

C. S. NINO

## Does Consent Override Proportionality?

Larry Alexander seems to argue in "Consent, Punishment, and Proportionality"<sup>1</sup> that consent cannot be the main ground for justifying punishment. He thinks that when consent legitimizes certain preventive actions (like those he mentions as examples) it displaces the requirement of proportionality between harm threatened and harm averted. If, however, we abandon that requirement we arrive at highly counterintuitive consequences.

Alexander recognizes that my theory does not rely on consent alone but also requires that the social costs of punishment be no greater than its benefits. But he seems to challenge me to give reasons for this addition to the consensual justification which is sufficient, however, in other cases of averting harm. He says that even if we accept that additional requirement we would not, in any case, satisfy the relevant intuitions about proportionality.

Let me set forth rather dogmatically some of the presuppositions of my thesis: legal punishment is a state action, and the state and all its acts are justified only insofar as they seek to secure the rights of people to the greatest degree possible;<sup>2</sup> when there is a conflict of rights (as would occur in a case in which state action and state inaction would both lead to violation of rights) one way out is to minimize social harms by giving preference to the more important rights of the greater number of people. But this policy must respect the side constraint of not using some people as means to benefit others, and this situation is avoided when the people

I am grateful to Gabriel Bouzat, Jaime Malamud, and Carlos Rosenkrantz for their helpful comments and to the Editors of *Philosophy & Public Affairs* for their very useful suggestions.

1. *Philosophy & Public Affairs* 15, no. 2 (this issue): 178–82.

2. I expand this point further in *Ética y derechos humanos* (Buenos Aires: Paidós, 1984).

who are affected consent to the normative relations which impose the harm. This implies that the *goal* of punishment is the minimization of social harms, and that consent is only a *limitation* on the pursuit of that goal. Achieving consent cannot itself be the goal of punishment; obviously, it would be pointless for the state to attach normative consequences to possible acts of individuals just for the sake of giving them the opportunity of consenting to those consequences. This consideration is ignored in Alexander's former article<sup>3</sup> in which he states that when punishment is part of an "enterprise of prevention" it is justified if the criminal had no right to commit the act and was given adequate notice of the punishment, even when the requirement of proportionality was not respected. It is doubtful, however, that an enterprise of prevention can be justified if it provokes more harms than those it prevents.

It is worth observing that the examples Alexander gives (the burglar who announces that he will die of a heart attack if we hide our valuables from him, the penny guarded by sharks) are *not* structurally similar to cases of punishment. For one thing, they are not examples in which someone causes a harm to another person. Neither the owner of the valuables who hides them from the thief with a heart condition nor the owner of the penny who puts it in a cave surrounded by sharks *causes* the death of the would-be thieves. Otherwise, we would have to say that I, too, cause the death of the individual who falls while trying to climb to my ninth-floor balcony in order to steal a flowerpot I keep there. (Whether or not I know that somebody will try to steal the flowerpot seems irrelevant to the issue of causation.) The thieves in all these examples have caused their own deaths. The explanation of this seems to lie in the criterion formulated by Hart and Honoré<sup>4</sup> according to which the voluntary act closest to the result is, at the same time, the barrier and goal of the search for the cause of that result. The opposite occurs in a normal case of self-defense: somebody tries to punch my face and I defend myself by wounding him with a knife. The last voluntary act before the relevant result (the injury to the attacker) is here not the aggressive action but the defensive one; therefore, in this case, the harm is caused by the defender, not by the very offender who suffers it.

3. "The Doomsday Machine: Proportionality, Punishment and Prevention," *The Monist* 63 (1980): 213ff.

4. *Causation in the Law* (Oxford: Oxford University Press, 1959), p. 31.

When somebody voluntarily causes himself a harm through a device set up by a third party, there is no reason in a liberal society for the state to intervene. Intervention would be justified, as we have seen, only for the sake of minimizing social harms, but in this case that policy would require interfering with the choice of an individual who takes a certain risk to obtain a certain benefit. If there is no right to perform the action and the interests of others are not involved, this interference seems to imply a perfectionist stance which detrimentally affects the autonomy of individuals. What would the justifying grounds be for the liberal state to restrain possession or use of instruments with which somebody might voluntarily harm himself *in the course of an activity the latter has no right to undertake*? (Could the state prevent me from building a tower on my property for the purpose of preventing my neighbor from committing suicide by throwing himself from the top of it?)

Rather, in central cases of self-defense in which consent is also relevant,<sup>5</sup> the actual harm which prevents a potential one is caused by one individual to *another*. Therefore, in establishing the normative consequences of each action involved in the situation, the aforementioned obstacle to the state's pursuing its basic objective of diminishing social harms is not present. The state must limit the harms that may be justified in self-defense<sup>6</sup> (and in doing so must take into account not only the harm averted and provoked in each situation, but also the socially beneficial deterrent effects that the exercise of the permission of self-defense has in relation to possible future crimes).

The same is true in the case of ordinary punishment. Here, unlike the case of Alexander's "doomsday machine," there are voluntary acts performed by people other than the offender who suffers the harm, that is, by public officials such as judges and prison wardens, which are closer to the harm than is the act of the offender. Therefore, ordinary punishment—like the central case of self-defense and unlike the cases of pre-

5. In my book *La legítima defensa* (Buenos Aires: Astrea, 1982), I distinguish three cases of self-defense, the central one of which requires, in order to be justified, the consent of the aggressor to the normative consequence of his act which consists in losing his immunity against harmful defensive actions.

6. Of course, there are views, based mainly on the idea that the aggressor becomes an external enemy of society whose interests should not be taken into account, which reject the requirement of proportionality in self-defense, but I think that this is a mistake (see *La legítima defensa*, pp. 50ff.).

ventive actions Alexander examines—involves a harm which is not caused by the person who suffers it and therefore requires a justification on the ground that it minimizes social harms.

But there is another, and more obvious, difference between legal punishment (this time including that inflicted by the “doomsday machine”) and Alexander’s examples of preventive actions which would justify a distinct treatment even if the former difference were not relevant enough. Legal punishment is a *public* measure, while the actions involved in his examples are *private* ones. This difference would by itself explain why we require in one case, but not in the other, some proportionality between harms caused and harms averted. This is so because when objects or mechanisms are created by the state they must be justified on the basis of their net social benefit. This implies taking into account the harms which would not take place without those devices, regardless of whether the individuals utilize them to cause themselves or others those harms, or whether the devices cause the harms directly. (The state should not, for instance, produce guns even when they do not, generally, cause harm directly but only through the voluntary acts of individuals.) Therefore, in the case of public preventive actions, in contrast to private ones, it does not seem relevant to determine whether they cause immediate harm to a third party or whether they are a condition of a situation in which somebody causes a harm to himself. In any case, there would be no reason for the state to create mechanisms or objects which made society suffer more harms than it would if such devices did not exist.

Alexander says that even if we took a balance of costs and benefits into account we would have counterintuitive results (for instance, the admissibility of a harsh punishment in order to prevent a multitude of petty offenses which imply harms that, once aggregated, are greater than those involved in the penalty). I think that the alleged counterintuitions (which, strikingly enough do not exclude the current acceptability of penalties such as long terms of imprisonment for deeds like theft) are simply prejudices motivated by bad examples. Suppose that in the case of a relatively harsh penalty for a relatively petty offense the following conditions obtain. First, the costs-to-benefit ratio is correct, which implies that the application of the respective criminal law prevents more harm than it causes for the whole society aggregately considered. (In coming to this conclusion we must take into account that there is a rule of thumb which advises us to maintain some proportion between the harm involved

in *each* penalty and the harm involved in the respective crime, given the usual uncertainty about the number of crimes and penalties that may occur.) Second, the assumption of punishment by the individual is really voluntary and conscious (which is doubtful, given some principles of rationality, when the harm he brings upon himself is far greater than the benefit he sought, taking into account the probability of each). Lastly, we must exclude some penalties (like capital punishment)<sup>7</sup> which are in themselves objectionable. Given all these conditions, why should we ignore an individual's free decision to sacrifice himself by suffering a greater harm than the one he causes, when this sacrifice produces a net benefit for society as a whole?

7. See some objections to it in my article "Pena de muerte, consentimiento y protección social," *La Ley* 801 A: 708 and in *Ética y derechos humanos*, pp. 277ff.