

SYMPOSIUM
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PUNISHMENT WITHOUT PAIN
OUTLINE FOR A NON-AFFLICTIVE DEFINITION
OF LEGAL PUNISHMENT

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Punishment Without Pain

Outline for a Non-Afflictive Definition of Legal Punishment

Andrei Poama

The intentional imposition of suffering on offenders is typically taken to be one of the necessary components of the *definiens* of legal punishment. Call this the afflictive definition of punishment. I argue that, despite its intellectual pedigree and contemporary pervasiveness, the afflictive definition is flawed in at least three ways: it is ambiguous, inaccurate, and non-operationalizable. In order to escape these three problems, I suggest that we should amend the definition of punishment by taking *suffering* out of its *definiens* and replacing it with the idea of *sanctions*. Call this second, amended definition the non-afflictive definition of punishment. I believe that my case is strongest in arguing for the elimination of suffering from our definition of punishment, and that my proposal provides a plausible solution for a sounder definition of legal punishment.¹

The argument is structured as follows. In Section I, I offer some background for my critique, by tracing it back to Jacob Adler's denunciation of what he calls the standard view of

¹ In what follows, I am using the terms 'definition', 'construal' and 'understanding' in an interchangeable way, unless otherwise explicitly stated.

punishment.² In Section II, I formulate my threefold critique of the afflictive definition of punishment. I argue that, whatever one's meta-theory of definition is, there are good reasons to require that any adequate definition of punishment be reasonably clear when it comes to understanding what punishment is (*non-ambiguity*), sufficiently accurate so that it does not exclude typical penal sanctions or include non-penal acts (*accuracy*), and suitably formulated to allow us to decide whether we are actually engaged in imposing punishment on someone or not (*operationalizability*).³ The afflictive definition fails to meet each of these three minimal definitional criteria. In Section III, I suggest that we should replace the afflictive definition with a non-afflictive one, and that we should do this by eliminating the idea of suffering in favor of that of sanctions. I also explore two possible objections to this definitional reform: the objection from circularity and the objection from concealment. Moreover, I single out two implications of disposing of the afflictive definition. The first implication is that a non-afflictive definition proves neutral as seen from the standpoint of various potential justifications of punishment. The second one is that a non-afflictive definition of punishment allows us to see that penal abolitionism rests on a definitional mistake.

² Jacob Adler, *The Urgings of Conscience. A Theory of Punishment* (Philadelphia: Temple University Press, 1992), 83-90.

³ If your meta-theory of definition is a sceptical one, and holds that any definitional attempt is a non-starter, then my whole argument will fail to convince you. That should not bother me too much, since I am concerned with an audience that takes definitions seriously. But, if you think that a minimal definition of any (normative) concept (or term or thing) is in order, then you should take the three criteria that I am putting forward to work independently from any particular understanding of what an appropriate definition should amount to substantively (in terms of the *nature* of the definitional activity) or methodologically (in terms of the *way* in which a definition should be formulated).

Before moving on to the first section, three preliminary remarks are in order. The first one concerns the status of the proposal for a non-afflictive definition of punishment. Though it might seem trivial to some, it is important to underline that the definition that I am aiming for is not a *legal* definition of legal punishment, but a theoretical definition of legal punishment. A legal definition of punishment is literally missing from our penal codes or otherwise legally authoritative texts.⁴ The main point worth noting at this level is that a strictly theoretical treatment of the question of punishment could never count as a legal one. For a definition to count as legal, we would have to act in a legislative setting and be vested with the appropriate competence for devising authoritative definitions. This remark is important insofar as it makes clear why an adequate definition of punishment should not be legislative in form or intent: we do not get to stipulate our way into the meaning of punishment. Consequently, this article should not be read as a proposal for a new understanding of punishment, but as a report on its current legal meaning.

The second remark is that this is an analysis that deals with legal punishment in particular, not with punishment in general. Addressing the question of punishment *simpliciter* is significant in its own right, but it tends to downplay the differences between the content of various forms of punishment, the identity of the agents that impose or experience them, and the limits set on the severity of those sanctions. Grounding a child is not punishing in

⁴ This is the case for the U.S. *Model Penal Code*, the French *Code Pénal*, the Belgian *Code Pénal*, the German *Strafgesetzbuch*, but the list is longer than that. Also, it is worth noticing that the absence of a legal definition is not limited to the question of punishment. Other terms—such as ‘income’—do not have a clear-cut legal definition either. For a more detailed discussion, see Huntington Cairns, “A Note on Legal Definitions,” *Columbia Law Review* 36, no. 7 (1936): 1099-1106.

the same sense as imprisoning an offender is, and any definition of punishment *simpliciter* will unavoidably miss the difference between these two kinds of penal practices. One specifying feature of legal punishment that will get lost in any analysis of punishment *simpliciter* is the fact that the former is bound by the principle of legality. One could hardly talk about forms of legal punishment that could not minimally align with this principle.⁵ However, since legal punishment is a particular instance of punishment in general, any definition of the former will have an important bearing on the definition of the latter. If suffering should be taken out of the *definiens* of legal punishment, then it should be equally eliminated from that of punishment *simpliciter*.⁶

The third, and final, remark is that I am concerned with the definition of punishment, not with its justification. Definition and justification are obviously linked, but they should be kept distinct. One of the reasons for doing so is that we do not want to gerrymander our definition of punishment according to our preferred justification. Another reason is that definitional matters should be satisfactorily settled prior to normative debates, insofar as an unstable definition of punishment will be vulnerable to *ad-hoc* reinterpretations in a way that serves our privileged

⁵ I take the legality principle to refer to the requirement according to which there is no punishment in the legal sense of the term unless there is a previously law specifying both the offence to be punished and its corresponding punishment. Thus read, the legality principle excludes the possibility of *legally* punishing someone retroactively, that is, for an act that was not a legal offence at the time when it was committed. This allows, of course, for the conceptual possibility of punishing that same act in a non-legal way. See Gabriel Hallevy, *A Modern Treatise on the Principle of Legality in Criminal Law* (Berlin, Heidelberg: Springer-Verlag, 2010).

⁶ For a definitional analysis of punishment *simpliciter*, see Leo Zaibert, *Punishment and Retribution* (Aldershot: Ashgate Publishing, 2006).

justificatory account of punishment.⁷ The priority of definitions that I have in mind is of a logical kind. Whenever we disagree about the adequate justification of punishment, we should be able to assess whether we are referring to the same thing or concept. Otherwise, we risk talking past each other. For example, though Rawlsian-minded liberals and communitarians disagree about the appropriate principles of distributive justice, their debate remains intelligible only insofar as they agree that distributive justice should be defined as the allocation of certain goods among the members of a society. The content and scope of what counts as a *good*, as a *member* or even as a *society* remain open to normative disagreements. But these disagreements make sense only against the background of a commonly held definition of justice.⁸

I

Shifting Away from Suffering: Background of the Non-Afflictive Definition of Punishment

Defining punishment without resorting to the idea of suffering is not an original undertaking, but it remains an exceptional one.

⁷ For this last second point, see Antony Flew, “The Justification of Punishment,” *Philosophy* 29, no. 111 (1954): 291-307.

⁸ The logical priority of definitions over justifications does not exclude the possibility of disagreements about definitions. Moral, political, and legal philosophy is replete with both definitional and normative debates. My argument is simply that a theory cannot be said to win a disagreement about the justificatory principles of a practice by surreptitiously resorting to a different definition of its subject-matter and thus changing the terms of the debate. It is nonetheless true that normative disagreements might sometimes lead to definitional debates. This happens when supporters of a specific theory argue that their opponents do not properly understand the meaning of a specific normative practice or concept. My claim, then, is that, if theorists radically disagree over the definition of their subject-matter, their *normative* disagreement will most likely never get off the ground.

A large majority of legal theorists and penal philosophers take suffering to be a necessary feature of punishment. Only a few of them construe punishment in the absence of any reference to afflictive experience, be it suffering, pain, unpleasantness, harm, evil or other sub-varieties of affliction.⁹ Even fewer authors explicitly go against understanding punishment in terms of suffering. Jacob Adler is, in this sense, an exception.¹⁰ Adler criticizes the conceptions according to which punishment inherently involves the experience of suffering by offenders. He takes these conceptions to form what he calls the standard view of punishment, an outlook that he deems representative of the ways in which punishment has been traditionally portrayed in the history of Western legal and political thought, from Plato, through Aquinas, Hobbes, Kant and up to contemporary figures like Hart or Nozick.¹¹

⁹ Some of these rare authors—namely, John Rawls, Claudia Card, Hugo Bedau—are enumerated and referenced in Adler, *The Urgings*, 80-108.

¹⁰ For another exception (quoted by Adler), see Unto Tähtinen, *Non-violent Theories of Punishment: Indian and Western* (Motilal Banarsidass, 1983). For a recent attempt at dissociating between burdensomeness and the intentional imposition of suffering, see Bill Wringer, “Must Punishment Be Intended to Cause Suffering?,” *Ethical Theory and Moral Practice* 16 (2013): 863-877. Wringer’s project differs from the one that I pursue in this article. I am strictly concerned with definitions, whereas Wringer examines both definitional and justificatory questions. For yet another critique of the afflictive definition of punishment, see Helen Anne Brown Coverdale, *Punishing with Care: treating offenders as equal persons in criminal punishment* (LSE PhD Thesis, October 2013), available at: etheses.lse.ac.uk/1080/.

¹¹ For a complete list of references, see Adler, *The Urgings*, idem. For other afflictive-prone authors that Adler might have taken into account but did not, see James Smith, “Punishment: A Conceptual Map and a Normative Claim,” *Ethics* 75, no. 4 (1965): 285-290; Sidney Gendin, “The Meaning of ‘Punishment’,” *Philosophy and Phenomenological Research* 28, no. 2 (1967): 235-240; C.J. Ducasse, “Philosophy and Wisdom in Punishment and Reward,” IN *Philosophical Perspectives on Punishment*, eds. Edward H. Madden, Rollo Handy and

Another way of formulating the standard view of punishment—which roughly corresponds to the afflictive definition—is, by way of metonymy, to speak about the Flew-Hart-Benn definition.¹² This latter definition lists five independently necessary and jointly sufficient conditions (or criteria) for an action or practice to count as punishment. According to this definition, punishment should consist in (1) the intentional inflicting of suffering, (2) on putative offenders, (3) for the offences that they are judged to have committed, (4) by someone else than the offender, and (5) holding a special authority qualified in terms of specific institutional rules.

Like Adler, I claim that the notion of suffering should be abandoned when it comes to understanding punishment, though my reasons are not the same. Adler's rejection of the standard view rests on two arguments. The first argument is that there are important counter-examples to suffering-centred forms of punishment, such as legal community service sanctions, push-ups in the case of cursory military sanctions or penance rituals pertaining to religious penal practices.¹³ The second argument is that suffering should be eliminated from our ideal accounts of justified instances of punishment. Because it explicitly rests on a

Marvin Farber (Springfield, IL: Charles Thomas, 1968), 3-19; Joseph Margolis, "Punishment," *Social Theory and Practice* 2, no. 3 (1973): 347-363; Walter Kaufmann, *Without Guilt and Justice. From Decidophobia to Autonomy* (NY: Peter H. Wyden Inc., 1973); J.P. Day, "Retributive Punishment," *Mind* 87 (1978): 498-516; J.R. Lucas, *On Justice* (Oxford: Clarendon Press, 1980); Philip Bean, *Punishment: A Philosophical and Criminological Inquiry* (Oxford: Martin Robertson, 1981); Kent Greenwalt, "Punishment," *Journal of Criminal Law and Criminology* 74, no. 2: 343-362; Steven Sverdlik, "Punishment," *Law and Philosophy* 7, no. 2 (1988): 179-201.

¹² Flew, "The Justification"; H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968), 8-11; S.I. Benn, "An Approach to the Problems of Punishment," *Philosophy* 33, no. 127 (1958): 325-341.

¹³ Adler, *The Urgings*, 91-100.

‘claim about which cases of punishment are important or ideal,’ Adler’s critique of penal suffering is a normative one. His standpoint is justificatory, not definitional.¹⁴

Both arguments are inadequate for the purpose of defining legal punishment. The limits of the first argument are obvious. The examples of military or religious sanctions do not have any decisive bearing on the way in which we should construe state-enforced legal punishment. More generally, such an argument does not exclude the possibility of multiplying the list of counter-examples *ad libitum*—something that Adler does when he mentions the eccentric counterfactual examples of one-minute long prison sentences or ten cents fines—in a manner that would weaken the accuracy and comprehensiveness of any definitional feature of punishment.¹⁵

The second argument is faulty insofar as it fuses an ideal construction of punishment with its definition. Adler’s aim in defending a suffering-free interpretation of punishment is to set the ground for a justification of penal practice that could not hold if punishment were to be intrinsically characterized by suffering, harm, evil, pain or other forms of affliction.¹⁶ This makes his critique of penal suffering seem *ad-hoc* and non-neutral. We cannot—or, at least, should not—arrange for the appropriateness of our justificatory accounts by tweaking the meaning of the practices we want to justify until they align with our normative commitments. If such moves were allowed, then any justification would be possible, granted that we have stipulated what the ideal

¹⁴ *Id.*, 81.

¹⁵ *Ibid.*

¹⁶ Adler holds that punishment is justified by a principle of rectification of offences, which are in turn construed as violations of basic rights.

meaning of a given practice should be for the purpose of *our* desired normative standpoint.¹⁷

The limits of Adler's two arguments might explain why his critique of penal suffering has not been taken seriously enough. Legal and political philosophers today continue to define punishment in terms of suffering. For example, Claire Finkelstein insists that punishment inherently 'involves the infliction of pain or other form of unpleasant treatment.'¹⁸ Antony Duff takes punishment to be 'something intended to be burdensome or painful.'¹⁹ Daniel McDermott considers that the fact that 'punishment *must* cause suffering' makes it a stringent subject-matter for moral consideration.²⁰ Steven Tudor thinks that it is 'uncontroversial that punishment, by definition, involves suffering.'²¹ Leo Zaibert asserts that punishment should be understood as 'the general phenomenon whereby we inflict something we believe is painful for the wrongdoer as a result of her wrongdoing.'²² Mitchell Berman argues that punishment

¹⁷ My claim here is that Adler is right about legal punishment not being definitionally afflictive, but that defending a non-afflictive definition on the basis of one's particular normative conception of punishment is not the right kind of reason from a strictly definitional standpoint. In other words, one is not entitled to resort to a particular justification of punishment to show why its afflictive definition is unwarranted.

¹⁸ Claire Finkelstein, "Positivism and the Notion of an Offence," *California Law Review* 88: 358.

¹⁹ Antony Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001), XIV-XVI.

²⁰ Daniel McDermott, "The Permissibility of Punishment," *Law and Philosophy* 20, no. 4 (2001): 403.

²¹ Steven Tudor, "Accepting One's Punishment as Meaningful Suffering," *Law and Philosophy* 20, no. 6 (2001): 583.

²² Zaibert, *Punishment and Retribution*, 36. As already indicated, Zaibert examines punishment *simpliciter*, but his definition applies, by way of logical consequence, to legal punishment as well.

presupposes the ‘imposition of something painful or burdensome.’²³ Daniel Boonin affirms that ‘intent of harming’ is a necessary definitional feature of punishment.²⁴ Nathan Hanna similarly claims that punishment invariably ‘inflicts pain, suffering or burdens.’²⁵

The examples could be multiplied, but I take it that these recent illustrations, Adler’s initial list and the complementary references that I enumerate in footnote 10 are sufficient to show that there is a strong consensus that punishment involves suffering as a matter of definition. One could nonetheless notice that the term *suffering* does not appear in all the definitional formulae. I am not worried about this terminological variation. This is because whatever I find problematic about penal suffering will also apply to penal pain, unpleasant treatment, burdensomeness, harm or to whatever other expression used to convey the idea of penal affliction.²⁶ Another reason not to care

²³ Mitchell L. Berman, “Punishment and Justification,” *Ethics* 118, no. 2 (2008): 261.

²⁴ David Boonin, *The Problem of Punishment* (Cambridge: Cambridge University Press, 2008), 25.

²⁵ Nathan Hanna, “Liberalism and the General Justifiability of Punishment”, *Philosophical Studies* 145, no. 3 (2009): 329.

²⁶ One could argue that the burdensome character of legal punishment is not the same as its afflictive character, insofar as burdensomeness does not necessarily entail suffering. If this is correct, then my critique does not apply to those authors who define punishment in terms of the intentional imposition of burdensomeness. However, even those authors who use the terms *burdensome* and *burden* in addition to other terms like *pain*, *suffering*, *unpleasant treatment* or *harm* do not insist on the categorically different meaning of the former as compared to the latter. One can then reasonably assume that they use these terms interchangeably and not disjunctively. Moreover, if *burdensomeness* understood non-afflictively were a necessarily defining feature of legal punishment, but *painfulness*, *suffering* or *harmfulness* were not, it is not clear why the authors I have cited choose to include both the former and the latter in the *definiens* of punishment.

about terminological variation is that the vocabulary of suffering seems to be more widely used than others. The language of suffering could, from this point of view, be representative of what is generally meant when philosophers define punishment by resorting to the language of affliction.

The goal of this section was twofold. First, I wanted to make clear that it is not for the first time that an afflictive understanding of punishment is being denounced. Second, I tried to show that the definition of punishment in terms of suffering is still the rule—not to say the habit—among legal and political philosophers. One possible explanation as to why this is so is that a convincing critique of the afflictive definition *qua* definition is missing. I try to offer such a critique in the following section.

II

The Afflictive Definition of Legal Punishment: Three Flaws

In criticizing the afflictive definition, I do not intend to address any meta-theoretical debate about the right purpose of definitions or about the adequacy of different definitional methodologies.²⁷ I have two reasons for not doing so. First, turning to a debate about the definition of *definition* is bound to take us to considerations whose contested character and generality will not contribute to our understanding of legal punishment in any interesting way. Second, my critique of the afflictive definition does not depend on any prior commitment to a particular view about the nature of definitions or the correct definitional methodology. In other words, I think that the grounds for going against the afflictive definition cut across our

²⁷ For a systematic discussion of the relevant meta-definitional debates, see Richard Robinson, *Definition* (Oxford: Oxford University Press, 1963).

meta-theoretical disagreements about definitions in general. Put differently, my proposal for eliminating the afflictive definition does not depend on any narrow or contested view of what a definition is or does.

The three objections that I raise against construing punishment in terms of suffering rely on three definitional criteria. These three criteria are non-ambiguity, accuracy and operationalizability. Before moving to the crux of my critique, I want to make explicit what I understand by each of these terms. Since their content is quite straightforward, not much explaining will be actually needed.

I start with non-ambiguity, which I take to refer to the absence of uncertainty or unmanageably multiple meanings of the *definiens*. Non-ambiguity is not an absolute criterion, since the definition of a term will not suffice to guarantee its disambiguation in other respects. There is no straight line leading from a non-ambiguous definition to a non-ambiguous use of a particular sign or concept. As Robinson puts it, ‘we should always have in mind the probability of ambiguity and the flexible nature of our vocabulary which causes it.’²⁸ This is certainly something to be aware of. However, the fact that ambiguity is not totally eliminable does not mean that it should not be minimized or made explicit if we want to avoid its morphing into equivocation.

We should be particularly interested in coming up with a non-ambiguous definition of legal punishment. This is because an ambiguous understanding of punishment could not accommodate the legality requirement and would thus fail to be a definition of legal punishment proper. If the *definiens* of legal punishment rests on multiple meanings, this should be clearly stated. But multiplicity of meanings would be awkward in this case. When

²⁸ Id.,154.

asked what we understand by legal punishment, we do not envisage a plurality of equally valid meanings and then choose one meaning in particular, even though we could have just as well chosen a different one. The task of a non-ambiguous definition of legal punishment is to provide us with a procedure for assessing whether we are actually talking about the same thing or concept, even if—and especially when—our interpretations or justifications of punishment differ.

The second, accuracy criterion states that a definition of legal punishment should be constructed in a way that is extensionally appropriate. This means that the definition should be sufficiently wide to include all instances of legal punishment and narrow enough to exclude instances that do not fall under our understanding of it. In particular, we should consider that a definition is radically inaccurate if it fails to include paradigmatic cases of legal punishment. A definition of punishment will be moderately inaccurate if it cannot accommodate instances of punishment that are not necessarily typical of penal practice. I will argue that the afflictive definition is both moderately and radically inaccurate.

The third, operationalizability criterion requires that the definition of legal punishment serve as a suitable basis for developing an operational definition of it. This is not the same as demanding that the definition of punishment *be* an operational one. Rather, the idea is that any adequate definition of punishment should offer us a good insight into the way in which we can go about formulating a subsequent operational definition. This is not an idiosyncratic requirement. Even in the case of the theoretical definitions of physical objects, we take it to be an advantage of these definitions that they can support us into identifying adequate procedures for constructing or representing those same objects. For example, defining weight as the force

exerted on an object due to gravity guides us into operationally assessing the presence and value of weight as the result of the measurement of objects on a Newton spring scale. When it comes to legal punishment, an operational definition is important because it provides us with a procedure for testing whether we are actually engaged in penal practice or not. More generally, operationalizability is what makes a definition practically relevant. As I will try to show, the afflictive definition of punishment is practically irrelevant because it is non-operationalizable.

The Problem of Ambiguity

I now turn to my first objection, according to which defining punishment in terms of the intentional infliction of suffering is ambiguous. There are two ambiguity problems in the afflictive definition. The first problem concerns the meaning of the term ‘intentional’, whereas the second one pertains to the multiple or sometimes uncertain meanings of the term ‘suffering.’ Since it can be easily bypassed, we can call the first problem the easy ambiguity problem. Because I do not see any convincing method for avoiding the second problem, I suggest that we call it the hard ambiguity problem.

The easy ambiguity problem is that the term ‘intentional’ is ambiguous between motives and objectives. It is unclear whether what is meant by saying that punishment is the intentional infliction of suffering should be construed as referring to the subjective motives of the penal agents or to the objective aims of the penal institution. However, we have good reasons to think that penal intentions apply to objectives and not to motives. If intentions were about motives, punishment would become quite an erratic practice. It is very difficult to test whether the representatives of the penal institution are actually motivated by

the offenders' suffering. Moreover, interpreting intentions in terms of motives would render punishment dependent on the actual existence of persons with a disposition for imposing suffering on other persons. Worse, any proof that penal agents lack afflictive motivation would authorize us into looking for agents that have such a motivation and solicit them to visit real punishment on offenders. This would make punishment a highly unpredictable practice and would violate the legality requirement.

Fortunately, we can resolve the easy ambiguity problem by specifying that intentions refer to objectives and not to motives. Unfortunately, this does not help us to solve the hard ambiguity problem, which is related to the multiplicity and uncertainty of the meaning(s) of suffering. It is not clear what the content of suffering is or should be. We can single out at least four dimensions that are constitutive of its ambiguity.²⁹ The first dimension concerns the variation in different kinds of suffering. There is, first, physical suffering, such as physical pain, discomfort or exhaustion. Second, suffering can express itself in a psychological mode, if we consider phenomena like fear, depression, shame, humiliation, anxiety, panic, and so on. Third, one should take into account more existential or moral forms of suffering that do not have to be caused by an external stimulus, but which can be enabled by a particular context or the performance of a specific action. This is the case of remorse, repentance, regret, grief and other similar experiences of contrition.³⁰

²⁹ The ambiguity generated by different kinds of suffering is explored in Jamie Mayerfeld, *Suffering and Moral Responsibility* (Oxford: Oxford University Press, 2002).

³⁰ Arguing that this dimension of ambiguity can be avoided by stipulating that penally relevant suffering should be restricted to a single kind—say, physical suffering—would be an arbitrary move. This is mainly because saying that

The second dimension of ambiguity is closely related to the first one. It emphasizes the difficulty of specifying the structure or content of the combination of different kinds of suffering that one should pursue when engaged in the practice of punishment. Combining different kinds of suffering into a suffering function might be impossible if we realize that these different kinds of suffering are incommensurable. One cannot try to combine entities that are categorically different, just as one cannot add numbers and letters if the latter are considered *qua* letters and not as algebraic expressions. Similarly, it does not seem to make sense to say that physical exhaustion is intra-personally commensurable with social humiliation or with moral regret.

The third dimension of ambiguity is not linked to our difficulty in constructing appropriate intra-personal comparisons between different kinds of suffering, but to the predicaments concerning the inter-personal comparisons between different subjective experiences of suffering. The punishment of some offenders might give rise to a strong physical sensation of discomfort, whereas the punishment of others could bring about an intense impression of social discrimination or stigmatization. If we take the afflictive definition as a guide into understanding the meaning of punishment, it is not obvious whether a penal sanction that results in physical discomfort and one that results in

punishment that does not track our stipulated form of suffering is not punishment in *our* sense of the word can always exclude other positively existing forms of legal punishment. For example, if our stipulation restricts suffering to the physical kind, it would be difficult to see how a fine or community work might be singled out as punishments from the standpoint of our stipulative definition. As argued on page 2, the stipulative move is open to the legislator, but it is not a theoretically sound move.

a sense of discrimination should be construed as comparable cases of punishment in any minimally informative way.³¹

The fourth dimension of ambiguity derives from the multiple ways in which penal suffering can be temporally organized. It is not clear *when* suffering should occur if we are to envisage it in terms of penal suffering proper. It is quite clear that suffering experienced by someone who experiences anxiety or fear at the mere thought of future punishment is not, properly speaking, a part of punishment, because any person experiencing such an anxiety or fear could then claim that she is being punished. Such an outlandish claim can be reasonably dismissed and does not therefore raise a problem for the supporter of the afflictive definition.³² Even so, it remains that the afflictive definition cannot help us decide whether the economic discomfort experienced upon an offender's attempt to regain a normal social life after release from prison should be read as penal suffering or not. Also, it is difficult to tell whether an offender was really punished if, for example, she experienced suffering only during the last moments of her prison term. Should we then say that the non-afflictive experience of imprisonment up to its last moments should not be understood as punishment?

The Problem of Inaccuracy

This fourth dimension of ambiguity leads me to consider my second objection against the afflictive definition. This is the

³¹ For an article that highlights the non-fungibility of different forms of suffering, see David Gray, "Punishment as Suffering," *Vanderbilt Law Review* 63, no. 6: 1620-1693.

³² Suffering experienced by someone at the thought of a probable punishment is also hard to consider as part of punishment proper, since it would collapse the positive distinction between the accused and the punished.

objection from inaccuracy. The objection can be formulated in two ways. First, one can say that an important number of penal sanctions are not very likely to produce suffering in any significant way. Sanctions like fines lack the affliction-prone dimension that might otherwise probabilistically characterize prison sentences. Second, one can come up with examples where offenders will either take pleasure in or be indifferent to the penal sanctions that are being imposed on them. Call the first inaccuracy problem the fine problem and the second inaccuracy problem the masochist/callous offender problem.

I will start with the fine problem. The reasoning behind this problem runs as follows: most penal sanctions do not, as a general rule, produce the kind of afflictive effects that would be required to take suffering as one of the necessary features of punishment. As it turns out, most penal sanctions are fines, and most of them are imposed for minor traffic offences.³³ It is

³³ This is at least the case for the U.S. and the French criminal justice statistics. For example, in France, the percentage varies between 30% and 41% in the 1990 to 2009 time period. See *Infostat Justice. Bulletin d'information statistique*, no. 114 (2011). The statistical reality of punishment matters, since we need a definition of real legal punishment, that is, a definition that has descriptive accuracy. It is also worth emphasizing that the legal qualification for minor traffic offenses in most U.S. state-level jurisdictions is penal, *not* civil. Out of the 52 state-level jurisdictions listed by the 2010 *Summary of State Speed Laws*, only 11 states—that is, 21%—have distinctly civil sanctions for minor speeding violations. The District of Columbia has both civil and penal sanctions for minor speeding violations. An overwhelming majority of the U.S. states have a penal qualification for minor speeding violations. The specific qualification varies from misdemeanours (Alabama, Arkansas, Delaware, Georgia, Indiana, Iowa, Louisiana, Maryland, Missouri, Mississippi, Montana, Nevada, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wyoming), to infractions (California, Colorado, Connecticut, Hawaii, Idaho, Kansas, Missouri, Nebraska, New York, North Carolina, Oregon, Virginia), violations (Kentucky, New Hampshire) or petty misdemeanours (Minnesota). See *Summary of State*

therefore reasonable to consider that most penal sanctions will not fit the afflictive definition, insofar as they will not result in the suffering of offenders.³⁴

The supporter of the afflictive view of legal punishment might try to dismiss the fine problem by resorting to two counter-arguments. The first counter-argument is that the fine problem is not a problem at all, given that even the smallest fine will produce a level of dissatisfaction, discomfort or annoyance which can easily be translated in terms of suffering. This argument is defective in two respects. First, it tends to trivialize and dilute the idea of suffering. This is because it considers that the payment of a fine involves a kind of suffering which, though less intense, is not fundamentally different from the suffering incurred through other forms of punishment, such as imprisonment, community work or electronic surveillance.

The supporter of the afflictive definition might reply that fine-generated suffering is special. But if the suffering generated by a small fine is not of the same type—meaning that it does not have the same nature—as the one produced by imprisonment or other sanctions, then this first counter-argument rests on a fallacy of equivocation. One cannot attempt to define legal punishment *in general* as the intentional infliction of suffering and then claim that the kind of suffering comprised in certain forms of punishment is

Speed Laws, National Highway Traffic Safety Administration, 11th edition (2011). Traffic violations—whether illegal parking or speeding—are generally considered as belonging to the criminal law in the U.K. as well. For a more extensive analysis of traffic violations as criminal offences, see Thom Brooks, *Punishment* (Routledge, 2013), 20, or Sally Cunningham, *Driving Offences: Law, Policy, and Practice* (Aldershot: Ashgate, 2008).

³⁴ Saying that fines are usually ancillary to prison terms or to probation is not sufficient to show that fines are *themselves* afflictive, because we could still consider it possible for the pain of imprisonment to generate suffering even in the absence of an accompanying fine.

categorically distinct from the suffering contained in others. This fragments the idea of suffering in a way that renders the afflictive definition equivocal across different instances of punishment.

Second, arguing that even small fines necessarily or typically generate suffering tends to misrepresent what fining is all about, which is the payment of a sum of money. It is not very plausible to try to describe the payment itself in afflictive terms. Simply paying for something does not necessarily cause the experience of suffering. We give money for a lot of things, but we do not necessarily nor usually suffer *because* we do so. In other words, the reason for suffering does not naturally reside in the fact of paying. If this were the case, then paying for gifts, complying with taxation or reimbursing a loan would all have to result in some form of suffering. If they do not, then it is not immediately obvious that suffering is a necessary feature of payments. Without a doubt, the fact that the notion of ‘suffering’ and that of ‘payment’ are not definitionally linked does not imply that the offenders who are fined—and especially those who are economically disadvantaged—will never suffer. However, the *probable* suffering of financially impaired offenders is insufficient for concluding that suffering is a *necessary* feature of all payments and, consequently, of all fines.³⁵

³⁵ I do not deny that financially impaired offenders might in some cases suffer more from paying a fine than from executing a prison sentence. Even so, four remarks are in order here. First, the perception of future suffering is not equivalent to the actual experience of suffering. Empirical evidence tends to show that people are generally bad at forecasting the extent to which they will be negatively affected by money losses, and that, given the phenomenon of hedonic adaptation, financial losses *do not* generate significantly or substantially higher levels of subjective disvalue. See, for example, John Bronsteen, Christopher Buccafusco, Jonathan S. Masur, “Happiness and Punishment,” *The University of Chicago Law Review*, 76 (2009): 1037-1081. Second, in cases where financially impaired offenders cannot possibly pay their fines, they

The second counter-argument that might be advanced by the supporter of the afflictive definition is that fines do not matter, because they are not really punishments in the same way in which, for example, imprisonment or electronic surveillance are. This response seems to rely on a claim according to which the entire class of punishments should be construed according to a core-periphery model, with real punishments at the core and quasi-punishments at the periphery. If we accept this model, we could say that imprisonment should, in virtue of its severity or seriousness, be interpreted as a real form of punishment, whereas fines are more adequately understood as quasi-punishments.

However, the core-periphery model fails to support suffering as a necessary feature of punishment. This is because there is at least one form of punishment—namely, the death penalty—that will be intuitively situated at the core of the class of all punishments, without thereby necessarily causing the offenders' suffering.³⁶ This might sound like a strange claim, but it fits both

cannot be said to undergo fining. Third, a fine does not have to be paid in a single lump sum, but can be spread over a longer duration. Such an arrangement might lower the probability and impact of the respective fine-generated afflictive experience. Fourth, even if we agree that losing money entails some form of suffering, this loss is not in any way definitional of punishment. Other policies—for example, taxation—involve some form of financial loss as well. But it cannot be said that tax-caused financial losses entitle us to refer to taxation as being a form of punishment, at least if we agree on using the term *punishment* in a non-figurative way. More generally, I agree with Gray that suffering is an incidental or contingent effect of punishing, but not a necessary feature of the 'normative concept of punishment'. See Gray, *op. cit.*: 1623. I want to thank both reviewers for helping me to clarify what is exactly at stake in the fine problem.

³⁶ Only 98 out of 195 states in the world have legally abolished the death penalty for all criminal offences. Though more states now have a *de facto* moratorium on the death penalty, the legal execution of people is far from being a peripheral form of punishment. For a more detailed analysis of capital

with the history of the technological transformations in the practice of capital punishment and with the jurisprudence that specifies its meaning and content.

The history of capital punishment can be plausibly interpreted as a series of attempts to take physical suffering out of the process of execution. For example, as Pieter Spierenburg recalls, one of the main rationales for introducing the guillotine as an execution method in France at the end of the XVIII century is that it was considered to be a painless procedure.³⁷ The painlessness of decapitation was certainly contested, but only in the name of other forms of punishment—such as hanging—that were considered to be comparatively less painful. The painlessness argument persists up to the present day in the United States, where the lethal injection is considered as an intrinsically painless method for executing offenders. The lethal injection, as developed since 1977 in Oklahoma, consists in the administration of three drugs, the first of which, sodium thiopental, induces anesthesia in the offender. The goal is to render the offender unconscious, so that she does not feel the paralysis induced by the second drug (pancuronium bromide) or the intense pain caused by the third one (potassium chloride), whose function is to induce heart failure.

The historical argument is obviously insufficient if we want to show that capital punishment does not have to produce physical suffering. However, one can emphasize that both the supporters and the adversaries of the death penalty tend to agree that what renders this form of punishment problematic resides in its afflictive effects. Those who criticize capital punishment argue

punishment, see *Death Sentences and Executions 2013* (Amnesty International, 2014).

³⁷ Pieter Spierenburg, *Violence and Punishment: Civilizing the Body Through Time* (Cambridge: Polity, 2013), 114.

that all suffering that goes beyond the mere fact of execution is gratuitous and, as such, renders the death penalty morally problematic. Those who, on the contrary, defend capital punishment, claim that the experience of suffering is not problematic as long as it is not inherently contained in the fact of execution itself. Thus, representatives of both positions tend to dissociate between capital punishment and its potential afflictive dimension. This means that, at least at the level of jurisprudential argument, suffering is not taken to be a necessary or intrinsic feature of the death penalty, but a contingent and external aspect that is more or less stably associated with the way in which the death penalty happens to be administered.³⁸ To put it differently, the experience of physical suffering does not characterize capital punishment in the same way in which locking up the offender characterizes imprisonment.

The idea of a synthetic, non-essential relation between capital punishment and physical suffering is not new. As recalled by the *amicus curiae* offered by the *American Association of Jewish Lawyers and Jurists* in *Baze v. Rees* (2008),

2000 years ago the rabbis of the Talmud agreed that notwithstanding the apparent literal meaning of the text, *execution must be carried out as painlessly as possible*. The relevant passages from the Talmud demonstrate that the rabbis sought—with the scientific knowledge and the means available to them in their time—to formulate the quickest, least painful, and least disfiguring methods of execution that the technology of the day would allow within the framework of Biblical texts.³⁹

³⁸ For a closer analysis of this implicit consensus, see Amanda Pustilnik, “Pain as Fact and Heuristic: How Pain Neuroimaging Illuminates Moral Dimensions of Law,” *Cornell Law Review* 97, no. 4 (2012): 801-848.

³⁹ Quoted in Robert Blecker, “Killing Them Softly: Meditations on a Painful Punishment of Death,” *Fordham Urban Law Journal* 30, no. 4: 974.

The thought here is not that all cases of capital punishment actually were or are painless, but that one should try to opt for those penal methods that minimize pain up to the point of eliminating it entirely. The very idea of trying to reduce or avoid pain as much as possible relies on the background assumption that there *can* be a painless form of capital punishment. If capital punishment without pain were not attainable, then the project of making it as painless as possible would be futile.⁴⁰ We have no good reason to think that the supporters of painless capital punishment are committed to penal futility.

In order to illustrate the possibility of painless capital punishment, we can resort to F.H. Bradley's case for construing legal punishment without resorting to the notion of physical suffering. Arguing against those who claim 'punishment consists in the infliction of pain for pain's sake,' Bradley takes the time to emphasize that

Pain, of course, usually goes with the negative side of punishment, just as some pleasure, I presume, attends usually the positive side. Pain is, in brief, *an accident of retribution*, but certainly I never made it more, and I am not aware that I made it even an inseparable accident. If a criminal defying the

⁴⁰ One could think of other practices—say, medicine—where reducing pain as much as possible remains meaningful even if we cannot remove pain altogether. But there is at least one important difference between punishment and medicine in this respect: the pain caused by a medical intervention is meant to avoid a greater pain whose existence is not causally dependent on medical practice, whereas the potential pain of killing someone would be, in this case, a direct causal effect of the penal practice. Knowing that, absent my penal intervention, there is no significant risk that the offender will die in physical pain, I would be logically inconsistent and morally disingenuous in claiming that the rationale of my intervention is to remove the pain of the offender's dying altogether. This is because it is precisely my intervention that causes the existence of physical pain in the first place.

law is shot through the brain, are we, if there is no pain, to hold that there is no retribution?⁴¹

More generally, one can argue that, if capital punishment is possible in the absence of physical suffering and capital punishment is an important instance of punishment, suffering is not a necessary feature of legal punishment. This argument can be pushed even further. Upon closer examination, we come to see that the death penalty cannot entail the suffering of the offender: a dead offender cannot be the subject of any experience, afflictive or otherwise. This is because, if capital punishment consists in the act of execution itself, then once the execution has been performed, the offender is no longer there to experience its effects. Conversely, capital punishment has not been imposed as long as the offender is still alive.⁴² This singles out capital punishment as a form of punishment whose effects cannot be actually experienced by the punished.

The example of capital punishment undermines the distinction between core and peripheric instances of punishment. In particular, it shows that this distinction is unable to back up the afflictive definition. The supporter of the afflictive view could try to counter my answer in two ways. On the one hand, she could remind me that physical suffering does not exhaust the whole range of types of suffering. Indeed, as indicated in my analysis of the hard ambiguity problem, not all suffering is physical. On the

⁴¹ F.H. Bradley, "Some Remarks on Punishment," *International Journal of Ethics* 4, no. 3 (1894): 284.

⁴² The idea that the (potentially) afflictive effects of capital punishment cannot be experienced by the executed offender is also defended in Joseph Zelmanowits, "Is There Such a Thing as Capital Punishment?," *British Journal of Criminology* 2, no. 1: 78-81. However, Zelmanowits' argument is that, since capital punishment is, by definition, suffering-free, we should not consider it as a form punishment. On the contrary, a non-afflictive definition of punishment shows why we should count capital punishment as punishment.

other hand, the defender of the afflictive view could emphasize that capital punishment produces a significant amount of non-physical suffering, especially in terms of the psychological suffering undergone as the offender awaits execution.

Both of these arguments are definitionally inconsequential. The second argument is inappropriate because it conflates the suffering resulting from the actual imposition of punishment with the suffering the offender might undergo in anticipation of its enforcement. The latter form of suffering is not, properly speaking, a characteristic of punishment itself, just as the suffering that might be felt during a criminal trial is not a feature of the penal sanction potentially decided at the sentencing phase. The kind of suffering that goes with the trial derives from the possibility of punishment, not from punishment itself. Similarly, the constant suffering lived on death row is the suffering of the waiting, not that of undergoing the death penalty itself. This supplementary distinction between the possibility—or the probability—of punishment and its actuality also shows why the non-physical forms of suffering that can be experienced prior to the real imposition of capital punishment are irrelevant when it comes to defining punishment itself. The definition of legal punishment should be the definition of the act of punishment *tout court*, not that of its possible or probable—and thus contingent—effects.⁴³

⁴³ Arguing that penal death represents an afflictive experience for the executed offender would require some plausible proof about the persisting existence of the person or entity undergoing this experience. Since, as the literature on posthumous interests shows, this proof remains at least controversial, saving the afflictive definition of punishment by positing the existence of a posthumously experiential person would come at an excessive metaphysical price.

Since the fine problem cannot be dismissed on the basis of a core-periphery distinction between different forms of punishment, the afflictive definition proves to be extensionally inaccurate. The afflictive definition is also inaccurate, insofar as it cannot make sense of those rarer instances of punishment where the offender does not or is unable to experience penal suffering. This is what might be called the masochist-callous offender problem.⁴⁴ The masochist offender is a person who takes pleasure in being subject to penal sanctions, whereas the callous one shows total indifference to punishment. Both cases raise a difficulty for the supporter of the afflictive definition. If suffering is not actually experienced, it is not clear whether, according to a suffering-centred view of punishment, the masochist and the callous offenders can be punished. Advocates of the afflictive view of punishment usually counter the masochist-callous objection by arguing that it is not the actual experience of suffering that matters, but the punisher's intention of imposing it.⁴⁵

Nevertheless, separating the experience of the punished from the intention of the punisher is not as straightforward as defenders of the afflictive definition assume. It is difficult, if not impossible, to properly understand punishment if we choose to ignore what being punished means. In order to better see why this is so, imagine that the punisher knows that she is confronted with a case of penal masochism or callousness. If the punisher's intention is to inflict suffering, then she has a good reason to

⁴⁴ For an initial formulation of the masochist problem, see Tziporah Kasachkoff, "The Criteria of Punishment: Some Neglected Considerations," *Canadian Journal of Philosophy* 2, no. 3: 364-365.

⁴⁵ See, for example, John Kleinig, *Punishment and Desert* (The Hague: Martinus Nijhoff, 1973), 24.

adjust the penal sanction in a way that renders the masochist and the callous offenders negatively sensitive to it.

With respect to the masochist, the imposition of suffering can be realized by suspending the penal sanction, thus depriving the offender of her source of penal pleasure. However, this means that the punisher does not punish anymore in the legal sense of the word. The suffering of the offender is not an aspect of her being punished, but an effect of the punisher's intentional choice to refrain from punishing. In the case of the callous offender, the punisher could adjust the administration of the penal sanction up to the point where the offender is negatively affected by it. It is not clear how feasible such adjustments are. An offender who is really unresponsive to suffering-inducing actions will very likely require creative forms of punishment that will seldom be available in the institutionally constrained context of the criminal justice system. Such creative penal sanctions will conflict with the legality requirement that characterizes legal punishment. In any case, even if the callous offender could be made to suffer, this still does not solve the problem posed by the masochist.

Alternatively, the punisher can choose not to adjust the penal sanction at all. Doing nothing, however, cannot be adequately characterized as the intentional imposition of suffering, especially since the punisher knows that neither the masochist nor the callous offender will suffer. Compare this with a situation where a teacher is trying to instill knowledge on children following a set of methods whose pedagogic potential she positively knows is null or negative. If the teacher did nothing to change or replace those methods, could we still continue to describe her activity as the intentional imparting of knowledge on children? The two situations are similar in at least one respect: just as the teacher would be merely pretending to teach, a punisher who knows that

her actions are doing nothing to produce the suffering of offenders would be pretending to punish.

All this shows that the distinction between the experience of suffering by the offender and the intentional imposition of suffering by the punisher is unwarranted and does not adequately answer the masochist-callous offender problem. To sum up on this point, it would be more appropriate to say that a punisher who is dealing with a masochist or callous offender can hope or wish or wait for the respective offender to suffer. It is nonetheless inaccurate to affirm that the punisher *intends* to impose suffering on the offender, when she knows that the offender is, as a matter of fact, enjoying or reacting indifferently to her penal sanction.⁴⁶

The Problem of Non-Operationalizability

The detailed analysis of the ambiguity and the inaccuracy problems should help us understand more quickly why the afflictive definition is flawed in a third way, namely, insofar as it is non-operationalizable. Defining punishment in terms of suffering is not useful if we want to use this definition as a basis for a subsequent operational definition of punishment. An operational definition is supposed to offer a validating test for performing those operations that are sufficient to construct the *definiendum* or assess whether we are in its presence. For example, the definition of a circle as the locus of points equidistant from a different, fixed point assists us in identifying the kind of operation—say, drawing a circle using a pair of compasses—that is suitable in order to construct it. An operational definition specifies an

⁴⁶ For an analysis of the distinctions between intending, wishing, hoping, and so on, see G.E.M. Anscombe, *Intention* (Oxford: Blackwell, 2nd ed., 1963).

observable condition or process for detecting the actual instances of a *definiendum*.

The reason why the afflictive definition cannot provide us with a suitable operational test for punishment is a direct consequence of the ambiguity of suffering. As already indicated, the four dimensions of ambiguity in suffering make it particularly hard, if not altogether impossible, to identify a method for guaranteeing whether we are punishing in the afflictive sense of the term or not. The discussion of the inaccuracy problem in its intensional dimension is illustrative of these operational limits. Insofar as the hard ambiguity problem is unsolvable, the afflictive definition will impede us in formulating *any* satisfying operational definition of punishment. On the one hand, this is because we can never be sure whether we are intentionally making offenders suffer in the relevant sense. On the other hand, there are cases—such as the one raised by the penally masochist or callous person—where it is highly uncertain whether we can punish at all. Therefore, the afflictive definition excludes punishment from the class of operationalizable *definiendi*. This should give us reasons to worry, especially if we think that punishment is required as an appropriate practical response to offences.

III

Toward a Non-Afflictive Definition of Legal Punishment

The ambiguity, inaccuracy and non-operationalizability of the afflictive definition are sufficient reasons for abandoning it. If you are convinced by the need to do so, then the goal of this article has been largely attained. Still, I need to say something about the way in which legal punishment could be defined without resorting to the idea of the intentional imposition of suffering on offenders. Additionally, it will be useful to highlight some of the

implications that flow from eliminating the afflictive definition. I will try to briefly address both of these issues in this third, and final section.

Sanctions, Not Suffering

One way of amending the afflictive definition would be to remove suffering as part of the *definiens* and keep the other four components enumerated at the beginning of the second section. This negative strategy is unsatisfactory, since it makes the definition incomplete. Saying that legal punishment is ‘done on putative offenders for their offences by a person different from them and holding a special authority to do so’ fails to indicate *what* is the kind of action punishment refers to. Something should be added to this statement before we can consider it as a candidate for definition. I suggest that the notion of *sanctions* is an adequate substitute for *suffering*. The idea of sanctions is normatively thinner than that of suffering, and it generally refers to the practical consequences legally attached to a particular action, activity or conduct. More specifically, sanctions are coercive measures whose authorization and enforcement are elicited by one’s failure to comply with a specific law, rule or order.⁴⁷

Modifying the first component of the *definiens* so that it becomes ‘the intentional infliction of sanctions’ escapes the three flaws of the afflictive definition. It avoids ambiguity, since the idea of sanctions can be positivistically construed as whatever counts as a sanction—or as its functional equivalent—within a particular jurisdiction. This also solves the accuracy and the operationalizability problems. If all forms of legal punishment are

⁴⁷ This is the sense in which the *Black’s Law Dictionary* defines *sanction*. See *Black’s Law Dictionary* (West, 9th ed., 2009), 1458.

sanctions and if sanctions are authoritatively spelled out in terms of the rules of a particular jurisdiction, it will be impossible to exclude paradigmatic forms of punishment from its definition. It will also be relatively simple to devise a procedure—say, reading the legally authoritative texts or consulting the relevant jurisprudence—to test whether we are dealing with a case of punishment or not. More generally, the terminology of sanctions is sufficiently capacious to accommodate any new or alternative forms of punishment—like criminal restitution, fines or community work—whose rationale does not seem to reside in their potential to make offenders suffer.

Sanctions should be understood enumeratively. This implies that their content is going to have the clarity of those authoritative rules—be they oral or written—that specify them. Furthermore, the idea of sanctions does not inherently rest on the offender's negative experience of punishment. The sanctioning character of an action is given by its bindingness or coercive character, not by its afflictive effects. The binding and coercive character of an action is neither necessary nor sufficient for something to be considered as afflictive. Taxes, for example, are both binding and coercive, and yet we do not try to define them in terms of the suffering that they necessarily generate.⁴⁸ On the

⁴⁸ At first blush, replacing *suffering* with *sanctions* collapses the distinction between civil, fiscal and criminal sanctions. This impression is mistaken. The distinction between these three kinds of sanctions persists in a legally positive way. This means that their difference resides in the fact of their formalization by different bodies of law. From a positivist standpoint, there are at least two important features that single out criminal sanctions. Unlike fiscal measures, the enforcement of criminal sanctions is practically incompatible with the continuation of the activity that is being sanctioned. Unlike civil sanctions, criminal ones are subject to stronger procedural safeguards. An account of punishment that is normatively thicker than the positivist one is not needed when it comes to its definition. My general argument in this article could be

other hand, a physical or psychological pathology can be afflictive, but it would be awkward to try to describe it as binding or coercive in the normative sense of the word. Therefore, 'bindingness' and 'suffering' are neither co-extensive nor co-intensive terms.

There are at least two objections that could be opposed to this definitional amendment. The first objection is that replacing 'suffering' with 'sanctions' makes the definition circular. The idea here is that 'sanction' is a loose synonym of 'punishment,' and that defining punishment in terms of sanctioning will thus make us run in a vicious circle. This objection is doubly misdirected. First, the meaning of sanctions is not strictly synonymous to that of punishment. The mere existence of civil sanctions testifies that not all sanctions are, by definition, penal ones. Second, the amended definition does not narrow down the *definiens* of punishment to its first component. Amending the afflictive definition does not modify or dismiss its other four components. These other components should be sufficient to indicate that the definition of punishment is not entirely circular. In particular, the requirement that punishment has to be imposed on a putative offender indicates that there is no extensional or intensional identity between punishment and sanctions. Sanctions *in general* are not necessarily inflicted on penally specified offenders.

The second objection is that eliminating suffering from the definition of legal punishment will render us insensitive to the afflictive effects of penal practice. Call this the objection from concealment. The objection claims that taking suffering out of the definition of punishment will result in obscuring, hiding, and covering up the fact that penal sanctions are often the sources of the offenders' negative experience, like physical and psychological

understood as asserting that we should be positivists about the definition of punishment, even if we do not have to be positivists about its justification.

pain, social or moral harm, as well as other various forms of unpleasantness. To put it in Scott Veitch's terms, a non-afflictive definition of punishment would simply illustrate, once again, the persistence of the 'amnesiac capabilities of legal thought and practice in the legitimation of human suffering.'⁴⁹ This objection is also doubly misguided. First, it conflates the definitional task—which is to bring clarity and accuracy into our understanding of the *definiendum*—with a normative one, which is to justify, criticize or practically modify the actions that fall under the *definiendum*. Second, the objection from concealment ignores that including suffering in the *definiens* of legal punishment cannot by itself serve as a safeguard against its potential afflictive effects. The objection can be thus turned on its head. Expecting punishment to always involve suffering might also normalize it, thus making us insensitive to it. On the contrary, a non-afflictive construal of punishment could be interpreted as a way of creating the conceptual space that is needed to regard suffering as a contingent—and thereby avoidable—aspect of penal practice.⁵⁰

Two Implications of the Non-Afflictive Definition

Most of the article focused on the definitional reasons for abandoning the afflictive understanding of punishment. I would like to briefly end by highlighting two important normative implications of the non-afflictive definition. The first implication is that opting for a non-afflictive definition levels the playing field between different—and potentially mutually exclusive—

⁴⁹ Scott Veitch, *Law and Irresponsibility. On the Legitimation of Human Suffering* (Abingdon: Routledge-Cavendish, 2007), 4. See also Linda Ross Meyer, "Suffering the Loss of Suffering: How Law Shapes and Occludes Pain," IN *Knowing the Suffering of Others. Legal Perspectives on Pain and its Meanings*, ed. Austin Sarat (Tuscaloosa: The University of Alabama Press, 2014), 14-61.

⁵⁰ For a more detailed response to this argument, see Coverdale, *op. cit.*

justifications of punishment. In particular, it allows supporters of retributivism to defend their position in a way that does not make their justification otiose. If, as Quinton used to argue, retribution is a logical doctrine, inasmuch as ‘suffering for suffering’s sake’ represents an ‘elucidation of the word [‘punishment’],’ then any conception that takes the offender’s suffering to be a ground for punishing will merely restate what it means to punish.⁵¹ It will not give us a distinct normative *reason* to punish. This does not imply that the non-afflictive definition is devised to save retributivism from normative irrelevance. Taking suffering out of punishment makes equal room for other conceptions as well, like restorative justice or more consequentialist views of punishment. If restorative justice is radically opposed to the offender’s suffering and the utilitarian-minded consequentialist is committed to reducing (useless) penal suffering as much as possible, then only a non-afflictive definition allows us to make sense of these theories as theories of punishment proper. To put it more generally, the non-afflictive view of punishment remains neutral in relation to different normative accounts of legal punishment.

The second implication is closely connected to the first one. Adopting a non-afflictive understanding of legal punishment shows that penal abolitionism rests on a definitional mistake. There are different forms of penal abolitionism, but the most vigorous ones—like the one held by Louk Hulsman or, more recently, Daniel Boonin and Nathan Hanna—claim that punishment should be abolished precisely because it consists in the intentional infliction of suffering on offenders.⁵² Abolitionists take suffering to be a necessary feature of any penal practice. If

⁵¹ A.M. Quinton, “On Punishment,” *Analysis* 14, no. 6: 134.

⁵² Louk Hulsman, “The Abolitionist Case: Alternative Crime Policies,” *Israel Law Review* 25, no. 2-4: 681-709; Boonin, *The Problem of Punishment*; Hanna, “Liberalism”.

this is not the case, then abolitionists lose their main rationale for rejecting punishment.

There is a sense in which the strength of the abolitionist project is predicated on the indistinct use that its supporters make of the terms *penal* and *punitive*. The meaning of these terms is not the same. The terms *penal* and *punishment* denote a specific type of legal sanction, whereas the terms *punitive* and *punitiveness* connote—and tend to criticize—the normatively unacceptable content or enforcement modality of a legal sanction. Oftentimes, abolitionists talk about punishment as if it were a synonym for punitiveness. More specifically, they tend to equate punishment with imprisonment, argue that imprisonment is essentially punitive, and conclude that punishment is essentially punitive and, as such, radically unjustified.⁵³ Since the first premise is false, the whole abolitionist argument is unsound. Though prisons tend to function punitively, they do not exhaust the entire range of penal sanctions. As already indicated, other sanctions, such as fines, criminal restitutions or community work are penal, but this does not make them inherently punitive.⁵⁴

A non-afflictive position would allow contemporary supporters of abolitionism to concentrate on the issues that really bother them, which are punitiveness and penal excess.⁵⁵ Appropriately understood, the problem that lies at the basis of abolitionist attitudes is the suffering that comes out of certain forms of punishment as practiced today, and not the fact of

⁵³ For an example of such a slippery use, see Howard Zehr, *The little book of restorative justice* (Intercourse, PA: Good Books, 2002).

⁵⁴ For a detailed critique of the ambiguous use of the term *punitive* and *punitiveness*, see Roger Matthews, “The myth of punitiveness,” *Theoretical Criminology* 9, no. 2: 175-201.

⁵⁵ For an analysis of penal excess, see David Garland, “Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America,” *Law & Society Review* 39, no. 4: 793-834.

punishing itself. Thus, for example, an abolitionist should not have a problem with penal sanctions that take a compensatory or restitution-based form and that are not deliberately directed at the offenders' suffering. Given that such sanctions actually exist *qua* penal sanctions, the abolitionist would have at least a *prima facie* reason to accept them on the basis of their non-afflictive content.⁵⁶ Doing so, however, would force the abolitionist to hold an inconsistent view, since she would, on the one hand, reject punishment overall and, on the other hand, be compelled to endorse certain existing non-afflictive forms of punishment. This internal inconsistency makes abolitionism ultimately untenable.

To summarize, we have three good reasons to give up on the afflictive definition of legal punishment, namely, its ambiguity, inaccuracy and non-operationalizability. We also have reasons to be optimistic about the possibility of an alternative, non-afflictive definition of punishment. This latter definition avoids the flaws of the former one. It also produces two interesting normative consequences. The first consequence is that we have a more neutral basis upon which different justifications of punishment can engage in principled deliberation. The second one is that a non-afflictive understanding of punishment allows us to see why penal abolitionism is a definitionally misdirected project. More generally, and though I take the sanction-based view of punishment to be a sound one, I believe that a discussion about

⁵⁶ For example, in the U.S., restitution is introduced as a penal sanction by the *Victim and Witness Protection Act* in 1982. For an in-depth analysis of penal restitution, see Charles F. Abel, Frank H. Marsh, *Punishment and Restitution. A Restitutionary Approach to Crime and the Criminal* (Westport, CT, London, England: Greenwood Press, 1984). For a positive analysis of criminal restitution, see Courtney E. Lollar, "What is Criminal Restitution," *Iowa Law Review* 100: 93-154.

the appropriate definition of legal punishment deserves to be addressed anew.⁵⁷

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