6: Proportionality – Larry Alexander


Alexander's objection: no proportionality limit on punishment

Alexander (1986: 179) presents the following objection to Nino's theory:

> The problem is that consent not only substitutes for desert as a justification for punishment, but it also overrides desert as a limitation on the severity of punishment. Put differently, the Consensual Theory of Punishment justifies any punishment, even if the punishment is severely disproportionate (in terms of the actor's deserts) to the severity of the crime. There is no proportionality limit to consensual punishment.\(^{181}\)

Alexander employs a retributivist criterion (the proportionality of punishment reflects moral desert) to judge Nino's theory. Moral desert is to be understood as (Alexander 1986: 178) 'the worth of one's moral character reflected in one's acts.' Alexander assumes that moral desert is a good (the proper?) justification of punishment and, secondly, that proportionality is to be understood in terms of desert.

But one could take a different view, take Hart (2008: 80), for example:

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\(^{181}\) Duff raises the same objection a decade later (1996: 13f.)
Some punishments are ruled out as too barbarous or horrible to be used whatever their social utility; we also limit punishments in order to maintain a scale for different offences which reflects, albeit very roughly, the distinction felt between the moral gravity of these offences. Thus we make some approximation to the ideal of justice of treating morally like cases alike and morally different ones differently.

For Hart it is social utility combined with moral gravity (i.e. how grave is the moral violation) which guides us in imposing a particular punishment. There is no attempt to inquire about the worth of the moral character of the offender. The underlying principle of justice is to treat like cases alike and different cases differently.

For Nino the proportionality of punishment does not have to be understood in terms of desert; he understands it in terms of minimum protective function (i.e. deterrence). Roughly, lesser crimes would require less severe punishments to deter and more serious crimes would require more severe punishments to deter.

**Consequentialist and retributivist proportionality**

Let us ask: What are, if any, the limits to punishment? A retributivist like Kant (of the lex talionis persuasion – return like for like) would demand the death penalty for murder – only this would be the right match. Here the limit is at the same time the harshest punishment possible. A liberal consequentialist (of Nino's or Hart's persuasion) would demand only as much punishment as is sufficient to achieve the deterrent effect. The retributivist cannot go below what she deems to be proportional in terms of desert, nor above it. Any deviation would constitute an 'injustice'. Because in one instance we would give the offender less than she deserves, in the other instance we would give her more than she deserves. Whereas for the consequentialist it is not necessary to ascertain what the offender morally deserves with regard to the quantity and quality of punishment. Rather, it is important to

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182 I am assuming that exile from the polis or years of torture are not available as punishments.
183 I am ignoring one major problem for retributivism here: how to match crimes and punishments. For the purpose of my argument, this is not important, and I am assuming that the retributivist has solved this problem. See Hart's discussion of the issue (2008: 162f.).
184 But see Finnis (2011: 178) who states that punishment requires 'determinatio' by a judge: 'There is no "natural" measure of punishment'.
ascertain what level of punishment would have the minimum protective (deterrent) effect we aim for.

If we applied the retributivist's proportionality principle (based on moral desert) as a template for assessing the quality and quantity of consequentialist punishment, then, we notice a degree of flexibility which is missing in retributivism. In lesser crimes it would be possible, for the consequentialist, to go below or above of 'what the offender deserves'. In serious crimes, e.g. murder, the consequentialist is constrained (just like the retributivist) by the natural limits of punishment – we cannot go (punish) beyond the death penalty. But here the consequentialist has the option to punish below the level 'which the offender deserves'. In my example this means we do not have to impose the death penalty for murder, if the lesser punishment is deemed sufficient for deterrence.

Assuming that most people are deterrable, we can say that the liberal consequentialist is more likely to inflict less harm through punishment (than the retributivist) when it comes to serious crimes. A punishment which effectively deters might well be below the level of punishment which the desert of the retributivist specifies. In lesser crimes it is conceivable to punish both less severely or more severely than the retributivist would.

But what about the undeterrable? Ideologically committed terrorists, for example, should prima facie not be punished, because they are unmoved by (the threat of) punishment. However, the consequentialist could argue that their example will deter others, perhaps other committed terrorists? If not, then their example would still be a general deterrent. It would demonstrate to would-be wrong-doers, as well as to the law-abiding, that the threats of the law are credible.

If there were no side-constraints to the consequentialist justification of punishment, we would be using some (the deterrable as well as the undeterrable) for the benefit of

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185 A ten-year sentence might be just as effective as a fifteen-year sentence.
186 The decision would depend on our sensitivities towards certain minor offences. If public nudity is not seen as particularly offensive, then we can go below the retributivist standard, and vice versa.
others (the law abiding). Nino overcomes this objection by stressing that wrong-doers consent to the legal-normative consequences of their acts.

But remember that in the above comparison I have applied the retributivist view of proportionality as a measure to judge the consequentialist way of punishing. But it is not obvious that this is the correct standard to be applied, unless one is a retributivist.

The Eighth Amendment to the US constitution forbids 'cruel and unusual' punishment. In his earlier paper ('The Doomsday Machine') Larry Alexander (1980: 219) reads this as a retributivist proportionality constraint. But it could equally, and coherently, be interpreted as forbidding punishments which violate human dignity, involve gratuitous harm or punishments which deviate from our past or recent standards – independently of what the offender might 'deserve morally'.

Alexander's interpretation of 'cruel and unusual' as a proportionality constraint seems to erode the retributivist stance. If punishment is a response to moral desert, then cruel and unusual punishment might sometimes be the right response. Kant, for example, proposes castration as a punishment for certain sex crimes. However, for Kant proportionality is constrained by human dignity (1991 [1797]: 106 [333]); human dignity constrains what we may do to others. Consequently, torturing someone to death, as a way to inflict the death penalty, would be wrong for Kant.

The liberal can often point to constraints within the constitution (e.g. no cruel and unusual punishment), which exclude certain types of punishment. However such constitutional constraints seem to be in conflict with the retributivist stance, notwithstanding Alexander's claim that they are compatible with it (or even part of it?). Nino (1996a: 134), for example, is against the death penalty because it excludes

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187 In Furman v. Georgia, 408 U.S. 238 (1972), Justice Brennan (of the US Supreme Court) interpreted cruel and unusual punishment thus: 'The primary principle (...) is that a punishment must not, by its severity, be degrading to human dignity. The paradigm violation of this principle would be the infliction of a torturous punishment of the type that the Clause has always prohibited.'

188 Richard Lippke agrees (1998: 36): 'It might be claimed that the state fails in its duty to vindicate the rights of victims of heinous crimes if it declines to impose inhumane or degrading punishments on the perpetrators of such crimes. After all, if proportionality is what we seek, humane and non-degrading punishments, even if they last for the rest of heinous offenders' lives, seem insufficiently respectful of victims' rights. Maybe what we should impose on heinous offenders is something proportional to what they imposed on their victims.'

189 One could of course ask Kant: Isn't castration a violation of human dignity?
that individual from the process of moral discourse. But, more importantly, the death penalty extinguishes the autonomy of a person (the autonomy of the person being one of Nino's three liberal moral principles).

Contrary to Alexander, moral desert only limits the quality and quantity of punishment as it applies to a particular crime. But it is not a general limitation, e.g. it does not exclude the death penalty per se (i.e. something which is usually the liberal position). And it does not exclude cruel and unusual punishment a priori; on the contrary, it might be required. The retributivist is more likely to require more severe punishment than the liberal consequentialist would deem necessary to be effective. Contrary to Alexander, the offender's consent does not authorise the tariff which the law attaches to crime. This is justified independently of the choice of the offender.

No liberal argument against severe punishments
Let us now look at Alexander's criticism of Nino (1986: 179) in more detail:

The point is simple enough. If the law imposes capital punishment for overparking, then one who voluntarily overparks 'consents' to be executed. Execution is therefore not unfair. And deserts by hypothesis do not matter. The liberal who embraces the Consensual Theory of Punishment has no 'liberal' argument against severe punishments for minor crimes.

Alexander misinterprets Nino here. The criminal does not consent to the punishment and therefore she does not consent to be executed, she only consents to change her legal-normative status. For Nino it is a different question, whether it is morally permissible to attach a particular punishment to a particular crime. This needs to be grounded independently of the criminal's consent. And this would be part of Nino's requirement that we need a fair legal framework – this is the place to settle the question of tariffs.

Let us unpack the implications of this proviso (a fair legal framework) with regard to proportionality. It implies that there must be some principle or rule (minimum protective function) at work when the state attaches tariffs to wrong-doing. And this principle must be justifiable to the population and/or would be largely shared by the
population. In addition principles of justice (e.g. treat like cases alike; treat different cases differently) will be operative in the fair legal framework. Furthermore, human dignity is a constraint which is often enshrined in liberal constitutions. Another constraint would be the present or recent practice in punishing. It is hard to see how attaching 'monstrous' penalties to petty crimes could be shared by the population and could be a sign of a just society – or of a fair legal framework.

In his response to Alexander, Nino (1986: 184) states: 'It is doubtful, however, that an enterprise of prevention can be justified if it provokes more harms than those it prevents.' For Nino, creating more harm than one is averting is self-defeating (1976: 106, see also 1983: 290f.):

if social protection were the sole justification of punishment, we would be authorised to employ extremely harsh measures in order to prevent the social harm involved in any offence; to hang a motorist, for instance, would be a much more effective way of preventing parking offences than to impose on him a moderate fine. [FN] This argument is clearly absurd: if one accepts the scale of values crucial to the argument (that the death of one person is worse than a congested traffic flow), the measure in question would, an any rational view of social protection, be self-defeating.

Nino does not accept the scale of values that the argument presupposes. Thus, contrary to Alexander, Nino does have an argument against severe punishments for minor crimes (it would be self-defeating) – and not just one, as I have just explained with regard to the fair legal framework.

Take Hart, another liberal, for example. As I have discussed in the chapter on Hart and Nino, principles of justice constrain the quality and quantity of punishment. Hart (1959: 23f.) explains:

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190 See the German Basic Law, i.e. constitution [Art. 1 Abs. 1 GG]: 'Die Würde des Menschen ist unantastbar.' (My translation: The dignity of man is inviolable [literally: untouchable].)
191 But, as we will see below, Nino also has an argument for (exceptionally) allowing severe punishments for minor offences.
The guiding principle is that of a proportion within a system of penalties between those imposed for different offences where these have a distinct place in a common-sense scale of gravity. This scale itself no doubt consists of very broad judgements both of relative moral iniquity and harmfulness of different types of offence: it draws rough distinctions like that between parking offences and homicide, or between 'mercy killing' [24] and murder for gain, but cannot cope with any precise assessment of an individual's wickedness in committing a crime (Who can?) Yet maintenance of proportion of this kind may be important: for where the legal gradation of crimes expressed in the relative severity of penalties diverges sharply from this rough scale, there is a risk of either confusing common morality or flouting it and bringing the law into contempt.

Often the moral gravity of an offence is related to its harmfulness. In order to deter an offender from crime (from bringing about a certain level of harm), a certain level of harm (through punishment) must be threatened. If the harm threatened is trivial, then it will fail in its deterrent function. If the harm threatened is much greater than the harm through crime (e.g. the death penalty for parking offences), it will fail in the purpose of reducing harm in society. Thus, both the moral gravity and the harmfulness of an offence can serve a guide in the severity of the punishment.

Hart (2008: 172) also points out that treating like cases alike and different cases differently expresses 'respect for justice between different offenders'. If we imposed the death penalty for overparking as well as for murder, we would be violating this principle of justice. At the same time we would be creating more harm than we would be averting. In this context the underlying scale of values (which Nino mentions in the earlier quote) is that one life is not worth more than all acts of illegal parking.

For Nino, legal punishment constitutes a 'public' measure which requires (1986: 186) '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.'

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192 I am assuming, like Nino, that the death of a person is a greater harm than the harm resulting from parking violations.
193 Similarly Hart (2008: 76) - writing about the utilitarian justification of punishment: 'Clearly it is part of a sane utilitarianism that no punishment must cause more misery than the offence unchecked.'
A non-aggregative reading of Nino

Thus far we have considered an aggregative reading of Nino, i.e. we looked at the sum of the harms averted and compared it to the sum of harms imposed by punishment. But Alexander writes (1986: 180): 'Even if one treats the harms averted and imposed by punishment non-aggregatively, however, Nino's consensual theory can be used to justify harsh punishment. That is so because consent appears to obviate any need to make punishment justifiable on a cost-benefit basis.'

In Alexander's non-aggregative reading of Nino's theory, he again employs the retributive principle of moral desert to judge whether a punishment is harsh (meaning 'morally disproportionate'). Let us instead use Hart's criteria of the (moral) gravity and harmfulness of the offence, and let us assume that past practice in punishment roughly reflects these criteria. Thus, if we were to impose punishments which deviated from past practice by being much harsher, we could call this new policy disproportionate. We are then judging the new measure by applying past practice as a standard.

Alexander (1986) gives several examples to illustrate his point – all taken from his earlier paper 'The Doomsday Machine' (1980). A burglar phones his intended victim and tells him that he knows that the victim is going out tonight and that he plans to come and steal his valuables. The burglar also tells the intended victim about his heart condition. If the valuables were too difficult to find he might suffer a heart attack from all the exertion and anxiety in searching for them. So he asks for the valuables to be left in plain sight. The intended victim hides the valuables and, when he returns, he finds the burglar, who has died from a heart attack. Alexander (1986: 180) asks whether this is: 'Excessive punishment for a non-violent burglary?' Other examples he gives are throwing one's watch into a shark tank to keep it safe from a would-be thief, or hiding jewels on top of an unscalable cliff. In all of these hypotheticals Alexander believes that the criminal consented to the harm, which he suffered as a result of his wrongdoing.

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194 I take this to mean: by punishing one individual, we avert more potential harm from this particular individual.
195 Of course our moral sensibilities might have changed or might be in a transition period. Thus, calling a punishment harsh or disproportionate might be misguided.
196 Alexander's criminals are all male.
This is a conceptual mistake, as I have discussed in the chapter on Hart. One can only be said to consent to a risk, but not, normally, to the materialisation of that risk, because there is no certainty that the risk will materialise (an exception to this is Alexander's Doomsday Machine – there, the harm is certain to materialise). The consent to the risk is really a consent to any legal-normative consequences (e.g. in tort law) which are attached to assuming a risk. The consent of the risk-taker is important, because their legal-normative status determines what burdens may, or may not, be placed on them in case the risk comes about.

But the outcome of the risk-taking, the distribution of harms and benefits, might be fair for Nino, if it originated from the consent to assume a risk. And, presumably, Nino would require certain constraints on assumption of risk which would be contained in a fair legal framework; e.g. protective devices which are designed to kill or maim wrong-doers would not be permitted. Strangely, Alexander calls the harm which befalls the wrong-doer when the risk materialises: 'punishment'.

In his reply, Nino states that the examples are structurally dissimilar to punishment. Because (Nino 1986: 184) 'they are not examples in which someone causes a harm to another person. Neither the owner of the valuables who hides them from a 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 thief.' Here the harm which befalls the wrong-doer was the result of the risks involved in the pursuance of the crime. Punishment (by the state) is something which occurs long after a crime was committed (following the acts of detection, apprehension, trial and sentencing), but not in the pursuance of the crime.

Alexander's examples are structurally similar to any other risks which are part of committing a crime: falling off the roof, triggering the alarm, getting bitten by the...

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197 Hobbes (1994, Chapter 28: 204 [162]) states that punishment is inflicted by the authority of man, rather than by natural events or through risk taking (these might count as 'divine punishments'): 'Sixthly, whereas to certain actions, there be annexed by nature divers hurtful consequences (as when a man, in assaulting another, is himself slain or wounded, or when he falleth into sickness by the doing of some unlawful act), such hurt, though in respect of God, who is the author of nature, it may be said to be inflicted, and therefore a punishment divine, yet it is not contained in the name of punishment in respect of men, because it is not inflicted by the authority of man.'
guard dog, getting injured while running away from the scene of the crime, etc. Whereas in cases of punishment the harm is caused by officers of the state. Alexander's examples constitute a 'private' measure – but even here, there are constraints by the law. There are limits (in law) to the measures one can take in defence of home and property, particularly when it comes to the use of deadly force. Punishment by the state constitutes a 'public' measure (i.e. legal punishment) which requires (Nino 1986: 186) '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.'

Alexander's examples are cases, where a private individual has taken preventive measures to make committing crime more difficult and/or more risky. They are not cases of punishment but cases where (Nino 1986: 185) 'somebody voluntarily causes himself a harm through a device set up by a third party'.

Alexander's mistake is to believe that burdens which result from the voluntary assumption of a risk are 'punishments' and, secondly, that the offender consents to these 'punishments'. Furthermore, Alexander reasons (by analogy) that the fairness of the outcome of risk-taking in private preventive measures would also apply to instances of state punishment. He, wrongly, believes that the fairness of the former negates any injustice which might be involved in state punishment, if this were based on a Consensual Theory of Punishment. However, consenting to a risk is too weak a principle to justify the imposition of punishment for Nino (- but not for Hart).

Would a non-aggregative reading of Nino lead to counterintuitive results? Nino (1986: 183) states that 'the goal of punishment is the minimization of social harms, and that consent is only a limitation on the pursuit of that goal. But, as we have seen above, there are other limitations, operative through the fairness of the legal framework, which would inhibit the application of harsh punishment. This would apply regardless of whether we employ an aggregative or a non-aggregative reading of Nino's theory.

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198 And the state must also require the principle of proportionality for cases of self-defence, according to Nino.

Making fair gambles riskier

Alexander (1980: 217) asks: 'But may we alter the world to make some fair gambles riskier than they would otherwise be? Yes, if the gambles are wrong to undertake in the first place; and most criminal acts are gambles that are wrong to undertake.' Here Alexander endorses the very position which he attacks six years later in his reply to Nino's theory. He endorses a disproportionate response (making 'some fair gambles riskier') to crime (Alexander 1980: 217): 'if the wrongdoer receives worse under the enterprise of prevention than he deserves under the enterprise of retribution by having undertaken a poor but fair gamble, what he receives is just under the principles of justice.' But note that in Alexander's position prevention is only limited by the notice principle (the offender must be aware of the threatened harm) and by the wrongful act principle, before we are entitled to create risks for wrong-doing.

However, there is a third principle of justice in play for Alexander. He writes that (1980: 216) 'the enterprises of retribution and prevention may be related under a higher level principle or principles.' And this principle, a principle of justice for Alexander, is respect for autonomy:

I believe that a further explanation can be provided, one that subsumes both the enterprise of retribution and the enterprise of prevention under more general principles of justice. The principles of justice include respect for autonomy. Respect for autonomy in turn requires that we allow fully competent adults to renounce, give away, contract away, or even gamble away that which they deserve, [217] retributively or distributively, because of their acts/character.

This would mean that giving the offender what she deserves retributively, based on (Alexander 1986: 178) 'the worth of one's moral character reflected in one's acts', is ultimately grounded in respect for the autonomy of the offender: we give her what she deserves (to be harmed through punishment). In the preventive enterprise we respect that the offender gambles away something which she deserves: certain rights (not to be harmed). But notice that in the latter Alexander employs the word 'deserve' in a strange way. In the former enterprise desert is based on the worth of one's moral character as reflected in one's acts – a wicked character deserves to be punished. In
the latter enterprise desert is based on certain rights we have: the right not to be harmed (in tort law). Is Alexander right to say that we 'deserve' these rights?

In the enterprise of prevention Alexander might want to say that the distribution of burdens (and benefits) resulting from a wrongful act is deserved because the wrong-doer took a risk. But this would mean that Alexander is judging the resulting distribution retributively. What if the risk did not materialise? Would the resulting distribution (enjoyment of the fruits of crime) be deserved?

In tort law the resulting distribution for the risk-taker (the consenting injured party) is not deserved (nobody deserves to be maimed by the guard dog), rather, it is fair because it is based on the volenti-non-fit-injuria maxim.

Because of Alexander's misuse of the word 'deserve' I doubt Alexander's contention that (1980: 216) 'the enterprises of retribution and prevention may be related under a higher level principle or principles': the principle of respect for autonomy.

Furthermore, in his attack on Nino Alexander is blurring the distinction between tort law and criminal law. In tort law assumption of risk may lead to a fair outcome, but not to a deserved outcome. It is an outcome about which the injured party is not entitled to complain.\(^{200}\) However, it would be wrong to classify this as punishment, as Alexander does. The justification of the distribution of harm in risky gambles is based on the 'volenti non fit injuria' maxim – it is not punishment. Interestingly, Alexander does not mention the maxim.

Contrary to Alexander, his examples are not similar to instances of state punishment, but are structurally similar to self-defence measures. The aim of the latter is not punishment, but preventing violations regarding my body or my possessions. And if I happen to catch the wrong-doer, while exercising my right to self-defence, she would subsequently be subject to punishment for her crime by the state. If we adopted

\(^{200}\) Note that the outcome may still be unfair, if, for example, the social conditions are unfair. One way of getting a college education in the US is through the GI-Bill. Enlisting in times of war, to get a college education later, is a gamble. But it is not a fair gamble, if those who are economically better off can get a college education without the need to enlist. But notice that enlisting is also a contractual obligation and not merely an assumption of risk.
Alexander's view, this would constitute a second 'punishment', the first being my preventive measures (which might have caused harm to the wrong-doer). Under Alexander's view of punishment this would lead to seriously disproportionate outcomes. If the wrong-doer is maimed (the first 'punishment') by the sharks who are protecting my possessions, she would then still go to prison for the attempted theft (the second punishment).

In Alexander's counterexamples the assumption of risk of the perpetrator justifies the harm. For Nino, in cases of state punishment, the severity of a particular punishment is not authorised by the consent of the perpetrator; the penalty which we attach to a particular crime is justified independently of the offender's consent. For Nino this is to be decided within the fair legal framework. Alexander's confusion originates from his belief that the consent to a risk, which justifies the harm in Alexander's preventive hypotheticals (and which in fact is based on the *volenti* maxim) also authorises the severity of a punishment in Nino's Consensual Theory of Punishment – but this is not so.

Nino puts forward another, indirect, defence of his position which perhaps is lacking in focus. Nino states that in current legal practice we sometimes do accept disproportionality: for example (1986: 186) 'the current acceptability of penalties such as long terms of imprisonment for deeds like theft'. Note that the mandatory minimum sentence is a practice which also promotes disproportionality between crime and punishment. See Fish (2008: 69f.).

Nino's consequentialism is flexible enough to allow for the possibility of a relatively harsh penalty for a relatively petty offence – viewed aggregatively. I suspect, that...
such a policy could be adopted because our sensibilities might have changed, or because the petty offence is on the rise (causing much more harm than previously). Nino (1986: 186f.) states that if we wanted to adopt such a policy three conditions must 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.)

I take this to mean the following. We should be guided by getting the costs-to-benefit ratio right. The uncertainty about how many crimes might occur and how many penalties might need to be imposed would require caution when deciding on the tariffs for wrong-doing. Otherwise the harms inflicted on offenders may be considerably greater than the harms prevented. Nino suggests that we would start off with a less severe punishment, and could then increase the penalties, if necessary.

The second condition requires that (Nino 1986: 187.) ‘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).’

This condition seems underdeveloped and, I must admit, that I am not certain that I have fully grasped what Nino means to say in the second condition. I take Nino to argue that, for example, a driver who parks illegally, and the penalty for this being 20 years of imprisonment, may not be culpable, because his rationality might be impaired. Nino also seems to suggest that the probability of getting caught for a petty crime is higher than for more serious crimes (– this may be true for my example of

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203 For example our attitudes towards littering and spitting in public.
204 Note that ‘assumption of punishment’ is shorthand for Nino’s ‘consent to assume liability to punishment.’
illegal parking, however, I am not sure that this principle holds in general). Therefore, again, committing such a petty crime suggests an impaired rationality. Nino seems to argue that an enormous disproportionality between wrong-doing and punishment would be self-defeating; we would have to assume that (most of?) the offenders could not be punished due to their impaired rationality.\footnote{Interestingly, Alexander made a similar point six years earlier in 'The Doomsday Machine' (1980: 218): 'Will not punishments in excess of retributive desert, even if imposed only on wrongdoers who undertake fair gambles, fall selectively on the foolhardy sub-class of the class of wrongdoers, those wrongdoers prone to underestimate risks? This objection appears at bottom to amount to a denial that either fair gambles or the autonomy presupposed by fair gambles exists where wrongful acts are concerned. It is similar to the argument regarding akratic behavior that one cannot act autonomously and at the same time realize the wrongfulness of his act - that all immorality is really ignorance. If one assumes to the contrary that undertaking a wrongful act in the face of a risk of punishment can be a fair gamble, the objection dissipates.' I fail to see why, by making different assumptions, the objection dissipates. For the objection to dissipate one would have to show that the original assumptions about akratic behaviour were wrong.}

Imposing disproportionate penalties for petty crimes would (mostly) catch out people whose judgement is impaired. Presumably, they could therefore not be punished, according to Nino. However, surely, there would be offenders whose judgement is not impaired. Either because one could easily commit a petty offence by accident (like being mistaken about the parking regulations), or one could commit them intentionally and fully aware of the consequences. In the former (i.e. accidentally committing petty offences) the harm of punishing would far outweigh the benefits of prevention (this would strengthen Nino’s position with regard to the first condition, but he does put it forward). Nino seems to discount the latter possibility, i.e. nobody in their right mind would park illegally and risk 20 years imprisonment, particularly, if the conviction rate for petty offences is high. I doubt that this would be the case (assuming that I have understood Nino correctly). I can imagine some people – 'risk takers' – whom I would consider to be rational, who would commit petty crimes even if severe penalties were attached to them.

Furthermore, the three-strikes-and-you're-out legislation in California (but also in other US states) is effectively attaching a severe penalty (25 years imprisonment) to the third crime – in some instances a petty crime like shoplifting.\footnote{Sixty-five per cent of those imprisoned under three-strikes-rule in California were convicted of non-violent crimes; 354 of them received 25-years-to-life sentences for petty theft of less than $250.' as reported in The Guardian, by Dan Glaister, 'Buried alive under California's law of "three strikes and you're out"’, Monday March 8th, 2004.} The continued use of this regulation seems to contradict Nino's intuitions in the second condition.
However, in the present California prison population (Taibbi 2013: 3) 'some 40 percent of three-strikers are either mentally retarded or mentally ill.' This seems to support Nino's point, however the remaining 60 percent are presumably not mentally impaired. In 2012 the Californian three-strikes law was reformed. A life sentence will only be imposed if the third felony is violent or serious.

The last condition excludes (Nino 1986: 187) 'some penalties (like capital punishment) which are in themselves objectionable.' One reason, according to Nino (1996a: 134), would be: 'capital punishment should be banned on the grounds that it excludes somebody from the process of moral discourse'. This is another safeguard against disproportionality in punishing.

And Nino (Nino 1986: 187) concludes his reply to Larry Alexander with the rhetorical question: '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?' It is clear from this passage that Alexander's moral desert principle is not the criterion Nino adopts for judging the fairness of a particular punishment.

If an individual voluntarily and knowingly committed a crime, if the purpose of the institution of punishment is just – and if it is constrained by principles of justice (through a fair legal framework), if the harmful measures are effective in preventing greater harm than they cause – without there being alternative measures, equally effective, which would cause less harm, then, a severe penalty could be justified according to Nino.  

207 See also Hart (2008: 80): 'Some punishments are ruled out as too barbarous or horrible to be used whatever their social utility'. I take it that Hart's objection to such punishments is grounded in principles of justice which limit using some people for the benefit of others.  

208 Haag (1987: 1417) gives an alternative explanation. He argues that the offender's assumption of risk prevents him from claiming that an injustice was done to him, if the punishment attached to the respective crime is disproportionate: 'The punishment he suffers - be it proportionate to his crime or not - cannot be unjust to him, because he volunteered to risk it. After all, the offender knew that his offense was punishable, and approximately what punishment he risked. We may feel compassion for him. But no injustice was done to him.' For Haag it is a different question, obviously to be decided by the law-abiding, whether it is right (i.e. proportionate) to attach certain punishments to certain crimes. Honoré (1962) holds a similar position.
However, this would be exceptional rather than the norm. Recall that Nino's answer to Alexander's charge is that an aggregative interpretation of harms and benefits would not lead to an enormous disproportionality between the gravity of the crime and the harm of punishment, if certain conditions are met.

Even if Nino's second condition fails, conditions one and three seem to be (jointly) sufficient to protect against disproportionate penalties for petty offences. Furthermore, Nino's requirement of a fair legal framework (and the principles of justice which are operative in it) is another safeguard against disproportionate penalties. But, interestingly, Nino did not stress this in his reply to Alexander. Nino (1986: 183) only refers to it indirectly when he states: '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'. One way to secure the rights of people is obviously to rely on a fair legal framework.

Summary
In this chapter I have argued that Nino's theory contains safeguards to minimise harsh punishments. Furthermore, Alexander's attack on the Consensual Theory of Punishment is based on a confusion. It originates from his belief that the consent, which justifies the harm in Alexander's examples of excessive 'punishment' (and which is actually based on the volenti maxim) also authorises the severity of a punishment in Nino's Consensual Theory of Punishment.