Adams, 5th ed.

What Punishment Is

DAVID BOONIN

The Need for a Definition

When we talk about the moral permissibity of legal punishment, what, precisely, do we mean? A general answer to this question is easy: we mean such practices as the state's imposition of monetary fines, forced incarceration, bodily suffering, and-in extreme cases-death. A more specific answer is more difficult. Simply illustrating punishment,[1] even by appealing to clear paradigmatic examples, is not the same as defining it.

But is a more specific answer necessary for our purposes? It is tempting to suppose that it is not. As long as we all know what counts as examples of punishment, it might be said, we can move directly to the task of arguing about whether or not it is morally defensible. Indeed, one book on punishment begins by declining to offer a definition of the term for precisely this reason: "one does not require a definition of 'punishment' in order to recognize clear cases of punishment's being imposed and to distinguish such cases from those in which individuals are treated in ways that, although similar to punishment in certain respects, are nevertheless something else entirely" [Montague (1995: 1)]. An "understanding" of punishment is certainly needed, Montague concedes, but one can understand punishment well enough without defining it.

While the reluctance to begin a discussion of punishment by developing a clear, specific definition is understandable, however, it is ultimately misguided. For a fully satisfactory inquiry into the moral permissibility of punishment, it is not enough to point to examples and say either that they are cases of punishment or that they are cases of something else. One must also be able to identify the properties that make them something else. If one cannot do this, then one cannot fully determine what, precisely, makes the permissibility of punishment problematic. More importantly, if one cannot do this, then one cannot satisfactorily determine whether or not a purported justification of punishment succeeds in justifying punishment or only in justifying something very much like it. Indeed.... Montague's own attempt to defend punishment on grounds of social self-defense fails in part for precisely this reasons.[2] Even if the argument from self-defense succeeds, I will argue, the practice that the argument would justify lacks two of the necessary characteristics that any satisfactory definition of punishment must include. Montague's failure to define punishment at the beginning of his book results in his failure to see that what he is defending at the end of his book is not exactly punishment.

Finally, and perhaps most importantly for the purposes of this book, we cannot fully disentangle the importantly related practices of punishment and compulsory victim restitution without understanding what makes some cases cases of punishment and others cases of something else. Such disentanglement is crucial to the project of this book: it is necessary to see precisely why rejecting the claim that punishment is morally permissible does not entail rejecting the claim that compulsory victim restitution is morally permissible. For all of these reasons, then, we must begin our investigation by clarifying what makes some forms of treatment cases of punishment and others cases of something else. And it is difficult to see how to do this without a definition.

The Criteria for a Definition

So, we want a definition of punishment. But we do not want just any definition. We want a good one. What would constitute a good definition of punishment? First, it must be *accurate*. It must provide us with a set of necessary and sufficient conditions that clearly demarcates cases of punishment from cases of something else. The results produced by this demarcation must cohere sufficiently well with what we mean by punishment when we argue about it and must do so over a sufficiently wide range of cases. If it is clear that responding to an offender's behavior by fining him,

From David Boonin, *The Problem of Punishment* (Cambridge, MA: Cambridge University Press; 2008), pp. 3–28.

beating him, or executing him do count as punishments, for example, and that responding to his offense by writing him a check, throwing him a parade, or giving him a free meal do not, then an adequate definition of punishment must account for these judgments.[3] If it is unclear or indeterminate whether or not responses such as voter disenfranchisement, supervised probation, public shaming, or certain forms of taxation should count as forms of punishment, then a good definition should help us to make sense of these facts as well.

Second, a good definition of punishment must be *illuminating*. A definition may be accurate, successfully discriminating between cases of punishment and cases of something else, but if it does so only because it contains various stipulations that are thrown in solely to produce the desired results and have no further independent motivation, then the definition will be unacceptably ad hoc. "When we appeal to it in asking whether or not a particular act counts as an act of punishment, such a definition will give us the correct answer, but it will do nothing to demonstrate why the answer is correct. In part, we want a good definition to get at the essence of the thing defined, to tell us not just that a given subject belongs in a certain class with certain other subjects, but in virtue of what fact or set of facts this is so.

Finally, a good definition of punishment must be *neutral* on the question of whether or not punishment is morally permissible. A definition is unacceptable if it begs the question one way or the other, with respect to either the merits of punishment in general or the merits of any kind of justification of punishment in particular. If, for example, one attempted to discriminate between punishment and mere private vengeance by saying that punishment is "authorized" while private vengeance is not, and if part of what one meant by an act's being authorized was that it was legitimate, then the resulting definition of punishment would unacceptably beg the question in favor of the claim that punishment is morally permissible. If one defined punishment so that part of what made an act a punishment is that it was justified because of its effects on society, or that it was not justified in this way, then the result would fail to be neutral with respect to the various competing solutions to the problem of punishment. In short, we want a definition of legal punishment that respects and reflects both our beliefs about what counts as punishment and our puzzlement over what, if anything, renders it morally permissible for the state to punish people.

Harm

A definition that satisfies these requirements can be obtained by testing various conditions against our intuitive reactions to clear, paradigmatic instances of legal punishment. As already noted, such cases include monetary fines, forced incarceration, bodily suffering, and, in extreme cases, death. So, we should begin by asking what these various practices have in common.

Perhaps the most obvious quality that these practices have in common is that they are all in some way bad for the person on whom they are inflicted.[4] This point is often expressed by saying that punishment necessarily involves "pain," but this way of putting things is unsatisfactory.[5] A murderer, for example, could be executed painlessly, and this would clearly be bad for him even if he does not experience pain. The same problem arises if punishment is defined, as it sometimes is, in terms of subjecting people to experiences that are "unpleasant." Other writers have attempted to capture the sense in which punishment involves something negative for the person on the receiving end by saying that punishment involves an "evil," but this runs the risk of defining punishment as something that is, at least in itself, a wrong; and this, in turn, would violate the requirement of neutrality by begging the question against those retributivists who maintain that the treatment that punishment inflicts on an offender is not merely allowable but a positive good. Finally, some writers have defined the negative effect of punishment on the person who is punished in terms of the language of rights. Punishment, on this account, involves depriving someone of what would otherwise be a right. If one holds the view that losing a right is always bad for someone, then putting things in terms of rights poses no real difficulties for an analysis of punishment as something that is bad for someone. But if, as seems plausible to me, there can be cases in which a person loses a right but is not made worse off by this loss, then such cases would seem to provide a good reason not to link punishment to rights by definition. A woman who is physically incapable of becoming pregnant, for example, might still have a legal right to an abortion, and if depriving her of that right would in no way be bad for her, it is difficult to see how it could, count as punishing her. It therefore seems more sensible to say that acts of punishment all, in some way, make the person who is punished worse, off than she would otherwise be. If an offender

received a monetary prize for her offense, or a paid vacation, a relaxing massage or life-extending therapy, for example, we would not be inclined to say that she had been punished for her transgression. And so, a natural starting point in generating a definition of punishment is to say that punishment *harms* the person who is punished, where harming someone means making her worse off in some way, which includes inflicting something bad on her or depriving her of something good. I will refer to this as the "harm requirement."

The Beneficial Consequences Objection

A critic of the harm requirement might object that this requirement neglects the beneficial long-term consequences that punishment can have for the person who is punished. Adler, for example, who rejects the claim that harmfulness is an essential property of punishment, appeals to what he calls the "conscientious punishee," the offender "who wants to submit to punishment, who believes that she can achieve reconciliation, atonement, expiation, renewed innocence, greater moral knowledge or some other good by undergoing the punishment" (1991: 91). Indeed, ... a number of writers have claimed not only that punishment ultimately benefits the offender who is punished, but that the moral permissibility of punishment is grounded in this very fact. A definition of punishment that incorporates the harm requirement would therefore seem to beg the question against such a position, ruling out the, possibility that punishment might be justified as ultimately good for the person punished by definitional fiat. This, in turn, would violate the neutrality requirement established earlier, rendering the definition unacceptable.

This objection to the harm requirement is understandable, but it is also mistaken. The harm requirement maintains that for a certain treatment to count as a punishment, it must harm the recipient. But it is neutral on the further question of whether or not being subject to such a harm might produce beneficial consequences in the future, including beneficial consequences that are great enough to outweigh (and perhaps even to justify) the immediate harmful ones. Consider, for example, a child who is spanked as a (nonlegal) punishment for having hit another child. The parent who punishes a child in this way may believe that spanking will make him understand more fully why what he did was wrong, and that this, in turn, will contribute to the child's moral development in various important ways. If this is so, then spanking the child now will ultimately 'benefit him in the future. But all of this is perfectly consistent with the harm requirement. Indeed, it presupposes it. For if spanking the child does benefit him in this way, then this will be so precisely because it involves inflicting a harmful treatment on the child as a means of demonstrating to him how it feels to be on the receiving end of such harmful treatment. If the spanking were not harmful to the child (if, for example, it felt just like being pleasingly caressed), then it would not have the desired educative effect of showing what it is like to be a victim of wrongful treatment in the first place. So, considerations of the possible long-term benefits of punishment provide no reason to reject the harm requirement. If anything, they provide further reason to accept it.[6]

The Masochist Objection

A second objection to the harm requirement is that it is subject to refutation by counterexample. Most people, for example, strongly dislike being physically beaten. But some people, apparently, do not. Most people would find incarceration highly unpleasant. But some people, perhaps, would not, and others, depending on their circumstances, might find it preferable to the available alternatives. And so, it might be urged, we can say at most that punishment involves treatments that are *typically*, harmful or that are considered undesirable by *most* people, but we cannot say that this is so of punishment in every instance. You and I might strongly prefer not to be whipped, for example, and so this punishment would be harmful to us, but a masochist might enjoy a beating; and, if he did, it would remain a form of corporal punishment nonetheless. Since such cases apparently involve acts that are acts of punishment but that do not harm their recipients, they seem to demonstrate that the harm requirement is not accurate over an important (even if somewhat limited) range of cases.[7]

The objection that appeals to cases such as the masochist rests on two claims: that in such cases the treatment in question does not harm the recipient and that it counts as punishment nonetheless. A defender of the harm requirement might reject the objection's first claim and argue that even if the masochist enjoys being beaten, a beating is still something that is objectively harmful to him. Similarly, even if a homeless or insecure person prefers the security of prison to the unpredictability of life on the outside, one could

argue that the restriction on his freedom of movement is objectively a grave harm to him even if he doesn't particularly mind it.

But even if the objection's first claim can be sustained in a significant range of cases, the second should be rejected outright. For if we concede that the masochist is not harmed by being whipped or that the homeless person is not harmed by being imprisoned, then we have two good independent reasons to conclude that he is not punished either. And if he is not punished, of course, then even if he is not being harmed, he cannot serve as a counterexample to the claim that punishment requires harm.

The first reason to believe that these attempted counterexamples fail in this way arises because there is a conceptual symmetry between punishment and reward. What is true of punishment in one direction, that is, must be true of reward in the other. Yet, in the case of reward, it should be clear that a person has not been rewarded for doing a good deed if the treatment that she receives in response does not in fact end up benefiting her. Suppose, for example, that I give you a piece of candy because you did me a favor last week, but the candy causes a severe allergic reaction. We might say that I tried to reward you for your good deed or that I intended to reward you, but we would not say that you had, in fact, been rewarded. And we would not say this precisely because you had not been benefited. Since it seems reasonable to presume that reward and punishment are symmetrical in this respect, this provides support for the claim that the offender who is not actually harmed by the treatment he or she receives is not actually punished by it.

The second reason to believe that without real harm there is no real punishment arises from cases in which we believe that no harm is done because of some particular fact about the treatment itself. When a stay in a minimum-security prison for white-collar criminals seems to resemble nothing more than an all-expenses-paid vacation at a comfortable resort, for example, people do not consider the offender to have been punished and they complain about his being treated so leniently for precisely this reason.[8] Our intuitive response to punishments that seem clearly nonharmful and to attempts to reward that clearly do not benefit both vindicate the claim that the harm requirement is a core component of our concept of punishment. And so, the apparent counterexamples to the harm requirement, in which it seems that a person is punished but is not harmed, in the end do not undermine the harm requirement but once again reinforce it.

I think that these considerations suffice to defend the harm requirement from what might be called the "masochist objection," but there is one more concern that might be raised at this point. For if we agree that the masochist who is not harmed by his whipping is not punished by it either, it can seem that we must therefore conclude that whipping is not a form of punishment after all. And that result can seem sufficiently counterintuitive to force us back to the conclusion that the masochist really is being punished and that punishment therefore really does not require harm. This worry about my rejection of the masochist objection is understandable, but it is ultimately misguided. The reason is that there is a crucial difference between saying that a particular person has been subjected to a form of treatment that is a form of punishment and saying that this person has, in fact, been punished. And even if it is possible that some people are not harmed by being subjected to forms of treatments that are uncontroversially characterized as forms of punishments, this does not mean that we must say that such people are actually punished by such treatments.

Since this response to the objection may at first seem puzzling, an analogy may be of use. Consider a doctor who administers a sedative to a patient. An essential property of a sedative is that it makes people sleepy. But just as there are some people who may be delighted by some forms of punishment, there may be some people who are stimulated by some forms of sedatives. If the doctor gives such a drug to such a patient, then what she gives the patient might still be properly characterized as a sedative because of its general properties, but this does not mean that in giving the sedative to this particular patient she actually sedates the patient. Similarly, if the state inflicts a form of corporal punishment on someone who is not harmed by it, then while it may be proper to continue to refer to this treatment as a form of punishment (since it is a form of treatment that does, in general, harm people), this does not mean that in administering it to this particular offender the state will in fact be punishing him. It will, at most, be attempting to punish him.[9]

The Community Service Objection

A final objection to the harm requirement also turns on the claim that it is subject to refutation by counterexample. While the masochist objection focuses on anomalous people who seem not to be harmed by

treatments that would harm most of us, this objection focuses on a somewhat anomalous punishment that seems not to harm most people. In particular, the objection maintains that while the harm requirement may be consistent with several of the most commonly recognized forms of punishment, it fails to account for cases of a less standard but still uncontroversially punitive treatment: cases in which an offender is sentenced to perform community service.[10] Adler, in particular, has argued that, at least for offenders who want to accept their punishment because they believe they will benefit from it in the long run, mandatory community service is a genuine form of punishment but is not harmful in any significant way to the offender (1991: 91–2). Adler points out that community service can include many behaviors that are not undesirable or unpleasant, such as coaching a sports team or working with handicapped people, and cites a study showing that many offenders continue to volunteer for such projects after their sentences have been completed. If mandatory community service can be both punitive and nonharmful, then the harm requirement must again be rejected.

But it is the community service objection itself that must be rejected. This objection to the harm requirement fails to take into account the difference between, say, coaching a soccer team made up of disadvantaged children and being *compelled* to coach such a team.[11] If I have always wanted to coach such a team and you give me the opportunity to do so, then you benefit me. If I would prefer to do something else and you coerce me into coaching the team, then you harm me even if I end up enjoying myself and want to continue coaching the team after my sentence has been served. An offender who is forced to do something she would otherwise not do is thereby harmed; for this reason, such offenders fail to serve as counterexamples to the harm requirement. If an offender who has always wanted to coach such a team is required to do so, then it may well be true that he is not harmed. But for the reasons given in the previous section, it would also seem right to conclude that he is not thereby punished.

Intentional Harm

I have argued thus far in defense of the harm requirement. If subjecting a particular offender to a particular treatment does not harm her, then even if the treatment is, in general, a form of punishment, she has not been pundished. The harm requirement accurately captures part of what is distinctive about punishment. It helps, for example, to distinguish correctly cases of punishment from cases of reward. But the harm requirement alone is not enough. For there are practices that involve inflicting the same kinds of harm that are inflicted in cases of punishment but that are clearly not cases of punishment. Consider, for example, the following two pairs of cases:

1. Larry marries Laverne and is charged a fee for processing his marriage license.
2. Moe marries both Betty and Veronica and is charged a fine for violating antipolygamy laws.
3. Curly is found not guilty of murder by reason of insanity and is confined against his will for the rest of his life.
4. Shemp is found guilty of murder and is confined against his will for the rest of his life.

In all four cases, a person does an action and is then harmed by the state as a result. Furthermore, the kind of harm that is incurred in (1) is the same as the kind incurred in (2), and the kind incurred in (3) is the same as the kind incurred in (4). But while (2) and (4) are clearly cases of punishment, (1) and (3) are clearly not.

Several considerations are required to account fully for the difference between (2) and (4), on the one hand, and (1) and (3), on the other. For the purposes of this section, however, we can focus on one feature: that which arises from the distinction between intentionally causing a harmful effect and foreseeably causing a harmful effect. Consider a patient who has been diagnosed with cancer and encouraged to undergo chemotherapy. She is told that the chemotherapy will have two effects: it will kill the cancer cells and it will cause hair loss. When this patient agrees to the procedure, she does so with the intention of killing the cancer cells. She foresees that this will also cause hair loss, but this is not her intention. This can be cashed out in counterfactual terms. If the chemotherapy would kill the cancer cells but not cause hair loss, she would still undergo it. If it would cause hair loss but not kill the cancer cells, she would not. Because of these facts, we can say that she intends to kill the cancer cells but merely foresees that she will loss her hair.

This same distinction can be applied to the question of the role that inflicting harm plays in the institution of punishment. When a person is found not guilty of murder by reason of insanity, the state may determine that to protect the public, he must be locked up in a mental institution. In doing so, the state recognizes that its action will seriously harm the person,[12] but harming him is not its intention. Its intention is merely to protect the public, and it would lock him up even if this did not harm him. Similarly, when the state charges a fee for processing a marriage license, it understands that the cost imposes a harm on those getting married, but this is not its intention. Its intention is merely to recover the costs involved in processing the relevant paperwork, and it would charge the same fee even if, for some reason, couples getting married benefited from paying it.[13] When the state punishes someone, on the other hand, it inflicts various harmful treatments on him *in order* to harm him. It is not merely that in sentencing a prisoner to hard labor, for example, we foresee that he will suffer. Rather, a prisoner who is sentenced to hard labor is sentenced to hard labor *so that* he will suffer, and if a given form of labor turned out to be too pleasant and enjoyable, he would be sentenced to some other form of labor for precisely that reason. As Benn puts it, the "unpleasantness" of punishment is not merely an incidental byproduct or side effect of it, but rather is "essential" to punishment (1967: 8).[14]

This is not to insist, it is important to emphasize, that the offender's Suffering must be intended for its own sake. That would reduce punishment to sadism. Rather, it is to maintain that the punisher intends to harm the recipient of the punishment and does not merely foresee it, even if this harm is, in turn, intended for the sake of some further end. When a parent punishes her child in a nonlegal context by spanking him, for example, the pain inflicted on the child is not simply a foreseen side effect of the spanking, as it might be in the case of the pain caused by removing a splinter. If the splinter came out painlessly, the parent would not reinsert it in order to pull it out again in a more painful manner, but if the first spank was too mild to cause any pain, the parent would spank again, and harder. But while the parent who spanks her child thus clearly intends the pain that she causes and does not merely foresee it, she causes the pain not as an end in itself, but rather for the sake of some further end, such as educating the child or deterring him from committing similar infractions in the futures.[15] It might at first seem odd to think that whether or not an act is an act of punishment could depend on facts about the intentional states of the punisher, but on reflection it should seem clear that this must be so. If you see an adult hitting a child, for example, you cannot know if the adult is disciplining the child or simply attacking the child without knowing the reason. If you see a uniformed official forcing a laborer to lift a heavy rock, you cannot know whether what you see is a prisoner being punished or a slave being exploited without knowing why the laborer is being forced to lift the rock.[16] And so, if you see an offender being subjected to a harmful treatment, you cannot know whether or not he is being punished without knowing why the offender is being so treated.[17]

As a result of these considerations, we must accept what I will call the "intending harm requirement": for an act to be a punishment, it must be done with the intent of harming the person being punished. Accepting this requirement is necessary to illuminate fully the difference between punishment, on the one hand, and such practices as charging user fees and requiring pretrial detention, on the other. Many examples can be used to support this basic point. Governments quarantine some of their citizens; call some of them for jury duty; conscript some of them into the military; subject some of them to curfews, taxation, and zoning regulations; build new highways or airports that adversely affect the quality of life of some of them; and so on. In all of these instances, and many more, the state acts in the full understanding that the act will harm some of its citizens. Clearly, though, none of these cases involves the state's punishing some its citizens. And part of what explains this is that the harm in these cases is foreseen but not intended.[18] The intending harm requirement, therefore, is needed to produce a fully illuminating definition of punishment.

The intending harm requirement is useful in other ways as well. First, it helps us to see more clearly not just what makes punishment distinctive, but what, makes it distinctively problematic. For the difference between intending and foreseeing is not just useful in understanding what punishment is. It is also morally relevant in determining whether or not it is justified. Consider, to take a common example, a pair of cases involving a bomber who, during a justified war, drops a bomb on an enemy ammunitions plant surrounded by civilian housing. In the first case, the bomber drops the bomb in order to destroy the ammunitions plant, thinking that this will induce the enemy to surrender, while foreseeing that as a regrettable consequence of

his act, some innocent civilians will be killed. In the second case, the bomber drops the bomb precisely to use the ammunitions plant as a means to kill innocent civilians, thinking that this will induce the enemy to surrender. Even though both bombers do the same act, with the same result, and with the same ultimate goal of inducing the enemy to surrender, it seems clear that what the second bomber does is worse than what the first bomber does. And it seems equally clear that this is so because the second bomber intentionally harms the civilians to achieve his purpose, while the first does not. Yet, as I have noted, intentional harm is precisely what the state inflicts in the case of legal punishment. It is one thing to justify the claim that it is morally permissible for the state to art in various ways while foreseeing that so acting will cause some of its citizens to suffer (e.g., changing the speed limit, modifying air pollution standards, imposing new regulations, raising taxes, or conscripting soldiers, all of which foreseeably cause harm to a significant number of people). It is quite another to justify the claim that it is morally permissible for the state to act in various ways *in order that* some of its citizens will suffer. Yet, this is precisely what must be justified in order to justify punishment. The intentional harm requirement, then, helps to illuminate more clearly what makes punishment distinctively problematic.

Finally, accepting the intentional harm requirement permits the discussion of the permissibility of punishment to proceed even if part of my earlier discussion of the nature of punishment is rejected. [Earlier] I responded to the masochist objection by maintaining that if a person is not harmed by a given act, then he is not punished by it either. But let us now suppose that I have been mistaken. For the purposes of the arguments to be developed in this book, this particular mistake can be ignored. For there is a final response that many people have offered to the various purported counterexamples to the harm requirement considered in the previous sections: we can say that even if, for example, the masochist is not harmed by the whipping he receives, the whipping is a punishment because it is done with the *intention* of harming him.[19] This response does not, strictly speaking, rescue the harm requirement from its critics. Rather, it replaces the harm requirement with the intentional harm requirement. For the reasons given in the previous section, I do not believe that this substitution is necessary. But since many readers may disagree with this assessment, and since I believe that the problem with punishment can be treated just as effectively if the substitution is accepted, I will go ahead and accept it, at least for the sake of the argument. The moral problem of punishment, after all, remains just as vivid even if this emendation in the definition is accepted: it is just as difficult to justify the state's acting with the intent of harming some of its citizens, regardless of whether or not it succeeds in harming them.

Intentional Retributive Harm

So punishment involves, at the least, intentional harm. But it also involves more than this. If I punch you in the nose to make you suffer, then I harm you, and do so intentionally, but I do not punish you. This is because I am not harming you in response to some transgression of yours. So, an additional requirement is this: to be a punishment, an act must involve intentionally harming someone *because* he previously did a prohibited act. And since we are concerned in this book with legal punishment in particular, we can be more specific: to be a legal punishment, an act must involve intentionally harming someone because he previously did a legally prohibited act, which means that he is responsible for having done the act and that he had no valid legal excuse for doing so.[20] Call this the "retributive requirement.[21] The retributive requirement is needed to distinguish cases of punishment from cases of mere gratuitous injury. It therefore seems plainly well motivated. Is there any reason to reject it.[22]

The Mistaken Verdict Objection

One reason to reject the retributive requirement might seem to arise from the following simple fact: sometimes innocent people are mistakenly convicted of offenses they did not commit and serve sentences for those offenses. It thus seems clear that sometimes innocent people are punished. Yet, if the retributive requirement is correct, there can be no such thing as punishment of the innocent, since by definition punishment involves punishing someone for an offense she actually committed. Since there seem plainly to be cases in which the innocent are punished, and since the retributive requirement seems unable to account for this fact, it seems plain that the retributive requirement must be rejected.[23]

This reasoning, however, is misleading. This can perhaps be most clearly seen by again appealing to the structural symmetry between punishment and

reward. Suppose that I have lost my beloved dog and have offered a $500 reward for her safe return. As you walk into my front yard for a visit one afternoon, she comes bounding up the steps, and I mistakenly conclude that you have found and returned her. So, I give you the $500. Clearly, what you have received from me is a benefit, and you have received it from me for just this reason. So, it is clearly true that you have been intentionally benefited by me. But even though this is true, it is not true that you have been rewarded by me, any more than it would be true that you have been repaid by me if I had given you the money under the mistaken impression that I had borrowed it from you last week and now owed it to you. I may believe that I am rewarding you for something, I may intend the money to be a reward, but in fact what I am giving you is not a reward. And it is not a reward (or a repayment) precisely because you have done nothing to be rewarded (or repaid) for. The same is therefore true in the case of punishment. If you are mistakenly convicted of an offense you did not commit, then the judge may believe that she is punishing you and may throw you in jail with this intention, but the harm she imposes on you cannot, strictly speaking, be a punishment. An innocent person can suffer the harms caused by a particular punishment but cannot, strictly speaking, be punished. As Quinton, among others, has recognized, "The infliction of suffering on a person is only properly described as punishment if that person is guilty" (1954: 59).[24]

The claim that an innocent person cannot, strictly speaking, be punished seems to be correct. Indeed, it seems to be as clearly correct, and for the same basic reason, as is the claim that a person who has not loaned money to someone cannot, strictly speaking, be repaid. And if the claim is correct, then the mistaken verdict objection to the retributive requirement must clearly be rejected. But it is important to emphasize that the retributive requirement can be construed in a slightly different way so that it retains its basic force even if the objection is sustained.[25] [Earlier] I noted that the intentional harm requirement can be construed in two different ways: as the requirement that an act cause harm and that the harm be caused intentionally, or as the requirement that an act be intended to cause harm, regardless of whether it does so. And although I maintained that the former, stronger version of the requirement should be accepted, I noted that even in the latter, weaker version, it was sufficient to generate the problem of punishment, and so stipulated that I would accept the weaker version at least for the sake of the argument. The same can be done here with the retributive requirement. On a strong reading, the requirement is that to be a punishment, an act must be retributive. This would require punishment to involve harm that is both retributive and intentional. On a weak reading, the requirement is that to be a punishment, an act must be *intended* as retributive even if it turns out not to be because the recipient of the treatment is innocent. This would require punishment to be intentional retributive harm rather than retributive intentional harm. As for the harm requirement, I believe that the retributive requirement should be accepted in its strong version. But, again as for the harm requirement, I believe that the weak version is sufficient to generate the problem of punishment. It is difficult enough to justify the claim that it is morally permissible for the state to act with the intention of harming someone because he is believed to have broken the law. It doesn't matter whether or not the person believed to have broken the law did, in fact, do so.

The Consequentialist Objection

A second objection to the retributive requirement, so understood, maintains that it violates the neutrality condition that any reasonable definition of punishment must satisfy. The objection runs as follows. Some attempted justifications for the practice of punishment are essentially "backward-looking" in nature. The considerations they appeal to as a justification for punishment lie in facts about what was true prior to the time that the punishment is imposed. On one retributivist account, for example, punishing an offender now is justified because the offender deserves to be punished, and the offender deserves to be punished because, in the past, the offender committed a wrongful act. So, a retributivist of this sort would have no objection to the stipulation that to count as a punishment, the act must be done because the recipient of the punishment acted in a certain way in the past. But other attempted justifications for punishment are essentially "forward-looking" in nature. On a typical consequentialist account of punishment, for example, punishing an offender now is justified because it will deter the offender and others like her from committing such infractions in the future. A defender of such a theory might therefore object to the claim that to count as a punishment, the act must be done because of the offender's past behavior. Rather, on this account, it must be done because of future benefits

that will accrue from doing it. And so, according to this consequentialist objection, the retributivist requirement makes the definition of punishment beg the question against consequentialist theories. This means that any definition that incorporates the requirement will fail the neutrality test and will therefore be unacceptable.[26]

This consequentialist objection to the retributive requirement fails because it neglects the distinction between the nature of punishment and the justification of punishment.[27] Consider again the concept of "repayment." Essential to its nature is that repayment involves paying someone back for a previously bestowed benefit. If I give you ten dollars and you have never provided me with any good or service, then my giving you the ten dollars cannot count as an act of repaying you. This is a claim about the nature of repayment. This claim, however, is completely neutral on the question of what, if anything, justifies the claim that repayment is a morally commendable way to behave. In particular, it is neutral about whether the practice is justified on backward-looking grounds (e.g., "because he is owed the money") or on forward-looking grounds (e.g., "because repaying people generates trust, which creates future benefits to society"). And the same is true of punishment. Legal punishment involves drawing a line on the basis of essentially backward-looking features—the line between those who have (or are believed to have) committed a legal offense in the past and those who have (or are believed to have) not—and then treating that line as morally relevant in determining how such people may permissibly be treated in the present. The claim that this is an essential feature of legal punishment, however, is neutral on the question of what, if anything, renders legal punishment morally permissible. And it is neutral on this further question precisely because it is neutral on the question of what, if anything, makes the line that it draws morally relevant. It is consistent with the retributivist view that the line is morally relevant because it separates those who deserve to suffer from those who do not, for example, but it is equally consistent with the consequentialist view that the line is morally relevant because of the good consequences that follow from drawing it there. Including the retributive requirement in our definition of punishment is therefore dictated by considerations of accuracy and illumination and is not overturned by considerations of neutrality.

Reprobative Retributive Intentional Harm

The result of the discussion to this point is that punishment involves acting with the intention of harming someone because she has (or is at least believed to have) committed an offense. These requirements are needed to distinguish accurately between cases of punishment and various cases that do not involve punishment. They do so in a manner that helps to illuminate what is distinctive about punishment. And they do so in a manner that is neutral on the question of whether or not punishment is justified and, if it is, on what grounds it is justified. There are two reasons, however, to hold that we are still short of an adequate definition. The first is that there are other differences between some of the pairs of cases previously discussed that these requirements fail to illuminate. The second is that there are other pairs of cases, not yet discussed, that these requirements fail to distinguish accurately. A definition based solely upon the requirements of harm, intention, and retribution, therefore, is still insufficiently illuminating and accurate.

To begin with the first consideration, let us return to the case of paying a fee when you voluntarily marry to one person versus paying a fine when you voluntarily marry more than one person at the same time. A fine is clearly a punishment, while a fee is clearly not. Part of the difference between a fine and a fee is illuminated by attending to the distinction between intending harm and merely foreseeably bringing it about, and part of it is illuminated by appealing to the fact that a fee is charged for doing a legal act, while a fine is charged for doing an illegal one. But focusing exclusively on these two differences threatens to obscure a further relevant difference between the cases. When the state charges you a fee to process your wedding license, it is in no way expressing disapproval of your decision to get married. But when the state imposes a fine on you for violating antipolygamy laws, part of what it is doing is expressing its disapproval of your behavior. And the same is true of the other cases that in part helped to motivate the intentional harm requirement. When we imprison someone because he committed an offense, for example, we are in part admonishing him for his behavior. When we quarantine someone because she has contracted a highly contagious disease, on the other hand, we impose a similar kind of harm on her, but in no way do we mean to express disapproval of her.

These considerations demonstrate that a fully illuminating definition of punishment must include a further requirement: to count as a punishment for an offense, the act must express official disapproval of the offender. As Duff and Garland put it, punishment "involves an essential element of condemnation" (1994: 13).[28] Call this the "reprobative requirement."

The second reason for accepting the reprobative requirement arises from consideration of a further case. If a definition of punishment limited to considerations of harm, intention, and retribution is insufficiently precise, then there will be cases in which an offender is harmed intentionally and because he committed a legally prohibited act but that are still not cases of punishment. I believe that there can be such cases and that, even though they are more contrived than those discussed to this point, they provide further valuable support for the reprobative requirement.

So, consider first the fact that there seem to be contexts in which the deliberate infliction of pain is meant to convey approval rather than disapproval. There is, for example, the practice of hazing within fraternities, as well as painful initiation rites within gangs and other clubs and organizations. As part of such a practice, the authorized leader of a group might deliberately inflict painful treatment on a new member, say by branding him with a hot iron, and the painfulness of the treatment might well be intentional and not merely foreseen. That is, if the treatment didn't cause pain to the recipient, then it would not fulfill its function as a rite of initiation (the iron, for example, would have to be made hotter if it didn't hurt the first time). But at least in the sort of case I am concerned with here, the message conveyed by the harsh treatment would be one of approval rather than disapproval. This is how it is understood by the person who inflicts the pain, by the person on whom the pain is inflicted, and by the other members of the relevant group. Now consider the case of a gang that requires potential new members to break the law—say, by stealing a car—in order to be eligible for initiation. In this case, the leader of the gang who brands the new member with a hot iron after the new member steals a car deliberately inflicts painful treatment on the new member precisely because he broke the law. Clearly, this is not a case of the new member being punished for his offense. But, just as clearly, this assessment cannot be justified without adding the reprobative requirement to the definition of punishment.

The need for the reprobative requirement is perhaps less immediately apparent than the need for some of the other elements of our definition. But once the need becomes apparent, it is difficult to imagine a convincing objection to it. One might, at first, be tempted to object that the requirement begs the question in favor of one particular justification of punishment: that punishment is justified as a means of expressing or communicating society's disapproval of the offender's act. But, like the consequentialist objection to the retributive requirement considered in Section 1.1.5.2, this objection confuses the question of what punishment is with the question of what makes punishment permissible. The reprobative requirement maintains that part of what makes an act a punishment is that it expresses official disapproval of the offender's behavior. But this requirement is entirely neutral on the question of whether or not this feature of punishment, or any other feature of it, renders it morally permissible.[29]

Authorized Reprobative Retributive Intentional Harm

The discussion to this point has focused on how punishment affects the person punished and on what reasons are given for it. The question of who is doing the punishing has been passed over. Does this question matter? If we were looking for a definition of punishment in general, this question would potentially become somewhat complicated. Some philosophers have argued that if acts of the sort that I have described are carried out by private citizens, then they cannot qualify as punishment for that very reason, but only as something like vigilante justice. Primoratz, for example, has argued that "by definition, punishment is determined and executed by those *authorized* to do so" [(1989: 84); see also Benn)]. Others, however, have argued that such acts should still be construed as punishment, though perhaps as unauthorized and impermissible punishment. Still others have puzzled over the question of whether or not a person can punish himself or whether a wrongful act can, in effect, be its own punishment.[30] For our purposes, however, we can sidestep these particular problems. This book is concerned with the permissibility of legal punishment, and where I have used the term "punishment," it has been as shorthand for "legal punishment." And whatever we might think about the coherence or existence of other forms of punishment, it is clear that a punishment cannot be a legal punishment, in particular, unless it is carried out by an authorized agent of the state acting in his or her official capacity.[31] Call this the "authorization requirement."

The case for the authorization requirement, understood as a necessary condition for legal punishment, is overwhelming. In the absence of such authorization, there is no reason to think of an act as a legal punishment, even if there is reason to think of it as a punishment of some sort. The only objection to the requirement that I am aware of maintains that it begs the question in favor of the moral permissibility of punishment and thus violates the neutrality condition established as one of the conditions for an acceptable definition. But this objection rests on the assumption that if an act is legally authorized, then it is morally permissible. And this assumption is plainly false. The authorization requirement is therefore consistent with definitional neutrality.

It is possible, of course, that still further restrictions are needed. However, I am not aware of any considerations that would justify them.[32] At this point, then, our definitional work would seem to be complete. The results can be put more formally in terms of a stronger and a weaker set of conditions. On the stronger version, *P*'s act *a* is a legal punishment of *Q* for offense *o* if and only if

(1) *P* is a legally authorized official acting in his or her official capacity and

(2) *P* does *a* because *P* *correctly* believes that *Q* has committed *o* and

(3) *P* does *a* with the intent of harming *Q* and

(4) *P*'s doing *a does in fact* harm *Q* and

(5) *P*'s doing of *a* expresses official disapproval of *Q* for having committed *o*.

On the weaker version, *P*'s act *a* is a legal punishment of *Q* for offense *o* if and only if

(1) *P* is a legally authorized official acting in his or her official capacity and

(2) *P* does *a* because *P* believes (perhaps mistakenly) that *Q* has com-mitted *o* and

(3) *P* does *a* with the intent of harming *Q* (even if *P* fails to actually harm *Q*) and

(4) *P*'s doing of *a* expresses official disapproval of *Q* for having committed *o*.

I have argued for the cogency of the stronger version of the definition. If the recipient of the treatment in question is not guilty of an offense or is not harmed by the treatment, then I have maintained that he is not punished by it. For the purposes of this book, however, the differences between toe weaker and stronger versions need not detain us, as long as the reader accepts one version or the other. As long as one agrees that attempting to punish people involves intending to select those who break the law and to harm them for doing so, the problem of punishment will arise with sufficient force When, in the final analysis, we agree that legal punishment is authorized intentional reprobative retributive harm, therefore, I will mean that we atleast accept the weaker version of the definition we have finally arrived at.

Allowing that punishment may be construed in terms of treatment aimed at those the state *believes* to have broken the law, however raises one final problem that must briefly be addressed. For without two further restrictions, such a definition will include two problem cases that many defenders of punishment will not wish to defend. Since we want an account of legal punishment that will not beg the question against its permissibility, we must restrict the weaker version of the definition still farther to prevent this from happening. First, there can be cases in which even though *P* believes that *Q* committed *o*, *P*'s belief is not reasonable. Suppose, for example, that a judge concludes that a defendant is guilty simply because the defendant is black. In this case, the judge might then send the defendant to prison because he believes that the defendant broke the law, and the weak version of the definition as it currently stands would include this as a legal punishment. But since it would not be fair to insist that a defense of legal punishment include a defense of acts such as that committed by the judge in this case, it would not be fair to include such acts within the scope of our final definition. Second, there can be cases in which even though *P*'s belief in *Q*'s guilt is reasonable, the evidence used in arriving at the belief is obtained at in morally objectionable ways. Suppose, for example, that a defendant really did commit a particular offense, but that the state proved its case by beating witnesses, breaking into people's houses and offices, depriving the defendant of the right to speak to an attorney, and so on. Since it would again be unfair to insist that a satisfactory defense of legal punishment include a defense of punishing a defendant in such circumstances, it would again be unfair to include such acts within the scope of our definition. When the definition of punishment as authorized intentional reprobative retributive harm is understood in the weaker sense, therefore, its second clause must be amended to refer only to cases in

which P justly and reasonably believes that Q, committed o.

Punishment versus Restitution

I have argued that legal punishment should be defined as authorized intentional reprobative retributive harm. In arguing for this definition, I have claimed that it does the best job of accurately distinguishing between cases of punishment and other cases, and that it does so in an illuminating and neutral manner. In developing this argument, I have used examples of practices other than punishment, including curfews quarantines, pretrial detention, gratuitous infliction of harm, and so forth. I have, however, deliberately refrained from appealing to one further case: compulsory victim restitution. I have done this precisely so that: the definition of punishment arrived at will not have been influenced ahead of time by preconceptions about the relationship between punishment and restitution. Having arrived at a satisfactory definition of punishment, however, we must now ask: given this definition, what should we say about the practice of compelling an offender to make restitution?

Let us begin with an example. Larry vandalizes Moe's car by painting obscene words on it and breaking the windshield. Larry is caught and found guilty. The judge orders Larry to compensate Moe for the harm he has caused. She forces Larry to remove the spray paint from Moe's car, to pay the costs of replacing the windshield, to pay the costs involved in Moe's renting a car while his is in the shop, and to compensate him for the inconvenience and emotional distress Larry caused him. This seems clearly to be a case of compulsory victim restitution. Is it also a form of punishment?

Clearly, the act satisfies the authorization requirement. The judge is a legally authorized official acting in her official capacity. Clearly, it satisfies the retributive requirement. She orders Larry to do these things because Larry vandalized Moe's car. It seems equally clear that the judge's act satisfies the reprobative requirement. The act at the very least, expresses the view that Moe is entitled to have his car returned to its original condition, which means that Larry was not entitled to damage it, which in turn means that Larry did something that he was not entitled to do. And finally, it seems clear that the judge's act harms Larry. Larry is made worse off by having to give Moe some of his money and spending some of his time cleaning up Moe's car. In all of these respects, the judge's act of forcing Larry to make restitution to Moe satisfies the definition of punishment we have arrived at. Indeed, for some theorists, these similarities between punishment and restitution seem to be sufficient to conclude that restitution is a form of punishment.[33]

But this conclusion is premature. For one further question remains: in imposing this burden on Larry, does the judge act with the intention of harming Larry? As we saw [earlier], distinguishing between harm and intentional harm is necessary in order to account fully for the difference between, for example, fees and fines. If the answer to this question is yes, then restitution is more like a fine than a fee and is a punishment. If the answer is no, then restitution is more like a fee than a fine and is not a punishment.[34]

The answer to the question is this: there is no one answer that covers every case in which a judge compels an offender to make restitution to his or her victim. In some cases, the judge's intent may be to impose a cost on the offender. She may say, for example, that she wants Larry to suffer the drudgery involved in cleaning the paint off Moe's car so that Larry will come to see how wrong his act was. In this case, part of the judge's motivation for imposing the cost on Larry is, indeed, punitive. Following Barnett, we can refer to cases of this sort as cases of "punitive restitution" (1977: 219–20). But this need not be true of all cases. In some cases, the judge's reasoning may be that Larry must pay the money because he owes it to Moe. In this case, the judge foresees that paying Moe will impose a cost on Larry in the same way that she might foresee that enforcing the terms of a contract will impose costs on one of the parties to the contract, but this fact plays no role in her decision. Following Barnett, we can refer to cases of this sort as cases of "pure restitution" (1977: 220). An argument against the moral permissibility of punishment, therefore, will also provide an argument against punitive restitution. But it will provide no reason to reject pure restitution.[35] And this fact will become important toward the end of our investigation.

Endnotes

[1]Unless otherwise noted, when I say "punishment" in this book, I mean "legal punishment."

[2]See Section 4.4.5.

[3]The claim that a good definition must accurately capture actual usage of the term 'punishment' does not mean that in order to use such a definition, a defender of the permissibility of punishment must defend the permissibility of all forms of punishment. It means that a defender of punishment must acknowledge that capital punishment and corporal punishment are forms of punishment, for example, but it does not mean that he or she must insist that they are morally permissible.

[4]That punishment involves treatment that is, by some measure, of negative value for its recipient is accepted by virtually every philosopher who has written on the subject, including such historical figures as Plato, Aristotle, Aquinas, Hobbes, Locke, Kant, and Hegel, as well as more recent writers such as Flew, Benn, Hart, McCloskey, Honderich, and Primoratz [for citations, see Adler (1991: 285-6)].

[5]See, e.g., Newman, who insists that "Punishment must, above all else, be painful" (1983: 6), and Corlett (2001: 68).

[6]It is possible, of course, that a proponent of the objection might insist that the benefits of submitting to punishment are immediate rather than delayed. But if the recipient of a given treatment is benefited at the moment that the treatment begins, it is not clear what reason we would have for considering it to be a punishment in the first place. If a pleasant caress on the child's back benefits him immediately and also somehow teaches him that it is wrong to hit other children, for example, then it may well serve the same purpose as a spanking for educative purposes, but it would clearly fail to count as punishment and so would again fail to provide a counterexample to the harm requirement.

[7]This problem is raised by, e.g., Kasachkoff (1973: 364–5) and Snook (1983: 131).

[8]When it was reported that the son of former vice presidential nominee Geraldine Ferraro was serving his sentence for a drug conviction in a $1,500-a-month luxury apartment, for example, the public outcry over the case prompted the governor of Vermont to discontinue the house arrest option for drug offenders [Tunick (1992: 3)].

[9]And in at least some cases, it will not even be clear that it should be considered an attempt at punishment, let alone a successful attempt. After his lawyer reached a plea bargain agreement with Oklahoma City prosecutors for a thirty-year prison sentence for two charges of shooting with intent to kill and one weapons violation, for example, Eric James Torpy insisted that he would rather get thirty three years to match the uniform number of his basketball hero, Larry Bird. The judge in the case was quoted as saying that "We accommodated his request and he was just as happy as he could be" ("Man Asks for More Jail Time to Honor Bird" 2005). Although three extra years in prison would generally be considered a form of (additional) punishment, it is difficult to believe that the judge thought he was punishing Torpy further by giving him the extra three years that would make him happy, let alone that doing so did, in fact, punish him.

[10]The case of an offender who is sentenced to probation might also be raised as a possible counterexample to the harm requirement. Probation is a relatively common sentence and, at least in typical cases, if the offender does not violate any of the terms of his probation, he will not suffer any harmful consequences as a result of his offense. But being subject to these requirements seems plausibly to count as a harm in itself (being deprived of the liberty to drink alcohol, to visit certain people or certain areas, and so on), and if one views the terms of probation as in no way harmful, it seems likely that one will, for that very reason, view a sentence of probation as something like a suspended sentence: not as a form of punishment but as an alternative to it. On either account, then, it seems implausible to construe probation as a genuine counterexample to the harm requirement.

[11]In a different context, Hampton notes that in the case of mandatory public service, "what makes any experience the suffering of punishment is not the objective painfulness of the experience, but the fact that it is one the wrongdoer is *made*, to suffer and one which represents his *submission* to the punisher" (1988c: 126). Duff also notes this weakness of the community service objection in his review of Adler's book (1993: 181).

[12]In some cases of this sort, of course, the state might determine that the person in question is also a threat to himself. In these cases, the person might be helped rather than harmed by being involuntarily confined. For purposes of this example, however, we can simply stipulate that we are talking about cases in which the person is clearly able to take care of himself, but poses an unacceptable risk to others.

[13]Regulations that require people to compensate the government for the costs their actions impose on it are widespread and are clearly understood to be nonpunitive. A rule approved by the Boulder County Board of Commissioners in Colorado in 2005, for example, requires that organizers of public protests that take place on public land pay the county to cover the costs of cleaning up after the event, and it is uncontroversial that this measure does not amount to punishing people for exercising their right to freedom of assembly (Miller 2005: 3A).

[14]Since the claim that punishment involves not merely harm but intentional harm is crucial to much of the argumentation in this book, it may be worth noting that the claim that the negative consequence for the offender is brought about intentionally is almost universally accepted in the literature on punishment. An extremely small sample of those who explicitly endorse it, selected more or less randomly from the literature I have examined in preparing this book, includes Ducasse (1968a: 9; 1968b: 34–5), Kasachkoff (1973: 367), Bean (1981: 2), Primorac [sic] (1981: 205), Burgh

(1982:193), Sverdlik (1988: 190, 198), Stephenson (1990: 229), Nino (1991: 258), Fatic (1995: 197), Wright (1996: 27), Clark (1997: 25), Scheid (1997: 441), Corlett (2001: 68), Gert, Radzik, and Hand (2004: 79), and Golash (2005: 1, 45).

[15]That the parent intends the harm only as a means and not as an end, it may be worth pointing out, does not undermine the counterfactual analysis of intentions presented here. A critic might point out that there is a counterfactual situation in which the parent would not harm the child: if the parent could achieve her ultimate end of educating or deterring the child without harming him, after all, surely she would. But this fact does not pose a problem for the claim that there is an important difference between the spanking case and the splinter-removing case. What matters is that in the spanking case but not in the splinter case, the parent has, in fact, chosen to use pain as a means to achieve her end, even if, in both cases, she would prefer not to.

[16]For a particularly poignant illustration of this phenomenon, see the nuanced discussion of the Soviet gulag system in Applebaum (2003). As Applebaum notes, whether or not a particular camp is best understood as a labor camp or a "punishment camp" depends largely on whether the prisoners were forced to work in order to produce needed goods or in order to make them suffer, and it is precisely in those cases in which the point of the suffering was not clear that it is unclear whether the system involved punishment or something else (221).

[17]In some cases, there may be no straightforward answer to this question and thus no straightforward answer to the question of whether the act in question should be construed as punishment. In virtually every state in the U.S., for example, prison inmates are denied the right to vote, and in several states, some or all of them are permanently barred from voting even after they have served their sentences. The justifications for felony disenfranchisement are murky at best, so accepting the intentional harm requirement will render it unclear at best whether this should count as a punishment. Since it seems to me unclear whether or not felony disenfranchisement should be understood as a punishment, this implication of the intentional harm requirement seems to count as a virtue rather than a vice [for a useful critical discussion of the practice, and of various attempts to justify it, see Pettus (2005: esp. chap. 4)].

[18]A further useful example concerns the so-called Megan's law provisions, which authorize states to post photographs of convicted sex offenders and other information about them on the Internet after they have been released from prison. Such provisions have been challenged as an unconstitutional extra punishment on the grounds that it harms them for their offense above and beyond the harm they received from serving their sentences. But in 2003, the U.S. Supreme Court ruled that although such provisions may harm them, they do not punish them, and in doing so it relied precisely on the distinction between foreseeable and intentional harm. As Justice Anthony Kennedy wrote for the majority in the 6–3 decision, "The publicity may cause adverse consequences for the convicted defendants, running from mild personal embarrassment to social ostracism," but the intention of the laws is "to inform the public for its own safety, not to humiliate the offender" (Holland 2003: 7A). Relatedly, the Court ruled that in determining whether or not pretrial detention constitutes a form of punishment, "a court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose" [*Bell v. Wolfish*, quoted by Tunick (1992: 126)].

[19]See, e.g., Kleinig (1973: 24): "while I do not think it to be a necessary characteristic of punishments that they be *experienced as* impositions, I would insist that they be *intended* as impositions." The same view is taken by Newman (1978: 8) and Walker (1993: 1).

[20]Sverdlik, in particular, points out that many definitions of punishment overlook this last requirement (1988: 183). To say that legal punishment is for a "legally prohibited act" need not beg any questions about whether acts of retaliatory warfare might be justified as punishment: even if they do count as punishment, they do not count as legal punishment [for a useful discussion of punitive justifications for acts of war, see Kemp (1996)]. And to say that punishment is for "a" legally prohibited act need not beg any questions about the possible relevance of prior convictions in determining the appropriate amount of punishment in any particular instance. On some views, for example, when a repeat offender is punished more severely for his third offense than he would be for his first, the extra severity of the punishment amounts not to punishing him for the third offense, but rather to punishing him again for his previous offenses; in this case, it would seem that he is being punished in response to more than one prohibited act. But if this analysis is be correct, we can simply construe the punishment itself as a combination of some punishment for one act and some punishment for another. To avoid any possible complications, however, throughout this book I will focus on cases involving first-time offenders. This restriction, moreover, begs no questions against the various attempts to justify punishment. If there is no justification for punishing someone the first time, after all, then there can be no justification for punishing someone the first time and then punishing him even more at a later time [for a useful critical discussion of the possible moral relevance of prior convictions, see Bagaric (2000)].

[21]The retributive requirement is defended by a number of writers, including Flew (1954: 85), Quinton (1954: 58–9) and Schedler (1976).

[22]In addition to the reasons given later, one might object that the requirement makes no mention of a proportionate fit between the punishment and the offense. But this omission is perfectly appropriate. Executing someone for stealing a

candy bar from a store is still a punishment, even if it is clearly an excessive punishment.

[23]This objection has been pressed by a number of writers, including Baier (1955: 130–2), Ewing (1963: 182), Locke (1963: 568–9), Gendin (1967–8: 235), Pratt (1968: 22), Scheid (1990: 456), and Hare (1986: 212). Kasachkoff (1973: 369) presents a closely related problem case: that of a teacher who punishes an entire class for an infraction committed by one unknown student. In this case, however, as in the case where one country takes military action against another in retaliation for an unprovoked attack, it should be clear upon reflection that the innocent students (or civilians) who suffer the consequences are not themselves being punished but rather are incurring the collateral damage produced by the punishment of the true offender. In addition, the classroom example can be rejected by appealing to the symmetry between desert and punishment appealed to in the text subsequent to this footnote: if every student in the class received a benefit in response to the act of one unknown Samaritan among them, it would be clear that the students who received the benefit but did not do the good act were not being rewarded but were simply benefiting from the good act of another.

[24]The same point is also persuasively pressed by Ducasse (1968a: 8; 1968b: 22) and put nicely by Dimock, who says that an innocent person can be "victimized" by the penal system but not "punished" by it (1997: 42).

[25]I am grateful to Jim Nickel for bringing this to my attention.

[26]This objection is sometimes attributed to Quinton (1954: 59) [see, e.g., Lacey (1988: 7)], but it is worth noting that while Quinton does claim that the retributivist thesis is "an account of the meaning of the word 'punishment'" on this basis, it is not at all clear that he takes this to be an objection to the definition itself.

[27]Those who note that these are two different questions include Hart (1968: 263), Primorac [sic] (1981: 207–8), Primoratz (1989b: 188), and Adler (2000: 1414).

[28]Others who emphasize this reprobative element of punishment include Hart (1958:14-15), Charvet (1966: 577), Hawkins (1969: 124–5), Feinberg (1970: 75, 86), Husak (1990: 84ff.), Nino (1991: 260), Von Hirsch (1993: 9), Hill (1997: 196; 1998: 343), and Miller (2003: 33–4).

[29]This point is clearly made by Davis (1991a: 313), though in a slightly different context.

[30]See, e.g., the conflicting positions taken by Winch (1972), Paton (1979), and Reiff (2005: 27–8) on whether the agent's subsequent regret can itself constitute a punishment.

[31]For a useful examination of conceptions of punishment in a variety of nonlegal contexts, see McCloskey (1954).

[32]It might be argued, for example, that a person cannot be punished by an act unless she knows that it is intended as a punishment, but it could equally be maintained that in such cases the person is in fact punished but does not realize it.

[33]Martin, for example, characterizes "compensation, to be paid to victims of crime" as one of the three main "modes of punishment": "[w]hen a violator is *forced* to pay compensation—as a feature of the verdict against him—such compensation counts as punishment" [(1987: 73, 74); for a related argument, see Martin (1990)]. Similarly, Abel and Marsh argue that compulsory victim restitution is a punishment "because it involves unpleasant consequences for an individual who has interfered with our pursuit or realization of individual and social ends" (1984: 18–19). Similar views are endorsed by Baylis (1968a: 45–6), Dagger (1991: 36–7), Hoekema (1991: 336–40) and, at least implicitly, Loewy (2000: 15–16).

[34]Abel and Marsh maintain that restitution is a punishment in part because they deny the intentional harm requirement. They point out that forbidding someone to work in a certain profession can be a form of punishment and that the state can establish licensing requirements "which have the effect (though not the purpose) of denying particular members of affected professions the right to practice their calling." From this, they conclude that "the state may punish, though its intent is to regulate," (1984: 39) and that the intentional harm requirement should therefore be rejected. But it is independently objectionable to hold that licensing requirements are a form of punishment. If they are, after all, then they clearly amount to punishing the innocent and yet are widely viewed as morally permissible. It is therefore much more plausible to conclude that licensing requirements are not a form of punishment than to assume that they are and conclude that punishment need not involve the intent to cause harm to the one punished.

[35]Barnett distinguishes between pure and punitive restitution in, e.g., (1998: 204). If it seems odd that the permissibility of the state's act could turn on the intention of the official who carries out the act on the state's behalf, it should be noted that this would seem to be true regardless of what one thinks of the relationship between punishment and restitution. It could, for example, be permissible for an official to approve the construction of a new airport while foreseeing that it will cause headaches to many people who live near the construction site but be impermissible to approve construction of the airport in order to cause the headaches.