10: Full-Bodied Consent – Thomas Scanlon

In his paper 'Punishment and the Rule of Law' Scanlon (2003: 227) expresses doubts about whether Nino's conception of consent in crime is a 'full-bodied' conception of consent. In this chapter I would like to consider in how far these doubts are justified. I will argue that Scanlon's doubts, about how much people know about tort law, are contradicted by our everyday experiences. Scanlon claims that there is something missing (a positive element) in Nino's conception of consent in torts and in crime. I suggest that the positive elements are present after all.

Consent has a licensing effect

Scanlon (2003: 227) recognises 'that, morally speaking, consent has a licensing effect.' And Scanlon believes that this particularly applies in contracts. To illustrate this, let us look at some examples from contract law. By hailing a cab, bidding at an auction or placing my chips on red, I enter into a contract. The consent here, in contrast to a written contract, is implied rather than explicit. This consent constitutes a license which permits the state to enforce the contract, and by doing so depriving the contractor of a liberty or right which they previously possessed. But Scanlon doubts whether this also applies to tort law (or to Nino's conception of crime). Scanlon (2003: 227) writes:

In order for an act to 'imply consent' in a way that has this licensing effect, Nino says, an act must be voluntary and the agent must know what the legal consequences of his or her action are – know, for example, that he or she is giving up certain legal claims or immunities. The idea of consent (or of an action implying consent) fits the case of contract much better than it does cases of assumption of risk. The condition of knowledge that Nino mentions seems out of place in the latter context: surely a person need not be aware of tort law in order to 'assume a risk' in a legally significant way.

Scanlon is right in thinking that to assume a risk one does not need to know tort law. However, people usually know that they might not have a claim for damages if they start skating on the ice-rink after having been warned that the ice has not been prepared properly and that they do so at their own risk, or that the insurance company
will not (fully) pay out if they accept a lift from a drunk driver; people know that such actions change their legal-normative status. This means that I don't have to know tort law to the degree of a good law student, but I normally know what the legal consequences of assuming a risk are. Contrary to Scanlon, this is no different in contracts. We enter into contracts every day (by taking a bus, by buying something from the supermarket, by changing to a different phone company). But we don't need to have a lawyer's grasp of contract law to do so.

The difference here is that in contracts we consent to legal-normative consequences, which are normally explicitly specified in the contract, or they are obvious and well understood in implied contracts (e.g. getting into a cab and stating a destination). In tort law we can assume (consent to) a risk, for example by accepting a lift from a drunk driver. But we cannot be sure whether the risk will materialise or not. However, there are legal-normative consequences attached to this assumption of risk: the injured consenting party may not be entitled to (full) legal redress by the tortfeasor (here: the drunk driver). The risk-taker may not understand the language I have just used, but she, normally, understands her altered situation after assuming a risk.

Sometimes the state attaches legal-normative consequences to an assumption of risk – and this changes the agent's normative status. But there are many acts of assuming a risk which are not tied to a change of normative status. I could, for example, decide not to revise for an exam and watch a movie instead. There are no (necessary) legal-normative consequences attached to doing so, I am, for example not barred from taking the exam. That is to say, my decision does not change my normative status at the time of assuming the risk. However, the results of the exam might or might not reflect a lack of revision.

There may be cases where the injured party is not aware that she is assuming a risk or cases where she is assuming a risk but is not aware that this brings about a change in her normative status. In such cases we cannot speak of consent. The latter case is equivalent to being ignorant of the law.

The value of having control over the outcome of our actions
Scanlon (2003: 227) is looking for an explanation ‘why defensible legal institutions must take a particular form – why they must, for example, make the loss of certain legal immunities dependent on actions that imply consent (or something like it).’ Scanlon says that the explanation we are looking for must appeal to an extra-institutional value – presumably to avoid circularity. He states that he is in agreement with Nino (and Hart) in rejecting retributivism as a justification of punishment. And Scanlon quotes Hart's (2008: 234f.) criticism of retributivism: it is 'a mysterious piece of moral alchemy, in which the two evils of moral wickedness and suffering are transmuted into good.'

Scanlon writes that the retributivist appeals to the extra-institutional value of desert. According to Scanlon (2003: 227), Nino's explanation, in contrast to retributivism, appeals to 'a deontological idea about how people's actions affect what they are (morally) entitled to, hence what they can (morally speaking) demand of their legal institutions.' In other words, a distribution of burdens and benefits which is based on consent is fair – the extra-institutional value for Nino is: fairness according to consent.

Scanlon (2003: 229) states that there is much in Nino's account of punishment which he agrees with, viz. to replace the retributivist's appeal to desert with an appeal to consent. But, as I have indicated, Scanlon has doubts about Nino's conception of consent in crime (and in tort law). Therefore, Scanlon suggest an alternative: 'something like consent.' He (Scanlon 2003: 227) suggests that we could appeal to 'the value that people reasonably place on having certain forms of control over what happens to them.' The underlying value 'is not the deontological licensing power of consent [as suggested by Nino] but rather the value of having a fair opportunity to avoid falling afoul of the law' (by exercising due care).

Recall that in the previous chapter on Scanlon I could not determine what the forfeit (laying down a right) of the offender was based on. In the essay 'Punishment and the Rule of Law' (2003) there is no mention of a forfeit, but Scanlon does speak of laying down rights. This essay was originally published in 1999, one year after the publication of What We Owe to Each Other. Taking my cue from the essay, I tentatively suggest an answer to the question I pursued in the previous chapter: the idea that the offender is laying down a right appeals to (Scanlon 2003: 227) 'the value
that people reasonably place on having certain forms of control over what happens to them.' For the offender this means (Scanlon 2003: 230) having had a fair opportunity to avoid a sanction, rather than knowing (as Nino requires) what the legal-normative consequences of wrong-doing are.

The positive and negative value of control

Scanlon (2003: 227) explains that the value we place on having control over the outcome of our actions are factors which we need to take into account when assessing legal institutions. But these factors play different roles in Nino's consent in contracts and in the consent (to assume a risk) in tort law. Scanlon (2003: 227f.) explains:

In the case of contracts, the value of control figures both positively and negatively. Positively, it is a central aim of the law of contracts to give effect to the wills of the parties. In order to do this, it must make the legal normative consequences of an act dependent on the beliefs and intentions of the agent. Negatively, this dependence greatly weakens the case of a person who complains about the enforcement of a contract voluntarily and knowingly undertaken: if he or she wished not to be bound, he or she could simply have refrained from consenting. In offering this way out, the law gives us a crucial form of protection against unwanted obligations.

Scanlon (2003: 228) then states that the law of torts has a different aim: 'compensating people for loss and injury.' He believes that the positive part which he identified in contracts does not apply to torts, but that 'an analogue of the negative part still applies.' Compensating people for loss and injury is a (retrospective) protection, but there are limits to this: 'By having the opportunity to avoid loss simply by avoiding behaviour that can be seen to be very risky, we already have an important form of protection against that loss. Indeed, it can be argued that this is as much protection as can reasonably be asked.' Just like in contracts, there is prospective protection in torts, if the individual had the opportunity to avoid the loss. If we don't want to be bound by a contract, we just don't consent; if we don't want to incur a loss, we refrain from risky behaviour.
Scanlon (2003: 228) draws a striking conclusion from this. The absence of the positive element in tort law explains 'why Nino's strong requirement of knowledge of the legal normative consequences of one's action makes more sense in the case of contracts than in that of assumed risk.' In the case of contract,

creating legal normative consequences that reflect the parties' intentions is a central aim of the law. (This was the 'positive' appeal to the value of control.) So knowledge, or something like it, has a natural relevance. [FN] Where only the negative value of control is at issue, however, an agent's state of mind is less relevant. Since the question is whether the person had the protection provided by an opportunity to avoid the loss, what is relevant is not what the person knew about the normative consequences of his or her act but what he or she could have known, by exercising a reasonable level of care, about its likely consequences, and about the availability of alternative courses of action.

I believe that Scanlon misunderstands what Nino (1983: 299) means when Nino claims that the principle of distribution (of burdens and benefits) ensuing from a contract is the same as 'the distribution achieved in the law of torts when the burdens that follow from a tort are placed on the consenting injured party.'

Contrary to Scanlon there is a positive element in the law of torts, but not with respect to the tortfeasor (e.g. the drunk driver), but instead with respect to the consenting injured party. The general function of tort law, Scanlon correctly explains, is not to give effect to the will of the tortfeasor, after all, she committed a private wrong (usually due to negligence), but to compensate individuals who were wronged. However, tort law makes room to take account of the will of the consenting injured party – and this is the positive element. It gives effect to the will of the individual (i.e. to the value of control over the outcome of our actions) who consents to take a lift from a drunk driver, because she wants to get home, and is thus assuming a risk. And this assumption of risk has legal-normative consequences: denial of (full) remedy. Similarly, tort law makes room for people to engage in dangerous sports. Tackling somebody in the office would be a tort, but tackling them (except for dangerous tackles) on the football field means the injured party has no claim for compensation, because they consented to such risks.
When we turn to Nino's theory of punishment, is there an analogue to the positive element (the value of control) in contracts and in torts? Note that in contracts there is no wrong-doer, the positive and negative elements apply to the contracting parties. In tort law, there is a wrong-doer (the tortfeasor), but the positive (and negative) element, which are important for Nino, apply to the consenting injured party. They did nothing wrong (if we accept the view that taking a risk is not wrong in itself).

But in crime there is a wrong-doer, and the criminal law is certainly not designed to give effect to the will of the wrong-doer. There is indeed a negative element: the criminal could have avoided harm through punishment if they had the opportunity to refrain from the proscribed act. But is there a positive element?

For Nino the burdens which the state attaches to crime only apply to individuals who consented to the legal-normative consequences of their act – they do not apply to minors, the mentally handicapped, people who acted under duress, etc. Thus, the law acknowledges the value we place on having control over the outcome of our actions.

Having considered Scanlon's reasoning, we are now in a position to state more clearly what might be behind Scanlon's doubts: Can there be an analogue to the positive element (of giving effect to the will of individuals in contracts and torts, i.e. the value we place on having control over the outcome of our actions) in crime? In contracts and torts the positive element is related to permissible acts (contracting, taking risks). Can a positive element be attached to proscribed acts (crimes)?

For Nino the answer is: Yes. In all three realms the law recognises the consent of the individual to bear certain (legally enforceable) burdens. One could object: both the consenting injured party and the offender hope/wish that the burdens never materialise. However, this might also apply to a contractor, who has no intention of fulfilling the contract or who is hoping to avoid having to perform (fully) what is specified in the contract. Nino's point is that the resulting distribution is fair because the individuals voluntarily and knowingly took on certain legal burdens, i.e. consented to them. Nino's requirement of consent in all three realms reflects the value we place on having control over the outcome of our actions.
Scanlon suggest that Nino's conception of consent in torts and crime is not a full-bodied notion of consent, because there is no positive element (the value of control) present – in contrast to contracts where we encounter both a positive an negative element. But I have argued that Scanlon has overlooked that there is a positive element both in tort law and in crime.

Scanlon's fundamental doubts about the notion of consent

Scanlon's (2003: 226f.) doubts about the notion of consent seem to be more fundamental. He suggests that only legal scholars or professionals know the full extent of the legal-normative consequences of entering into a contract:

Even in the case of contracts, the requirement that an agent know the legal consequences of his or her act may seem too strong [227] when understood literally. But it does seem that a party to a contract must intend, and hence believe, that he or she is laying down some legal right (whether or not he or she must know exactly what that right is). This makes it appropriate to speak of consent. In the case of assumed risk, however, it is a stretch to speak of consent to a legal consequence.

Scanlon is suggesting that when we assume a risk, we (because we don't have any legal training) don't realise that legal-normative consequences might be attached to the assumption of risk. But our everyday experience contradicts Scanlon's claim. Every time we participate in sports, particularly team sports, we know that we might get injured. And we know that for any injuries, which happen within the normal parameters of the game, we have laid down our entitlement to legal redress.290 By assuming a risk (agreeing to participate) we also consent to the legal-normative consequences. And this is well understood by everyone.

Contrary to Scanlon, there is no significant difference, with regard to the consent involved, between a contract and the assumption of risk in tort law, when the

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290 The unfortunate recent trend, which is turning us into a more litigious society (because of the introduction of ‘no win - no fee’), fortunately, has not had a significant effect on our enjoyment of participating in sports - e.g. neither amateur nor professional footballers are routinely suing each other for injuries sustained.
individual knows that assuming a risk involves a change in normative status. Nino (1983: 299) explains that the principle of distribution in cases of punishment is based on the consent of the criminal to be liable to punishment. This provides the state with a prima facie moral justification for exercising the correlative legal power of punishment. The principle of distribution, which that moral justification presupposes, is the same as that which justifies the distribution of advantages and burdens ensuing from contracts and the distribution achieved in the law of torts when the burdens that follow from a tort are placed on the consenting injured party.\footnote{Recall that in the Hart chapter I have argued that assumption of risk in tort law is too weak a principle to justify punishment, but it is strong enough to justify other remedies or their denial.}

Scanlon's doubts about Nino's conception of consent relate to the assumption of risk in tort law (and by implication also to criminal punishment), but not to contracts. In contracts the consent is to the legal-normative consequences of the contract – one does not consent to a risk here\footnote{Except for a commercial risk.}. The agent takes on certain obligations, which are specified (or implied) in the contract. Scanlon (2003: 227) writes that the idea of a full-bodied notion of consent is 'more clearly applicable to the case of contracts than to torts or punishment.' Scanlon is suggesting that if Nino's claims (about consent) fail in the realm of tort law, then they also fail in the realm of criminal punishment. Of course, this does not follow.

What I would concede to Scanlon is the following. The offender might not know whether the change of normative status results from committing the crime and directly consenting to a loss of immunity from punishment, or from consenting to a risk (to be punished) which comes with legal-normative consequences attached to it. These are indeed issues which usually only concern legal scholars. But no matter which view the offender takes about this issue, the important thing is that she understands that acting in a certain way results in a change of her legal-normative status.\footnote{There might be another reason why Scanlon has doubts about punishment. He rejects the consent in torts as well as the consent in the context of crime. The consent in torts is based on assumption of risk. Perhaps Scanlon believes that Nino's conception of consent in crime is also based on assumption of risk (as in Hart's justification). But I am not certain about this.}

Nino actually anticipated this objection, put forward by Scanlon, in his DPhil thesis (1976: 113/6; see also 1991b: 273):
The fact that the consent to assume a liability to punishment requires knowledge that it is a necessary consequence of the offence, does not imply that the individual must be able to describe that consequence in a precise technical way, knowing, for instance, what 'liability' or 'immunity' mean for legal theorists. The individual must be able to recognise the legal situation which follows from the offence under some description which could be translated into the forgoing technical description.'

Summary
Scanlon's charge that Nino's conception of consent in torts and, by analogy also in crime, is not a 'full-bodied notion of consent' rests on claims which are contradicted by our everyday experiences. An individual does not need to have a law student's grasp of tort law, jurisprudence, or contract law in order to bring about a change in their legal-normative status. Furthermore, the positive element, which Scanlon identified in contracts is also present in torts and in crime.