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# The Consent Solution to Punishment and the Explicit Denial Objection\*

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ABSTRACT: Recently, David Boonin has put forward several objections to Carlos S. Nino's 'Consensual Theory of Punishment'. In this paper I will defend Nino against the 'explicit denial objection'. I will discuss whether Boonin's interpretation of Nino as a tacit consent theorist is right. I will argue that the offender's consent is neither tacit nor express, but a special category of implicit consent. Further, for Nino the legal-normative consequences of an act (of crime) are 'irrevocable', i.e. one cannot (expressly and successfully) deny liability to them. I will suggest an explanation for Nino's irrevocability claim.

Keywords: Carlos S. Nino, consensual theory of punishment, explicit denial objection, tacit consent, irrevocability.

## 1. Introduction

The foremost proponent of the 'consent solution' to the justification of punishment was the Argentinian legal scholar Carlos Santiago Nino (1943-1993). The important feature of Nino's theory of punishment is that the wrong-doer, by committing an illegal act, consents to assume a liability to punishment. If caught and convicted, this 'assumption of liability' would be decisive for punishing an offender – without having to establish that citizens, including the offender, have an obligation to obey the law. According to Nino individuals have moral obligations, whether they consent to them or not. And the criminal law, on the whole, tends to track these moral obligations. In addition, Nino assumes a 'fair legal framework' for his justification of punishment.

Nino's theory has, regrettably, not been widely discussed – notable exceptions are Ted Honderich (2006), Thomas Scanlon (1986, 2000, 2003) and, most recently, David Boonin (2008). Boonin has put forward several objections to Nino's theory and in this paper I will concentrate on one of these objections: 'the explicit denial objection'. 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 (Boonin 2008, p. 164; see also Lacey 1988, p. 48.)?

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## 2. *Nino's Consensual Theory of Punishment*

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 for its ends. Nino (1983, p. 291) objects to a 'justification of punishment based solely on social protection'. Because such a conception of punishment (Nino 1983, p. 293) 'necessarily implies an unfair distribution of burdens and benefits among members of society'.<sup>1</sup> Diminishing overall harm within a society by selectively harming some of its citizens would be unfair. The will of the offender is then subordinate to the 'will' of society. And this is morally problematic for Nino (1983, p. 306), because he invokes the Kantian principle that individuals must never be treated merely as means to an end. 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 (through punishment) for the benefit of all (see also Lacey 1988, p. 47).

What is missing in justifications which are based purely on social protection is a moral justification for meting out punishment which involves the ends of the would-be offender. In Nino's theory the offender provides that moral justification by consenting to assume the liability to punishment (Nino 1983, p. 299):

[T]he fact that the individual has freely consented to make himself liable to that punishment (by performing a voluntary act with the knowledge that the relinquishment of his immunity is a necessary consequence of it) provides a *prima facie* moral justification for exercising the correlative legal power of punishing him.

By committing a crime the offender assumes the legal-normative consequences of crime (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. This is analogous to the justificatory structure of enforcing contracts in cases of breach of contract.<sup>2</sup>

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. This analogy serves to illustrate the consensual element in the actions of the offender, even if s\he does not consent to any presumed obligation to obey the law, nor to the institution of punishment, nor to being punished. What the offender consents to by committing an illegal act is to assume liability to punishment. A positive attitude to the legal-normative consequences of a contract is not a requirement for valid consent. Similarly,

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<sup>1</sup> Another aspect of an unfair distribution of burdens and benefits could be applying tariffs which are disproportionate to the crimes in order to improve deterrence.

<sup>2</sup> 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 move: what is fair in contract law (and in the law of torts) must also be fair in criminal law. Alternatively, Nino might start from criminal law and justify punishment through the consensual element, which is the hallmark of a liberal society. The analogy to contract law would simply support the fairness claim of his theory of punishment.

a positive attitude to the legal-normative consequences of crime, according to Nino's theory, is not a requirement for valid consent to these consequences.

### 3. *The Explicit Denial Objection*

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 s\he 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.

'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, p. 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.' 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. This requirement prevents unacceptable consequences in the examples of the doctor and the cab passenger. However, it would have fatal consequences for a consent-based theory of punishment, because would-be offenders could always announce that they do not want 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. But let us, for now, accept Boonin's contention that Nino means 'tacit' consent.

Let us define the term 'tacit consent' first. In ordinary usage 'to give consent'<sup>3</sup> means to agree to something. In the context of political philosophy (Green 2008, 5.1), consent can be defined as 'a performative commitment that undertakes an obligation through the very act of consenting.' The adjective 'tacit' means silent.<sup>4</sup>

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 [1690]), § 119, p. 64), an early tacit consent theorist, accepts that certain actions, while being on the ter-

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<sup>3</sup> Latin *consentire*: to feel together, to agree.

<sup>4</sup> Latin *tacitus*: silent; *tacere*: to be silent.

ritory of a state (like travelling on the highway or staying at an inn), are forms of tacit consent.<sup>5</sup>

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. 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, 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.

The broader, non-Lockean, conception of tacit consent requires that there exists a 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*); e.g. putting down one's chips on the roulette table is taken to be placing a bet, and getting into a cab and stating a destination is taken to mean that one is hiring the cab. According to this broad conception, one can tacitly consent *ex actionem* or *ex silentio*.

An individual can only tacitly consent if there is an 'operative convention' in place (see Lloyd Thomas 1995, p. 39; also Archard 1998, pp. 8-9.); 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 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<sup>6</sup>. 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 crime<sup>7</sup>. And since there is no convention, it does not make sense for the would-be criminal to expressly dissent (to assume liability to punishment). Furthermore, Nino does not characterise the consent

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<sup>5</sup> 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, p. 83 and p. 87; 1979, pp. 89-93).

<sup>6</sup> Although a bidder who wants to stay anonymous could agree this as a sign of 'private tacit consent' with the auctioneer beforehand.

<sup>7</sup> There might be conventions which are operative among criminals though.

to assume liability to punishment as 'tacit' consent. What Nino does say about the nature of consent (with regard to contracts) is the following. He 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, p. 294):

[B]y 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.

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 act (i.e. the obligations or liabilities s/he is assuming). We can say that Nino distinguishes between explicit consent ('I take XY to be my lawfully wedded wife') and between implicit consent through the performance of an action which necessarily has legal-normative consequences. The opposing pair 'implicit' – 'explicit' suggests that the implied consent can be made explicit, and Nino is doing just that in his consensual theory of punishment (Nino 1983, p. 301).

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.

The common factor between consent through action in contracts and consent to assume liability to punishment is not that the actors tacitly consent (tacit consent would only apply to the contractors in Nino's examples<sup>8</sup>), but that both the contractor and the criminal consent to assume a liability to pay/punishment through performing an action. 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 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.<sup>9</sup>

One could put forward another argument, Kantian in spirit, to discount the idea that criminals could expressly dissent from assuming a liability to punishment. Crimi-

<sup>8</sup> Nino obviously takes tacit consent to be a form of implicit consent.

<sup>9</sup> It seems that in tacit (but also in explicit) consent there is an audience (an involved party) of at least one: the cab driver, the croupier, the auctioneer. In crime 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!" states explicitly 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. More on this below.

nals, 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, s\he 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 his/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? Let us keep an open mind about it for now and we will re-visit this issue below.

Now the question arises: What is the nature of the would-be criminal's consent? We have excluded the possibility that it is tacit consent, because there is no operative convention in place. Neither is it express consent, because criminals do not, normally, profess to a liability to punishment. Note that Nino counts both the criminal's consent and (contracts based on) tacit consent as instances of implicit consent. The common factor between consent through action in contracts and consent to assume liability to punishment is that both the contractors and the criminal consent to assume a liability to pay/punishment through performing an action (— the common factor is not that there is an operative convention in place).

Although Nino does not do so, it would be philosophically prudent to distinguish these types of implicit consent conceptually, in order to get a thorough understanding of the criminal's consent and to be sure that we are, in fact, dealing with an instance of consent<sup>10</sup>. One distinguishing feature, as we have noted, is that the criminal's consent does not rely on an operative convention. Secondly, the action in question is proscribed by law, whereas the actions (buying/selling) of implicit contracts are not proscribed. However, the most important difference is this: in non-criminal forms of implicit consent one can consent to both the action (hiring a cab) and to the legal-normative consequences (the obligation to pay the fare). In crime one can only con-

<sup>10</sup> Note that Scanlon (2003, p. 227) is sceptical whether Nino's notion of consent in crime is 'a full-bodied notion of consent'. Unfortunately, this is not something I can pursue here.

sent to the legal-normative consequences. The action in question, i.e. the crime, is not something that is on offer. One cannot 'consent' to a crime, in the way one can consent to hire a cab, because it is a proscribed action. The hallmark of all non-criminal acts of consent, whether they be explicit or implicit is that the action in question is 'on offer': one can consent to have the operation or not; one can consent to bid for a painting or not. The criminal just performs the crime —s/he does not consent to it.

Nino stresses throughout his writings that the criminal consents to the legal-normative consequences, but occasionally Nino writes — wrongly in my view — that the criminal also 'consents' to the crime (— see the second requirement below). In Nino's consensual theory of punishment (Nino 1983, p. 299; see also Nino 1976, p. 117) a penalty can only be imposed if certain requirements are met: 1. 'the person punished must have been able to prevent the act to which a liability to suffer punishment is attached' and 2. 'he must have consented to perform the act which involves a liability to suffer punishment' and 3. 'he must have known that the undertaking of the liability was a necessary consequence of the act he consented to perform.' However, I take such — rare — instances (when Nino claims that the criminal consents to the act in crime) to be lacking in conceptual precision — I don't think this is fatal for Nino's theory.

Nino writes that the enforcement of the legal-normative consequences of an act is only morally justified if the agent performs the act voluntarily as well as knowing that certain legal-normative consequences necessarily follow from it. The first and second requirement above, together, express what Nino means by 'voluntary' (the third requirement is about knowing the legal-normative consequences). I take the second requirement to be an imprecise way of expressing the voluntary nature of the act in crime. The following passage, and other similar passages, support this reading of Nino (1976, p. 113/3; see also Nino 1983, p. 296, p. 299, p. 301):

When that legal consequence of a voluntary act is known by the agent we may say that he 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.

This shows that the consent to the legal-normative consequences is central for Nino. And this is most clearly expressed in *The Ethics of Human Rights* (Nino, 1991, p. 280): "This foresight of a consequence as the necessary outcome of a voluntary act is what I call "consent"."

By committing a crime, the agent consents to its legal-normative consequences (liability to punishment). Note that the criminal (normally) has a positive attitude towards the crime (the action) but a negative attitude towards the legal-normative consequences. However, this does not weaken Nino's claim that there is an analogy between crimes and contracts, because in contracts we often find a negative attitude towards the legal-normative consequences (I want to buy the car, but I am not keen to pay) — and having this negative attitude does not invalidate consent in contracts.

Let us now examine non-criminal instances of implicit consent which are not instances of tacit consent, i.e. ways of consenting implicitly without there being an operative convention in place. If two people are starting to date then A's touch could mean 'May I kiss you?' and B could respond in a variety of ways to signal consent: by



returning the touch, by smiling, by moving closer. One can always be wrong about the signs of non-tacit implicit consent, because there is no operative convention in place. The actions of both A and B could be interpreted in other ways. A's touch could have been accidental and B could have smiled about A's clumsiness, etc. They could both deny that their actions are to be interpreted in one particular way.

Let us consider another example. A traveller who does not place his/her belongings on the seat next to them might be indicating (i.e. implicitly consenting) that they want company on the journey. But it could just mean that our traveller is a considerate person and wants to spare fellow travellers the inconvenience of asking him/her to move the belongings off the seat. The hallmark of non-tacit forms of implicit consent is that the imputed interpretation can be disputed, because there is no operative convention in place.

Note that in non-tacit forms of implicit consent there are no legal-normative consequences attached to the act in question, whereas in Nino's conception of implicit consent (in crime) there is a legal-normative consequence: liability to punishment. Nino's consent resembles more the structure of a contract than the structure of acts of implicit consent in non-criminal contexts. For this reason Nino, presumably, stresses the parallel to contracts and to the law of torts.<sup>11</sup>

Thus, in order to distinguish the nature of the criminal's consent from express consent, tacit consent and non-tacit forms of implicit consent, I suggest, we call it 'direct consent'. We could 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).*

Note that the consent is to the consequences of the action only – not to the action itself. The criminal cannot consent to the crime, because crime is not something one can consent to – it is a proscribed action<sup>12</sup>. Claiming that the criminal consents to the crime would be a category mistake. The criminal 'directly' consents to the legal-normative consequences of his/her action only.

Thus, Boonin's concern that Nino's consensual theory needs to exclude the possibility of the wrong-doer expressly dissenting from the liability to punishment is misplaced. Because, as we have seen, the criminal is not tacitly consenting, which would allow for express dissent, but, rather, his/her consent is 'direct'.

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<sup>11</sup> By assuming a risk one consents to the legal-normative consequences: e.g. refusing to wear a seatbelt while driving might reduce the level of compensation by the insurance company of the guilty driver. Similarly, one consents to the legal-normative consequences, if one accepts a lift from a drunk driver (one of Nino's examples, 1993, p. 296).

<sup>12</sup> Though criminals could 'consent' among each other to commit a particular crime, if a question like this arises: 'Should we rob bank A or bank B?'

#### 4. *Nino's Irrevocability Claim*

For Nino the legal-normative consequences of an act are 'irrevocable', i.e. one cannot (expressly and successfully) deny liability to them (Nino 1983, p. 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 involved in framing the laws, i.e. s/he 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, p. 16), that the act 'misfires'. In both of my 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 his/her (illegal) act? S/he may try to do so — if s/he 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 an audience/authority which could invalidate the attempted action, or what appears to be the attempted action (the cabbie could say: 'Ok, you don't have to pay the fare. I will take you to your destination.'). By 'audience' I mean the other involved party in non-criminal contexts

of consent. Here we have at least two parties who are negotiating whether an action may be performed or not. This audience, which one is addressing, can respond in three ways: [1] either consent (and thus validate that the proper procedure has been followed); [2] dissent (either implicitly or explicitly); or [3] invalidate (i.e. declare it to be a misfire) the attempted action. I will give some examples to illustrate the three possible responses.

The other, the audience one is addressing, in such contexts of consent has the authority to [1] consent (the cabbie saying: 'Kings Cross it is!') or to [2] reject a fare ('Sorry, my shift has come to an end.') or to [3] void an attempt to a free ride ('Sorry, I am not a charity.'). the croupier could [1] accept a bet, [2] reject a bet ('Rien ne va plus!') or [3] void a bet (recall Boonin's doctor example or 'You placed your chips after the ball has come to a rest – this is against the rules!'); the bride/groom could [1] consent ('I do!'), [2] change their mind ('No, I don't!'), or [3] 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.<sup>13</sup>

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 can prevent the act in question from becoming actual (as in the above examples) — such an audience/authority is not present in crime.<sup>14</sup>

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 an audience/authority 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.

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 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

<sup>13</sup> The official conducting the ceremony, the witnesses and the wedding guests would most likely also declare that the attempted wedding misfired.

<sup>14</sup> Criminals usually try to avoid having an audience (witnesses) and sometimes even try to 'eliminate' the audience.

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. 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 s\he, not the municipality, is liable in case of an accident<sup>15</sup>. It is the consent to the legal-normative consequences which morally justifies enforcing these consequences — in the case of crime: punishment.

If an act of consent is commonly accepted or desirable the state will usually not get involved (A consents to meet B 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 minimise disputes and to facilitate a resolution if a dispute arises. For this reason 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 for the protection of society rather than for 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 s\he is committing the prohibited act, nor does s\he try to uncouple the legal-normative consequences of the act<sup>16</sup>. S/he 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.<sup>17</sup>

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-tacit implicit consent (the dating 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.')

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<sup>15</sup> 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!').

<sup>16</sup> S/he 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 his/her moral stance.

<sup>17</sup> An exception would be to protest against harsh penalties. Here the proscription of the law is accepted, but the tariff is not accepted.

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 has been assumed, the legal-normative consequences 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<sup>18</sup>. But once the act has become actual (contract, marriage, a successful bid) the legal-normative consequences are irrevocable. According to Nino, this irrevocability 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 which has the power to validate/invalidate the act in question prior to or during its performance. Crimes do not 'misfire'.

In contexts of express or tacit consent there is an audience which could validate/invalidate the act in question<sup>19</sup>. The act comes about if the conventional procedure has been correctly followed. It misfires, if there is a breach of the conventional procedure (e.g.: 'I don't want to get married.' or 'I am not betting.' or 'XY does not agree to the terms of the contract.'). In my examples the breach of conventional procedure occurs because of an explicit denial of the act itself or of its legal-normative consequences.<sup>20</sup>

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 'invalid' by nature. And society does not make provisions (by providing an audience for acts of crime) to validate or invalidate crime.

In contexts of express or tacit consent it is possible to revoke the legal-normative consequences (by either sabotaging/denying the act itself or by denying the consequences) and thus the act does not come about. In these contexts there is a prior revocability and (often) revocability *in actu*, but once the act has come about the legal-normative consequences are irrevocable (wedding, contract, auction etc.). In crime there is neither a prior revocability nor a revocability *post factum*.

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

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<sup>18</sup> Note that the assumption of risk (as in the condemned bridge) in non-criminal contexts cannot be made to misfire by explicit denial.

<sup>19</sup> If there are disputes (in civil law), then, sometimes a judge can take on the role of 'in/validating audience'.

<sup>20</sup> As Austin has pointed out (in *How to do Things with Words*), there are many other ways for conventional acts to misfire. If I am already married, then going through another wedding ceremony with a different woman misfires as an act of getting married (in Christian societies).

perpetrator was coerced, if there was a mistake in fact<sup>21</sup>, if there are other excusing factors<sup>22</sup>. And Nino (1991, p. 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)."<sup>23</sup>

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 contexts<sup>24</sup> society does not allow for prior revocability nor for revocability *in actu* nor for revocability *post factum* by the agents. The logical structure of crime does not allow for such (i.e. prior and *in actu*) revocability. Rather, in the interest of justice, society reserves the right to suspend or mitigate the legal-normative consequences of crime *post factum*.

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<sup>21</sup>I leave a restaurant and take somebody else's umbrella, mistaking it for mine – this would be an excuse in law.

<sup>22</sup> 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.

<sup>23</sup> In my view, such a cancellation of liability in the rapist's case does not any more (perhaps it never did) serve the interest of justice.

<sup>24</sup> 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).

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