

CARLOS NINO'S CONCEPTION OF CONSENT IN CRIME*

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In this paper I discuss the nature of consent in general, and as it applies to Carlos Nino's consensual theory of punishment. For Nino the criminal's consent to change her legal-normative status is a form of implied consent. I 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" to the legal-normative consequences of a proscribed act – this is the consent which Nino employs. I argue that Nino's conception of consent in crime exhibits many common features of "everyday" consent, which justify that it be classed as a form of (implied) consent. Thus, Nino is right to claim that the consent in crime is similar to the consent in contracts and to the consent to assume a risk in tort law.

Keywords: Carlos Nino, consent, crime, punishment.

Neste artigo discuto a natureza do consentimento, em geral, e como se aplica à teoria consensual da punição de Carlos Nino. Para Nino o consentimento do criminoso para mudar seu status jurídico-normativo é uma forma de consentimento implícito. Distingo três tipos de consentimento implícito: 1) o que se baseia numa convenção operativa (ou seja, o consentimento tácito); 2) aquele em que não há convenção operativa; 3) o "consentimento directo" às consequências jurídico-normativas de um acto proscrito - este é o tipo de consentimento que Nino emprega. Defendo que a concepção de Nino de consentimento no crime exhibe muitas características comuns de consentimento quotidiano, o que justifica que seja classificado

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como uma forma de consentimento (implícita). Assim, Nino tem razão ao afirmar que o consentimento do crime é semelhante ao consentimento dos contratos e ao consentimento para assumir um risco em direito penal.

Palavras-chave: Carlos Nino, consentimento, crime, punição.

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 is to lay out how everyday consent works, and how this applies to Nino's conception of the offender's consent, because this is mostly missing in the literature. And in the process I will engage with the pertinent literature. Because of the aims and scope of this paper, I cannot present and respond to all of the objections to Nino's theory which have been put forward.^[1]

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.

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."

1 Here I give a concise response to Scanlon. The issues raised by Honderich need more space and I will deal with them in another paper (forthcoming). I have discussed Boonin's objections in Imbrisevic (2010).

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"^[2] to the legal-normative consequences of a proscribed act.

Tacit Consent

Let us define the term "tacit consent".^[3] In ordinary usage "to give consent"^[4] means to agree to something and/or to give permission. The adjective "tacit" means silent.^[5] 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.^[6] 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

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

3 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'"

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

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

6 See A. John Simmons: "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 mode of expression, not its lack of expression." (Simmons, 1976: 282). See also Archard (1998: 4).

Thomas 1995, Archard 1998, Hyams 2005) take a broader view of tacit consent.^[7] 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.^[8] 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*.^[9]

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 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.,

7 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).

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

9 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 (2010).

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.^[10]

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).

Direct Consent^[11]

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)

¹⁰ Note that for 'publicity' we need to read 'observability'.

¹¹ I have elaborated on the notion of 'direct consent' in the Spanish journal *Theoria*: "The Consent Solution to Punishment and the Explicit Denial Objection" (2010).

to the necessary consequences. Instead, the wrong-doer consents, at the point of committing a crime, directly to the legal-normative consequences. 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 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 1996: 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.

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 authors^[12] 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.^[13]

Frank Snare (1975: 5) suggests a plausible explanation why some writers stress the importance of the right attitude: "I suspect the prominence of

12 Stadden (1907), Hurd (1996), Alexander (1996).

13 See Joseph Raz (1986: 81), David Archard (1998: 4), Joel Feinberg (1986: 173) and Alan Wertheimer (2003: 144).

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.^[14] 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 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 normally^[15] 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

14 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.’

15 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.

receiving consent.”^[16] 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?”^[17]).^[18] 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. Third parties may not interfere with the action to which B has consented (Idem: 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 materially^[19], 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.

For Nino (1983: 301) the difference between express and implied consent is as follows:

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

16 See also A.J. Simmons (1979: 76).

17 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”.

18 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 court.

19 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.

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 Furner (2010: 57) agrees: “In law, the form in which consent is communicated 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.”

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 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).^[20] “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

20 Furner (2010: 63), referring to the 19th Century German legal scholar Friedrich Karl von Savigny, paraphrases Savigny (1840: 257ff. [§134]): ‘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.’

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).^[21]

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.^[22] 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

21 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.’

22 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.

it express or implied) we could not ascertain that there is such a matching psychological state within the consenting person.

In the context of contract law this is 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.^[23]

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.^[24] 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.^[25] Equally, consenting to sell one’s car, while visibly drunk, constitutes invalid consent.^[26]

23 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?’

24 See A. J. Simmons (291: 276): ‘as with promising, one can consent insincerely, but not unintentionally.’ Also Archard, p. 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.’

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

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

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.^[27] 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.”^[28]

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 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 operation^[29], 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

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

28 See also 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.’

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

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.^[30]

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 nature^[31]. 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 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.

The 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

30 See Feinberg (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.'

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

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 conditions^[32]), does not invalidate a contract. In risky 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 harm^[33].

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.

32 E.g. going out of business.

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

Nino considered assumption of risk to be too weak a principle to justify punishment.^[34] 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.”

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 exam^[35]. 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. (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, therefore, one cannot be said to consent to it. 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.

Scanlon’s Doubts about Nino’s Conception of Consent

One commentator, Thomas Scanlon, discusses some aspects of Nino’s notion of consent in crime in more detail. Scanlon (2003: 227) claims that the idea of a full-bodied notion of consent is “more clearly applicable to

34 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.

35 My example.

the case of contracts than to torts or punishment.” Contractors are likely to know the legal burdens or liabilities which result from their consent, whereas, Scanlon believes, most individuals don’t know tort law and consequently don’t know that they are giving up certain legal claims or immunities. 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. More importantly, Scanlon’s claims are contradicted by our everyday experiences. An individual does not need to have a law student’s grasp of tort law in order to bring about a change in their legal-normative status.

Scanlon also points out that in contracts we have both a positive element: the value we place on having control over the outcome of our actions, and a negative element: protection against unwanted obligations by not taking on any legal obligations/liabilities – by not entering into the contract. Scanlon concedes that there is a negative element in torts: it protects individuals retrospectively by compensating them for loss and injury, or they could avoid loss by simply refraining from taking a risk. And there is a negative element in criminal punishment: individuals, normally, have the opportunity to avoid harm by refraining from wrong-doing. But Scanlon does not see a positive element in either tort law or in criminal punishment. This is another reason why he has doubts about Nino’s conception of consent in both of these areas.

However, Scanlon has overlooked that the positive elements are present. 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 consent to risk 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. And this is well understood by ordinary people – not just by law students.

In criminal punishment there is also a positive element. The burdens which the state attaches to crime only apply to individuals who freely and knowingly performed the act to which legal-normative consequences are attached. These burdens are normally not placed on 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. Offenders voluntarily and knowingly take on certain legal burdens. This means that nothing is missing from Nino's conception of consent in tort law and in criminal punishment.

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:

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.

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 assent^[36]; (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 commit a proscribed act, you also consent to the burdens which necessarily follow from crime – liability to punishment.*

36 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.

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 liberty³⁷ of committing a proscribed act could be seen as the "consideration".

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.

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.

37 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).

Conclusion

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. Nino's analogy between contracts and crime is useful because it can be shown that many of the essential features of a contract are present in crime.

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