

PUNISHMENT, CONSENT, VALUE, AND RESPECT: A CRITIQUE OF DAVID ALM

Castigo, consentimiento, valor y respeto: Una crítica a David Alm

MATÍAS PARMIGIANI ^{a, b}

<https://orcid.org/0000-0002-5462-5781>

matias.parmigiani@unc.edu.ar

^a Centro de Investigaciones Jurídicas y Sociales (CONICET - Universidad Nacional de Córdoba, Córdoba, Argentina)

^b Universidad Siglo 21, Córdoba, Argentina

Abstract

The present paper constitutes a critique of David Alm's article "Punishment, Consent and Value", in which it is argued that the consensual theory of punishment defended by C. S. Nino is false. Whilst Alm believes that this theory is grounded on an inadequate model of normative relations, here I will defend the hypothesis that such an assessment derives from an insufficient conception of human value and respect.

Key words: Nino; Alm; Punishment; Consent; Value; Respect.

Resumen

El presente trabajo constituye una crítica del artículo "Punishment, Consent and Value" de David Alm, en el cual se sostiene que la teoría consensual de la pena defendida por C. S. Nino sería falsa. Mientras Alm cree que ella descansa en un modelo inadecuado de nuestras relaciones normativas, aquí defenderé la hipótesis de que esa apreciación se deriva de una concepción insuficiente del valor y el respeto humanos.

Palabras clave: Nino; Alm; Castigo; Consentimiento; Valor; Respeto.

In his paper "Punishment, Consent and Value" (2018), David Alm addresses the consent view of punishment developed by C. S. Nino by undertaking a new line of criticism. As we know, Nino believed that when a person commits an offense for which the legal system foresees a punishment that is justified on strict consequential grounds, such a person will not be used as a mere means to promote social protection — thus transgressing Kant's second imperative— if and only if her offense is

interpreted as an expression that she consents to lose her legal immunity from punishment (1983, pp. 291-292). Along his brilliant exposition, Alm validates this notion of consent as genuinely consensual, for it *would* meet the three conditions any act of consent requires to be valid, namely: voluntariness, knowledgeability and intentionality (2018, pp. 905-909). Nonetheless, what he does not accept is the model of normative relations lying behind Nino's theory, apparently related to a wrong conception of human value and respect (2018, p. 903). Indeed, these two concepts are at the heart of Alm's criticism, developed in section 4 of his paper. The following remarks will mainly focus on this section, as they aim to show that Alm's criticism ultimately fails because, probably like Nino's theory, it rests on an insufficient understanding of these concepts.

The paper is structured as follows. Section 1 presents the basic thesis of the consent view and Alm's initial agreement with it. Sections 2 and 3 begin to explore Alm's argumentative strategy to discredit the consent view. Whilst Section 2 analyzes where the normative power of consent would lie, in his opinion, Section 3 digs deeper in this direction, by asking what it means to respect a person's consent. As will be shown, though Alm's position is not clear in this regard, it might be compatible with a one-sided model of normative relations, not totally qualified to deal with punishment and other kinds of human practices. Section 4, on its part, lays out Alm's core argument against the consent view and explains why it fails. Lastly, Section 5 provides a tentative diagnosis of what may be the matter with Alm's criticism. In the end, it may well be that the consent view is false, as Alm claims. Section 5, however, will simply try to summarize why Alm's criticism does not manage to affect it.

1. The Consent View: Some Preliminaries

In *Los límites de la responsabilidad penal* [LRP, from now on] (1980) as well as in a plurality of essays coping with different criminal topics (the death penalty, drug abuse, proportionality between harm threatened and harm averted, self-defense, etc.), but mainly in "A Consensual Theory of Punishment" (1983), Nino has tried to offer a twofold justificatory approach to the practice of punishment. On the one hand, he embraces the typical deterrent justification, according to which punishment becomes justified if and only if social protection is somehow guaranteed by it. Yet, aware that a purely deterrent view could be objected on behalf of the Kantian worry that we should never treat people *merely* as a means, he offers, on the other hand, a consensual type of justification whose main desideratum goes exactly as follows:

The fact that the individual has freely consented to make himself liable of 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 (Nino, 1983, p. 299).

As might be seen, for consent to be present, two conditions must be granted: (1) a voluntary act (which here means, essentially, a free and not coerced act) *plus* (2) a certain knowledge or foresight of the normative consequences it leads up to (which, in the case of punishment, must be interpreted as a relinquishment of immunity to punishment, “which is to say to the gaining of a power by officers of the society”) (Honderich, 2006, p. 50). In Nino’s words, just as “it is a matter of positive law that [...] taking something off the shelf of a supermarket involves the obligation to pay the price” (1980, p. 231), committing a voluntary offense would involve, *mutatis mutandis*, a relinquishment of our immunity to punishment (cf. Parmigiani, 2017; 2021a).

Resting on this sort of analogies, some interpreters had it that the notion of consent involved in Nino’s account would be tantamount to the Lockean notion of “tacit”, “alleged” or “*ex actionem*” consent (cf. Boonin, 2008, p. 164; Malamud Goti, 2008, pp. 227-255; for a contrary view, see Imbrisevic, 2010). Such a notion, as we know, has been extensively criticized in the literature, mainly for being incapable of doing a proper justificatory work in certain moral contexts (cf. Simmons, 2001; Parmigiani, 2020a). But, in Alm’s view, insofar as it is granted that an act is (1) voluntary, (2) knowledgeable and (3) and intentional, *valid* consent might be present. The first two conditions have been set by Nino himself, as seen above. And, if he is right, an offense that is both voluntary and knowledgeable may tacitly express, for that very reason, its author’s consent to her punishability. However, what about the third condition? Even if Nino did not refer to it, Alm believes it is met in his account. Indeed, since consent, as Alm writes, “essentially involves an intention to change the moral status of another’s action” (2018, p. 905), it may well be that *through her offense* the offender intends to change the moral status of the sanctioning officers of the state.

2. The Normative Power of Consent in Alm’s Argumentative Strategy

Up to this point, Alm’s position seems to be in line with Nino’s account. Nonetheless, in section 4 of his paper, Alm begins to deploy an

argumentative strategy whose ultimate objective would be to step back from it. In Section 4 of the present paper, I will expose and criticize the strategy's last stage, which represents the hard core of Alm's criticism to the consent view of punishment. As will be shown, Alm's main argument is structured in a quite simple logical format. However, given the philosophical assumptions on which its premises are grounded, it becomes mandatory until then to reveal their content and discuss their implications. This section and the next one seek to do precisely that.

There has been too much discussion among philosophers about the right way to explain the moral power of consent (for a recent demonstration see, for instance, Müller and Schaber, 2018). As has been recently argued (cf. Parmigiani 2021b), an approach to consent can hardly be conclusive if it does not cope with basic questions such as (i) "What is consent?", (ii) "When is it required?", (iii) "Why is it required?", (iv) "What is it supposed to do?", and (v) "How does it manage to do what it supposedly does?", not to mention some others. These questions, of course, are far from being sufficient, but they give us a very general idea of what a comprehensive approach must look like. Particularly important here is question (iv), for Alm's answer to it will reveal his most distinctive philosophical assumptions. But question (i) is also relevant, if only because it tells us a bit of where Alm stands. The next paragraph intends to deal with it.

Following Hohfeld, Owens and other authors, Alm conceives consent as a *normative power*, understood as an ability "to extinguish a claim of one's own, temporarily or permanently, and along with that claim its corresponding duty or obligation, belonging to someone else" (2018, p. 910). However, what is a normative power? The question is rather complex, but here we can take sides with some standard treatments of the issue (cf. Raz, 1972; Owens, 2012; Koch, 2018). If we focus on *physical powers*, like the ability to run 100 meters in 10 seconds, or the ability to practice Kundalini Yoga, they might be defined as dispositions to act in certain ways when their possessors intend to do so. Moreover, if we focus on *intellectual powers*, like the ability to memorize complex information in short periods of time, or the ability to solve math problems, the same definition seems to apply. Both kinds of powers can be exercised in solitude, without depending on other people's actions, reactions or collaboration. But a normative power is quite a different matter. Unlike those other powers, *normative powers* can only exist within given normative frameworks and be exercised in certain social environments, made up by people willing to behave towards their possessors in a specific manner. Therefore, since consent is a

normative power, whose exercise will always be subject to how others act, no one would be in a position to consent to something and alter her *normative landscape*, to use D. Owens' expression (2012), unless others *acknowledge* such a change (Alm, 2018, p. 911).

As regards question (iv), many philosophers, including Nino, take it for granted that consent accomplishes a morally transformative function. For them, this is *what it does*. In H. Hurd's words, "consent turns a trespass into a dinner party; a battery into a handshake; a theft into a gift; an invasion of privacy into an intimate moment; a commercial appropriation of name and likeness into a biography" (Hurd, 1996, p. 123).¹ Particularly in Nino's opinion, consent's transformative function rests upon a more basic principle of morality, namely "the *principle of dignity* of the person", which "allows for a dynamic handling of rights by permitting consent of individuals to serve as grounds for the liabilities and obligations that limit them" (Nino, 1996, p. 53). Hence, whilst "the *principle of personal autonomy* determines the goods that are the content" of our most basic rights (freedom of movement, freedom of expression, etc.), and the *principle of "inviolability"* of the person describes the function of those rights by establishing barriers of protection of individual interests against claims based on interests of other people or of some collective whole" (Nino, 1996, p. 53), the principle of dignity "permits one to take into account deliberate decisions or acts of individuals as a valid sufficient basis for obligations, liabilities, and loss of rights" (Nino, 1996, p. 52). By appealing to consent, Nino thinks, we transform our normative landscape (cf. *supra*), transferring a right of our own to someone else.

To a certain extent, it can be said that Alm's answer to question (iv) matches Nino's explanation. After all, he is explicit when he writes

¹ Along the same lines, Wertheimer writes that "we are interested in consent to sexual relations because consent has the power to be *morally, institutionally, and legally transformative*" (2000, p. 559); Schnüriger writes that "consent works as a criterion of legitimacy, deeply pervading social life, making actions and practices permitted that would otherwise be forbidden" (2018, p. 21); Koch writes that "acts of consent effect changes in the normative situations of both their authors and their addressees" (2018, p. 32); Schaber writes that "by giving others our consent we give them the permission to do things with us that without our consent would wrong us" (2018, p. 55); Manson writes that "consent renders permissible certain kinds of action that would otherwise be impermissible"; and Bullock writes that "consent has the power to transform morally unacceptable actions into morally acceptable ones" (2018, p. 85). The list, of course, is far from being exhaustive, but it is a good sample of the agreement reigning among philosophers on the transformative nature of consent. For a critical assessment of this consensus, see Parmigiani 2021b.

that the power of consent “amounts to an ability *to alter* the shape of the person’s own claims” (Alm, 2018, p. 911; italics added). As previously seen, Alm believes that this ability to alter or transform our moral stance would not exist if other people did not respect it, which “amounts to acknowledging these alterations” (2018, p. 911). To make this possible, he says that it is necessary “to behave as if claims and their correlative obligations are now shaped the way the consenting agent intended (or at least foresaw)” (2018, p. 911). So far, so good. However, what kinds of actions towards the consenting agent *are* (or *are not*) *allowed* from our part once—or even before—consent is given? That is, what can (or cannot) we do to acknowledge and respect the normative alterations enabled by consent? To tackle these questions, Alm appeals to an illustration. He invites us to imagine an overprotective father who thinks of his adult daughter as “daddy’s little girl” and treats her as lacking “the maturity necessary to make decisions about sex”, even if she is “old enough to have developed an interest in it” (2018, p. 911). Now assume that the daughter has given—or is about to give—her consent to engage in a sexual encounter with a willing partner. If the partner were treated by the father as a simple rapist—or as a potential rapist—he would neither acknowledge nor respect his daughter’s decision, for he would be acting as if the normative alterations (already) enabled by her consent were inexistent. Moreover, in Alm’s view, such an action would also *wrong* his own daughter (2018, p. 911). But what if he just dares to express his doubts or concerns regarding the encounter? Would such an act be equally *wrongful* or *disrespectful*?

At the beginning of section 4, after taking for granted that “a claim is an expression of the claim’s holder value”, Alm goes on to suggest not only that “to respect another person’s claim [...] is to respect that about him which makes him valuable in his own right”, but that “the moral power of consent is also expressive of its holder’s value” (2018, pp. 910-911). Further on, when analyzing the father’s refusal to treat his daughter as if she had consented to have sex with a willing partner, he seems to confirm the previous suggestions, by implying that the value affected is the daughter’s “value as an agent”, that is: “as a person capable of making decisions for herself” (2018, p. 912). The problem with these definitions is that they cannot offer the slightest clue to morally evaluate whether the doubts or concerns worrying the father may be expressed to his daughter without involving a wrongful or disrespectful treatment.

Curiously, to complete his analysis of the case, Alm adds that the father may also wrong his daughter by “giving insufficient heed to

some reason” (2018, p. 911). The addition is rather curious especially for two motives. On the one hand, because the reason he mentions as not being sufficiently heeded by the father is the reason “to treat his daughter as able to extinguish certain reasons” (i.e. the father’s reasons, I must assume) (2018, p. 912), when all that it means, once again, is that his daughter must be valued as someone capable of making decisions for herself. But the addition is even more curious, on the other hand, because, in the reign of reasons and personal relations, it seems to put the father on equal footing with complete strangers. Naturally, authoritarian and overprotective parents such as the father described in Alm’s example should not even dare to claim for themselves a right to get involved in the sexual decisions of their children. However, think of loving and attentive parents. What would refrain them from making recommendations or giving advice to their beloved ones if they truly fear for their happiness or wellbeing? Why would they want to relinquish that privilege? Furthermore, if we decide to set the original case aside and focus instead on the relationships between close relatives, friends, colleagues, or even neighbors, things do not look very different. Imagine for instance a woman who has enough reasons to believe that her dearest friend will suffer from an unhappy love affair. Granted that there is trust and confidence between them, I see no reason why her suggestions might be considered disrespectful. They may cause inconveniences, of course, as every time we must face what Mill would have called the “unfavorable judgment of others” (2003, p. 150). Nonetheless, in a liberal society, as he also tried to make it plain in *On Liberty*, that does not necessarily give us a right to complain.

3. A Conceptual Insight into the Notions of “Value” and “Respect”

In order to understand the full implications of what is really going on here, it might be useful to gain further insight into the notions of “value” and “respect”. So far, it is out of the question that Alm’s approach makes the most of these notions. But since his paper avoids definitions in that sense, what are the available alternatives?

To begin with the first concept just mentioned, there are at least two approaches that may give us an idea of what makes someone valuable. The first approach is Kantian in spirit, and it holds, in short, that what explains the value of a person is some sort of universal characteristic that everyone would share, such as our rational agency, humanity or will from which springs any moral value (cf. Korsgaard, 1996a, pp. 239-

243). By contrast, the second approach is more Hegelian in spirit, for it appeals to something less abstract as the source of our value, such as the love, attention or care that naturally link those people embedded in personal relationships of some kind (cf. Scheffler, 2004). Whilst the first approach would favor an agent-neutral (or impersonal) conception of value, according to which agent X is of value to agent Y in virtue of a feature *f* that all agents share in principle, the second approach would be compatible with an agent-relative or more personal conception of value, according to which the value of X to Y becomes a function of the personal relationship X and Y maintain (cf. Scheffler, 2004).²

Once we take notice of these alternatives, the type of “respect” that each of them would presumably stand for will come as no surprise. S. Benhabib has suggested a useful terminology to clarify the issue. Under the standpoint of what she calls “the generalized other”, to respect someone would just amount to adopt the kind of universal attitude every person demands from us by the mere fact of being a rational agent. From this point of view, what the others are entitled to expect from us corresponds exactly to what we are entitled to expect from them (cf. 1987, p. 87). In general, however, these expectations will be met by means of restrictions, which is precisely Darwall’s point when he coins the expression “recognition respect”. In his own words:

To have recognition respect for someone as a person is to give appropriate weight to the fact that he or she is a person by being willing to constrain one’s behavior in ways required by that fact. Thus, it is recognition respect for persons that Kant refers to when he writes, “Such a being is thus an object of respect *and, so far, restricts all (arbitrary) choice.*” Recognition respect for persons, then, is identical with recognition respect for the moral requirements that are placed on one by the existence of other persons (Darwall, 1977, p. 45).

On the other hand, when it comes to respecting someone under the standpoint of what Benhabib calls “the concrete other”, there is no

² “Agent-neutral value” and “impersonal value”, as well as “agent-relative value” and “personal value”, not to mention the “reasons” that spring from these values (i.e., “agent-neutral/impersonal reasons”; “agent-relative/personal reasons”), are terms of art. They have been introduced by T. Nagel (1970) and discussed extensively since then (see, for instance, Mack, 1989; Broome, 1995; Korsgaard, 1996b; Raz, 2001; Farrell, 2004; Dancy, 2004; Skorupski, 2011; Ridge, 2017; Buckland, 2017). Here I take sides with Scheffler’s intuitive account of the distinction, assuming the existence of both kinds of values.

pattern or mold fixed in advance, for everything depends on the kind of interaction that takes place between two people (cf. Benhabib, 1987, p. 87). On some occasions, I may be authorized to assess someone's deeds, character or accomplishments by appraising them, negatively or even positively. On some others, I may be not. It all depends on the kind of interaction that I keep with that person, as well as on the specific feelings, emotions and expectations that may have generated between us over time. If I lack moral standing in someone's eyes, for example, why would I even bother to express what I think or feel over a matter of her personal concern? That would seem no less disrespectful than approaching a total stranger to suggest that "she should think again" about the self-harming behavior she might be engaged in (Duff, 2001, p. 305). Even under the assumption that I act "out of concern for her good", the suggestion would be disrespectful for no other reason than because, as Duff says, it is "none of my business" (2001, p. 305). By contrast, in other, more friendly contexts, and in so far as I have a certain moral standing, expressions of this sort become not only expected and acceptable but highly welcome.³

The former section, as shall be remembered, raised the important question of *what we are allowed (and not allowed) to do* to respect someone's consent and, for that reason, her own value as an agent (see Section 2 above). Well, the sole purpose of the last conceptual insight was to try to shed some light into a matter on which Alm's paper seems to be silent. In plain words: what model of normative relations would underlie his approach to consent? The answer is not easy but here we might take a guess by considering again what a father is supposed to do to respect the sexual decisions of his daughter. Alm is explicit in what he is *not allowed* to do, like treating her as his property, or her sexual partners as rapists. Both kinds of behavior would be unacceptably authoritarian. Nevertheless, since no one else is allowed to act differently in this regard, such an answer would merely give us a rough picture of the problem. Does it mean that Alm ultimately embraces the Kantian, more generalized approach to value and respect? In one sense, we may be inclined to think so, but textual evidence is far from being conclusive. And, in either case, the challenge remains the same: why a loving and attentive father may not be allowed to express his own daughter his doubts and concerns about her sexual decisions without disrespecting her as a person?

³ Other inescapable references in the literature to this second approach on respect are Dillon (1992), Frankfurt (1997), and Raz (2001). Benhabib's terminology, however, will suffice for the moment.

To be fair, all Alm says is that an overprotective or patriarchal father has no right to treat his daughter “as incapable of deciding over a matter of intimate concern to her” (2018, p. 911). What is less clear to me is whether another father –a *different* kind of father, it must be stressed– must be equally restricted in his opinion. For, in certain circumstances, is it not obvious that daughters, not to mention sons, or siblings, or fathers, or mothers, or even friends, may not be in the best position to adopt wise decisions concerning their personal affairs? Again, imagine two close friends, P and Q. Whereas P is *circumstantially* incapable of acting in her own interest, Q has strong reasons to believe this to be the case. Two options are envisaged by Q: 1) not saying a word to P; or 2) trying to convince her that she is about to embark in an arrangement she might regret. If the second option is tantamount to treating a person “as (*circumstantially*) incapable of deciding over a matter of intimate concern to her”, and Q has moral standing in the eyes of P, then I see no point in Alm’s contention that such a treatment shall be deemed wrongful or disrespectful.

When presenting the two approaches to “value” and “respect” as different conceptual alternatives, we may have run the risk of exaggerating the real tension between them. For, as is now apparent, there simply is no problem when it comes to determine what must be done to respect the power of consent of a person without becoming detached or disengaged from her personal needs or concerns. In fact, if we turn our attention back to Benhabib’s account, the two standpoints that she postulates are perfectly compatible in her opinion, even though they are not thought to overlap (cf. 1987, pp. 92-99). Most of the time, nothing but context will determine which perspective to adopt. When there is no bond between two people, or the only existing bond is an unhealthy one, certain attitudes, however caring or attentive they may be, will hardly ever get to hit the nail on the head. In such contexts, it may be that the best way to respect someone’s consent consists in leaving the person on her own. By contrast, in other, less impersonal contexts, like the one referred to above, it may be that the best way to do the same demands from us more direct forms of involvement. The range of options is certainly wide and some of them will recommend us to act either before or even after consent is given. It may be important to advise my brother over a business he is about to celebrate as well as it may be logical to blame him for having agreed to a disadvantageous contract. In and of itself, consent does not preclude moral criticism.

Indeed, I take this last point to be of crucial importance to address the consensual nature of punishment, at least once it is assumed that

punishment has a consensual nature. In Nino's account, for instance, an offender cannot be blamed by the state, for blaming, in his opinion, is a perfectionist practice, and no perfectionist practice is supposed to have a place within a liberal conception of society (Nino, 1980, pp. 484-485; 2008a, pp. 37-38; 2008b, p. 23). Whether punishing X becomes justified depends on two conditions: its deterrent function and X's consent to be punished (see Section 1 above). Nino's theory, for this reason, seems to be constructed upon a model of normative relations in which the state relates to its citizens, and the citizens relate to their state, assuming a strictly Kantian standpoint. Of course, if the state were like an alien to its citizens, any blaming attempt on its part would be plainly disrespectful. But imagine a state whose authorities, norms and institutions have done enough not only to satisfy the most basic needs of their citizens, but also to give credit to their most demanding expectations. Moreover, imagine a state under the control of its citizens. In such a scenario, would it not be reasonable to conceive of the citizens-state relationship as a far less impersonal issue? If, as it happens here to be the case, the state has finally managed to have a moral standing in the eyes of its citizens, why would it want to relinquish its right to blame or to reproach when someone commits a crime, or even a minor offense? Nino's position in this respect sounds certainly unconvincing (cf. Malamud Goti, 1981, p. 167; Beade, 2011; Parmigiani, 2013). Yet Alm's general remarks on how to honor the power of consent reveals a normative model of human relations that, if not incorrect, looks at least undeveloped to fare any better.

4. Alm's Criticism to the Consent View: Why Does It Fail?

Bearing these considerations in mind, it is now time to address Alm's criticism to the consent view of punishment. Two single premises are crucial for the whole argument. Given Alm's conviction that treating a consenting person as if she did not consent implies inflicting some sort of wrong on her (Premise 1), it must be inferred that treating an offender as if her offense did not express her consent to punishment would somehow wrong her too (Premise 1'). But Alm asserts that the offender would *not be wronged* in such a case (Premise 2) (2018, p. 912). "From these two premises it follows that there is no valid consent [...] and the consent view is false" (2018, p. 912) (Conclusion). Yet the real question is how to back the premises leading to that conclusion.

Here it might be useful to make a different kind of comparison. Think of someone who insists on benefiting me by giving me a gift or a present that I presumably like despite my refusal to accept it. There

is no question that this is a case in which my consent (or dissent) is clearly disregarded. However, for this to entail that *I am wronged*, a further explanation needs to be given. For instance, can there be a *wrong* wherever no *harm* is involved? If the answer is *negative* (NA), then the insistence of my benefactor cannot wrong me at all. And since the simple fact that our consent is disregarded does not mean that we are wronged, it follows that there is no need to interpret the state's failure to punish a consenting offender as a wrongful action. In line with this answer (NA), Premise 2 might be true, but at the expense of Premise 1. On the contrary, if the answer is *positive* (PA), as Owens (2012), Tadros (2016), Gardner and Shute (2000), and other writers seem to think, then it would make perfect sense not only to say that my benefactor might wrong me by disregarding my consent (or dissent) but also that the state can do the same to an offender by refusing to punish her.⁴ In Owens' opinion, both actions would be wrongful for the very reason that they neglect the agents' *normative* (non-material) interests in shaping their own normative landscapes (2012, pp. 8 y 65).⁵ Naturally, there are compelling reasons to cast doubt on this proposal (cf. Parmigiani 2020b). But even when there were not, such an answer (PA) would openly contradict Premise 2.

Later in the text, Alm believes it necessary to embark on two *tasks* –as he calls them– to supplement what is missing to support his

⁴ Gardner and Shute's most popular example of what it means to wrong a person without harming her involves a case of rape in which the victim is "forever oblivious to the fact that she was raped" and "whose life is not changed for the worse, or at all, by the rape" (2000, pp. 6-7). "Pure rape", as they call it, seems to involve no harm. In their view, however, that does not make any difference to its *wrongfulness* (p. 7). Both Owens (2012, pp. 176-177) and Tadros (2016, pp. 201-204) seem to agree with this basic contention, though each of them understands a different thing by "wrongdoing".

⁵ Owens' conceptual machinery is rather complex, but for the moment it will suffice to notice that an interest is material when its satisfaction is not mediated by convention. Examples of material interests are the interest in having access to food or in controlling certain natural resources. Normative (non-material) interests, on the other hand, are those whose possible objects "comprise what it *makes sense* for us to do or feel, what it is *appropriate* for us to do or feel as well as deontic phenomena like permissions, rights, and obligations" (2012, p. 9; italics added). Since normative interests can only be satisfied by being in possession of a normative power, whose existence depends on a social framework of interpersonal attitudes and linguistic conventions, a person's normative interest will be neglected in so far as her normative power lacks social acknowledgement. Consent, of course, is the perfect example of a normative power, aimed at satisfying what Alm calls a "permissive interest", namely "an interest in being able to authorize" a certain act by declaring that it would be "a wronging in the absence of such a declaration" (2012, pp. 176-182).

argument. First, as he states, it should be clear that the offender is not wronged for not being treated as responsible for her action, as Hegel or Morris would put it (Alm, 2018, pp. 912-913). However, since the consensual theory of punishment is at the same time a consensual theory of criminal responsibility, as Nino reiterated on countless occasions (1980, pp. 385-406), the first task will be of no use. Second, and here is the real issue, for consent to be what justifies the offender's change of moral status, "the *wrongful* nature of the offender's deed" shall play no direct role (Alm, 2018, p. 913). That would happen, for instance, if a person could consent to "punishability" just "by signing a waiver form" (2018, p. 913), a possibility that the consent view would not admit. But what if we decide to bite the bullet?

Imagine that a person commits a wrong [e.g., a morally egregious act] for which the legal system prescribes no penalty whatsoever. Given that the state must abide by the rules, there can be no wrong in its decision not to punish her. But if this is the natural answer, then we have that the main role in explaining the offender's change of moral status, *vis-à-vis* her consent, is not played by the *wrongful* nature of her deed, as Alm seems to think, but by its *unlawful* character. Thus, as things stand at present, for someone to validly consent to punishability by signing a waiver form, it seems to be enough that such an act be sanctioned by the law. A legal rule of this sort may strike us as rather absurd, but it in no way sets out an impossible scenario. In my view, the consensual theory of punishment is compatible with this reading (see below), as Alm himself would have admitted at the beginning of his paper. Indeed, he writes that, for Nino,

consent to lose one's legal immunity is *a conventional matter, determined by what the law happens to say* (1991, p. 281) – though not any old law could make the offender's consent legitimize punishment, as Nino's additional conditions imply. Hence, talk of the offender's consent presupposes the existence of a state and a legal system. It does not apply to the state of nature. In the absence of state and law, after all, it is unclear at best both to whom and to what a malefactor consents simply by his wrongdoing (Alm, 2018, p. 904; italics added).

As is manifest, it is the unlawfulness and not the wrongfulness of the deed what certainly matters for Nino. Of course, among the *moral* conditions to be met for consent to legitimize punishment, Nino mentions that the obligation whose violation entails punishment must be "justifiable" (Nino, 1983, p. 299; Alm 2018, p. 904), and it is not clear

how a legal rule that merely obliges us not to sign waiver forms may be *prima facie* justifiable. However, imagine a legal system that admits self-incrimination as a sufficient condition to be punished. From an economic approach to procedural law, that may sound as a reasonable provision. And imagine that, in such a system, many innocent people decide to self-incriminate by signing waiver forms, perhaps because they see imprisonment as a better alternative than freedom. For instance, they may be poor or homeless, in which case spending a time in jail could help them to withhold the cold winters or have an education. To avoid this consequence, suppose that the legal system's authorities decide to enact a rule that, instead of sanctioning self-incriminated *innocent* people with prison, sanctions them with a different kind of penalty, such as forced labor. Even when having a rule like this may not be justifiable all things considered, who can take it to be unreasonable or plainly absurd in this context?

In one of the final passages of his paper, Alm remarks that “it is precisely the lack of a direct role for the agent's value *qua* agent that makes the offender's case differ from one involving a change in moral status due to consent” (2018, p. 913). Recall that, on Alm's model, consent is valid in so far as it is the expression of an agent's value *qua agent*. From a Kantian perspective, we know exactly what this value amounts to in terms of respect: unless someone is treated as perfectly capable of deciding for herself, she will not be valued in her own right as a real agent. However, from the consensual view of punishment, we also know that an offender is someone who decided to be treated as an offender, that is: as a punishable agent. Why then are we supposed to think that her “value *qua* agent could at most play an indirect role in accounting” for her “change in moral status”, as Alm concludes (2018, p. 913)? His explanation is that the change is enabled not by what the offender autonomously does, but by the way her victims are treated: “if we do not let our views about how we are required to treat a person reflect how he has in turn treated others, we fail to properly recognize the value of these others” (2018, p. 913).

The consensual theory of punishment defended by Nino is, first and foremost, a consequentialist view, aimed at preserving the value of personal autonomy (Nino, 1996, pp. 48-50; Parmigiani 2021a). Hence, there is no mystery about its level of commitment with the victims' rights. But its distinctive mark, as already stated, derives from its attempt to handle the Kantian objection raised against a purely consequentialist justification of punishment (see Section 1 above). Nino thought that the consensual requisite could avoid offenders to be used only as means

and not as ends in themselves, without jeopardizing the value of the victims. In either case, in his opinion, what this additional requisite ensures is the preservation of the offenders' value *qua agents*, for they are now treated as authorizing their own punishment. However, is this not precisely an admission of the very one thing Alm's interpretation is trying to deny?

5. Final Remarks

To conclude these remarks, I would like to suggest, in accordance with what was previously said, a tentative diagnosis of what may be going on with Alm's criticism. In the father-daughter case as presented in the paper, it was clear that the patriarchal father wrongs (or disrespects) his daughter for behaving as if her power of consent had never been exercised. But now imagine a state punishing an offender with ten years' imprisonment, when all she could reasonably foresee in advance was a prison penalty of up to five years (i.e. the one prescribed by the law). The reason why such a penalty would wrong (or disrespect) the offender, on Nino's ground, is that it would violate the knowledge condition of her consent (see Section 1 above). So, unlike Alm's suggestion, it is not as if an offender would be wronged by the state for not being punished; rather, it is as if she would be wronged for not being punished *as prescribed by the law*, which is a completely different matter.

On the contrary, if the state decided to punish the offender with a less severe penalty than the one prescribed by the law, or even if it decided not to punish her at all, then the offender's consent would clearly be disregarded. For the consent view, however, there is no need to see a wrong in each of these decisions, which is Alm's central contention along his paper. Following Beyleveld and Brownsword, what the consent view may be willing to claim is that consent does not represent "a free-standing consideration" (2007, p. 242). It may argue, for instance, that "consent becomes a relevant issue" only when "there is a *prima facie* violation of a right" (2007, p. 242), which, in the case of punishment, would be –let us assume– the offender's freedom of movement. Therefore, when such a freedom is not at risk, consent may be perfectly disregarded.

Of course, none of this is to say that a state unwilling to punish a guilty offender on whatever ground is just because of that reason in accordance with her deed. There might be diplomatic or economic motives for suspending a penalty (on this point see Nino, 1980, pp. 340-347). Nor does it even mean that there is no middle ground between

punishing and not punishing an offender, or between respecting and disrespecting her as an agent. Just like a father can show respect for his daughter's decision without having to share what she values, and even by expressing his disapproval, the state can equally respect the offender by punishing her as prescribed by the law (or even by not punishing her at all), without waiving its right to condemn what she did and render it wrongful, abhorrent, or even atrocious. In both cases, one can express respect for a decision (or for an agent) without appraising its content (or what *she* concretely was at a certain point in her life). In my view, one of the merits of the consensual theory of punishment was that of taking notice of this difference, although much more needs to be said in its favor to make it palatable (cf. Parmigiani 2021a).

References

- Alm, D. (2018). Punishment, consent and value. *Ethical Theory and Moral Practice*, 21, 903-914. <https://doi.org/10.1007/s10677-018-9926-2>
- Beade, G. (2011). El problema del anti-perfeccionismo en el liberalismo de Carlos S. Nino. *Isonomía. Revista de Teoría y Filosofía del Derecho*, 35, 143-165.
- Benhabib, S. (1987). The generalized and the concrete other: The Kohlberg-Gilligan controversy and feminist theory. In E. Feder Kittay & D. T. Meyers (Eds.), *Women and moral theory* (pp. 77-95). Rowman & Littlefield.
- Beyleveld, D. & Brownsword, R. (2007). *Consent in the law*. Hart.
- Boonin, D. (2008). *The problem of punishment*. Cambridge University Press.
- Broome, J. (1995). Skorupski on Agent-Neutrality. *Utilitas*, 7(2), 315-317.
- Buckland, J. (2017). Normative reasons qua facts and the agent-neutral/relative dichotomy. *Philosophia*, 45, 207-225.
- Bullock, E. C. (2018). Valid consent. In A. Müller & P. Schaber (Eds). *The Routledge handbook of the ethics of consent* (pp. 85-94). Routledge.
- Dancy, J. (2004). Enticing reasons. In R. J. Wallace, P. Pettit, S. Scheffler & M. Smith (Eds.). *Reason and value: Themes from the moral philosophy of Joseph Raz* (pp. 91-118). Clarendon Press.
- Darwall, S. (1977). Two kinds of respect. *Ethics*, 88(1), 36-49.
- Dillon, R. S. (1992). Respect and care: Toward moral integration. *Canadian Journal of Philosophy*, 22(1), 105-132.
- Duff, A. (2001). Harms and wrongs. *Buffalo Criminal Law Review*, 5(1), 13-45.

- Farrell, M. D. (2004). Autonomía y consecuencias. In H. Hongju Koh & R. C. Slye (Eds.). *Democracia deliberativa y derechos humanos* (pp. 79-88). Gedisa.
- Frankfurt, H. (1997). Equality and respect. *Social Research*, 64(1), 3-15.
- Gardner, J., & Shute, S. (2000). The wrongness of rape. In J. Horder (Ed.), *Oxford essays in jurisprudence. Fourth series* (pp. 1-42). Oxford University Press.
- Honderich, T. (2006). *Punishment: The supposed justifications* (revised edition). Pluto Press.
- Hurd, H. (1996). The moral magic of consent. *Legal Theory*, 2(2), 121-146.
- Imbrisevic, M. (2010). The consent solution to punishment and the explicit denial objection. *Theoria*, 25(2), 211-224.
- Koch, F. (2018). Consent as a normative power. In A. Müller & P. Schaber (Eds.). *The Routledge handbook of the ethics of consent* (pp. 32-43). Routledge.
- Korsgaard, C. (1996a). Aristotle and Kant on the source of value. *Creating the Kingdom of Ends* (pp. 225-248). Cambridge University Press.
- Korsgaard, C. (1996b). The reasons we can share: An attack on the distinction between agent-relative and agent-neutral values. *Creating the Kingdom of Ends* (pp. 275-310). Cambridge University Press.
- Mack, E. (1989). Against Agent-Neutral Value. *Reason Papers*, 14, 76-85.
- Malamud Goti, J. (1981). Comentario bibliográfico al libro de C. S. Nino "Los límites de la responsabilidad penal. Una teoría liberal del delito". *Doctrina Penal*, 4, 165-173.
- Malamud Goti, J. (2005). Carlos S. Nino y la justificación del castigo. *Programma, Controversias de derecho penal*, 1, 89-106.
- Manson, N. C. (2018). The scope of consent. In A. Müller & P. Schaber (Eds.). *The Routledge handbook of the ethics of consent* (pp. 65-74). Routledge.
- Mill, J. S. (2003). *On liberty*. Blackwell.
- Müller, A., & Schaber, P. (2018). *The Routledge handbook of the ethics of consent*. Routledge.
- Nagel, T. (1970). *The possibility of altruism*. Oxford University Press.
- Nino, C. S. (1980). *Los límites de la responsabilidad penal*. Astrea.
- Nino, C. S. (1983). A consensual theory of punishment. *Philosophy and Public Affairs*, 4, 289-306.
- Nino, C. S. (1996). *The constitution of deliberative democracy*. Yale University Press.
- Nino, C. S. (2008a). La derivación de los principios de responsabilidad

- penal de los fundamentos de los derechos humanos. In G. Mourino (Ed.), *Fundamentos de derecho penal: Los escritos de C. S. Nino* (pp. 25-41). Gedisa.
- Nino, C. S. (2008b). Derecho penal y democracia. In G. Mourino (Ed.), *Fundamentos de derecho penal: Los escritos de C. S. Nino* (pp. 13-24). Gedisa.
- Owens, D. (2012). *Shaping the normative landscape*. Oxford University Press.
- Parmigiani, M. (2013). Liberalismo, sanción y reproche: Una revisión crítica del concepto de “reproche” en la teoría jurídico-penal de C. S. Nino. *Isonomía, Revista de Teoría y Filosofía del Derecho*, 39, 37-81.
- Parmigiani, M. (2017). Is it “impossible to will to be punished”? Exploring a consensual way out of the Kantian dilemma. *Revista de Estudios Kantianos*, 2(1), 60-88.
- Parmigiani, M. (2020a). El alcance justificatorio del consentimiento tácito: El problema de Locke y la lógica del beneficio. *Doxa, Cuadernos de Filosofía del Derecho*, 43, 103-132.
- Parmigiani, M. (2020b). Los intereses permisivos y el poder (moral) del consentimiento: Una crítica a David Owens. *Isonomía, Revista de Teoría y Filosofía del Derecho*, 53, 1-30.
- Parmigiani, M. (2021a). La teoría consensual de la pena en la encrucijada. *Ideas y valores*, 70(175), 95-115.
- Parmigiani, M. (2021b). Consentimiento y transformación moral: Una crítica al enfoque dominante. *Anuario XIX del Centro de Investigaciones Jurídicas y Sociales* (pp. 529-556). Universidad Nacional de Córdoba-Advocatus.
- Raz, J. (1972). Voluntary obligations and normative powers. *Proceedings of the Aristotelian Society*, 46, 79-102.
- Raz, J. (2001). *Value, respect, and attachment*. Cambridge University Press.
- Ridge, M. (2017). Reasons for action: Neutral vs. relative. *The Stanford Encyclopedia of Philosophy*. <https://plato.stanford.edu/entries/reasons-agent/>
- Schaber, P. (2018). Consent and wronging a person. In A. Müller & P. Schaber (Eds.). *The Routledge handbook of the ethics of consent* (pp. 55-64). Routledge.
- Scheffler, S. (2004). Projects, relationships, and reasons. In R. J. Wallace, P. Pettit, S. Scheffler & M. Smith (Eds.), *Reason and value: Themes from the moral philosophy of Joseph Raz* (pp. 247-269). Oxford University Press.

- Schnüriger, H. (2018). What is consent? In A. Müller & P. Schaber (Eds.). *The Routledge handbook of the ethics of consent* (pp. 21-31). Routledge.
- Simmons, J. (2001). Denisons and aliens: Locke's problem of political consent. *Justification and legitimacy: Essays on rights and obligations* (pp. 158-178). Cambridge University Press,
- Skorupski, J. (2011). *The domain of reasons*. Oxford University Press.
- Tadros, Victor (2016). *Wrongs and crimes*. Oxford University Press.
- Wertheimer, A. (2000). What is consent? And is it important? *Buffalo Criminal Law Review*, 3(2), 557-583.

Received 7th April 2021; revised 11th June 2021; accepted 20th July 2021.