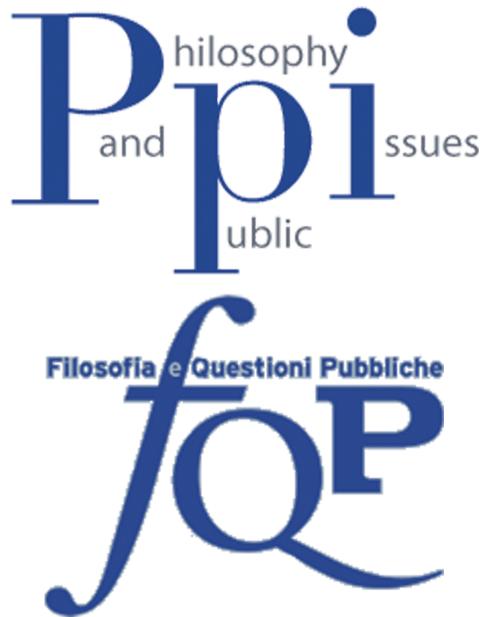


SYMPOSIUM
THE PHILOSOPHY OF PUNISHMENT



HOW NOT TO DEFINE PUNISHMENT

BY

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How not to Define Punishment

Antony Duff

Brooks offers a critical survey of different normative theories of punishment, finding serious problems with them all, and argues that we should adopt ‘the unified theory of punishment’ that he draws from Hegel and the English Idealists.¹ I had intended to focus this paper on ‘the unified theory’, to ask whether it is indeed both genuinely unified and plausible; but I was so taken aback by what Brooks says about the definition of punishment in the early pages of the Introduction that I have focused instead on that. It might seem misguided to devote so much attention to these first few pages: but if one is going to engage in definitional discussion, it is important to get it right.

Much ink, at least some of it wasted, has been spilled on the definition of punishment.² Brooks offers this definition [pp. 1-2]:

- (1) Punishment must be for breaking the law.
- (2) Punishment must be of a person for breaking the law.
- (3) Punishment must be administered and imposed intentionally by an authority with a legal system.
- (4) Punishment must involve a loss.

¹ Thom Brooks, *Punishment* (London: Routledge, 2012); all bare page references in the following text are to this book.

² For what is still a useful discussion, see D E Scheid, ‘Note on Defining ‘Punishment’ (1980) 10 *Canadian Journal of Philosophy* 453.

This definition diverges in some ways from familiar definitions, such as Hart's;³ but Brooks fails to show that the divergences constitute advantages.

I

Punishment within and outside the Criminal Law

The most striking divergence from other definitions is that Brooks reserves 'punishment' for *criminal* punishment—punishments imposed by a legal authority for the commission of what the law defines as a crime.⁴ Other kinds of imposition that we might call 'punishment', 'in our casual everyday talk', should not properly be so called; the reason for this, it seems, is that 'they involve arbitrary executive decisions made by private individuals outside of a legal system'. By contrast, when someone is subjected to criminal punishment she is 'not punished simply because someone else disagreed with her', but 'because of a particular act that she performed' [p. 2]. Now one could indeed argue that, given criminal punishment's distinctive features (the harshness of the sanctions it can involve, its relation to the state and the state's coercive power), a justificatory theory of criminal punishment will need to be different from whatever justificatory theories we might offer of other kinds of punishment—though it may be argued in response that we can find useful connections of meaning between these various practices of punishment; but to

³ As Brooks notes; see H L A Hart, *Punishment and Responsibility* (2nd ed; Oxford: Oxford University Press, 2008), 4-5.

⁴ I leave aside here the question of whether Brooks would reserve 'punishment' for criminal punishment, as imposed by a criminal court for the commission of a criminal offence; or would also allow us to count e.g. 'punitive damages' awarded by a civil court as punishments.

argue that we should not, when we are being ‘precise’ [p. 2], count anything other than criminal punishment as punishment is a more radical claim, which Brooks fails to justify, since the contrast he draws between criminal punishment and extra-legal ‘punishments’ is spurious. He is in good company in focusing on criminal punishment, and might also appeal to Hart’s limitation of ‘the standard or central case of punishment’ to punishment imposed by legal authority for offences ‘against legal rules’;⁵ but not even Hart’s company can render his arguments persuasive.

First, we might agree that what is imposed arbitrarily, for no good or relevant reason, is not punishment: the punisher must at least claim that there is good reason for the imposition, and that reason must involve the punishee’s (alleged) commission of a punishable wrong (I comment later on whether such claims and allegations must be true). However, just the same is true of punishment imposed outside the law. It is true even of the example on which Brooks focuses, that of a parent punishing a child: if what I do to my child is to count as punishment, I must claim that the imposition is justified as a response to some wrong of which the child is guilty—i.e. that there is that good and relevant reason for what I do. It is more obviously true of other kinds of punishment to which Brooks pays less attention. A range of institutions—including schools, universities, religious organisations, many kinds of business, professional associations—operate with codes of ethics or discipline, and with officers or committees who are authorised to impose punishments on those who violate them: what is imposed can count as a punishment only if it is purportedly imposed for the commission of a specified offence, and is imposed by someone with the authority to do so. Parents and disciplinary committees

⁵ Hart, n. 3 above, 5; punishments imposed outside the law are ‘relegate[d] to the position of sub-standard or secondary cases’.

can of course punish arbitrarily: they can define the norms arbitrarily or retrospectively; they can reach decisions about guilt on inadequate or irrelevant grounds; they can impose punishments whose character and severity are arbitrary. But just the same is true of criminal courts, and of the legislatures that make the laws which the courts apply; such arbitrariness is objectionable, for the same kind of reason, in each case.

Second, some punishments outside the criminal law are imposed by ‘private individuals’, as in the case of parents, though even there it matters that the parent can claim the authority (legal and moral) to punish. Others, however, are imposed by the authorised officials of the institution whose code is being applied: when a teacher, or a university discipline committee, punishes a student for some misconduct, they are not acting as ‘private individuals’. We can agree that punishment involves (a claim to) authority—and that authority will often be either defined or at least constrained by the law; but the authority need not be that of a court of law.

Third, criminal punishment is often, perhaps typically, imposed ‘because of a particular act that [the punishee] performed’, and not ‘simply because someone else disagreed with her’ (nor even just because the court disagreed with her, unless the disagreement was about, for instance, whether she had a legally cognizable justification for her admitted commission of an offence). However, first, it is not a definitional feature even of criminal punishment that it must be for an act (even if we take ‘act’ to include ‘omission’): the law can define thought crimes, or crimes of status or condition, for which people can be punished; and whilst those who argue that criminal liability, and thus punishment, *should* be imposed only for or on the basis of an act will object to such laws, their objection is not and could not plausibly be that they are incoherent in authorizing ‘punishment’

for something other than an act.⁶ Second, in many other punitive contexts, punishments are typically imposed for particular acts specified in the relevant disciplinary code, and are not imposed ‘simply because someone ... disagreed with’ the person being punished: if I am to portray what I impose on you as a punishment, I must claim that it is imposed for a breach of some norm that I have the authority to enforce. Anything that is to count as punishment must be purportedly imposed for an ‘offence’: but that is not to say either that the offence must be one defined as criminal by the law, or that it must consist in or involve ‘a particular act’.

So far, then, we have been given no good reason to reserve ‘punishment’ for the criminal punishments imposed by legal authorities acting under the aegis of the criminal law. Outside the criminal law, and outside the law, individuals or bodies can claim the authority to impose what they call punishments on those who have broken a relevant code or norm; we have been given no reason to dismiss such calling as merely ‘casual everyday talk’.

II

Punishment as Necessarily of Offenders?

Punishment, as careful definers often put it, must be of an alleged offender for an alleged offence.⁷ Brooks allows no such qualification in his definition: punishment is ‘of a person for

⁶ See D N Husak, ‘Does Criminal Liability Require an Act?’, in Husak, *The Philosophy of Criminal Law* (Oxford: Oxford University Press, 2010), 17; R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart, 2007), ch. 5.

⁷ Compare, among others, Hart (n. 3 above), 5.

breaking the law’ [p. 1], and—as if to avoid any doubt—‘[w]hen we speak of someone being *punished* in this book, we refer to someone who has committed a crime’ [p. 2]. On the face of it this seems an odd restriction, since it forbids us to object that punishment is unjust when it is imposed on an innocent person; such impositions, on the Brooks definition, do not count as punishments, and thus cannot be condemned as unjust punishments. Brooks himself seems to ignore this point, when he writes of ‘[t]he objection ... that it is always unjustified to punish those who have not broken the law’:

[w]hen a person is innocent, this person has not acted in such a way that would warrant punishment and, thus, he should be unpunished. [p. 4]

But if punishment is by definition of someone who has committed a crime, the punishment of an innocent is not *unjustified*, or something we *should* not do; it is impossible.⁸

There is a close conceptual connection between punishment and guilt, a connection that reflects a deep normative connection between justified punishment and guilt, and it might be tempting to emphasise the normative connection by presenting it as if it were conceptual:

Even if the world gathered all its strength, there is one thing it is not able to do, it can no more punish an innocent one than it can put a dead person to death.⁹

⁸ See too n. 11 [p. 217]: Brooks tells us that he ‘will speak interchangeably of punishment’s “definition” and “justification” ... because punishment is unjustified where the definitional parts are not fully present’. But if a definitional element is missing, there is then no punishment that could be either justified or unjustified, *as* punishment. There might be (depending on which elements are present) an imposition of some kind; but the mere fact that an imposition does not count as punishment cannot render the imposition unjustified.

It is a mistake, however, simply to conflate the conceptual and the normative connections. The conceptual connection concerns what must be claimed or alleged if an imposition is to count as a punishment: if what I do to V is to count as punishing her, I must *claim* that she is guilty of an offence to which this imposition is a response I am authorised to make. The truth, or warrantability, of that claim bears not (directly) on the definitional question of whether what I do is punish V , but on the normative question of whether or how what I do is justified.

Consider the two kinds of case in which we might talk (in ‘our casual everyday talk’) of punishing an innocent person. In one, V is deliberately framed by the police or prosecutor, or is convicted by a judge or jury who believe her to be innocent: those who procure this result, being aware of the person’s innocence, are deliberately punishing an innocent—although if the imposition is to count as a punishment at all, they must of course claim that she is guilty. In the other kind of case, there is no deliberate miscarriage of justice: V is convicted because the lawfully obtained evidence of her guilt left, in the court’s honest opinion, no room for any ‘reasonable doubt’ of her guilt; but, tragically, she is in fact innocent—as might become clear when new evidence later emerges.¹⁰ Now in the first kind of case a convicted innocent might indeed protest that she is not being *punished*—she is being scapegoated, or persecuted. If the claims made about her guilt are obviously spurious, if the scapegoating is manifest, we

⁹ S Kierkegaard, *Purity of Heart is to Will One Thing* (trans. D Steere; London: Fontana, 1961), 85.

¹⁰ These cases mark, of course, the two ends of a spectrum; between them fall a range of cases in which there is some more or less serious defect in the way in which an innocent person comes to be convicted (corrupt or careless investigations, evidence that is not properly examined, the drawing of hasty conclusions ...), but no deliberate attempt to procure the conviction of a known innocent.

might agree with her. This is not, however, simply because the claim that she is guilty is false: it is because that claim is so manifestly fraudulent that what is being done is obviously the mere pretence of punishment. In the second kind of case, by contrast, we (and she) would be more likely to say that she was indeed being punished—but punished mistakenly and thus unjustly: for in that case the claim of guilt is made reasonably and in good faith.

This reflects a more general point about a range of concepts, of which punishment is one. Sometimes a concept that picks out a particular kind of activity or enterprise includes as part of its meaning the immediate normative criteria for the success or legitimacy of that activity or enterprise: this is true, for instance, of such concepts as education, medicine and (as some would argue) law itself.¹¹ If a doctor administers a drug to a patient as part of his treatment, and the drug harms the patient rather than curing him, its administration counts as a failure, as bad medicine, by the normative criteria internal to the very idea of medicine: it still counts as medical treatment (at least if it is intended to heal rather than harm); but it must be judged as defective qua medical treatment. If that failure was radical enough, if it would have been obvious to any competent doctor that this drug was not suitable, we might indeed say (by way of rhetorical emphasis) that he was being poisoned rather than treated, or that the doctor was not a real doctor but a quack: if something fails radically enough to satisfy the core normative criteria for being a good *X*, we might say that it is not (‘really’) an *X* at all. If the doctor is not even aiming to heal rather than harm (if, for instance, she is taking the opportunity to harm the patient under the guise of treating him), we might say that she is not acting qua doctor, is not engaged

¹¹ See further R A Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986), ch. 3.

(even badly) in medicine—that she is merely pretending to do so: which implies that, as a conceptual matter, medical treatment must be aimed at healing or benefitting the patient. We *might* say the same about punishment (though I don't think that the conceptual issue is so clear here): that if an imposition is to count as punishment at all, not only must it be claimed that it is being imposed on a guilty person, it must be aimed at the guilty; that if it is inflicted on someone who is known or believed to be innocent, it should no longer count as punishment, but only as a pretence of punishment. We might be tempted to say that, but need not decide here whether we should say that, or say rather that it would be flagrantly unjust as punishment.¹² All we need note here is that even if punishment must definitionally be aimed at the guilty, and must be of the actually guilty if it is to be justified as punishment, it counts as punishment (albeit necessarily as punishment that fails as punishment) even if it misses that aim—even if it is mistakenly imposed on an innocent.

It might seem that I have laboured this point unnecessarily: for I have agreed with Brooks that there is a conceptual or definitional connection between punishment and guilt, and that if the person on whom some hardship is inflicted is actually innocent, then what is inflicted on her cannot be justified as punishment; so why should it matter whether we express the point by saying (as I would) that it is punishment, but unjustified as such; or by saying (as Brooks would) that it is not punishment (properly speaking)? It matters partly because we should be clear about the difference, and the connections, between definitional

¹²The institutional character of criminal punishment might be relevant here: if the system as a whole is aimed at punishing only the guilty, its occasional abuse by individuals to procure the 'punishment' of victims they know to be innocent might still count, in virtue of its institutional context and character, as punishment.

and justificatory claims, and about the different ways in which normative criteria might be involved in the criteria for the correct application of a concept. But it matters too because if we are concerned, as Brooks is, with the justification of criminal punishment, we are concerned with a practice that is, like any human practice, unavoidably fallible: it will inevitably sometimes convict and punish an innocent person, however earnestly those working within it try to avoid such errors; if we are going to punish anyone, we will sometimes punish an innocent. A justification of a system of criminal punishment must thus be a justification not of a system that only punishes the guilty, but of a system that punishes only those who are found guilty through a fair criminal process; of a system, that is, that sometimes punishes the innocent.

III

Punishment and Loss

Brooks rightly resists [p. 5] the suggestion that punishment must include pain; instead, he suggests, we should define it in terms of ‘loss’.¹³ But what is not clear from his definition is whether that loss must be intended as a loss. Punishment must be ‘imposed intentionally’, and ‘must involve a loss’ [p. 2]; but that leaves open the possibility that the loss could be a foreseen, but not intended, aspect of the imposition. When a tort defendant loses his case and is ordered to pay damages to the plaintiff, that

¹³ I’d rather say that punishment must be burdensome, to emphasise that punishment can be undertaken willingly by a repentant offender: whilst I can willingly undertake or embrace a burden, as a burden, I cannot do more than accept a loss as a necessary cost of something else—I cannot embrace it as a *loss*.

payment involves a loss (though the loss might be relatively painless, if the amount is small relative to his means); but ordinary damages are not understood as punishment, even if they are awarded by a legal authority against a person who has broken the law in the sense that he has failed to take the care that, according to the law, he ought to take.¹⁴

It might seem that, on a plausible reading of Brooks' definition, the loss must be intended as a loss: for if punishment 'must involve a loss', as part of its meaning, to intend to impose punishment must be to intend to impose loss; if I intend what I do to count as punishment, I must intend it to involve a loss. A later comment, however, suggests otherwise.

Suppose there is a violent psychopath. He is genuinely suffering from psychopathic delusions that compel him to attempt killing innocent persons without provocation. He lacks culpability for his actions, but these actions present a clear danger to the public. The unified theory of punishment might argue that the violent psychopath should be incapacitated regardless of culpability. [pp. 140-1]

Now if this person's incapacitation is to be justified by a theory of *punishment*, it presumably must be justified precisely as a punishment; but is that how we should understand this kind of incapacitation? One puzzle is that it is not clear what sort of case Brooks has in mind, since 'psychopathy' is not normally understood as involving 'delusions' which might 'compel' the person to violence; that is one reason why there is continuing controversy about the criminal responsibility, and culpability, of

¹⁴ That is of course why 'punitive damages' are distinguished from ordinary damages: they are intended not, like ordinary damages, to provide compensation for the harm suffered by the plaintiff, but rather to burden the defendant.

psychopaths.¹⁵ So a theory of punishment might well justify the punishment of a violent psychopath, on the simple grounds that he is culpably guilty. But if we instead think of someone who lacks culpability, because his actions were ‘compel[ed]’ by his delusions (someone who would count as psychotic rather than as psychopathic), then it is not clear why we should count his detention as a punishment. He would, if he came to trial at all, be a strong candidate for the insanity defence—rightly so, if he lacks culpability. The court would no doubt order his detention in a psychiatric institution, to protect both him and others; but it would not do so as a criminal punishment for his crime—at least as we normally understand the idea of punishment. The key point here seems to be that if our aim is simply to incapacitate someone who is radically disordered and non-culpable, in order to protect others, it surely should not be our *intention* to inflict any loss on him. The only sufficiently secure method of incapacitation might in fact involve a loss; but if we could sufficiently incapacitate without inflicting loss, we should do so; and we should try to minimise whatever loss cannot be avoided. This is, of course, a standard way of distinguishing the compulsory detention of the mentally disordered from the punishment of culpably responsible offenders: the latter, but not the former, must be intended to be burdensome (or to cause a loss, in Brooks’ terms). But it seems that Brooks would count all such detentions as punishments, if the detained person has committed a crime, since all involve a loss (of freedom).¹⁶

¹⁵ For some useful recent readings, see L. Malatesti and J. McMillan (eds.), *Responsibility and Psychopathy* (Oxford: Oxford University Press, 2010).

¹⁶ There might be room for argument about whether the incapacitative detention of a non-culpable, disordered offender is imposed *for* his crime: but that is not something that seems open to Brooks, given what he says about the deluded, non-culpable ‘violent psychopath’.

There are two ways in which Brooks could deal with this issue. One—the more orthodox way—would be to distinguish punishment from other modes of crime-related state coercion by holding that punishment must be intended to cause loss (or to be burdensome); in which case a theory of punishment, unified or not, will have nothing to say about the incapacitative detention of the non-culpably dangerous (except that it is not punishment). The other would be to expand the definition of punishment to cover such coercive practices as the detention of the non-culpably dangerous; but then we would need to know how far that expansion should go. In particular, if the focus is on preventing the dangerous from harming others, why should the commission of a crime be a condition for detention: it might be evidentially significant, but if we could be confident that they are dangerous on the basis of other evidence, why wait until they kill? That would not count as ‘punishment’ in ‘our casual everyday talk’; but if what we justifiably do to the ‘violent psychopath’ to prevent his further crimes is to count as justified punishment, it is not clear why punishment in its now expanded sense should require an (alleged) offender.

My own view is that we should, for the sake of both analytic and normative clarity, stick with the narrower definition of criminal punishment, as an intentionally burdensome response to one who has been convicted of committing a crime: that is a distinctive practice, different in its normative character from other coercive practices such as the detention of those judged to be in some way dangerous; if it is to be justified at all, it requires a distinctive normative rationale. I suspect that this is also Brooks’ view: but then he needs, first, to make clear that punishment must be intended to involve a loss; and second, to rethink his comments about the ‘violent psychopath’.

IV

Punishment and Expression

Another way in which some theorists would distinguish punishment from other kinds of coercive imposition is by arguing that punishment involves, definitionally, the expression or communication of censure or condemnation.¹⁷ When we punish an offender, the burden we impose is not *merely* a burden; it carries, and is intended to convey, a message about what he did. (Such a definitional claim is not yet a normative claim about the proper justifying aims of punishment: it is, rather, a claim about just what it is that needs to be justified if we are to justify a system of punishment.)

Brooks notes, and gives short shrift to, the definitional claim [pp. 3-4].¹⁸ Now the claim is certainly arguable—but his rejection of it is radically under-argued. He finds in Feinberg's article an identification of 'punishment' with imprisonment, other species of non-custodial sanction being classed as 'penalties': but, as he notes, most convicted offenders receive non-custodial sentences; a theory of punishment that counted only imprisonment as punishment would not be a theory of punishment as we practise it. Feinberg does sometimes appear to identify punishment (as expressive), or the 'hard treatment' that constitutes punishment, with imprisonment, though elsewhere he is more careful to recognise that imprisonment is just one form of punishment.

¹⁷ See, for different versions of this idea, J Feinberg, 'The Expressive Function of Punishment', in Feinberg, *Doing and Deserving* (Princeton NJ: Princeton University Press, 1970) 95; I Primoratz, 'Punishment as Language' (1989) 64 *Philosophy* 187; A von Hirsch, *Censure and Sanctions* (Oxford: Oxford University Press, 1993); R A Duff, *Punishment, Communication and Community* (New York: Oxford University Press, 2001).

¹⁸ He pays more attention later (ch. 6) to normative theories of punishment as expression or communication.

Penal theorists also sometimes talk as if criminal punishment consists in and only in imprisonment (or capital punishment). But, first, other theorists, including some who take censure-communication to be a defining feature of punishment, make it clear that criminal punishment need not be custodial, and argue that we should make less use of prison than we do.¹⁹ Second, the fact that both criminal punishment, and what Feinberg and others count as ‘penalties’ rather than ‘punishments’, can consist in a fine does not by itself go any way towards showing that we cannot usefully distinguish punishments, as communicating censure, from penalties as mere sanctions. Brooks argues that

[t]he view that penalties and ‘punishments’ (understood as imprisonment) are different in character is ... a distinction drawn too sharply that we should reject. [p. 3]

However, if punishment is ‘understood as imprisonment’, it is clearly different in character from non-custodial penalties: the distinction between custodial and non-custodial sanctions can be drawn quite sharply and clearly.²⁰ More importantly, if we understand punishment to encompass a range of non-custodial sanctions, we can still draw a clear distinction between censure-communicating punishment and penalties that lack such a communicative dimension.

Monetary sanctions provide the simplest example here. An official requirement to pay a specified sum of money could constitute any of a variety of kinds of imposition: it could be a tax demand; an award of damages, or an order to pay a sum owed, arising from a civil case; an administrative penalty for breach of a

¹⁹ See e.g. von Hirsch, n. 17 above; Duff, n. 17 above.

²⁰ Though some glossing would be needed to deal with such phenomena as the suspended prison sentence, or with cases in which breaching the requirements of a non-custodial sanction can attract a prison sentence.

non-criminal regulation; or a criminal punishment imposed following conviction. What the requirement amounts to, what it means, depends on the grounds on which it is made; on the institutional context in which it is made; and on the terms or tones (themselves determined partly by the institutional context) in which it is made. On the definitional suggestion under discussion here, it should count as a punishment only if it is intended to convey a formal censure of the conduct because of which the requirement is made.

Such a distinction is formally drawn, for instance, in German law, which distinguishes crimes (*Straftaten*) from regulatory infractions (*Ordnungswidrigkeiten*), the latter being dealt with under a regulatory code that is separate from the criminal code. Monetary sanctions are available under both codes—as criminal fines (*Geldstrafen*) for *Straftaten*, as administrative penalties (*Geldbussen*) for *Ordnungswidrigkeiten*. The meaning of the monetary sanction is, however, different in the two cases: for crimes attract a formal condemnation expressed in the sanction—the fine is imposed for conduct that is reproachable (*vorwerfbar*) and blameworthy (*schuldig*), whereas administrative penalties lack such a censorial meaning.²¹ I do not suggest that the distinction is unproblematic:²² but it is not a manifestly untenable distinction; and one could not accuse German law of confusing punishment with imprisonment.

There is room for argument about whether it is useful to include censure-communication in our definition of (criminal)

²¹ See *Gesetz über Ordnungswidrigkeiten* (1968; consolidated in 1975); for a useful (and critical) introduction see T Weigend, 'The Legal and Practical Problems Posed by the Difference between Criminal Law and Administrative Penal Law' (1988) 59 *Revue Internationale de Droit Pénal* 67.

²² See the doubts raised by the European Court of Human Rights in e.g. *Öztürk v Germany* (1984) 6 EHRR 409; also Weigend, n. 21 above.

punishment, to mark out the particular kind of practice that is to be theorised; but Brooks' selective critique of Feinberg does not give us reason to doubt the possibility, or utility, of distinguishing punishments from penalties.

V

Finally

It is not clear how much time it is useful to spend on the definition of punishment (or of criminal punishment). We do need to mark out the particular practice, or range of practices, that we aim to subject to normative theorising; but that is not to say that we need to offer a 'definition' of punishment. However, if we are going to offer a definition, as Brooks does at the start of his book, we need to do so with care and attention to detail—something that I fear Brooks has failed to do.

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