C. S. NINO

A Consensual Theory of Punishment

I. A Dilemma

Underlying most discussions of the justification of punishment is a dilemma pitting a certain general conception of the aims of a liberal and rational system of criminal law against intuitions about distinctions and requirements that this system ought to take into account. These intuitions—for example, that an innocent person should never be punished or that certain subjective attitudes are required for criminal responsibility—do not appear to be supported by a view of the criminal law which is mainly concerned with the protection of society in general.

In the face of this dilemma some thinkers rely on their intuitions, refusing to accept a general conception which, although initially attractive, threatens to usher us into a Brave New World. Others remain faithful to the principles they consider essential to a liberal and rational morality, dismissing their intuitive convictions as outmoded superstitions.

This article proposes an escape from the dilemma. What will be expounded here is the part of a general theory of criminal responsibility which deals with the justification of punishment.[1] The theory endeavors to reflect some basic liberal ideals while satisfying many of our deepest moral intuitions about these matters.

II. Punishment and Social Protection

Punishment is one species of the large family of measures involving intentional deprivation of a person's normally recognized rights by official institutions, using coercive means if necessary. This general class also

1. The whole of that general theory is found in my Ph.D. thesis.

includes quarantines, the confinement of dangerous mental defectives, requisitions in time of war, and the like.

The justification of these measures on the grounds of social protection is rarely attacked as a general principle, provided some minimum conditions are met. These conditions take into account the fact that this is a sort of protection that requires causing harm to the very thing which is thereby protected from still greater harms. For example, if we say that society suffers harm when some of its members contract a disease, obviously we should say the same when someone is deprived of his freedom by virtue of a quarantine. The imposition of these measures, therefore, must not occur before the following requirements are met: it must be certain or highly probable that what is taken to be an evil will occur; the protective measures must be both necessary and effective for preventing that evil; and the measures must involve lesser evils than those they are intended to prevent. If there is no dispute about the evaluation of evils involved, it would simply be self-defeating to protect society from a harm by using a measure which either involves a greater harm, is ineffective, or is unnecessary.

In the case of nonpunitive measures involving the coercive deprivation of rights, it is beyond doubt that these measures constitute a lesser evil than those they seek to prevent. When this is so, few people would object to such measures. Although there are some complications that this hasty acceptance overlooks (some of which I shall mention below), it is undeniable that considerations of social protection provide a prima facie justification for the coercive deprivation of some rights.

The obvious question is, To what extent can the legitimacy of punishment be defended on the same grounds as the legitimacy of, say, quarantines? This leads us, of course, to an evaluation of the well-known utilitarian justification of punishment.

I shall not survey here the arguments which object that the prudential requirements governing all protective measures listed above are hardly met in the case of punishment. These objections depend on empirical claims, and will not be discussed in this essay.

Yet other arguments against justifying punishment on grounds of social protection seem to lose much of their weight when they are examined in the context of other compulsory and generally unpleasant deprivations of rights. For instance, the argument that social protection would allow

extremely harsh penalties for preventing even the most trifling offenses[2] is clearly absurd: hanging a motorist for the sake of preventing parking offenses would be self-defeating as a measure of social protection on the assumption that one accepts the scale of values which is crucial to the argument (the death of a person is worse than a congested traffic flow).[3]

A much more serious argument is the commonly invoked one[4] pointing out that the utilitarian justification of punishment allows for cases in which innocent people could be punished in order to prevent greater harms to society. But it is striking that problems raised by such cases (which are fairly unlikely if the prudential conditions are observed) have been a source of such deep doubts about social protection as a justification of punishment, when we consider that in actual fact the victims of non-punitive compulsory measures are always innocent. The burden of showing the relevant difference between punishment and other coercive measures rests on those who allege this argument.

Nevertheless, the justification of punishment based solely on social protection faces a further objection, which I consider decisive, and which applies to the punishment not only of innocent people but to that of the guilty as well. Although it is seldom invoked in present discussions of punishment, it is the same objection being made increasingly against utilitarianism in general.[5]

In the same way that a measure increasing the national product at the cost of a highly inequitable distribution of wealth could be questioned as unfair, a measure diminishing the overall harm that the community would suffer at the cost of selectively harming some of its members could likewise be attacked as unfair. Such measures are condemned by the Kantian

2. See this argument, for instance, in K. G. Armstrong, "The Retributionist Hits Back," in *The Philosophy of Punishment*, ed. H. B. Acton (London: Macmillan & Co., 1973).

3. Except that we considered, as Rousseau and others did, that the individual who commits an offense is automatically excluded from society and, therefore, is not counted any longer in the calculation of benefits and harms affecting that society. See a critical appraisal of this view in C. S. Nino, "La justificación de la legítima defensa," *Doctrina Penal* 2, no. 6 (1979).

4. This argument is advanced, among others, by J. D. Mabbott, "Punishment," in *The Philosophy of Punishment*, ed. H. B. Acton, and K. G. Armstrong, "The Retributionist Hits Back," p. 155.

5. See, especially, John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971), pp. 26, 27; and Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), pp. 28, 29, 32, 33.

injunction against using men only as means and not as ends in themselves.

Without pursuing the arguments and rejoinders that this appeal to distributive justice provokes, I am convinced this appeal is valid. Unless we adhere to the mythical view that society is a sort of living organism,[6] there is no reason for seeing it as the basic moral unit, whose comparative well-being—independent of the well-being of each of its members—is the ground on which political action can be justified. If individuals are taken to be those basic moral units and not simply as the basic psychological ones (in the sense of being the sole source of pleasure and displeasure), it is their comparative well-being that should ground political action.

Accordingly, to justify quarantines or penalties it is not enough to point out that society, as a whole, will be better off. A leper could rightly appeal to the unfairness of having his condition aggravated by depriving him of his freedom while others enjoy health and freedom because of his deprivation.

However, in the case of the nonpunitive deprivation of rights this objection can be overcome by observing certain conditions in the imposition of these measures. In some cases a procedural mechanism could be designed that achieved a fair allocation of burdens (we might, for instance, resort to a lottery to decide whose goods are to be requisitioned). In other cases the unpleasantness of the measure could be reduced to a minimum. But the most general way of qualifying measures of social protection so as to overcome the problem of distributive unfairness is to offer compensation to the individuals who suffer the deprivation.[7]

The problem, however, is that no similar devices can be envisaged for supplementing punishment in order to make it compatible with the requirement of a fair distribution of benefits and burdens among the members of society. If punishment is justified by its capacity to diminish future crimes against society, and if this objective is pursued by means of general and special deterrence, the unpleasantness of punishment is not a mere side-effect (as in the case of other measures) but is essential to the purposes being pursued.[8] To offer compensation to the people who are

6. D. Gauthier, *Practical Reasoning* (Oxford: Oxford University Press, 1963), p. 126.

7. See this point in Nozick, *Anarchy*, pp. 142–46.

8. I think that this is also a conceptual requirement, distinguishing punishment from other coercive legal measures.

subjected to punishment would, obviously, be incompatible with the reason for imposing it.

Thus, it seems that unless we surrender to the retributivist claim that considerations of desert (according to the evaluation of the moral character of people as reflected in their acts) should be taken into account, punishment necessarily implies an unfair distribution of burdens and benefits among members of society.

However, I think that there is a line of argument which shows that the practice of punishment can be patterned after a commonly accepted principle of distribution that does not rely on the moral blameworthiness of people and does not require us to relinquish the conception of punishment as a measure of social protection. Section III will be dedicated to the analysis of that general principle, and in Section IV its application to punishment will be discussed.

III. Distribution According to Consent

Appeals to an equitable distribution of benefits and burdens are out of place when the individuals concerned have consciously acquiesced in a balance which is not egalitarian. For we recognize fairness according to consent[9] as a separate justification of political action, and it may be combined with other criteria of fairness. No doubt, this is an area of morality that needs much more exploration than it has so far received. I can only present here some general remarks about the matter.

One obvious category of cases (though not the only one) in which we accept what could, but for its origin, be considered an unfair distribution of goods, is that of contracts. The scope of social relationships recognized as permissible objects of contract could vary greatly, but the validity of such contracts, apart from this, is not dependent in any legal system on whether or not they represent a perfectly equitable distribution of burdens and benefits among the parties; the validity basically depends instead on whether those parties have freely consented to the distribution involved.

There is indeed a strong and praiseworthy trend in modern legal systems which could be described as aiming to prevent gross inequality of bargaining power. But, this trend responds to an increasing concern over

9. A. M. Honoré, "Social Justice," *McGill Law Journal* 8, no. 2 (1962), distinguishes from among different principles of justice what he calls "justice according to choice," connecting this principle to the justification of punishment.

the extent to which it can be maintained that the will of the parties is free and conscious even in the absence of such traditional defenses as duress or necessity.

Quite obviously the emphasis on the parties' actual freedom to contract is due to the fact that only the presence of such freedom can justify a departure from the requirement that social distributions of benefits and burdens should be equitable, taking into account such circumstances as needs, desert, and so forth. When an equitable distribution is being pursued, as in systems of social security, the will of the persons involved may be overridden. Certainly the limits to which voluntary and possibly inequitable distributions are to be permitted, and equitable but possibly compulsory ones are to be enforced, arouse well-known ideological controversies. Nevertheless, few would deny that if inequitable distributions are to be upheld, one of the firmest grounds for upholding them would be their consensual character, and that if compulsory distributions are enforced, the equity of their content would be a good argument in their favor.

The nature of the consent required for the validity of contracts is a matter of permanent controversy among jurists. Rather than comment on the details of those discussions, I shall simply reiterate some basic guidelines for what constitutes consent (even when, in practice, some departures from those guidelines are tolerated for a variety of pragmatic considerations).

It is often supposed that for an individual to consent to the assumption of some duty or responsibility he must necessarily make a statement such as, "I consent to this." Such a supposition is a mistake. Aside from what may be legally required for the validity of a special class of contracts, the consent of the individual to some duty or responsibility is shown by the performance of *any* voluntary act with the knowledge that the act has as a necessary consequence the assumption of the duty or responsibility in question. For instance, the act can be to sign a document, to take a taxi, to lift a hand in an auction, all of which may have as consequence having incurred the obligation to pay for something.

What is required in the first place is, therefore, that the act implying consent be voluntary. (Of course, this requirement is excluded in some cases of defense, such as automatism, coercion, and insanity.) Obviously, the voluntariness of the act is not enough to constitute consent: the agent must be aware of the relevant circumstances in relation to which the

action is described. An individual entering into a contract must not only sign a certain document without being forced, but he must also know what he is doing. This knowledge must include, in particular, awareness of the obligations or liabilities he is assuming with his act.

A person consents to all the consequences that he knows are necessary effects of his voluntary act. As Hobbes put it: "Whoever voluntarily doth any action, accepteth all the known consequences of it."[10] Therefore, the person who voluntarily performs an act knowing that it has the undertaking of certain obligations as a necessary consequence consents to undertake those obligations.

Obviously, the consent to undertake a contractual obligation is independent of the attitudes of the person toward the acts that are the object of the obligation. An individual may consent to undertake the obligation of performing an act despite the fact that he greatly dislikes performing it or that he does not intend to perform it when the occasion arrives; consenting to undertake a contractual obligation can even be accompanied by the belief that the obligation will never be enforced.

It is generally accepted that the fact that a contractual obligation has been consented to provides at least a prima facie moral justification for enforcing it. We can test our convictions about the matter with the following example of a covenant that may have quite dramatic effects: the voluntary enlistment of an individual in the army of a country at war. If the volunteer dies defending the country, one might indeed say that he shouldered a very unequal share of the burdens of protecting his society compared with the benefits he obtained. But few would consider this, in contrast to the case of conscription, morally problematic because the person has consented to undertake the obligation of fighting. This is obviously so even when the individual has miscalculated the risks involved or had intended to desert; we would agree that to enforce the obligation by compelling him to stay in the battlefield, for instance, is prima facie right.

A quite similar idea, though it does not involve an obligation, is the basis for the principle of the law of torts, recognized to some extent by most legal systems, that the consent to assume a certain risk on the part of the injured party may exclude the responsibility of the tort-feasor for the harm caused through the realization of the risk. One application of

10. *Leviathan*, ed. Michael Oakeshott (London: Collier Macmillan, 1977), p. 218.

the principle is represented by the well-known maxim *volenti non fit injuria.* Here, as in the case of contracts, it is important to note that the decisive factor is not the expectation of some *factual* consequences (which can only serve as evidence of the consent of the individual[11]) but rather that the person has consented to assume some *normative* consequences. The voluntary act of the individual must involve consent to exonerate the other party from his legal duties and liabilities.

The situation given in all these cases can be described in the following way: We have a voluntary act which may or may not be intended to change legal relationships. That act may have some factual consequences, such as the risk of suffering harm which the volunteer who enlists in the army or the gambler who places a bet or the person who accepts a lift from a drunken driver brings upon himself. As we shall see later, the knowledge that a factual consequence may *possibly* follow from an act is not a morally relevant reason that justifies placing the legal burdens attached to that consequence on an individual. Specifically, consent to run the risk of some harm does not necessarily imply consent to suffer that harm. But the act can also have legal normative consequences. It is a matter of law that in certain circumstances saying voluntarily, "I bind myself to pay to you one hundred dollars for your work," involves the obligation to pay one hundred dollars, that taking something voluntarily from the stall of the supermarket involves the obligation to pay the price of the item, that knowingly accepting a lift from a drunken driver involves (in one view) renouncing the right to obtain compensation if an accident occurs. When that particular legal consequence of the 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. Another way of describing the situation is to say that the consent to certain *legal* normative consequences involves *moral* normative consequences.[12] The individual who, for instance, consents to undertake some legal obligation is, in principle, morally obliged to do the act which is the object of that obligation.

11. See A. M. Honoré, "Causation and Remoteness of Damage," *International Encyclopedia of Comparative Law* (New York: Oceana Publications, n. d.), vol. 11, chap. 7, p. 114.

12. Dr. Joseph Raz suggested the distinctions between the factual, the legal normative, and the moral normative consequences of an act.

IV. The Consent to Assume a Liability to Punishment

If we look at the case of punishment, it is easy to find analogies with the cases mentioned above. Punishment is not something that befalls its 'victim' through some fortuitous happening or the actions of third parties without the possibility of control on his part. Among other things, it is the product of the will of the person who suffers it, at least when certain requirements related to the agent's state of mind are met.

Some authors suggest that there is a sense in which it is possible to say that the criminal wants to be punished. That sense was explained in such an obscure way that little was done to dissipate the instinctive reaction against the suggestion. It is as preposterous to think that criminals generally want to be punished as to think that volunteers want to die in battle.

A case of punishment, however, can be described in terms preserving the analogy with either the case of contracts or the case in which the injured party has consented to assume the risk of some harm. Here too we must examine not the factual consequences of an offense but the normative ones. 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.

A necessary legal consequence of committing an offense is the loss of immunity from punishment that the person previously enjoyed. This loss of immunity is obviously correlative—in Hohfeldian terms—to the legal power on the part of certain public officials to punish the offender. The individual who commits a crime assumes a legal liability to suffer punishment and relinquishes the right that he would otherwise enjoy of seeking compensation or criminally prosecuting the official for the deprivation of rights involved in punishment.

This is merely a description in the simplest terms of the normative legal situation in which the individual finds himself after committing an offense. This description does not itself provide a moral justification for attaching these legal consequences to those acts. The fact that the offender loses his legal immunity from punishment does not imply that he also loses the moral immunity deriving from the principle that it is prima facie wrong to sacrifice an individual for the benefit of others. The as-

sertion that an offense involves losing this moral immunity must be grounded on something more than the mere fact that the law gives officials the power to punish offenders.

The individual who performs a voluntary act—an offense—knowing that the loss of his legal immunity from punishment is a necessary consequence of that act consents to that normative consequence in the same way that a contracting party consents to the normative consequences following from the contract. 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, and it is independent of the attitude of the agent toward the event which is the object of the normative characterization. The individual may believe that his actual punishment is extremely improbable, or he may intend to evade it. This is irrelevant to his consent to lose his immunity from punishment, as is the attitude of the gambler, who is sure that he will win or who intends to cheat, in relation to his consent to undertake the obligation to pay the bet if he loses.

Therefore, the relevant consent here is the consent to the normative consequences of the act, that is to say, in the case of an offense, the consent to assume a liability to punishment. This consent is given when the act is voluntary and the agent knows that the normative consequence in question ensues *necessarily* from the performance of the act. The mere belief that the liability to punishment (or, in general, any consequence of the act) is a *possible* or *probable* outcome of the action is not sufficient in itself for concluding that the agent has consented to assume that liability. This feature of the notion of consent is relevant in determining whether or not any consequence of a voluntary act is consented to by the agent. The belief that the consequence may possibly follow from the act may justify the assertion that the agent has consented to run the *risk* of generating that consequence, but it is not enough to support the conclusion that the agent has consented to bring it about. This latter consent cannot be inferred from the former consent alone (though I think—but cannot argue here—that it can be inferred when, in addition, the agent is disposed to act the same in the counterfactual case of foreseeing the consequence as certain). This implies that a person who, for instance, unknowingly commits an offense of strict liability, being aware that the law creates this sort of offense and that, consequently, a liability to punishment may be a possible consequence of his acts, does not necessarily

consent to assume that liability. This view requires making some plausible maneuvers, which I shall not undertake here,[13] for dealing with crimes of negligence.

My contention is that insofar as the agent's consent to forgo his immunity against punishment is required before that punishment is imposed, the gap in the moral justification of the practice, left by pure considerations of social protection, can be bridged. When the protection of the community requires necessary and effective punitive measures involving lesser harms than the harm feared, the consent of the recipient of those measures makes an appeal to an equitable distribution of those burdens out of place. If the punishment is attached to a justifiable obligation, if the authorities involved are legitimate, if the punishment deprives the individual of goods he can alienate, and if it is a necessary and effective means of protecting the community against greater harms, then the 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.

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. This justification of course presupposes that several conditions have been satisfied. First, the person punished must have been capable of preventing the act to which the liability is attached (this excludes the rare case of punishing an innocent person that pure social protection might allow). Second, the individual must have performed the act with knowledge of its relevant factual properties. Third, he must have known that the undertaking of a liability to suffer punishment was a necessary consequence of such an act. This obviously implies that one must have knowledge of the law, and it also proscribes the imposition of retroactive criminal laws.

Because this is not the first time that the justification of punishment

13. The core of the account of the punishability of negligence, which I developed elsewhere in my doctoral dissertation, does not differ much from that of J. L. Mackie in "The Grounds of Responsibility," *Law, Morality and Society: Essays in Honour of H.L.A. Hart*, ed. P.M.S. Hacker and J. Raz (Oxford: Oxford University Press, 1977), p. 184.

has been connected with the requirement of subjective attitudes, I would like to distinguish the thesis advanced here from some others. I require more than a certain subjective attitude toward the offense committed; I demand a subjective attitude toward punishment itself. (Indeed, it is precisely the need for this latter attitude which justifies requiring particular attitudes toward the offense.) Furthermore, my requiring subjective attitudes is not based on a utilitarian calculus, nor on the value of such things as freedom of choice or predictability of the future.[14] Finally, I cannot agree with current retributivist views which demand subjective attitudes on the grounds that punishment should be a reaction against an immoral act and, consequently, requires a wicked state of mind (under the justification of punishment suggested here, the blameworthiness of the agent is as little relevant as it is in the case of contracts).[15]

V. Some Possible Objections

The variety of situations in which this principle applies precludes raising certain objections against its application to punishment. It might be alleged that in contracts the parties consent to undertake obligations and to grant correlative rights, whereas all that the offender consents to is to relinquish an immunity. But, apart from the fact that it is not easy to see why this difference in the characterization of the normative consequences should have moral significance, one must recall that there are several contracts—like the contract of agency—some of whose consequences can be described in terms of relinquishing certain immunities. 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.[16] Finally, it could be al-

14. In this respect, among others, this view differs from that of H.L.A. Hart: see his *Punishment and Responsibility* (Oxford: Oxford University Press, 1968).

15. In my doctoral dissertation I defended the opinion that the liberal view, which excludes the moral self-degradation of people as a basis for the State's interfering with their conduct, implies that the blameworthiness of the agent should be disregarded, not only as a sufficient condition of punishment, but also as a necessary one.

16. See A. M. Honoré, "Causation and Remoteness of Damage," p. 117.

leged that the consent to forgo one's immunity from punishment is always implicit (the law does not attach that normative consequence to an explicit declaration to that effect), which marks a clear difference from the case of contracts, most of which require an explicit consent to the normative effects. Again the answer must be that there are many contracts (in fact most of the contracts that we undertake every day, such as traveling on a bus) where implicit consent is enough, and that the doctrine of assumption of risk expressly contemplates cases of implicit consent.[17] Furthermore, one may well argue that the difference between explicit and implicit consent has no moral significance even in the case of contracts (quite apart, of course, from its relevance for dealing with evidential problems). 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.

However, I am not denying that punishment presents peculiarities that are not shared by other institutions covered by this principle of distribution. Punishment is *threatened* and not *offered* to individuals who contemplate committing a crime. Furthermore, in contrast to the case of contracts, an alternative course of action open to the individual seeking to avoid punishment involves compliance with a legal restriction which may be perceived by that person as a burden. Do these facts imply that the choice of the agent who decides to commit a crime assuming a liability to suffer punishment is not entirely free, and, therefore, that consent to this consequence cannot be given?

The current discussion about the distinction between threats and offers, inaugurated in a lucid article by Nozick,[18] illuminates our present problem little since it is oriented toward the elucidation of the case in which the threatened person decides not to defy the threat but to do what

17. Honoré, "Causation," p. 115.

18. Robert Nozick, "Coercion," in *Philosophy, Politics and Society*, ed. P. Laslett, W. G. Runnciman, and Q. Skinner (Oxford: Oxford University Press, 1972), p. 101.

he is told. It does not follow from the fact that the individual is coerced in the latter case that he is also coerced when he defies the threat. On the contrary, one would say that when he defies the threat, the individual is resisting coercion, and that this resistance, far from being unfree, is the result of a great strength of will.

There is, however, a perturbing aspect of the distinction between threats and offers. Nozick calls our attention to the relevance of looking not only at the choice the person who received a threat or an offer has, but also at the choice he would have made about moving from a situation in which the threat or the offer had not been made to a situation to which it has been.[19] According to Nozick, the fact that the threatened person would not normally have chosen to go from the prethreat to the threat situation whereas the person who receives an offer would normally have chosen to move from the preoffer to the offer situation is decisive in discriminating between the two cases in relation to the voluntariness of that person's action. This criterion seems to call into question the voluntariness of the assumption of a liability to punishment on the part of an offender, since he or she would not normally choose to move from a situation in which the action is not punishable to a situation in which it is. However, the same can be said in the case of contracts, since a contracting party would normally prefer to achieve the object of his or her contract without entering into it and without the correlative obligations that, in absence of the relevant legal rules (like property laws), he would not have to assume. If an offender might claim that the law coerces him into assuming a liability to punishment should he want a certain prohibited advantage, a contracting party might also claim that the law coerces him into accepting the terms of an offer should he want something over which the offerer has legal power. In the case of contracts we do not allow such a claim when the relevant laws are considered just; the justification of particular distributions based on the free choices of the parties presupposes the fairness of the legal framework within which those choices are made.[20] The same can be said in the case of the criminal law: a particular distribution of punishment can only be justified on the basis of the consent of the recipients when the legal prohibition of the act to which punishment is attached is just (it should not be, for instance, discriminatory

19. See ibid., pp. 127ff.

20. This presupposition might create some difficulties for those who seek to justify the fairness of the legal framework itself on the basis of consent.

and should not proscribe actions that people have the moral right to do).

It is also important to consider the circumstance in which the action required if one is to avoid the punishable action itself carries a certain burden or restriction. The analysis of a rather peculiar case of punishment will illustrate the relevance of the consequences of the alternate choice of the individual in determining whether his assumption of punishment is free. Suppose that the law makes punishable both an act and its omission. So far, there is nothing in the characterization of consent that precludes saying that, in a case like this, whatever course of action the individual adopts, he consents to make himself liable to punishment. Yet, the case is not substantially different from that in which the individual is punished for something over which he has no control, such as the color of his skin. One may propose some further qualification of the range of actions which can be consented to by people. If voluntariness is excluded when the action is empirically necessary, it should be excluded with even greater reason when the action is logically necessary. The prescription of a penalty for an action and its omission is equivalent to the prescription of that penalty for the complex action resulting from the disjunction of the action and the omission in question; and this complex action is logically necessary.

Quite apart from the above qualification, there is a substantive principle underlying our intuitive rejection of a case like the foregoing, which applies as well to different situations. According to this principle, a liability, burden, or obligation can only be justified on the basis of the consent of the agent when the alternative course of action open to him either does not involve any liability, burden, or obligation, or, if it does, those consequences can be justified, without recourse to the fact that the individual has chosen this alternative. The idea behind this principle is, obviously, that the choice of a certain action is not free when the alternative one implies relinquishing rights that the agent would otherwise enjoy; this is not the case when the burdens attached to the alternative action are burdens that the individual ought to assume, whether he consents to them or not. This principle proscribes putting individuals in a situation such that, whatever they decide to do, their choice would be taken as the basis for depriving them of certain rights.

This principle has a general consequence with regard to the justification of the legal obligations which are complied with by the individual who decides to avoid the liability to suffer punishment (and the further

burdens and obligations which may follow from that compliance). They cannot be justified by taking into account the decision not to forgo the immunity from punishment. If they are justified at all, it should be on the basis of reasons that are independent of this choice.

This consequence is obvious in the case of obligations such as those related to killing, stealing, or raping. But it may be less obvious in the case of other legal obligations and restrictions. Take the case of conscription mentioned above, for instance. An individual who decides not to assume the liability to punishment attached to the evasion of conscription chooses to comply with the requirement of military service, and this, in its turn, implies assuming a complex of specific duties and burdens (such as wearing a military uniform). One may be tempted to justify compliance with conscription and the assumption of the subsequent specific duties and burdens on the basis of the choice of the individual; in the end, he is not physically compelled to that compliance. But the principle we are discussing precludes that justification, since the opposite choice would imply certain penalties (both in the case of evading conscription altogether and of violating the subsequent duties), and those penalties need to be justified on the basis of the consent of the agent. If conscription and the specific duties and burdens that it involves (as opposed to the penalties attached to the violation of these duties) are at all justifiable, they must be justified on grounds other than the consent of the individual. This justification is, in its turn, necessary for justifying the penalties attached to the evasion of conscription and the violation of the military duties, in addition to the requirement that the agent had consented to make himself liable to those penalties.

This principle does not preclude the possibility that in some cases the obligation the individual complies with when he decides to avoid the liability to suffer punishment can be grounded on a *previous and different* choice of the individual. This is so, for instance, in the case of the army volunteer also mentioned earlier. If the volunteer decides to face the impending battle, the subsequent restrictions on his freedom of action can be justified on the basis of his *previous* choice to enlist in the army; the alternative to such a choice did not involve assuming any obligations or burdens. But the choice to enlist was a different choice from that, for instance, of facing a battle; this latter choice cannot by itself serve to justify the restrictions on his freedom, since the opposite choice (namely

deserting) would be taken as grounds for justifying the corresponding punishment.

The case of the volunteer serves to clarify an important aspect of the general thesis here advanced. The thesis does not involve the hypothesis of a social contract in any of the varieties defended by political philosophers. It does not rely on an explicit or implicit acceptance by the citizens of the criminal laws imposing obligations or stipulating penalties for noncompliance. It does not assert that every case of punishment is like the case of the punishment of the volunteer who deserts, consequently violating obligations he has previously voluntarily assumed. The grounds on which the obligations that the offender violates can be justified are irrelevant to this thesis: they may be either consensual or independent of the consent of the people subject to them; in most cases, as in the case of conscription or the obligation not to kill other people, those grounds are independent of a choice of the agent; in some exceptional cases, such as the case of the volunteer, those obligations are grounded on a previous and different choice from that of deciding to commit an offense. The focus of this thesis is on this latter choice. The justification of punishment defended in this article relies on the consent to assume the liability to suffer punishment involved in the voluntary commission of an offense with the knowledge that that liability is a necessary consequence of it.

Obviously, following out these suggestions would lead to a discussion of the extent to which the consent of the person affected can justify measures and political arrangements which may imply inequitable burdens upon him.[21] I shall not develop this theme here; but I venture to say that the discussion of the justification of punishment could be considerably expanded and illuminated if it embraced this topic.

If we think of the matter in this way, we will eventually understand the truth behind the superficial absurdity that criminals want to be punished. This claim is intended to support the idea that we punish criminals as people, respecting their moral autonomy, and not as mere things to be manipulated.[22] I would like to put the matter the other way round:

21. See some interesting remarks about the extent to which *hypothetical* consent may or may not justify certain arrangements or measures in Ronald Dworkin, "The Original Positions," in *Reading Rawls*, ed. Norman Daniels (Oxford: Oxford University Press, 1975).

22. See Jonathan Glover's discussion on manipulation in *Responsibility* (London: Routledge & Kegan Paul, 1955), pp. 155ff.

unless we rely on the moral autonomy of the individual, making his liability to punishment depend on his free and conscious undertaking of it, all the burdens imposed on offenders, even in the name of treatment, would be unfair even if they are not accompanied by tangible countervailing benefits. Otherwise such burdens would be exacted gratuitously for the exclusive profit of others and would fall under Kant's condemnation of practices which treat men only as means and not as ends in themselves.[23]

I think that it is in keeping with Kant's spirit though not with his letter, to interpret that condemnation as applicable not to every use of punishment as a measure of social protection but only to those uses that fail to take into account the individual's consent. Only when that consent is respected do we treat individuals as ends, since only then do we recognize their own ends.

23. *Philosophy of Law*, trans. W. Hastie (Edinburgh, 1887), pp. 195–98.

This article is a modified version of one chapter of my thesis submitted to Oxford University for the Doctor of Philosophy degree. I express my gratitude to Professor A. M. Honoré, Dr. J. M. Finnis, Professor H.L.A. Hart, and Dr. P. F. Skegg, for their illuminating comments and criticisms. My thanks are also due to the Editors of *Philosophy & Public Affairs* for their very helpful advice.