everything that could reasonably be expected of them. Of course they could have done more, e.g. every citizen being visited by a city official in person. But such a measure could have been reasonably rejected by the city officials as well as by the citizens. And those citizens

²⁷⁷ Children and the mentally handicapped are normally not held responsible for their acts.

who were actually harmed would, presumably, themselves in retrospect reject such a measure, according to the VoC account.

What would be sufficiently good conditions in the context of crime? The law does not address this question directly. It incorporates the problem by allowing for mitigating factors in the sentencing. If the law was broken by a competent adult, then having been brought up in deprived circumstances and by abusive parents could be mitigating factors. The law then takes account of two things: the external circumstances (e.g. social deprivation, physical and psychological abuse) and the subjective make-up of the individual (e.g. the ability to resist temptation or one's sense of right and wrong). Of course, this distinction is not as clear cut as it seems; there is probably a high degree of interplay between these factors.

This means that the law does acknowledge that a person was not put in a good position to choose. But if the wrong-doer is a competent adult, this lack does not excuse crime – it only mitigates the sentence. I suspect that the rationale for the sentence is the following: You are partially to blame for your wrong-doing, and the outcome (harm though punishment, although lesser harm, because of mitigation) is justified – for Nino the outcome would be fair. The offender cannot blame anyone else, but if the law did not take into account her (deprived) conditions of choice in the sentencing, then the offender would be entitled to complain.

Current legal practice stresses that choice under conditions, which count not as 'sufficiently good conditions' but which count as conditions under which it would be appropriate to impute 'a choice' to the offender, is the decisive factor. To put it differently: (in the law) a choice under unfavourable conditions is still a choice. For this reason the unfavourable circumstances of the offender only mitigate the harm through punishment, but they do not cancel it out.

The law acknowledges, however, that unfavourable conditions may deteriorate to such a degree that it is not a choice anymore. This is when the law acknowledges duress or necessity (and coercion for married women) as a defence.

Furthermore, as I have discussed in the Consent chapter, tort law (as well as criminal law) acknowledges certain mental invalidating conditions (e.g. intoxication) to insure that valid consent was given. Thus, current legal practice with regard to the validity of consent can be seen as an approximation to Scanlon's VoC account, rather than an instance of the FV.

Having contrasted the VoC account with the FV, Scanlon (1998: 265), surprisingly, states that forfeiture is entailed by the institution of punishment: 'Forfeiture is a creature of particular institutions and relatively specific principles such as those governing promising (provided, of course, that these are justifiable). It is not a moral feature of choice in general.' But Scanlon (1998: 266) explains that forfeiture does not figure in the justification of the institution of punishment 'but, rather, the less sharp-edged notion of the value of choice.'

The forfeit in Scanlon's application of the VoC account to criminal punishment (as well as in the FV itself), is not part of a punishment (e.g. loss of possessions or the right to vote), rather, it means that the agent forfeits her standing, (1998: 265) 'lays down a right', which would entitle her to complain with regard to the outcome of an institutional policy.

Thus, Scanlon's application of the VoC account to criminal punishment appears to be close to Nino's account of punishment (Nino allegedly, being the clearest exponent of the FV). The wrong-doer consents to a loss of immunity from punishment, because this legal-normative consequence necessarily follows from committing a crime. Immunity from punishment is a right which we all possess as long as we stay within the law. The offender is not entitled to complain about being punished, because she consented to a loss of immunity from punishment. And this appears to be close to Scanlon's claim that the offender lays down a right not to be punished.

The nature and basis of a forfeit

Note that Scanlon apparently uses of the words 'forfeit' and 'Forfeiture' in the sense of 'surrender', i.e. giving something up voluntarily (1998: 266): 'laying down one's (legal) right not to be penalized'. He does not mean by it: *an involuntary loss owing to crime or fault*. The latter meaning is prevalent among legal scholars (Joel Feinberg,

Randy Barnett²⁷⁸), as well as among current forfeiture theorists of punishment (e.g. Alan H. Goldman, Charles W. Morris and Daniel McDermott). Feinberg²⁷⁹ characterises a voluntary loss of rights as 'alienation', whereas an involuntary loss of rights is known as 'forfeiture'.

There is an apparent paradox here: The commission of crime is voluntary but the forfeiture of rights (in the traditional understanding of 'forfeiture'), which ensues from that commission, is involuntary. This paradox can be resolved, if we keep in mind that the criminal hopes not to be caught/convicted and thus the forfeiture would not have any practical consequences. In Nino's theory this paradox is not present, because the loss of a right (immunity from punishment) comes about voluntarily – the offender *consents* to it. The commission of a crime necessarily involves a change of one's legal-normative status (loss of immunity from punishment) for Nino. In Scanlon's use of the term 'forfeiture' the consequences of crime (laying down a right to complain about being penalised – i.e. the forfeit) are, apparently, also incurred voluntarily.

It is not clear to me what the basis for Scanlon's claim is that the offender is (1998: 266) 'laying down one's (legal) right not to be penalized'. It appears to be a conscious decision by the offender, but is it based on consent? In the following chapter I discuss Scanlon's paper from 2003 (Punishment and the Rule of Law) where it is clear that he does not think that Nino's conception of consent in crime is a full-bodied form of consent. But there Scanlon (2003: 227) uses the same phrase in the context of contracts: 'a party to a contract must intend, and hence believe, that he or she is laying down some legal right (whether or not he or she must know exactly what that right is). This makes it appropriate to speak of consent.' Scanlon's position seems to be that in the context of crime the offender is laying down a right (i.e. the forfeit), but it is not based on consent; in the context of contracts the contractor is laying down a right, but

²⁷⁸ Barnett, 1986: 297: 'A tortfeasor can be said to "forfeit" (as opposed to alienate or transfer) rights to resources in order to provide compensation to the victim of the tort.'

²⁷⁹ 'It was an important part of the classic doctrine of natural rights as expounded by Locke and Blackstone that some natural rights at least (certainly including the right to life) can be forfeited but not alienated. The distinction is roughly that between losing a right through one's fault or error, on the one hand, and voluntarily giving the right away, on the other.' Alienation is based on voluntary relinquishing or transferring a right. Forfeiture occurs if one's standard of behaviour falls below a certain standard of 'proper behaviour' (Feinberg 1978: 111). The right-holder loses the right through wrongdoing (usually crime).

it is based on consent. Without further explanation by Scanlon this seems to be inconsistent.

So the question is: what is the offender's forfeit based on? Perhaps Scanlon means 'waiver' (i.e. non-exercise of a right)? But waived rights are retained and revocable at any time.²⁸⁰ Or Scanlon might adopt Hart's position²⁸¹: by committing a crime you expose yourself to a risk (of punishment) and this gives society a moral licence to punish. Thus, the outcome is fair. But note that in tort law assuming a risk is usually interpreted as *consenting* to the risk.

Perhaps it is Hart's position which is behind Scanlon's understanding of forfeiture. Because, in my reading of Scanlon, it is the assumption of risk (as exemplified in tort law) which is the best candidate to illustrate his idea of forfeiture. And Scanlon (1998: 259) explicitly cites the tort law maxim *volenti non fit iniuria*.

There is another possibility, 'laying down one's right not to be punished', might be an involuntary loss of a right, resulting from wrong-doing. Thus, Scanlon would be using the word forfeiture in the traditional sense. But the phrase 'laying down one's right' looks like a (conscious) choice.

Be that as it may, it is striking that Scanlon's illustration of the VoC account (1998: 263f.) as it 'would apply to the justification of criminal punishment' looks very much like Nino's account, or at least, it appears to be compatible with Nino's theory. This is surprising because Nino is supposed to be the clearest proponent of the FV.²⁸²

In modern liberal states the law makes room for considerations of whether the wrongdoer was placed in a favourable enough position by society. The law considers mitigating factors (e.g. social deprivation) as well as excuses (e.g. ignorance or mistake of the law). It is precisely because of the potential harm through punishment that the law makes room for such considerations. Thus, the law is not just concerned with an agent's control (countervailing factors could be: accident, intoxication, crimes

²⁸⁰ See Feinberg (1978: 115).

²⁸¹ See my chapter on Nino and Hart.

²⁸² And this perhaps explains why Scanlon subsequently changed his views - Nino might not be an exponent of the FV after all.

of passion or provocation) and voluntariness (countervailing factors could be: duress, insanity or immaturity) with regard to her action but also with the social circumstances in which the agent was placed – in which the choice was made.

Nino's theory of punishment does not aim for a radical change in legal practice but, rather, to give a better explanation and justification of what goes on in the context of crime and punishment. If we follow Scanlon and equate the FV with Nino's theory of punishment, then, we can say that Scanlon's criticism of the FV, or Nino's theory, does not fully capture the reality of the law in criminal contexts. His criticism of the FV is successful in the non-criminal context (concerning issues of distributive justice), but it loses its bite in the criminal context. This is *a fortiori* true for Nino's theory of punishment because, in addition to principles of justice which are inherent in the law (mitigation, excuses), Nino assumes a fair legal framework. And, in my understanding of Nino, this means that in order to have a fair legal framework we need to have a fair society, because a legal framework could not be fair in an unfair society.²⁸³

If society did not do enough to place people in a favourable position of choice, then they may complain or have a claim to redress, according to the VoC account. If we contrast this with the reality of legal practice, we notice a difference. When social deprivation is accepted as a mitigating factor, the wrong-doer is nevertheless most often found guilty and sentenced – albeit with a lesser punishment. The equivalent of complaint or redress, which Scanlon recognises in the non-criminal realm, is constituted by mitigation in the criminal context.

But note that the scope of complaint or of redress in the non-criminal context can be such that it completely cancels (substantive) responsibility or the bad outcome. However, mitigation is, in most cases, only a partial 'cancellation' of a failure or a wrong by society. It appears then that Scanlon's attack of the FV might have some bite in the criminal context after all.

²⁸³ It may well be 'fair' in a restricted sense, by applying the law consistently and impartially (this is something which could be said about Nazi-laws).

However, we need to consider the reason for having the institution of punishment in liberal states²⁸⁴: protection of society from future harm. This aim justifies that the 'cancellation' through mitigation is most of the time only partial. Even if society did not do enough to put agents in a favourable position of choice, the law and its sanctions will be applied nevertheless in order to reduce future harm to society.

Of course it would be reasonable to address some of the common causes of crime, e.g. a difficult upbringing combined with being failed by the educational system (48% of all UK prisoners are at or below the reading age of an 11-year old²⁸⁵). This would go a long way to put individuals in a sufficiently good position of choice. However, very few politicians want to tackle the problem of crime in such a comprehensive way.²⁸⁶

Note that being failed by society in this sense is not a failure of the institution of punishment. But it does suggest that the institution of punishment must be part of a fair legal framework, as demanded by Nino; and presumably this fair legal framework requires a fair society. And this is compatible with Scanlon's VoC account.

A fair society

The virtue of the Value of Choice account is that it is forward-looking, whereas the FV (as Scanlon presents it, not as allegedly exemplified by Nino) is backward-looking. Yvonne Dennier (2010: 122) writes: 'If we decide to make choice central in determining the demands of justice, we risk creating a society in which solidarity only means solidarity with the good and prudent.' Adopting the FV would lead to the abandonment of the imprudent, because of their past choices. Dennier (2010: 123) argues that justice and solidarity require a 'forward-looking policy of inclusion' because 'it would be unfair to cut off fair equality of opportunity in the *future* because of *past* choices.'

Building on Dennier we could say that allowing for mitigation (because of social conditions) is only one step in the direction of justice, i.e. society has not done enough yet to put the wrong-doer in a favourable position to make future choices. The failure

²⁸⁴ Nino and Scanlon (as well as Hart) are in agreement on this.

²⁸⁵ As Rachel Williams reports in *The Guardian* (2012).

²⁸⁶ Perhaps because the politics of 'law and order' is always a vote winner; perhaps because politicians shy away from long-term projects which go beyond their term in office.

of society, which mitigation acknowledges, requires that criminals are not abandoned after sentencing, but are provided with favourable conditions, which will allow them to make responsible future choices.

It is clear that our current practice of the law is not an instantiation of the FV, but is, rather, attempting to take into account the demands of the VoC account. Since Nino is broadly in agreement with the current practice of law in liberal societies (allowing for excuses and mitigation), his theory is not threatened by Scanlon's attack on the FV. Furthermore, contrary to Scanlon, Nino is not an exponent of the FV.

In Nino's discussion of the ideal constitution of rights in a liberal society, he states that moral principles establish a set of fundamental rights, which may then be manifested in a constitution (1996a: 43). The most important principles for Nino are: (1.) the principle of personal autonomy (this allows the individual the freedom to adopt ideals of human excellence and of life plans based on these ideals); (2) the principle of inviolability of the person (this forbids the curtailment of the autonomy of an individual for the sole reason of enhancing the autonomy of others – we must not use others as a mere means to our ends); (3) the principle of dignity of the person (this 'permits one to take into account deliberate decisions or acts of individuals as a valid sufficient basis for obligations, liabilities, and loss of rights'²⁸⁷). Principle (3.) limits (2.) and may cancel the limitation that principle (2.) places on (1.). Nino (1996a: 52) writes:

Therefore, when the principle of dignity of the person applies (since the person affected consents to a normative relation resulting in a loss of autonomy), the prohibition on restraining the autonomy of an individual in order to increase that of others is overridden. This manifests itself in the fact that legal institutions which establish obligations and liabilities depending on the consent of the people affected – such as contract, marriage, and criminal laws – should be justified on the basis of promoting autonomy in society at large. [FN]
Individuals who, for instance, commit a crime may be punished in order to prevent further crimes and, consequently, to promote a greater aggregative

²⁸⁷ See Nino (1996: 52); also Nino (1991b: 129-185).

amount of autonomy. Such individuals are not entitled to complain²⁸⁸ that they are being used as mere means because they have agreed to assume liability for punishment when they voluntarily commit a crime while knowing that liability is a necessary, normative consequence of the act.

For Nino the institution of punishment is ultimately justified on the basis of promoting autonomy in society at large. We need to distinguish this from the *prima facie* justification of punishment which Nino gives: *protection of society from future harm*. The latter is instrumental; by protecting society we are at the same time safeguarding the autonomy of individuals. (This seems to be in agreement with Scanlon's VoC account: putting people in a sufficiently good position to choose enhances their autonomy.)

With respect to the law-abiding Nino is forward looking – by having the institution of punishment we are increasing their autonomy. If we were only backward looking, with respect to the criminal – by restricting her autonomy – then this would be inconsistent, because we would exclude them from our efforts to promote autonomy in the future (i.e. the forward looking aspect) for all members of society. This exclusion could only happen if one were a 'classic' forfeiture theorist of rights, which Nino is not. Nino is a (moral) licence theorist, just like Hart.

In my interpretation, Nino's theory requires the inclusion of the criminal in the promotion of autonomy in the future. It would not be enough to just assess whether they were put in a sufficiently good position by society and leave it at that (this would be backward-looking). It follows from Nino's theory that we could promote their autonomy in two ways: by addressing the social causes of crime (prevention)²⁸⁹ and by striving to promote the autonomy of prisoners before they are released and after they are released (i.e. forward-looking). For example, if the reading age of a prisoner is that of an 11-year old, this needs to be addressed and not ignored.

²⁸⁸ Provided society has done enough - both for Scanlon's VoC account and with regard to Nino's fair legal framework.

²⁸⁹ Recall one of Scanlon's (2000: 264) demands for the VoC account: 'the maintenance of social and economic conditions that reduce the incentive to commit crime by offering the possibility of a satisfactory life within the law.'

This would equally apply in the non-criminal context – in a fair society. The British Army does accept recruits with the reading age of a 7-year old and the Army aims to train them up to a reading age of a 12-year-old. However, such a low reading age is not the norm. According to the Select Committee on Defence (Third Report, 14 March 2005): 'MoD's figures suggests 50 per cent of all recruits entering the Service have literacy or numeracy skills at levels at or below Entry Level 3 – equivalent to those expected of an 11 year old.'

I am assuming that a young person (they are usually 18 years old) with the intention of joining the army, who has a reading age which is equivalent to that of an 11-year old child, is not in a sufficiently good position to choose, particularly in times of war. Here society did not do enough to put these recruits into a sufficiently favourable position to choose (whether to join up or not). Their value of choice is diminished and the outcome, if resulting in harm (think of casualties in war), would not be 'legitimate' (unobjectionable) – neither for Scanlon nor for Nino.

Scanlon's requirement of choice in obligation-creating institutions corresponds to Nino requiring consent to the legal-normative consequences of crime. For Nino the burden of being liable to punishment is something that can only come about if the individual consented to the legal-normative consequences of her act. For both thinkers the legitimacy of the outcome in obligation (and liability)-creating institutions depends on the background conditions being in place as well as on the 'conscious' choice. For Scanlon these are conditions which put the agent into a sufficiently good position to choose. For Nino these conditions are a fair legal framework which, in my interpretation, is based on a fair society. Thus, even if our current legal practice sometimes falls short of the requirements of the VoC account, Nino's theory, by requiring a fair legal framework, aims to fulfil what Scanlon's VoC account demands.

In Nino's theory of punishment it is the 'fairness' of the legal framework combined with the consent (to the loss of immunity to punishment) of the offender which justifies punishing people. The fairness of the legal system (which, among other things, includes principles of justice which constrain the distribution of punishment) is a necessary (background) condition. The consent to the loss of immunity from punishment is another necessary, but not sufficient, condition for justifying the meting

out of punishment (note that on the FV it would be a sufficient condition). Because this consent gives the state a moral licence to punish.

Scanlon (1998: 265) rightly points out that 'since a policy of deliberately inflicting harm is more difficult to justify than a policy of creating a risk while trying (no doubt imperfectly) to protect people against it, the institution of punishment carries a heavier burden of justification than the program of waste removal.'

For Nino (1983: 299) we can meet the requirements of this heavier burden of justification if three conditions are met: 1. 'When the protection of the community requires necessary and effective punitive measures involving lesser harms than the harm feared' and 2. 'the agent's consent to forgo his immunity against punishment is required before that punishment is imposed' and 3. when the institution of punishment is part of a fair legal framework.

Several features in Nino's theory suggest a high degree of compatibility with Scanlon's VoC account, rather than a contrast (as exemplified by the FV). The fairness of the legal system, apart from aiming at justice, is also concerned with the question of whether the agent was in a good position of choice. And Nino's requirement of consent (to liabilities) matches Scanlon's requirement of consent in obligation/liability-creating acts. Even though it is not entirely clear what is behind Scanlon's claim that the offender is 'laying down a right', it is compatible with Nino's theory.

Summary

I have argued that Nino is neither a forfeiture theorist in the way 'forfeiture' is used by legal scholars (or by forfeiture theorists of punishment), nor is Nino an exponent of the FV as expounded by Scanlon. It turns out that Nino's theory is wholly compatible with Scanlon's VoC account (and current legal practice could be seen as an approximation to the VoC account). Thus, Scanlon's rejection of the FV is not a threat for Nino's Consensual Theory of Punishment.

10: Full-Bodied Consent – Thomas Scanlon

In his paper 'Punishment and the Rule of Law' Scanlon (2003: 227) expresses doubts about whether Nino's conception of consent in crime is a 'full-bodied' conception of consent. In this chapter I would like to consider in how far these doubts are justified. I will argue that Scanlon's doubts, about how much people know about tort law, are contradicted by our everyday experiences. Scanlon claims that there is something missing (a positive element) in Nino's conception of consent in torts and in crime. I suggest that the positive elements are present after all.

Consent has a licensing effect

Scanlon (2003: 227) recognises 'that, *morally speaking*, consent has a licensing effect.' And Scanlon believes that this particularly applies in contracts. To illustrate this, let us look at some examples from contract law. By hailing a cab, bidding at an auction or placing my chips on red, I enter into a contract. The consent here, in contrast to a written contract, is implied rather than explicit. This consent constitutes a license which permits the state to enforce the contract, and by doing so depriving the contractor of a liberty or right which they previously possessed. But Scanlon doubts whether this also applies to tort law (or to Nino's conception of crime). Scanlon (2003: 227) writes:

In order for an act to 'imply consent' in a way that has this licensing effect, Nino says, an act must be voluntary and the agent must know what the legal consequences of his or her action are – know, for example, that he or she is giving up certain legal claims or immunities. The idea of consent (or of an action implying consent) fits the case of contract much better than it does cases of assumption of risk. The condition of knowledge that Nino mentions seems out of place in the latter context: surely a person need not be aware of tort law in order to 'assume a risk' in a legally significant way.

Scanlon is right in thinking that to assume a risk one does not need to know tort law. However, people usually know that they might not have a claim for damages if they start skating on the ice-rink after having been warned that the ice has not been prepared properly and that they do so at their own risk, or that the insurance company

will not (fully) pay out if they accept a lift from a drunk driver; people know that such actions change their legal-normative status. This means that I don't have to know tort law to the degree of a good law student, but I normally know what the legal consequences of assuming a risk are. Contrary to Scanlon, this is no different in contracts. We enter into contracts every day (by taking a bus, by buying something from the supermarket, by changing to a different phone company). But we don't need to have a lawyer's grasp of contract law to do so.

The difference here is that in contracts we consent to legal-normative consequences, which are normally explicitly specified in the contract, or they are obvious and well understood in implied contracts (e.g. getting into a cab and stating a destination). In tort law we can assume (consent to) a risk, for example by accepting a lift from a drunk driver. But we cannot be sure whether the risk will materialise or not. However, there are legal-normative consequences attached to this assumption of risk: the injured consenting party may not be entitled to (full) legal redress by the tortfeasor (here: the drunk driver). The risk-taker may not understand the language I have just used, but she, normally, understands her altered situation after assuming a risk.

Sometimes the state attaches legal-normative consequences to an assumption of risk – and this changes the agent's normative status. But there are many acts of assuming a risk which are not tied to a change of normative status. I could, for example, decide not to revise for an exam and watch a movie instead. There are no (necessary) legal-normative consequences attached to doing so, I am, for example not barred from taking the exam. That is to say, my decision does not change my normative status at the time of assuming the risk. However, the results of the exam might or might not reflect a lack of revision.

There may be cases where the injured party is not aware that she is assuming a risk or cases where she is assuming a risk but is not aware that this brings about a change in her normative status. In such cases we cannot speak of consent. The latter case is equivalent to being ignorant of the law.

The value of having control over the outcome of our actions

Scanlon (2003: 227) is looking for an explanation 'why defensible legal institutions must take a particular form – why they must, for example, make the loss of certain legal immunities dependent on actions that imply consent (or something like it).'

Scanlon says that the explanation we are looking for must appeal to an extra-institutional value – presumably to avoid circularity. He states that he is in agreement with Nino (and Hart) in rejecting retributivism as a justification of punishment. And Scanlon quotes Hart's (2008: 234f.) criticism of retributivism: it is 'a mysterious piece of moral alchemy, in which the two evils of moral wickedness and suffering are transmuted into good.'

Scanlon writes that the retributivist appeals to the extra-institutional value of desert. According to Scanlon (2003: 227), Nino's explanation, in contrast to retributivism, appeals to 'a deontological idea about how people's actions affect what they are (morally) entitled to, hence what they can (morally speaking) demand of their legal institutions.' In other words, a distribution of burdens and benefits which is based on consent is fair – the extra-institutional value for Nino is: fairness according to consent.

Scanlon (2003: 229) states that there is much in Nino's account of punishment which he agrees with, viz. to replace the retributivist's appeal to desert with an appeal to consent. But, as I have indicated, Scanlon has doubts about Nino's conception of consent in crime (and in tort law). Therefore, Scanlon suggest an alternative: 'something *like* consent.' He (Scanlon 2003: 227) suggests that we could appeal to 'the value that people reasonably place on having certain forms of control over what happens to them.' The underlying value 'is not the deontological licensing power of consent [as suggested by Nino] but rather the value of having a fair opportunity to avoid falling afoul of the law' (by exercising due care).

Recall that in the previous chapter on Scanlon I could not determine what the forfeit (laying down a right) of the offender was based on. In the essay 'Punishment and the Rule of Law' (2003) there is no mention of a forfeit, but Scanlon does speak of laying down rights. This essay was originally published in 1999, one year after the publication of *What We Owe to Each Other*. Taking my cue from the essay, I tentatively suggest an answer to the question I pursued in the previous chapter: the idea that the offender is laying down a right appeals to (Scanlon 2003: 227) 'the value

that people reasonably place on having certain forms of control over what happens to them.' For the offender this means (Scanlon 2003: 230) having had a fair opportunity to avoid a sanction, rather than knowing (as Nino requires) what the legal-normative consequences of wrong-doing are.

The positive and negative value of control

Scanlon (2003: 227) explains that the value we place on having control over the outcome of our actions are factors which we need to take into account when assessing legal institutions. But these factors play different roles in Nino's consent in contracts and in the consent (to assume a risk) in tort law. Scanlon (2003: 227f.) explains:

In the case of contracts, the value of control figures both positively and negatively. Positively, it is a central aim of the law of contracts to give effect to the wills of the parties. In order to do this, it must make the [228] legal normative consequences of an act dependent on the beliefs and intentions of the agent. Negatively, this dependence greatly weakens the case of a person who complains about the enforcement of a contract voluntarily and knowingly undertaken: if he or she wished not to be bound, he or she could simply have refrained from consenting. In offering this way out, the law gives us a crucial form of protection against unwanted obligations.

Scanlon (2003: 228) then states that the law of torts has a different aim:

'compensating people for loss and injury.' He believes that the positive part which he identified in contracts does not apply to torts, but that 'an analogue of the negative part still applies.' Compensating people for loss and injury is a (retrospective) protection, but there are limits to this: 'By having the opportunity to avoid loss simply by avoiding behaviour that can be seen to be very risky, we already have an important form of protection against that loss. Indeed, it can be argued that this is as much protection as can reasonably be asked.' Just like in contracts, there is prospective protection in torts, if the individual had the opportunity to avoid the loss. If we don't want to be bound by a contract, we just don't consent; if we don't want to incur a loss, we refrain from risky behaviour.

Scanlon (2003: 228) draws a striking conclusion from this. The absence of the positive element in tort law explains 'why Nino's strong requirement of knowledge of the legal normative consequences of one's action makes more sense in the case of contracts than in that of assumed risk.' In the case of contract,

creating legal normative consequences that reflect the parties' intentions is a central aim of the law. (This was the 'positive' appeal to the value of control.) So knowledge, or something like it, has a natural relevance. [FN] Where only the negative value of control is at issue, however, an agent's state of mind is less relevant. Since the question is whether the person had the protection provided by an opportunity to avoid the loss, what is relevant is not what the person knew about the normative consequences of his or her act but what he or she could have known, by exercising a reasonable level of care, about its likely consequences, and about the availability of alternative courses of action.

I believe that Scanlon misunderstands what Nino (1983: 299) means when Nino claims that the principle of distribution (of burdens and benefits) ensuing from a contract is the same as 'the distribution achieved in the law of torts when the burdens that follow from a tort are placed on the consenting injured party.'

Contrary to Scanlon there is a positive element in the law of torts, but not with respect to the tortfeasor (e.g. the drunk driver), but instead with respect to the consenting injured party. The general function of tort law, Scanlon correctly explains, is not to give effect to the will of the tortfeasor, after all, she committed a private wrong (usually due to negligence), but to compensate individuals who were wronged. However, tort law makes room to take account of the will of the consenting injured party – and this is the positive element. It gives effect to the will of the individual (i.e. to the value of control over the outcome of our actions) who consents to take a lift from a drunk driver, because she wants to get home, and is thus assuming a risk. And this assumption of risk has legal-normative consequences: denial of (full) remedy. Similarly, tort law makes room for people to engage in dangerous sports. Tackling somebody in the office would be a tort, but tackling them (except for dangerous tackles) on the football field means the injured party has no claim for compensation, because they consented to such risks.

When we turn to Nino's theory of punishment, is there an analogue to the positive element (the value of control) in contracts and in torts? Note that in contracts there is no wrong-doer, the positive and negative elements apply to the contracting parties. In tort law, there is a wrong-doer (the tortfeasor), but the positive (and negative) element, which are important for Nino, apply to the consenting injured party. They did nothing wrong (if we accept the view that taking a risk is not wrong in itself).

But in crime there is a wrong-doer, and the criminal law is certainly not designed to give effect to the will of the wrong-doer. There is indeed a negative element: the criminal could have avoided harm through punishment if they had the opportunity to refrain from the proscribed act. But is there a positive element?

For Nino the burdens which the state attaches to crime only apply to individuals who consented to the legal-normative consequences of their act – they do not apply to minors, the mentally handicapped, people who acted under duress, etc. Thus, the law acknowledges the value we place on having control over the outcome of our actions.

Having considered Scanlon's reasoning, we are now in a position to state more clearly what might be behind Scanlon's doubts: Can there be an analogue to the positive element (of giving effect to the will of individuals in contracts and torts, i.e. the value we place on having control over the outcome of our actions) in crime? In contracts and torts the positive element is related to permissible acts (contracting, taking risks). Can a positive element be attached to proscribed acts (crimes)?

For Nino the answer is: Yes. In all three realms the law recognises the consent of the individual to bear certain (legally enforceable) burdens. One could object: both the consenting injured party and the offender hope/wish that the burdens never materialise. However, this might also apply to a contractor, who has no intention of fulfilling the contract or who is hoping to avoid having to perform (fully) what is specified in the contract. Nino's point is that the resulting distribution is fair because the individuals voluntarily and knowingly took on certain legal burdens, i.e. consented to them. Nino's requirement of consent in all three realms reflects the value we place on having control over the outcome of our actions.

Scanlon suggest that Nino's conception of consent in torts and crime is not a full-bodied notion of consent, because there is no positive element (the value of control) present – in contrast to contracts where we encounter both a positive and a negative element. But I have argued that Scanlon has overlooked that there is a positive element both in tort law and in crime.

Scanlon's fundamental doubts about the notion of consent

Scanlon's (2003: 226f.) doubts about the notion of consent seem to be more fundamental. He suggests that only legal scholars or professionals know the full extent of the legal-normative consequences of entering into a contract:

Even in the case of contracts, the requirement that an agent know the legal consequences of his or her act may seem too strong [227] when understood literally. But it does seem that a party to a contract must intend, and hence believe, that he or she is laying down some legal right (whether or not he or she must know exactly what that right is). This makes it appropriate to speak of consent. In the case of assumed risk, however, it is a stretch to speak of consent to a *legal* consequence.

Scanlon is suggesting that when we assume a risk, we (because we don't have any legal training) don't realise that legal-normative consequences might be attached to the assumption of risk. But our everyday experience contradicts Scanlon's claim. Every time we participate in sports, particularly team sports, we know that we might get injured. And we know that for any injuries, which happen within the normal parameters of the game, we have laid down our entitlement to legal redress.²⁹⁰ By assuming a risk (agreeing to participate) we also consent to the legal-normative consequences. And this is well understood by everyone.

Contrary to Scanlon, there is no significant difference, with regard to the consent involved, between a contract and the assumption of risk in tort law, when the

²⁹⁰ The unfortunate recent trend, which is turning us into a more litigious society (because of the introduction of 'no win - no fee'), fortunately, has not had a significant effect on our enjoyment of participating in sports - e.g. neither amateur nor professional footballers are routinely suing each other for injuries sustained.

individual knows that assuming a risk involves a change in normative status. Nino (1983: 299) explains that the principle of distribution in cases of punishment is based on the consent of the criminal to be liable to punishment. This provides the state with a *prima facie* moral justification for exercising the correlative legal power of punishment. 'The principle of distribution, which that moral justification presupposes, is the same as that which justifies the distribution of advantages and burdens ensuing from contracts and the distribution achieved in the law of torts when the burdens that follow from a tort are placed on the consenting injured party.'²⁹¹

Scanlon's doubts about Nino's conception of consent relate to the assumption of risk in tort law (and by implication also to criminal punishment), but not to contracts. In contracts the consent is to the legal-normative consequences of the contract – one does not consent to a risk here²⁹². The agent takes on certain obligations, which are specified (or implied) in the contract. Scanlon (2003: 227) writes that the idea of a full-bodied notion of consent is 'more clearly applicable to the case of contracts than to torts or punishment.' Scanlon is suggesting that if Nino's claims (about consent) fail in the realm of tort law, then they also fail in the realm of criminal punishment. Of course, this does not follow.

What I would concede to Scanlon is the following. The offender might not know whether the change of normative status results from committing the crime and directly consenting to a loss of immunity from punishment, or from consenting to a risk (to be punished) which comes with legal-normative consequences attached to it. These are indeed issues which usually only concern legal scholars. But no matter which view the offender takes about this issue, the important thing is that she understands that acting in a certain way results in a change of her legal-normative status.²⁹³

Nino actually anticipated this objection, put forward by Scanlon, in his DPhil thesis (1976: 113/6; see also 1991b: 273):

²⁹¹ Recall that in the Hart chapter I have argued that assumption of risk in tort law is too weak a principle to justify punishment, but it is strong enough to justify other remedies or their denial.

²⁹² Except for a commercial risk.

²⁹³ There might be another reason why Scanlon has doubts about punishment. He rejects the consent in torts as well as the consent in the context of crime. The consent in torts is based on assumption of risk. Perhaps Scanlon believes that Nino's conception of consent in crime is also based on assumption of risk (as in Hart's justification). But I am not certain about this.

The fact that the consent to assume a liability to punishment requires knowledge that it is a necessary consequence of the offence, does not imply that the individual must be able to describe that consequence in a precise technical way, knowing, for instance, what 'liability' or 'immunity' mean for legal theorists. The individual must be able to recognise the legal situation which follows from the offence under some description which could be translated into the forgoing technical description.'

Summary

Scanlon's charge that Nino's conception of consent in torts and, by analogy also in crime, is not a 'full-bodied notion of consent' rests on claims which are contradicted by our everyday experiences. An individual does not need to have a law student's grasp of tort law, jurisprudence, or contract law in order to bring about a change in their legal-normative status. Furthermore, the positive element, which Scanlon identified in contracts is also present in torts and in crime.

11: The Criminal Dissents – Ted Honderich

In his book, *Punishment: The Supposed Justifications Revisited*, Ted Honderich (2006: 1) considers what is clear and persuasive in the arguments and justifications for the practice of punishment, as well as paying 'attention to the main obscurities'. As part of this endeavour Honderich provides a short but insightful discussion of Nino.

I will evaluate Honderich's objection that the offender is giving every indication of dissenting to her punishment. Secondly, although the offender cannot be said to consent to the distribution (punishment) resulting from crime, I will argue that the distribution is owed to/based on the consent to change one's normative status. Lastly, Honderich wrongly imputes to the agent that her predominant end is avoidance of punishment/harm.

Necessary and contingent consequences of consent

Honderich summarises Nino's theory thus (2006: 51):

What the offender is said to consent to, then, is no more than the loss of his legal immunity. More precisely, what he consents to can be expressed as a certain conditional proposition: if he is caught, and if the authorities make no mistakes, he will not be regarded as having a legal immunity to punishment.

Here Honderich clarifies that it would be a mistake to think that wrong-doers consent to their punishment. Honderich (2006: 51) points out that virtually all offenders 'do not consent to being punished.' They do not think that it is 'a necessary consequence of their action'. This is an important point by Honderich, because one can be said to consent to something if one knows that it is a necessary consequence of one's action; and this is also Nino's position.

Of course, an agent can expressly consent to consequences which do not necessarily follow from her action. However, this would be an unusual way of consenting.²⁹⁴ One expressly consents to a clearly defined action (or change of legal status) as well as to

²⁹⁴ For example, after consenting to lend you my car I could say: 'And I consent to you crashing my car.'

consequences which necessarily follow. Thus, if I consent to a risky operation, it follows that subsequently I cannot sue the surgeon for battery or for wounding with intent – provided that the surgeon performed the operation within the medically accepted guidelines.

We can say: if the state attaches legal-normative consequences to performing an act, then these normative consequence necessarily come about, once the respective act is performed.²⁹⁵

By consenting to the operation I also consent to the risk of being harmed by the operation – or to being made better by the operation²⁹⁶. The upshot of that risk, being harmed or being made better, is a contingent matter. These contingent consequences are (practically and logically) closely related to the object of my consent. Thus, what results from the operation is 'owed to' or 'according to' my consent (to run certain risks). I will say more about the fairness of resulting distributions shortly.

In implied consent (through performing an act) one consents to the necessary consequences of this act, or rather, because the consent is implied, *one can be said to consent* to these consequences. One can only impute consent to an agent, in cases of implied consent, if she is performing the act voluntarily and knowingly. A newly arrived foreigner who agrees to go to the pub in the UK does not consent to buy a round for everyone else in the party, if she is not aware of this convention; she only consents to go to the pub.

Offenders dissent to their punishment

Although offenders consent to a loss of immunity to punishment, they do not desire to be punished. Honderich writes (2006: 51): 'they are wholly against their punishment, struggle to evade it, and so on. Rather than consent, they *refuse* or *dissent*.' This looks, at first glance, paradoxical, because the offender is consenting to a certain legal consequence (loss of immunity from punishment), but he is (Honderich 2006: 51) 'dissenting in every sense to his punishment.'

²⁹⁵ To give another example: after I say 'I do' (i.e. I consent) at the marriage ceremony, and the ceremony was correctly performed by all involved parties, the tax authorities will view us as a married couple and we might claim 'married couples' allowance'.

²⁹⁶ This, of course, is not considered to be a risk, but a benefit.

Interestingly, Honderich (2006: 51) states that 'there is not much to be gained by asking if the first consent is 'really consent'. Let us rather ask what conclusions follow, given that the situation is as described.' However, contrary to Honderich, it might be useful to ask this question after all.

By the 'first consent' Honderich means the consent to the legal consequence of committing a crime (i.e. loss of immunity from punishment). The paradox is this: the criminal consents to one (legal) consequence of crime but not to another consequence (punishment). The paradox dissolves if one keeps in mind that the legal consequence necessarily follows from the action, but any actual punishment is merely a contingent consequence of crime. In Nino's (and Raz's) terminology it is a 'factual consequence' as opposed to a 'legal-normative' consequence.

One can be said to consent to something, as Honderich realises, if it necessarily follows from an action – and if one is aware of this. I will illustrate this with an example: if I consent to lend you my car, one necessary consequence of this is, that if the police stop you and realise that you are not the owner of the car, you will not be prosecuted for stealing my car, because you are (legally and morally) entitled to use my car.

Consenting to lend you my car normally involves that you will be driving my car, that it will be parked outside your house, etc. But if you then crash my car, I did not consent to this, because it is not a necessary consequence of lending you my car. I merely consent to your driving my car.²⁹⁷

There is an interesting disanalogy here²⁹⁸. I consent to all legal-normative (i.e. necessary) consequences which ensue from my proposed act. But, normally, I do not desire for any of the negative contingent consequences of lending you my car to come about, e.g. you crashing my car. However, I probably desire some positive contingent

²⁹⁷ The risk of damage to my car is much smaller than the risk in the risky operation - unless you are a terrible driver. I suspect that for this reason I cannot be said to consent to the risk of damage to my car. However, there are conventions in place about responsibility for damage to borrowed property. The borrower, presumably, tacitly consents to compensate the lender for any damage she might cause.

²⁹⁸ Pointed out to me by Patrick Riordan.

consequences for you: that you enjoy the drive, that you get to your destination in time, etc.

In the criminal case, the wrong-doer does not normally desire any negative contingent consequences; society, however, represented by its officers of the law, desires a particular negative contingent consequence (punishment) to follow on from the necessary consequences of crime. The reason for this close connection (between the necessary and contingent) is because society attaches legal-normative consequences to the performance of certain acts with the aim of achieving a certain result (reduction of harm), and this is linked to a particular contingent consequence of crime: punishment.

As I have argued in the chapter on consent, the would-be criminal's consent is twofold. First, by committing a proscribed action, she consents to a loss of immunity from punishment, and, secondly, she consents to run the risk of being punished²⁹⁹. Note, however, that the wrong-doer, even though she does not desire any negative contingent consequences of crime, is acquiescing³⁰⁰ to some of the most obvious ones: e.g. being the subject of an investigation by police, being questioned, having to hide, appearing in court, and so on – and possibly being punished. Her acquiescing to these consequences is entailed by her consent to run the risk of being punished. It is a gamble. We could phrase her acquiescence in the following way: *If I get caught, and if I get convicted, I will be punished.*

This is so in crimes which are done with some forethought. Nino does not make this explicit in his theory (- and neither does Honderich). But this aspect of crime is something which would strengthen the justificatory power of Nino's theory. We could say, going beyond Nino, that the Consensual Theory derives its force from the twofold consent – as well as from the acquiescence of the offender to some of the negative contingent consequences of committing a crime.

A second aspect of the paradox is the subjective attitude of the agent. Criminals, rather than consent to their punishment, (Honderich 2006: 51) '*refuse or dissent.*' One

²⁹⁹ But recall that Nino does not want to rely on the consent to risk in his justification of punishment.

³⁰⁰ I will say more on the word *acquiesce* shortly.

can go further than this. The wrong-doer presumably also resents the legal-normative consequences of crime. She would prefer to commit certain acts without being subject to the criminal law.³⁰¹ Does this negative attitude invalidate the alleged consent (to a loss of immunity from punishment)?

Nino (1983: 295) points out that it does not, because the same holds in the context of contracts and in other, non-criminal, contexts. A positive attitude is not required for a contract to be valid. I may consent to sell you my car and at the same time resent doing so, as well as resenting you driving my car. In former times parents may have consented to the marriage of their pregnant daughter, but at the same time wishing that there were no wedding or wishing for another husband.

This illustrates that in consent it may be the case that only one particular aspect is important to the agent (the sale of the car, the marital status of the daughter), whereas other aspects may be viewed with a negative attitude. In crime it is the committing of the proscribed act which is important to the criminal, whereas some other consequences of crime are viewed with a negative attitude.³⁰²

Is the resulting distribution of burdens fair?

Following his summary of Nino's theory, Honderich (2006: 51) asks three questions:

does it follow from what we have, whatever else may be said for punishing the offender, that the resulting distribution of burdens in the society cannot be resisted as unfair, inequitable, or inegalitarian? Secondly, does it follow from what we have that his own end is being recognized if he is punished? Is his moral autonomy respected? Does it follow in turn, thirdly, that the authorities have prima facie moral justification for punishing him?

Honderich states that he cannot accept the first two inferences on which the third rests. The first inference, about the resulting distribution of burdens, is open to objections, according to Honderich. The offender only consents (Honderich 2006: 52)

³⁰¹ See my discussion of Nozick.

³⁰² Enjoying the fruits of crime is a consequence which is usually viewed with a positive attitude.

'in a secondary sense to a necessary condition of his punishment, and not (...), in any sense, to his punishment.'

This means that offender does not consent to the resulting distribution – although Nino (1983: 293) claims: 'Appeals to an equitable distribution of benefits and burdens are out of place when the individuals concerned have consciously acquiesced in a balance which is not egalitarian.' And there are two other passages (in 'A Consensual Theory of Punishment') about the distribution in contracts, where Nino explicitly talks about 'consenting' to an inequitable distribution (1983: 293). I will examine these in due course.

First, some comments on the usage of the verb *to acquiesce* and on the notion of *consent to an inequitable distribution of burdens and benefits*. In the above quote Nino uses the somewhat awkward phrase *consciously acquiesced*. In the first place it is a pleonasm³⁰³. Secondly, *to acquiesce* is weaker than *to consent*. The SOED (1983) defines *acquiesce* thus: 'to remain at rest; to rest satisfied *in, under*; to agree tacitly to; concur *in*.' The difference between consenting and acquiescing is that the former often has legal-normative consequences attached to it, whereas the latter does not. *To acquiesce* is a weaker form of agreeing to something than *to consent*. At one end of the spectrum of *to acquiesce*, which is important in the case of crime, it expresses: *to agree to put up with something*³⁰⁴. Perhaps Nino added *consciously* to the verb *to acquiesce* in order to give the phrase a similar force as the verb *to consent*. This reading is supported by Nino's use of the word *consent* (to an inequalitarian distribution of burdens and benefits) in the two passages I have quoted above.³⁰⁵

Before I say more on Honderich's criticism, I would like to comment on Nino's unusual notion of *consent to an inequitable distribution of burdens and benefits* in a contract. Recall that for 'inequitable' we need to read 'unequal' (see my discussion in

³⁰³ As I have mentioned in the respective chapter, there is an interesting parallel to Scanlon, who was the editor of *Philosophy and Public Affairs*, when Nino's paper was published. Scanlon talks about 'conscious choice' (1986: 192 and p. 204; 1998: 22 and p. 269), 'active choice' (1998: 258) and 'conscious decision' (1998: 258). These look like pleonasm, but I suspect that he wants to stress the deliberate aspect of a choice/decision.

³⁰⁴ Collins English Dictionary: to comply (with); assent (to) without protest; [from Latin *acquiēscere* to remain at rest, agree without protest, from *ad-* at + *quiēscere* to rest, from *quiēs* quiet].

³⁰⁵ In his DPhil thesis Nino (1976: 198) explains that 'consenting to run a risk' does not amount to 'acquiesce in the harm itself'.

chapter 2). When a party to a contract consents to an *inequitable distribution*, this would need to be viewed from an outside perspective. The parties to a contract expect a benefit³⁰⁶ of course, so from their perspective the distribution does not appear to be inequitable.

Nino is trying to say that if one party to a contract appears to have the better deal (from an outside perspective), then the law (which is an important outside perspective) does not normally make provisions to invalidate that contract, if it is based on consent. Both contractors expect a benefit – or see the contract as beneficial to themselves. I suppose this is why the law normally does not interfere in what might appear to be an 'inequitable distribution'.³⁰⁷

There is another issue, related to the idea of distribution of burdens (here: punishment), which needs to be addressed.³⁰⁸ Normally, benefits or burdens which are distributed in society exist prior to the distribution. The *distribuendum* could be positive (sweets) or negative (the national debt). The *distribuendum* ensuing from crime is not pre-existing; it comes about as a result of crime. Is it unfair that only wrong-doers, but not others, are eligible for the distribution of punishment? No, because it is primarily the wrong-doer who brings this *distribuendum* into existence, by performing a proscribed act. Note that we could have penal laws without ever having to impose punishments. Without crimes, punishments and their distribution would not (need to) come about. Furthermore, since the *distribuendum* is not something people normally desire, it is fair that the law-abiding (who could be said to be involved in the framing of laws, but not in their violation) are excluded from the distribution.

Let us now return to Honderich. His point seems to be that the offender did not consent to the distribution but, rather, only consented to the legal-normative consequences of crime – or, viewed from *ex post*, she only consented to a necessary

³⁰⁶ Provided there is no coercion involved, nor situations where a party is facing some form of dilemma or predicament, nor a lack of information by one of the contractors.

³⁰⁷ However, Wertheimer (1996: 41) writes: 'Prior to the nineteenth century, it is said, the governing principle of contracts was some conception of fairness or reciprocity, as exemplified by the Roman law principle *laesio ultra dimidium vel enormis*, under which a contract could be avoided if a party received less than one-half the normal market value of what was exchanged.'

³⁰⁸ Pointed out to me by Patrick Riordan.

condition of his punishment. If this is indeed Honderich's point, then he is forgetting something which he, very perceptively, pointed out himself: the offender cannot be said to consent to any punishment because his punishment is a contingent rather than a necessary consequence. Thus, the offender cannot be said to consent to the distribution (i.e. punishment) which may result from altering his legal-normative status.

Honderich is right to stress this difference between what one can consent to in the context of crime and what one can consent to in non-criminal contexts (particularly in contracts). However, let us attempt a more charitable reading of Nino: *The wrongdoer consents to a loss of immunity from punishment and the resulting distribution (punishment) is owed³⁰⁹ to this consent*. This would square with Nino's (1983: 293) characterisation of his theory as 'distribution according to consent'. Nino could still claim that the resulting distribution is fair because it is 'owed to' or 'according to' consent.

Nino (1983: 293) characterises consent in contracts, and the resulting distribution, as follows:

One obvious category of cases (though not the only one) in which we accept what could, but for its origin, be considered an unfair distribution of goods, is that of contracts. The scope of social relationships recognized as permissible objects of contract could vary greatly, but the validity of such contracts, apart from this, is not dependent in any legal system on whether or not they represent a perfectly equitable distribution of burdens and benefits among the parties; the validity basically depends instead on whether those parties have freely consented to the distribution involved.³¹⁰

³⁰⁹ I borrow this phrase from Honderich (2006: 52).

³¹⁰ This is not quite right. In some legal systems (e.g. the German legal system) consenting to an inequitable distribution, i.e. a distribution where there is a striking mismatch between benefits and burdens, invalidates a contract. This is so, for example, in the case of an excessive interest rate (usury), and where one party is taking advantage of someone's predicament, inexperience, lack of judgement or considerable weakness of the will ('die Ausbeutung der Zwangslage, der Unerfahrenheit, des Mangels an Urteilsvermögen oder der erheblichen Willensschwäche eines anderen die in auffälligem Missverhältnis zur Leistung stehen.'). See the German Civil Code - BGB § 138. Similarly in the English common law of contract, as Stephen Waddams asserts. He points out that it is important to look at what judges do and not just at what they say. The law of contract 'shows that relief from contractual obligations is in fact widely and frequently given on the ground of unfairness' (1976: 369).

See also the following passage (1983: 294): 'Nevertheless, few would deny that if inequitable distributions are to be upheld, one of the firmest grounds for upholding them would be their consensual character'.

On closer inspection of these passages it turns out that Nino is always referring to the distribution in contracts and not to the distribution resulting from crime. He starts to discuss the context of crime later on in the paper (1983: 297ff.).

Nevertheless, Nino's analogy with contracts appears to break down with respect to the distribution of burdens in crime. In contracts we may consent to, what appears to be, an inequitable distribution, whereas in crime the criminal can only indirectly 'consent' to the resulting distribution, i.e. punishment. The criminal consents to change her legal-normative status and the resulting distribution is owed to this consent. What we need to keep in mind is that the criminal normally does not wish for this particular distribution (being punished) to come about. Thus, when the wrong-doer consents to a loss of immunity from punishment (i.e. the necessary consequence of crime), she does not normally consent to any contingent consequences – unless she were to state this explicitly³¹¹.

We need to ask: does the fact that one can specifically consent to an (apparently) inequitable distribution in a contract³¹², and this is what makes it fair, weaken Nino's claim that the resulting distribution in the context of crime (punishment) is also fair because it is owed to consent?

It is true that there is a difference between the scope of consent in contracts and in crime. But the analogy aims to show that an unequal distribution may be fair, if it is *based on/owed to* consent – but not that the individual consented to a specific distribution.³¹³ This applies both to contracts and as well as in the context of crime.

³¹¹ However, this would be unusual in the context of crime - see my discussion of the Explicit Denial Objection.

³¹² By specifying the distribution of benefits and burdens - the promise of the parties to exchange mutual performances.

³¹³ As I have discussed in the section on Ignorance of the Law, a lot of sentencing is discretionary.

How strong is Honderich's (2006: 52) charge that the offender only consents 'in a secondary sense to a necessary condition of his punishment, and not (...), in any sense, to his punishment.'? In Nino's defence we could argue that there are three things which could (jointly) ground the claim that the resulting distribution in crime is fair. Firstly, there is the consent to a loss of immunity from punishment, which Honderich acknowledges. Secondly, there is the consent to the risk of harm through punishment. And, thirdly, there is acquiescence to the contingent negative consequences of committing a crime – the most important of these being punishment. Thus, the resulting distribution ensuing from crime is fair because it is owed to a twofold consent as well as to the acquiescence I have just mentioned.

Furthermore, we need to remember that there are contracts where the resulting burdens and benefits remain, to a certain extent, unspecified. In a contract for the rights to oil exploration it may turn out that there is no or very little oil. Similarly, in restaurants which offer 'Eat as much as you can' for a fixed price, it is not certain how much or how little the customer will eat.³¹⁴ However, these contracts are fair, because they are based on consent.

Let us try another reading of Nino (1983: 293): 'Appeals to an equitable distribution of benefits and burdens are out of place when the individuals concerned have consciously acquiesced in a balance which is not egalitarian.' Here Nino talks about the distribution in contracts. But could it be applied in the context of crime?

Perhaps we could take the following line: Criminals acquire new burdens – the burdens of loss of immunity from punishment. The underlying distribution pattern³¹⁵ for burdens and benefits in society is related to past conduct. The default position for everyone is immunity from punishment, but criminal wrong-doing results in a changed distribution of burdens and benefits: the wrong-doer is now not immune from punishment any more, whereas all law-abiding citizens still are.

³¹⁴ Some restaurants offer 'Children eat for free', but they often try to limit the risk/burdens by specifying what counts as a 'child'. They impose a height restriction rather than an age restriction. Others restrict the number of children per accompanying adult.

³¹⁵ Note that benefits (free health insurance) and burdens (poll tax) may be distributed to everyone, regardless of their conduct. I would like to distinguish this from advantages (honours) and disadvantages (punishments) which are normally distributed according to a pattern: past conduct. In the former there is no pattern of distribution, in the latter there is.

Let us look at an example by Nino (1983: 295) which would support this reading – the example of voluntary enlistment in the army of a country at war:

If the volunteer dies defending the country, one might indeed say that he shouldered a very unequal share of the burdens of protecting his society compared with the benefits he obtained. But few would consider this, in contrast to the case of conscription, morally problematic because the person has consented to undertake the obligation of fighting. This is obviously so even when the individual has miscalculated the risks involved or had intended to desert;

The volunteer consented to a distribution where some in society do not have an obligation³¹⁶ to fight and where others (including the volunteer) do have this obligation, because the latter consented to take on this obligation. This is how far the consent to a changed distribution of benefits and burdens goes in our example. It does not extend to the (contingent) distribution where some volunteers die fighting and some survive. The volunteer assumes a risk but does not, normally, want the upshot of the risk to be realised. That is, the volunteer does not consent to a distribution which involves being killed in battle. But this does not make such a distribution (some die, some survive) unfair. We can say that it is 'based on' or 'owed to' consent.

The justificatory structure in the volunteer example mirrors the three-pronged structure which I have put forward for the resulting distribution in crime. We have consent to the legal-normative consequences (e.g. severely restricted liberty by whatever the military requires), consent to the risk of being harmed in war, and acquiescence to the contingent negative consequences of volunteering during war-time – the worst being death on the battle field.

Nino explains that we can only speak of consent if the (normative) consequences of the act necessarily follow from it:

³¹⁶ One might argue that all able-bodied citizens have a moral obligation to fight during times of (a just) war, but not a legal obligation, unless conscription is introduced.

The mere belief that the liability to punishment (or, in general, any consequence of the act) is a possible or probable outcome of the action is not sufficient in itself for concluding that the agent has consented to assume that liability. This feature of the notion of consent is relevant in determining whether or not any consequence of a voluntary act is consented to by the agent. The belief that the consequence may possibly follow from the act may justify the assertion that the agent has consented to run the risk of generating that consequence, but it is not enough to support the conclusion that the agent has consented to bring it about.

Nino is very clear that consenting to run a risk is not consenting to the realisation of that risk. The former often constitutes a change in one's legal-normative status (for example in tort law – if I accept a lift from a drunk driver), the latter is merely a possible consequence of this change (e.g. being hurt if the driver crashes). This means that the offender, for Nino, does not (normally) consent to the distribution which results from the change she effects to her legal-normative status, i.e. she consents to a loss of immunity from punishment (as well consenting to the risk of being punished), but she cannot be said to consent to the punishment, if it happens to come about.³¹⁷ At most we could say – although Nino does not say it – that the offender acquiesces to the possibility of harm through punishment.³¹⁸

It appears, in reply to Honderich's point, that two readings of Nino are possible with regard to 'consenting to the distribution of burdens and benefits'. In the first reading Nino is referring to contracts only. However, in crime and in some contracts the resulting distribution, Nino might argue, is *based on/owed to* consent. In the second reading offenders consent to a new distribution with regard to their normative status. But note that both readings are not mutually exclusive, rather, they could be combined.

Nino's failure (and the virtue of Honderich's analysis) is that he did not highlight an important difference between contracts and crimes: in contracts one can consent to an unequal distribution of burdens and benefits, whereas in the context of crime one can

³¹⁷ Unless the offender explicitly says so.

³¹⁸ Note that Hart (2008: 49) acknowledges this acquiescence of the offender. He writes that the criminal 'knew that it was likely he would be punished and that he had decided to pay for his satisfaction by exposing himself to this risk'.

only be said to consent to the legal-normative consequences of crime, as well as to consenting to run the risk of harm. The distribution (punishment) resulting from consent in crime is itself a contingent matter, and thus one cannot be said to consent to it – but one can be said to acquiesce to the possibility of being harmed through punishment.

Recognising the offender's ends

I will now turn to Honderich's discussion of the second inference (2006: 52):

how *can* it be said with any force that the offender's own end is being recognized? What we do, and what raises the entire problem, which is to say our punishing of him, is what he does not consent to, despite the fact that he has in a sense consented to a necessary condition of it. It is, with respect to what is important, quite false to say that the agent has 'consciously acquiesced'.

I have argued, in my discussion of the first inference, that Nino refers to contracts when he uses the phrase 'consciously acquiesced', as well as other similar phrases. Nevertheless, Honderich raises an interesting question: in what way is the offender's end being recognized? For Nino punishment is not something which the offenders wills, but it is *the product of his will* (1983: 297).

Nino writes (1983: 306): 'Only when that consent is respected do we treat individuals as ends, since only then do we recognize their own ends.' Nino is not saying that we respect an individual's end (i.e. crime) when we require consent to loss of immunity (as a licence to punish), but rather that we recognise their ends. We recognise that they committed the offence voluntarily and knowingly. The offender chose an end which necessarily had legal-normative consequences attached to it.

We need to keep two things conceptually apart. I can treat/respect an individual as an end by, for example, requiring due process, allowing for excuses, allowing for mitigating factors – or requiring consent to loss of immunity from punishment in cases of wrong-doing. Their consent is a safeguard which prevents society from using the individual merely as means to an end. By requiring consent (to loss of immunity) I also recognise their ends (i.e. voluntarily and knowingly committing a crime). But this

does not mean that I in fact *do* or *have to* respect the ends of this individual, particularly if these ends involve wrong-doing.

For Kant (1948 [1785]: 97 [436, 6], a rational being possesses dignity in virtue of its capacity for autonomy, i.e. the ability to give itself moral laws.³¹⁹ And because of their inherent dignity, rational beings must treat themselves and others as ends in themselves and not merely as means to an end. This means that we respect an individual's capacity to adopt and pursue ends by treating her not just as a means to an end (here: the end being a reduction of harm in society, the means being punishment); but we also treat the offender as an end in herself, by requiring consent to the legal-normative consequences of crime, i.e. we recognize that the individual freely and knowingly chose this particular end). However, we do not necessarily have to respect their particular end.

Nino (1983: 305) writes that 'we punish criminals as people, respecting their moral autonomy, and not as mere things to be manipulated.' The same point is very clearly stated by Hart (1959: 9). He explains that restrictions may apply to any social institution:

The most general lesson to be learnt from this extends beyond the topic of punishment. It is, that in relation to any social institution, after stating what general aim or value its maintenance fosters we should enquire whether there are any and if so what principles limiting the unqualified pursuit of that aim or value.

In Nino and in Hart it is the limiting principles which prevent using individuals as mere means and, at the same time, they ground the claim that we recognise their ends. The most important limiting principle for Nino is consent to the loss of immunity from punishment (1983: 306), 'making his liability to punishment depend on his free and conscious undertaking of it'. Thus, the law includes safeguards (e.g. the requirement of due process, allowing for excuses, allowing for mitigating factors – or

³¹⁹ Kant writes in the Groundwork (1948 [1785]: 97 [436, 6]) '*Autonomy* is therefore the ground of the dignity of human nature and of every rational nature.' [*'Autonomie* is also the Grund der Würde der menschlichen und jeder vernünftigen Natur.]

requiring consent to loss of immunity in cases of wrong-doing) which ensure that we recognise the ends of individuals.

Hart (2008: 49) explains:

Recognition of excusing conditions is therefore seen as a matter of protection of the individual against the claims of society for the highest measure of protection from crime that can be obtained from a system of threats. In this way the criminal law respects³²⁰ the claims of the individual as such, or at least as a *choosing being*, and distributes its coercive sanctions in a way that reflects this respect for the individual.

Thus, both Nino and Hart have safeguards in place to prevent using individuals as mere means to an end.

Consent in contracts and consent in crime

Let us look at another criticism which Honderich raises against Nino: the analogy between consent in contracts and consent in crime does not work (2006: 52):

Suppose I get into a taxi and give an address. I also tell the driver that I intend *not* to pay for the ride, and in the end succeed in overcoming his incredulity. He believes me. Still, for whatever reason, he delivers me to the right number in darkest Ritson Road.

For Honderich it is far from certain that a contract has come about or that the driver has a moral justification for demanding payment of the fare. Honderich continues (2006: 52):

This suggests that while consent with respect to the law's contracts does not require proof of a certain intention, it is also true that a statement of the wrong intention, so to speak, gets in the way of consent and contract. What is of most relevance, however, is this: the commission of an offence is in closer analogy to

³²⁰ For 'respect' read 'recognise'.

this very odd taxi case than to the ordinary case where the passenger does not say he intends not to pay. The consensual theorist points to a certain act, the offence, and claims it to be analogous to giving a taxi-driver [p. 53] an address. But the offender will also give every evidence of not intending the upshot having to do with punishment. It follows that if we begin with an offence, and find a close analogy of it that might turn up in civil law, we do not find anything remotely like a clear case of consent and contract.

At the beginning of this passage Honderich is hinting at Boonin's Explicit Denial Objection. He then claims that, contrary to Nino, there is no close analogy between an offence and between consent and contract in civil law. It is true that the offender will give every evidence of not wanting to be caught – he will be careful to avoid detection and capture. However, by committing a crime the offender not only changed her legal-normative status (i.e. loss of immunity from punishment), he also, presumably, is aware that there is a risk of being captured and subsequently punished. We can say the offender assumed (consented to) this risk. And, following my discussion above, we can add that the offender acquiesced to the possibility of the materialisation of this risk.

The attitude of acquiescing to the upshot of the risks inherent in crime is presumably prevalent in crimes that are committed with some forethought³²¹. This attitude is best captured in the phrase: 'It's a fair cop'. But this attitude, combined with the knowledge that committing a crime means to change one's legal-normative status, as well as assuming the risk of being harmed (through punishment) is compatible with Honderich's (2006: 53) claim that 'the offender will also give every evidence of not intending the upshot having to do with punishment.'

In a standard commercial contract it is the consent to the legal-normative consequences which establishes the analogy to Nino's notion of consent in crime. For Nino, this is sufficient. If someone signs a contract to buy an estate and then says, that they have no intention of paying a penny for the estate, i.e. they are giving every

³²¹ That is, excluding crimes of passion, cases of provocation or instances where the affects play an important role.

evidence of not intending the upshot of their contract, then (Nino 1991b: 281) 'this manifestation may worry the seller but it lacks any legal significance.'

But note that there are contracts which involve a high degree of risk; consenting to a risky operation would be such a case. Or take an individual who signs up to join the army for a 20-year stint. Even if her country is not presently at war, this might change in the future; and this involves a high degree of risk. In both of these examples all three elements by which I have characterised crime (consent to a change of normative status, consent to a risk and acquiescence to the upshot of the risk) are also present. In the examples of risky contracts, it is these three features which establish the analogy to crime (and torts). As I have said before, Nino only relies on the first element, but the Consensual Theorist may rely on all three.

Honderich (p. 53) states that 'the offender will also give every evidence of not intending the upshot having to do with punishment.' A positive attitude towards the object of a contract is not a necessary condition for the contract to be valid – this is something Honderich (1988: 181) acknowledges himself:

It is important that for the passenger [in a taxi cab] to have consented, certain other things are *not* required. It does not matter if he believes he can avoid paying, intends not to pay, or does not want to pay, either at the time he consents or when he gets to his destination. None of these things affects the fact that he has in law consented.³²²

This contract – and the consent to take on certain legal obligations – is still valid. Similarly, the consent to a change in normative status in the context of crime is valid, although the criminal is likely to have a negative attitude towards the loss of immunity from punishment, towards the assumption of risk and towards the possibility of the risk materialising. Consequently, the analogy between contract and crime remains intact.

Acting in accordance with the offender's ends?

³²² See Honderich (2006: 50) and (1985: 128).

In his book *The Consequences of Determinism* (1988), Honderich takes up the discussion of the offender's ends again, but with a slightly different emphasis.

Honderich (1988: 183) writes:

The general idea of the Consensual Theory, and all theories of punishment having to do with agreement-claims, is that in punishing a man we have the defence that somehow we are acting in accordance with *his* past or present will, volition, autonomy, self-determination, end, or desires. In the Consensual Theory, it is said in particular that we are treating him as an end. This is understood with commendable clarity as our acting in accordance with his ends.

Nino would presumably not agree with the last statement. It is too close to the proposition that the offender wants or wills his own punishment. Nino's position differs from this. If an offender gets caught, and if she is successfully tried, then the punishment would constitute a distribution (of burdens and benefits) which is 'according to consent' (1983: 293). This does not mean that the distribution (the punishment) is in accordance with the offender's ends, because the offender clearly does not want to be punished.

Nino (1983: 297) writes that punishment 'is the product of the will of the person who suffers it, at least when certain requirements related to the agent's state of mind are met.'

Honderich (1988: 183) continues:

But if we take into account both his consent of a kind to lose his immunity, whatever the details of that consent, and his dissent in every sense with respect to his punishment, it is at least arguable that in punishing him we are acting against what are his ends. We are certainly acting against his predominant ends. We can be said, as well, to be acting against his predominant will, volition, self-determination, desires, or whatever.

As I have argued above, treating an individual as an end (i.e. respecting their inherent dignity) and acting against her ends (wrong-doing) are compatible ways of dealing with individuals.

Nino (1991b: 282) believes that

the autonomy of people is respected when we rely on their consent to assume a liability to punishment (...). To respect people's autonomy is not merely to satisfy their desires (the mother who feeds her baby is not respecting its autonomy) but to take their *decisions* to realize certain states of affairs (which sometimes have inseparable components which are or may turn out to be disagreeable) as expressions of their own plan of life. The consent of the individual prevails over his desires as a reason for behaving in certain ways towards him.

Contrary to Honderich, the criminal's predominant ends are to commit the crime, rather than avoiding punishment. The latter is an end, but not a *predominant* end, because criminals, normally, are hoping that this upshot (punishment) of their wrong-doing will never come about. They are motivated by committing a crime and not by avoiding punishment. For this reason, the latter is not a predominant end. The other ends of the wrong-doer (not to be caught, not to be tried, not to be punished) only come about *because* of the crime, because of her predominant end. Nino (1991b: 282) writes:

The idea of autonomy implies that each person is the only judge who can decide, sometimes irrevocably, which of his desires he must try to satisfy and which he may put at risk of frustration. In the case of punishment, the individual who decides to commit a crime embraces a project which includes both the enjoyment of the fruits of the crime and the subjection to a normative situation which puts the agent under the punitive power of public officials. To exert that power is not to disregard the agent's choice, but is in accordance with it, even when it frustrates some of his stronger desires.

Being punished is a negative contingent consequence of committing a crime. Although contingent, it is closely related to the legal-normative consequences which are attached to crime and which necessarily follow. In crime, just like in the non-criminal context, the agent normally wills the act (the crime – or the operation), but not any contingently related negative consequences. If I consent to a risky operation, I consent to all legal-normative consequences which necessarily follow from the object of my consent: e.g. losing the right to legal redress if the possible harm, about which I was informed, materialises. But I do not, normally, desire any closely related negative contingent consequences: e.g. to sustain a permanent disability or, in the worst case, to die.

Let us see if Honderich's charge (it is against the individual's predominant ends if she is harmed) works in the risky operation scenario. Am I acting against the patient's ends if the operation results in harm for her? The answer is: No. The patient's aim is to be healed, but she consents to a change in her legal-normative status, as well as assuming the risk of harm which is inherent in the operation. This is analogous to the case of crime. The criminal's aim is to enjoy the fruits of crime, but she consents to a change in her legal-normative status, as well as assuming the risk of punishment which is inherent in committing a crime. Contrary to Honderich, if committing a crime results in punishment, then we are not acting against the offender's predominant ends (which are to commit the crime), but we are enforcing the legal-normative consequences which are attached to crime. It is true that the state is acting against the offenders secondary ends (not to be punished), but, as I have pointed out, these only come about *because* of her predominant end (to commit a crime). The operation cannot be had without the risk of harm and crime cannot be committed without the risk of harm (through punishment³²³).

By punishing an offender the state is, of course, acting against some of her desires (not to be punished). Punishment is supposed to be an unwelcome measure and, therefore, it will normally conflict with the desires of the offender. The more important question is: Does the state fail to treat the offender as an end in herself when it acts against some of her desires (not to be punished)? The answer is 'No',

³²³ It needs to be acknowledged that the harm in the operation is unintended, whereas the harm of punishment is intentionally inflicted by officers of the state.

because the offender, by consenting to a loss of immunity from punishment, has given the state a licence to punish. In this way the state is respecting the individual as an end and not merely as a means to an end.

In the medical operation we find it desirable to give the surgeon protection in instances where the operation is not (wholly) successful, because the object of consent (the operation and the subsequent well-being of the patient) is valuable to us. For this reason the patient is not just consenting to the operation (which would otherwise constitute battery) – i.e. consenting to all the features of the operation, regardless of the outcome – but the patient is also asked to consent to the risks which are involved in the operation (i.e. consenting to the risk of a negative outcome).

The structure of non-criminal consent, in the operation, is mirrored in tort law. By accepting a lift from a drunk driver I, at the same time, consent to run the risk of harm which is inherent in such an act. This protects the drunk driver from shouldering all of the (legal-normative) burdens of his wrong-doing – because we, as a society, find this to be equitable. We value distributions of burdens which are based on consent.

Thus, if a risk materialises (here: we inflict punishment), this does not mean we are acting contrary to the predominant ends of the offender. Her predominant ends are to commit the crime. In the operation the predominant end is to be well, and in the example from tort law her predominant end is to get home (by accepting a lift from a drunk driver). But none of the agents are wishing or willing for any of the inherent risks to materialise.

Fairness according to consent has a wider application

Let us look at another objection by Honderich (1988: 183):

Should we suppose that the consent which consists in the offender's acting with knowledge of a certain consequence is none the less somehow decisive because, after all, it is the kind of consent which is entrenched in the ordinary law of contract? Should we suppose, for this reason, that the objection that has just

been made must somehow be ill-judged?³²⁴ One might well resist the assumption that the kind of consent which is decisive in contracts is also decisive with punishment.

Honderich imputes the following argument to Nino: If the consent in contracts suffices to give us moral justification to enforce the legal-normative consequences of the contract, then it also suffices in the context of crime, because it is the same (or a similar) kind of consent.

However, this is not quite Nino's strategy, as I have discussed in the chapter on *Nino and Hart*. Nino's contribution is to highlight that the wrong-doer does consent to something – the legal-normative consequences of crime. This consent is, in important respects, analogous to the consent in contracts and in the law of torts. Just like in contracts and in the law of torts, in punishment the underlying principle of distribution can be characterised as: 'fairness according to consent' (Nino 1988: 293).

If individuals, voluntarily and knowingly, consent to assume burdens, then we consider the resulting distribution to be fair, because this is a principle which guides us in non-criminal contexts. 'For we recognize fairness according to consent as a separate justification of political action' (Nino 1983: 293). Thus, Nino's point is that consent is an important principle in the non-criminal context, in contracts, in the law of torts, but more generally as a justification for political action. It is a principle which has a much wider application than just in the realms of contract law and the law of torts³²⁵. The analogy to contracts and torts serves to explain that we have a similar consensual structure, but also to point out that consent is an important justifying principle in all of the non-criminal context.

Summary

Even though the offender is giving every indication of dissenting to her punishment, this does not invalidate the consent to the legal-normative consequences of crime. The

³²⁴ The following objection (1988: 183): 'He consents in a secondary sense to some necessary condition of his punishment, and dissents in every sense from his punishment itself.'

³²⁵ One of Nino's examples is the volunteer who joins up to fight in a war.

former is a contingent consequence, the latter follows necessarily from criminal wrong-doing.

Honderich is right that the offender cannot be said to consent to the resulting distribution (actual punishment), whereas in contracts we can specify the resulting distribution of burdens and benefits. But we can say that the resulting distribution (punishment) is owed to/based on the consent to change one's normative status. However, one could read Nino differently: the consent to an unequal distribution of burdens and benefits in crime refers to the burdens of being liable to punishment: the law-abiding are immune from punishment, whereas the law-breakers have assumed these burdens.

Furthermore, Honderich wrongly imputes to the agent that her predominant end is avoidance of punishment/harm. This is not so, neither in crime, nor in the risky operation, nor in accepting a lift from a drunk driver. The predominant end is to commit the crime (and to enjoy the fruits of crime), to have the operation (and be well) and to get home (safely).

In both of his books, Ted Honderich presents important and insightful criticisms of Nino's theory, but I have tried to show that, ultimately, they do not threaten the core of the Consensual Theory of Punishment.

12: Conclusion

My contribution to the debate

Let me state how I have contributed to defending, extending and evaluating Nino's theory.

I have provided an exegesis of Nino's theory and, while doing so, I have explained the central ideas for his theory, the most important being Nino's conception of consent. I have also stressed the need for conceptual clarification when Nino's use of words is unclear or confusing. This was particularly important for the following terms: 'inequitable', 'coerce', and 'acquiescence'.

I have identified three justificatory strands to which a Consensual Theorist could appeal: 1. consent to the legal-normative consequences of the act (loss of immunity from punishment); 2. consent to a risk (of punishment); 3. acquiescence to the factual consequences, following from wrong-doing (actual punishment). But Nino only relies on the first strand, although, including the other two strands would give additional support to his theory.

Contrary to some commentators, Nino does not employ tacit consent, instead he operates with a type of implied consent which I have called 'direct consent', because the offender directly consents to the legal-normative consequences of wrong-doing, but not to the crime itself. I have suggested an explanation why crime is not a consentable act.

I have noted that Nino's treatment (in his DPhil thesis) of strict liability and criminal negligence is not convincing. Both of these notions, may not be central for a theory of punishment, but they are nevertheless important and deserve to be integrated into the theory.

I have argued that Hart relies on assumption of risk in his justification of punishment, and this is based on the *volenti non fit injuria* maxim. However, this maxim normally applies in tort law, and the burdens which ensue in tort law for a consenting injured

party are not as severe as the burdens of punishment.³²⁶ I have also explained that Nino rejects assumption of risk as a justification, because the consent of the offender is direct, whereas the consent of the risk-taker is first and foremost to the risk and, by implication, to the legal-normative consequences which might be attached to assumption of risk. If the risk does not materialise, in analogy to tort law, the legal-normative consequences don't come into play - they remain dormant.

However, the rejection of assumption of risk as a justification shows up an inconsistency in Nino's theory. If the consent to the risk of injury in tort law justifies placing the burdens of the tort on the consenting injured party (based on the principle 'fairness according to consent'), then it is not clear why consent to the risk of punishment, in the context of crime, is not sufficient to justify placing the burdens of that exposure to risk on the wrong-doer. Making the claim that the principle of distribution is the same in crime, contracts and torts would commit Nino to accept Hart's justification of punishment, which is grounded in exposure to risk. If Nino were to drop the claim about tort law, it would resolve the inconsistency, without changing the core of his theory.

I have argued that Nino's account of punishment answers Nicola Lacey's (1988: 52) concerns that 'a justification for institutions of punishment must include a justification for their actual use in individual cases, and that the individual question is in some ways primary: can any single infliction of punishment ever be justified?' Nino's theory gives us this additional justification for individual cases of punishment, while also giving us a justification for the institution of punishment. Society has a license to impose punishment, because the wrong-doer consented to be liable to certain burdens, whereas the law-abiding are not subject to these burdens.

I have argued that Nino misjudges the seriousness of the challenge which arises out of Nozick's account of coercion. We should use the preferences of the fair-minded, rather than the preferences of the wrong-doer, as a guide to what is the normal or moral course of events. There is no convincing reason to accede to the preferences of individuals who seek an unfair and prohibited advantage.

³²⁶ There is also a weaker burden of proof requirement in tort law compared to criminal law.

I have discussed Larry Alexander's claim that there is no limit to the punishment which the consent of the offender authorises. Alexander's attack on the Consensual Theory of Punishment is based on a confusion. It originates from his belief that the assumption of risk, which justifies the harm in Alexander's examples of excessive 'punishment' (and which is actually based on the *volenti* maxim) also authorises the severity of a punishment in Nino's Consensual Theory of Punishment.

The strongest objections to Nino's theory have been put forward by David Boonin. In order to counter the 'Ignorance of the Law' objection, I suggested that a Consensual Theory of Punishment needs to rely on two premises in order to justify that (claiming) ignorance of the law is no excuse. The first premise explains why individuals are presumed to 'know' current laws. The second premise explains why individuals are presumed to 'know' new legislation.

But one problem remains for Nino: how to treat the oblivious and/or imprudent native, hermit, tourist and immigrant. They may be said to have consented to a risk, by not bothering to inquire about the il/legality of their proposed act. But recall that assumption of risk is too weak a principle for Nino to justify punishment.

Furthermore, it would mean that Nino would treat these individuals differently from those who became informed. The punishment of the former would be based on assumption of risk, the punishment of the latter on consent to the legal-normative consequences of crime. I suggested a way out, by distinguishing harmless from dangerous activities. Then negligence could be the grounds for punishment. But more problems arise from this solution. This issue is a weakness of the Consensual Theory of Punishment for which I (currently) don't see a solution.

Boonin also raises the Explicit Denial Objection. I have explained why explicit denial in the context of crime does not cancel the act of crime or cause a misfire. The conventionality and/or the (in-)validating audience (the official and the bride/groom at the wedding, the croupier, the cabbie, the auctioneer etc.), for acts which have legal-normative consequences in non-criminal contexts, is missing in crime, because crimes do not have a conventional character, rather, they are by nature undesirable acts. And society does not make provisions (by providing an audience/a representative of the

state for acts of crime) to validate or invalidate crime. Regardless of any explicit denials, by going ahead and/or by going through with the proscribed act, the crime still comes about.

I have argued that Scanlon's attack on the Forfeiture View does not threaten Nino's theory. Several features in Nino's theory suggest a high degree of compatibility with Scanlon's Value of Choice account, rather than a contrast. The fairness of the legal system, apart from aiming at justice, is also concerned with the question of whether the agent was in a good position of choice. And Nino's requirement of consent (to liability) matches Scanlon's requirement of consent in obligation/liability-creating acts. Even though it is not entirely clear what is behind Scanlon's claim that the offender is 'laying down a right', it is compatible with Nino's theory.

Furthermore, I have argued that Scanlon's doubts about Nino's conception of consent in tort law and in crime can be allayed. The positive element, which Scanlon identified in contracts, is also present in torts and in crime.

I have conceded to Honderich that the offender cannot be said to consent to the distribution (actual punishment) which results from wrong-doing, whereas in contracts we can specify the resulting distribution of burdens and benefits. But we can say that the resulting distribution (punishment) is owed to/based on the consent to change one's normative status. And I have suggested that one could read Nino differently: the consent to an unequal distribution of burdens and benefits in crime refers to the burdens of being liable to punishment: the law-abiding are immune from punishment, whereas the law-breakers have assumed these burdens.

I have argued that Honderich wrongly imputes to the agent that her predominant end is avoidance of punishment/harm. This is not so, neither in crime, nor in the risky operation, nor in accepting a lift from a drunk driver. The predominant end is to commit the crime (and to enjoy the fruits of crime), to have the operation (and be well) and to get home (safely).

I have also explained and evaluated Nino's analogical use of contract law and torts: the individual consents to the legal-normative consequences of their act, and the

principle of distribution which applies in crime is the same as in contracts and in torts (when the burdens that follow from a tort are placed on the consenting injured party).³²⁷

The merits of Nino's theory

Nino's theory of punishment is not to be seen in isolation, but is part of Nino's liberal theory of the state. He starts from three liberal moral principle, the most important being the 'autonomy of the person'. From these principles Nino derives the purpose of the state (facilitating the exercise of autonomy). By punishing offenders the state preserves the autonomy of other individuals.

Nino (1983: 305) states that his theory does not rely on 'the hypothesis of a social contract in any of the varieties defended by political philosophers. It does not rely on an explicit or implicit acceptance by the citizens of the criminal laws imposing obligations or stipulating penalties for non-compliance.' Instead Nino posits that we have moral obligations, whether we consent to them or not. Does he, by making this stipulation avoid the problem of political obligation, because his theory does not require (that it be demonstrated) that citizens, including the offender, have an obligation to obey the law?

It appears that Nino succeeds in this respect. The criminal law tends to track these moral obligations (e.g. not to murder, torture and rape). But, of course, not all laws can be reduced to moral obligations - think about *mala prohibita*. Is there a moral obligation to drive on the left or on the right? Neither is wrong in itself. But if we think of the overall purpose of the state, facilitating the exercise of autonomy, then the underlying moral obligation is to respect the autonomy of others. This justificatory structure may not always work in other areas of the law, but Nino is concerned with the criminal law and with the justification of punishment.

Nino (1983: 299) recognises that there is a gap between the offender's consent (to loss of immunity from punishment) and the enforceability of that liability by the state. Does the offender's consent justify the enforcement of the normative consequences?

³²⁷ But, as mentioned before, Nino might have to drop the claim about torts.

The move from consent to legal normative consequences of an act to the enforcement of the moral-normative consequences needs a moral justification. The offender's consent, taken on its own, cannot bridge that gap.³²⁸ It can only do so in conjunction with the aim of punishment: to avert harm to society and thus preserve autonomy. The political theory which surrounds Nino's account of punishment explains why the state is justified in enforcing the legal-normative consequences of wrong-doing. Nino's theory explains why the recognition of wrong-doing justifies a response which goes beyond mere censure³²⁹: punishment.

A plausible theory of punishment ought to provide an explanation of how to bridge the gap between wrong-doing and punishment. And Nino provides such an explanation.

But I believe that Nino makes another important contribution to the debate about punishment which has been overlooked by the commentators. We hold wrong-doers responsible for their acts, and consequently they are responsible for what happens to them as a result for their wrong-doing. When justifications for punishment are put forward, the following sentiment is often also put forward: *You brought it upon yourself!* or *You only have yourself to blame!* What is behind this sentiment?

Kant (1922: 196 [363]) makes the following observation about punishing a criminal³³⁰: 'The only time a criminal cannot complain that he is wronged is when he brings his evil deed upon himself [wenn er seine Übeltat sich selbst über den Hals zieht³³¹]'.

And Mabbott states (1939: 161):

'Punishment is a corollary not of law but of law-breaking. Legislators do not *choose* to punish. They hope no punishment will be needed. Their laws would succeed even if no punishment occurred. The criminal makes the essential choice; he "brings it on himself." '

³²⁸ Alexander misunderstood Nino in this respect.

³²⁹ Understood as a verbal response - unlike Duff's understanding of censure.

³³⁰ My translation.

³³¹ The idiom 'sich etwas über den Hals ziehen', which is now obsolete, means to cause something ('etwas verursachen'). The literal meaning of this passage is to 'to put on the evil deed/punishment' like a garment, or 'to pull it/put it over his neck' (note the allusion to hanging).

Larry Alexander thinks that the offender undertook a gamble (1980: 217). And the gambler is responsible for the outcome of a (fair) gamble. The underlying principle is assumption of risk - similar to my discussion of Hart's justification of punishment.

Forfeiture theorists (e.g. McDermott, Morris, Goldman) explain that by breaking the law the offender loses certain rights and this makes it permissible to punish. A forfeit is an involuntary loss of rights resulting from wrong-doing. Forfeiture occurs if one's standard of behaviour falls below a certain standard of 'proper behaviour' (Feinberg, 1978: 111). Here one could also say: the offender brings the punishment on herself, because the forfeit of rights is tied to wrong-doing. The problem with forfeiture accounts of punishment is that there is a tension between the idea of voluntarily committing a crime and, at the same time, involuntarily losing rights. Nino's theory resolves this tension (the offender consents to a loss of immunity from punishment).

Although Scanlon does not subscribe to the sentiment that the offender brought it upon herself, the idea of laying down a right could be interpreted in this way. For Scanlon (2003: 227) laying down a right is not based on consent, but it is 'something *like* consent'. In this respect Scanlon probably comes closest to Nino's account of punishment, compared to other theorists.

Scanlon's claim of laying down a right seems to be a novel category of rights-loss. It is not a forfeit, which would be involuntary. It is not a waiver. Waiving a right means that one releases others from their obligations to the right-holder, but one is still in possession of the right – one is (Feinberg, 1978: 114) 'reserving it'. And it is not based on consent, but it comes close to it.

I believe that Nino gives a plausible account of the sentiment that the offender brings the punishment on herself. Punishment doesn't just befall an individual, she is not just manipulated by outside forces. For Nino punishment is the product of the offender's will (1983: 297). Nino states that the focus of this thesis is on the choice to commit an offence (1983: 305), which means that the offender consents to a change of normative status. Nino's theory explains what is behind the sentiment/intuition that the offender

brings the punishment on herself: consent to the legal-normative consequences of crime.

Bibliography

- Alexander, L., 1980. 'The Doomsday Machine: Proportionality, Prevention and Punishment', *The Monist*, Vol. 63, pp. 199-227.
- Alexander, L., 1986. 'Consent, Punishment, and Proportionality', *Philosophy and Public Affairs*, Vol. 15, No. 2, pp. 178-182.
- Alexander, L., 1996. 'The Moral Magic of Consent (II)', *Legal Theory*, Vol. 2, pp. 165-174
- Amirthalingam, K., 1995. 'Mens Rea and Mistake of Law in Criminal Cases: A Lesson from South Africa', *UNSW Law Journal*, Vol. 18: 2, pp. 428-442.
- Amirthalingam, K., 2002. 'Ignorance of Law, Criminal Culpability and Moral Innocence: Striking a Balance between Blame and Excuse', *Singapore Journal of Legal Studies*, (July), pp. 302-327.
- Anderson, S., 2011. 'Coercion', *The Stanford Encyclopedia of Philosophy*, ed. by Edward N. Zalta, [Online], available: <http://plato.stanford.edu/archives/win2011/entries/coercion/> [14/09/2013].
- Aquinas, St. T., 1920 [c.1225–1274]. *Summa Theologica*. Second and Revised Edition, translated by Fathers of the English Dominican Province, [Online], available: <http://www.newadvent.org/summa/2096.htm> [14/09/2013].
- Archard, D., 1998. *Sexual Consent*, Boulder (Colorado): Westview Press.
- Aristotle, 2002. *The Nicomachean Ethics*. Translated by C. Rowe, Oxford: OUP.
- Armstrong, K.G., 1961. 'The Retributivist Hits Back', *Mind*, Vol. 70, No. 280, pp. 471-490.
- Ashworth, A., 1991. *Principles of Criminal Law*, Oxford: Clarendon Press.

Ashworth, A., 2013. 'What if imprisonment were abolished for property offences? A pamphlet published by the Howard League for Penal Reform.' London. [Online], available: http://d19ylpo4aovc7m.cloudfront.net/fileadmin/howard_league/user/online_publications/What_if_imprisonment_were_abolished_web.pdf [14/09/2013].

Austin, J., 1885. *Lectures on Jurisprudence, or The Philosophy of Positive Law*, 5th ed., revised and edited by Robert Campbell, London: John Murray.

Austin, J.L., 1975. *How to do Things with Words*, Cambridge/Massachusetts: Harvard University Press.

Barnett, R., 1986. 'A Consent Theory of Contract', *Columbia Law Review*, Vol. 86, No. 2 (Mar., 1986), pp. 269-321.

Barnett, R., 2012. 'Contract Is Not Promise; Contract Is Consent.', *Suffolk University Law Review*, Vol. 45: 3, pp. 647-666.

Bell, T.W., 2009. 'The Scale of Consent', *Chapman University Law Research Paper*, Vol. 9: 1, [Online] available: http://works.bepress.com/tom_bell/13 [14/09/2013].

Bentham, J., 1996 [1789]. *An Introduction to the Principles of Morals and Legislation*, ed. by J.H. Burns and H.L.A. Hart, 2nd ed., Oxford: Clarendon Press.

Binder, G., 2002. 'Punishment Theory: Moral or Political?', *Buffalo Criminal Law Review*, Vol. 5, pp.321-372..

Boonin, D., 2008. *The Problem of Punishment*, Cambridge: Cambridge University Press.

Bouvier, J., 1856. *Bouvier's Dictionary of Law*, Vol. I & II, 6th ed., Philadelphia: Childs & Peterson, [Online] <http://ecclesia.org/truth/bouviere.html> [14/09/2013]

- Carter, I., 2012. 'Positive and Negative Liberty', *The Stanford Encyclopedia of Philosophy*, ed. by E. N. Zalta, [Online] available: <http://plato.stanford.edu/archives/spr2012/entries/liberty-positive-negative/> [14/09/2013].
- Coleman, J.L., 2010. 'Epilogue to Risks and Wrongs', *Yale Law School, Public Law Working Paper No. 218*, [Online] available: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1679554 [14/09/2013].
- Corrado, M., 1994. 'Is There an Act Requirement in the Criminal Law?', *University of Pennsylvania Law Review*, Vol. 142:5, pp. 1529-1561.
- Cottingham, J., 1979. 'Varieties of Retribution'. *The Philosophical Quarterly*, Vol. 29, No. 116, pp. 238-246.
- Cowart, M.R., 2004. 'Understanding Acts of Consent: Using Speech Act Theory to Help Resolve Moral Dilemmas and Legal Disputes', *Law and Philosophy* 23, 2004, pp. 495-525.
- Dagger, R., 2010. "Political Obligation", *The Stanford Encyclopedia of Philosophy*, ed. by E. N. Zalta, [Online] <http://plato.stanford.edu/archives/sum2010/entries/political-obligation/> [14/09/2013].
- Dempsey, M.M., 2013. 'Victimless Conduct and the Volenti Maxim: How Consent Works', *Criminal Law and Philosophy*, Vol. 7, No. 1, pp 11-27.
- Dennier, Y., 2010. 'From Brute Luck to Option Luck? On Genetics, Justice, and Moral Responsibility in Reproduction', *Journal of Medicine and Philosophy*, Vol. 35, pp. 101–129.
- Duff, R.A., 1986. *Trials and Punishments*, Cambridge: Cambridge University Press.
- Duff, R.A., 1996. 'Penal Communications: Recent Work in the Philosophy of Punishment', *Crime and Justice*, Vol. 20, 1996, pp. 1-97.

Duff, R.A., 2001. *Punishment, Communication, and Community*, New York: Oxford University Press.

Dworkin, G., 1982. 'Is More Choice Better than Less?', *Midwest Studies In Philosophy*, Volume 7: 1, pp. 47–61.

Dworkin, R., 1975. 'The Original Position' in N. Daniels (ed.), *Reading Rawls*, Stanford: Stanford University Press, pp. 16-53.

Feinberg, J., 1978. 'Voluntary Euthanasia and the Inalienable Right to Life', *Philosophy and Public Affairs*, Vol. 7: 2, pp. 93-123.

Feinberg, J., 1984. *Harm to Others*, New York: Oxford University Press.

Feinberg, J. 1986. *Harm to Self*, New York: Oxford University Press.

Finkelstein, C., 2002. 'Death and Retribution', *Criminal Justice Ethics*, Vol. 21: 2, pp. 12-21.

Finnis, J., 1972. 'The Restoration of Retribution', *Analysis*, Vol. 32: 4, pp. 131-135.

Finnis, J., 2011 [1999]. 'Retribution: Punishment's Formative Aim' in his *Human Rights and Common Good: Collected Essays*, Volume III, Oxford: Oxford University Press, pp. 167-179.

Fish, M.J., 2008. 'An Eye for an Eye: Proportionality as a Moral Principle of Punishment', *Oxford Journal of Legal Studies*, Vol. 28: 1, pp. 57–71

Fletcher, G., 1978. *Rethinking Criminal Law*, Boston: Little, Brown & Co.

Frankfurt, H.G., 1998. 'Coercion and Moral Responsibility', in his *The Importance of What We Care About*, Cambridge: Cambridge University Press. pp. 26-46.

- Fried, C., 1981. *Contract as Promise: A Theory of Contractual Obligation*, Cambridge (Massachusetts): Harvard University Press.
- Furner, J., 2010. 'Tacit Consent Without Political Obligation', *Theoria*, pp. 54-85.
- Gardner, J., 2008. 'Introduction' to H.L.A. Hart's *Punishment and Responsibility*, 2nd ed., Oxford: OUP, pp. xiii-liii.
- Glaister, D., 2004. 'Buried alive under California's law of "three strikes and you're out" ', *The Guardian*, March 8th, [Online] available: <http://www.theguardian.com/world/2004/mar/08/usa.danglaister> [14/09/2013].
- Golding, M.P., 2002. 'The Cultural Defense', *Ratio Juris*, Vol. 15: 2, pp. 146-158.
- Goldman, A.H., 1979. 'The Paradox of Punishment', *Philosophy and Public Affairs*, Vol. 9: 1, pp. 42-58.
- Goldman, A.H., 1982. 'Towards a New Theory of Punishment', *Law and Philosophy*, Vol. 1: 1, pp. 57-76.
- Goodin, R.E., 2008. 'An Epistemic Case for Legal Moralism', [Online] available: http://150.203.86.5/news/Bob_Goodin.pdf [14/09/2013].
- Green, L., 2008. 'Legal Obligation and Authority', *The Stanford Encyclopedia of Philosophy*, ed. by E. N. Zalta, [Online] available: <http://plato.stanford.edu/archives/fall2008/entries/legal-obligation/> [14/09/2013].
- Green, L., 1988. *The Authority of the State*, Oxford: Clarendon Press.
- Hall, J., 1960. *General Principles Of Criminal Law*, 2nd ed., Indianapolis: Lexis Law Publishing.
- Haag, E.v.d., 1986-1987. 'Can any Legal Punishment of the Guilty be Unjust to them?', *Wayne Law Review*, pp. 1413-1421.

Hart, H.L.A., 1955. 'Are There Any Natural Rights?', *The Philosophical Review*, Vol. 64: 2, pp. 175-191.

Hart, H.L.A., 1958. 'Positivism and the Separation of Law and Morals', *Harvard Law Review*, Vol. 71: 4, pp. 593-629.

Hart, H.L.A., 1959-1960. 'Prolegomenon to the Principles of Punishment', *Proceedings of the Aristotelian Society*, Suppl. Vol. LX, pp. 1-26.

Hart, H.L.A., 1963. *Law, Liberty and Morality*, Stanford: Stanford University Press.

Hart, H.L.A., 1983. 'Diamonds and String: Holmes on the Common Law' in his *Essays in Jurisprudence and Philosophy*. Oxford: Clarendon Press, pp. 278-285.

Hart, H.L.A., 1997. *The Concept of Law*. 2nd ed. Oxford: OUP.

Hart, H.L.A., 2008. *Punishment and Responsibility*. 2nd ed. Oxford: OUP.

Hays, C.L., 2004. 'Martha Stewart's Sentence: The Overview', *New York Times*, 17th July. [Online] available: <http://www.nytimes.com/2004/07/17/business/martha-stewart-s-sentence-overview-5-months-jail-stewart-vows-ll-be-back.html?pagewanted=all&src=pm> [14/09/2013]

Hershovitz, S., 2012. 'What Does Tort Law Do? What Can It Do?', *Valparaiso University Law Review*, Vol. 47, pp. 99-118.

Hobbes, T., 1994 [1651]. *Leviathan*, ed. by E. Curley, Indianapolis: Hackett Publishing.

Hohfeld, W. N., 1913. 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', *The Yale Law Journal*, Vol. 23: 1, pp. 16-59.

- Hohfeld, W. N., 1917. 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', *The Yale Law Journal*, Vol. 26: 8, pp. 710-770.
- Holmes, O.W., 1923. *The Common Law*. Boston: Little, Brown & Company.
- Honderich, T., 1985. 'Punishment, the New Retributivism, and Political Philosophy', in *Philosophy and Practice: Royal Institute of Philosophy Lecture Series: 19*, Supplement to *Philosophy* 1984, ed. by A. Phillips Griffiths, Cambridge: Cambridge University Press, pp. 117-147.
- Honderich, T., 1988. 'The Consequences of Determinism: A Theory of Determinism', Vol. 2. Oxford: Clarendon Press.
- Honderich, T., 2006 [1969]. *Punishment: The Supposed Justifications Revisited*, revised edition, London: Pluto Press.
- Honoré, A.M., 1962. 'Social Justice', *McGill Law Journal*, Vol. 8: 2, pp. 77-105.
- Houlgate, L.D., 1967. 'Ignorantia Juris: A Plea for Justice', *Ethics*, Vol. 78: 1, pp. 32-42.
- Hume, D., 1777 [1751]. *An Enquiry Concerning the Principles of Morals*, ed. by Peter Millican and Amyas Merivale, London: A. Millar, [Online] available: <http://www.davidhume.org/texts/epm.html> [12/09/2013].
- Hume, D., 1979 [1748]. 'Of the Original Contract', in A. MacIntyre (ed.), *Hume's Ethical Writings: Selections*, New York: Collier Books.
- Hurd, H., 1996. 'The Moral Magic of Consent', *Legal Theory*, Vol. 2, pp. 121-146.
- Husak, D.N., 1994. 'Ignorance of Law and Duties of Citizenship', *Legal Studies*, Vol. 105, pp. 105-115.
- Hyams, K., 2005. *Consent*, unpublished DPhil thesis, Oxford.

Imbrisevic, M., 2010a. 'The Consent Solution to Punishment and the Explicit Denial Objection', *Theoria*, Vol. 68, pp. 211-224.

Imbrisevic, M., 2010b. 'Why is (Claiming) Ignorance of the Law no Excuse?', *The Review Journal of Political Philosophy*, Vol. 8.1, pp. 57-69.

Johnson, R., 2012. 'Kant's Moral Philosophy', *The Stanford Encyclopedia of Philosophy*, ed. by E. N. Zalta, [Online] available:
<http://plato.stanford.edu/archives/sum2012/entries/kant-moral/> [14/09/2013]

Kant, I., 1948 [1785]. *Groundwork of the Metaphysic of Morals*, translated by H.J. Paton. London: Hutchinson.

Kant, I., 1999 [1785]. *Grundlegung zur Metaphysik der Sitten*, ed. by B. Kraft and D. Schönecker, Hamburg: Felix Meiner Verlag.

Kant, I., 1922 [1797]. *Metaphysik der Sitten*, Leipzig: Felix Meiner Verlag.

Kant, I., 1991 [1797]. *Metaphysics of Morals*, translated by M. Gregor, Cambridge: Cambridge University Press.

Keedy, E. R., 1908. 'Ignorance and Mistake in the Criminal Law', *Harvard Law Review*, Vol. 22: 2, pp. 75-96.

Kessler, F., 1943. 'Some Thoughts about Freedom of Contract', *Columbia Law Review*, Vol. 43: 5, pp. 629-642.

Kleining, J., 1982. 'The Ethics of Consent', *Canadian Journal of Philosophy*, Supplementary Volume VIII, pp. 91-118.

Knowles, D., 1999. 'Punishment and Rights', in M. Matravers (ed.), *Punishment and Political Theory*, Oxford: Hart Publishing, pp. 28-47.

- Lacey, N., 1988. *State Punishment: Political Principles and Community Values*, London: Routledge.
- Lamond, G., 2000. 'The Coerciveness of Law', *Oxford Journal of Legal Studies*, Vol. 20: 1, pp. 39-62.
- Lloyd Thomas, D.A., 1995. *Locke on Government*, London: Routledge.
- Locke, J., 1980 [1690]. *Second Treatise of Government*, ed. by C. B. Macpherson. Indianapolis: Hackett Publishing Company.
- Lucas, J.R., 1979. 'The Nature of Law', *Philosophica*, 23: 1, pp. 37-50.
- Mabbott, J.D, 1939. 'Punishment', *Mind*, 48, pp.152-167.
- Mackie, J.L., 1977. 'The Grounds of Responsibility', in P.M.S. Hacker & J. Raz (eds.), *Law, Morality and Society: Essays in Honour of H.L.A. Hart*, Oxford: Clarendon Press, pp. 173-188.
- McDermott, D., 2001. 'The Permissibility of Punishment', *Law and Philosophy*, Vol. 20, pp. 403-432.
- Mansfield, J. H., 1961. 'Informed Choice in the Law of Torts', *Louisiana Law Review*, Vol. 22, pp. 17-76.
- Matravers, M., 2000. *Justice and Punishment: The Rationale of Coercion*, Oxford: OUP.
- Matthews, P., 1983. 'Ignorance of the Law is no Excuse?', *Legal Studies*, Vol. 3, pp. 174-192.
- Mill, J.S., 1982 [1859]. *On Liberty*, ed. by G. Himmelfarb, Harmondsworth: Penguin Books.

- Morison, J., 1988. 'Hart's Excuses: Problems with a Compromise Theory of Punishment' in P. Leith and P. Ingram (eds.), *The Jurisprudence of Orthodoxy: Queen's University Essays on H.L.A. Hart*, London: Routledge, pp. 117-146.
- Morris, C.W., 1991. 'Punishment and Loss of Moral Standing', *Canadian Journal of Philosophy*, Vol. 21: 1, pp. 53-80.
- Murphy, J. 1981. 'Consent, Coercion, and Hard Choices', *Virginia Law Review*, Vol. 67: 1, pp. 79-95.
- Nietzsche, F., 2006 [1887]. *On the Genealogy of Morality*, ed. by K. Ansell-Pearson, translated by C. Diethe, Cambridge: Cambridge University Press.
- Nino, C.S., 1976. *Towards a General Strategy for Criminal Law Adjudication*, unpublished DPhil. thesis, Oxford.
- Nino, C.S., 1983. 'A Consensual Theory of Punishment', *Philosophy and Public Affairs*, Vol. 12: 4, pp. 289-306.
- Nino, C.S., 1984a. 'Liberty, Equality and Causality', *Rechtstheorie*, Vol. 15, pp. 23-38.
- Nino, C.S., 1984b. 'The Limits of the Enforcement of Morality through the Criminal Law' in J.J. Gracia et. al. (eds.), *Philosophical Analysis in Latin America*, Dordrecht: D. Reidel, pp. 93-113.
- Nino, C.S., 1986. 'Does Consent Override Proportionality?', *Philosophy and Public Affairs*, Vol. 15: 2, pp. 183-187.
- Nino, C.S. 1991a. 'The Epistemological Moral Relevance of Democracy', *Ratio Juris* 4: 36-51.
- Nino, C.S., 1991b. *The Ethics of Human Rights*, Oxford: Clarendon Press.

Nino, C.S., 1996a. *The Constitution of Deliberative Democracy*, New Haven: Yale University Press.

Nino, C.S., 1996b. *Radical Evil on Trial*, New Haven: Yale University Press.

Nozick, R., 1969. 'Coercion', in S. Morgenbesser, P. Suppes, and M. White (eds.), *Philosophy, Science, and Method*, New York: St. Martin's Press, pp. 440-472.

McPherson, T., 1967. *Political Obligation*, London: Routledge & Kegan Paul.

Plato, 1987. *The Republic*, translated by D. Lee, 2nd revised ed., London: Penguin Books.

Primoratz, I., 1989. *Justifying Legal Punishment*. Amherst/New York: Prometheus Books.

Quinn, W., 1985. 'The Right to Threaten and the Right to Punish', *Philosophy and Public Affairs*, Vol. 14: 4, pp. 327-373.

Rawls, J., 1955. 'Two Concepts of Rules', *The Philosophical Review*, Vol. 64, pp. 3-32.

Raz, J., 1986. *The Morality of Freedom*, Oxford: Clarendon Press.

Rhodes, M.R., 2000. 'The nature of Coercion', *The Journal of Value Inquiry*, Vol. 34, pp. 369-381.

Ripstein, A., 1999. *Equality, Responsibility and the Law*, Cambridge: Cambridge University Press.

von Savigny, F.K., 1840. *System des heutigen Römischen Rechts*, Vol. 3. Berlin: Veit und Comp.

Samek, R.A., 1966. 'Punishment: A Postscript to Two Prolegomena', *Philosophy*, Vol. 41: 157, pp. 216-232.

Scanlon, T.M., 1986. *The Significance of Choice: The Tanner Lectures on Human Values*, delivered at Brasenose College, Oxford University, [Online] available: http://tannerlectures.utah.edu/_documents/a-to-z/s/scanlon88.pdf [14/09/2013].

Scanlon, T.M., 1998. *What We Owe to Each Other*, Cambridge (Massachusetts): Harvard University Press.

Scanlon, T.M., 2003 [1999]. 'Punishment and the Rule of Law', in his *The Difficulty of Tolerance: Essays in Political Philosophy*, Cambridge: Cambridge University Press, pp. 219-233.

Schramme, T., 2004. 'Coercive Threats and Offers in Psychiatry', in T. Schramme and J. Thome, J. (eds.), *Philosophy and Psychiatry*, Berlin: Walter de Gruyter, pp. 357-369.

Sena, J.F.M., 1995-1996. 'Carlos Santiago Nino: A Bio-Bibliographical Sketch', *Miami Inter-American Law Review*, Vol. 27: 1, pp. 45-105.

Simmons, A.J., 1976. 'Tacit Consent and Political Obligation', *Philosophy and Public Affairs*, Vol. 5: 3, pp. 274-291.

Simmons, A.J., 1979. *Moral Principles and Political Obligations*. Princeton: Princeton University Press.

Simmons, A.J., 1993. *On the Edge of Anarchy: Locke, Consent, and the Limits of Society*. Princeton: Princeton University Press.

Simmons, A.J., 1998. ' "Denisons" and "Aliens": Locke's problem of political consent', *Social Theory & Practice*, Vol. 24: 2, pp. 161-182.

Simons, K., 1987. 'Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference', *Boston University Law Review*, Vol. 67:2, pp. 213-287.

Simons, K., 2008. 'The Crime/Tort Distinction: Legal Doctrine And Normative Perspectives', *Widener Law Journal*, Vol. 17, pp. 719-732.

Smith, J. & Hogan, B. 1996. *Criminal Law*, 8th ed., London: Butterworths.

Snare, F., 1975. 'Consent and Conventional Acts in John Locke', *Journal of the History of Philosophy*, Vol. 13:1, pp. 27-36.

Stadden, C.M. 1907. 'Error of Law', *Columbia Law Review*, Vol. 7, pp. 476-519.

Taibbi, M., 2013. 'Cruel and Unusual Punishment: The Shame of Three Strikes Laws', *Rolling Stone Magazine*, 27th March, [Online] available: <http://www.rollingstone.com/politics/news/cruel-and-unusual-punishment-the-shame-of-three-strikes-laws-20130327#ixzz2cctvXBa1> [14/09/2013].

Waddams, S.M., 1976. 'Unconscionability in Contracts', *The Modern Law Review*, Vol. 49, pp. 369-393.

Wallerstein, S., 2009. ' "A drunken consent is still consent" – or Is It? A Critical Analysis of the Law on a Drunken Consent to Sex Following Bree', *The Journal of Criminal Law*, Vol. 73, pp. 318–344.

Wasserman, D., 1987. 'Justifying Self-Defense', *Philosophy and Public Affairs*, Vol. 16: 4, pp. 356-378.

Wertheimer, A., 1999. *Exploitation*, Princeton: Princeton University Press.

Wertheimer, A., 2003. *Consent to Sexual Relations*, Cambridge: Cambridge University Press.

Wigmore, J.H., 1943. 'The Scope of the Contract-Concept', *Columbia Law Review*, Vol. 43: 5, pp. 569-574.

Williams, A., 2007. 'Liberty, Liability and Contractualism' in N. Holtug and K. Lippert-Rasmussen (eds.), *Egalitarianism*, Oxford: Clarendon Press, pp. 241-261.

Williams, R., 2012. 'Is prison education working?', *The Guardian*, Monday 30th January, [Online] available: <http://www.guardian.co.uk/education/2012/jan/30/prison-education-failures> [14/09/2013].

Zimmerman, D., 1981. 'Coercive Wage Offers', *Philosophy and Public Affairs*, Vol. 10, pp. 121-145.

Other sources:

Austrian Penal Code, '§ 9 StGB Rechtsirrtum', [Online] available:
http://www.jusline.at/9_Rechtsirrtum_StGB.html [14/09/2013].

Collins English Dictionary – Complete and Unabridged, 2003, London:
HarperCollins Publishers, [Online] available:
<http://www.collinsdictionary.com/dictionary/english/acquiesce> [14/09/2013].

German Civil Code (Bürgerliches Gesetzbuch), [Online] available:
<http://www.gesetze-im-internet.de/bgb/> [14/09/2013].

German Basic Law (Grundgesetz), [Online] available:
http://www.bundestag.de/bundestag/aufgaben/rechtsgrundlagen/grundgesetz/gg_01.html [14/09/2013].

Oxford Dictionary of Law, 2003, ed. by E.A. Martin, 5th edition, Oxford: OUP.

Select Committee on Defence: Third Report, 14 March 2005, [Online] available:
<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmdfence/63/6306.htm>
[14/09/2013].

Shorter Oxford English Dictionary, 1983, revised by G. W. S. Friedrichsen, 3rd
edition, London: Guild Publishing.

Cases cited:

Bailey [1800] 168 ER. 657

Bilbie vs. Lumley [1802] 2 East 469

Broome v Cassell & Co Ltd [1972] (AC 1207)

Furman v. Georgia, 408 U.S. 238 [1972)

Martindale v Falkner [1846] 2 C.B. 706

The Port Caledonia and the Anna [1903] P 184

R v Howe [1987] AC 417

Southwark London Borough Council v Williams [1971] 2 All ER 175 - Lord Denning

United States v. Anthony [1st Cir. 2008].

United States v. Coviello [1st Cir. 2000]

Westminster City Council v Croyalgrange Ltd [1986] 83 Cr App R 155

Willer [1986] 83 Cr App R 225