H.L.A. Hart and the Justification of Punishment

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Historically, discussions of the morality of punishment have been dominated by the conviction that punishment is an inescapable feature of social life. Thus it is widely believed that laws will not be respected unless those who break them are punished. Yet another view deeply entrenched is that avoiding or mitigating pain and suffering ought to be a fundamental goal of civilized societies. These two convictions are in obvious tension. Punishment requires the deliberated infliction of pain or suffering. How then can it be justified?

There are two familiar ways of seeking to overcome this tension. Some have argued that the punishment of those who break the law is justified because justice requires it, a view known as retributivism. Others have argued that punishment is needed for purposes of social protection. On this latter view, where its use results in a reduction of pain and suffering experienced by those falling under the authority of a legal system, punishment is justified. This approach evaluates punishment by reference to its consequences or its utility.

For most of this century, retributivism has held little appeal at least among those people whose ideas have directly influenced sentencing policy. They have for the most part seen forward-looking justifications of punishment as “more civilized than arguments based on revenge and retribution.” Of even more significance, however, is the fact that now forward-looking or utilitarian justifications are widely seen as equally suspect. The criticisms here are double pronged. First, forward-looking accounts of punishment allow only a secondary role for principles of justice and responsibility. They also require subordinating the interests of those being punished to the welfare of others. As a consequence, they ignore the Kantian principle that human beings should be treated as ends and never as means only. Second, empirical research in the last two decades suggests that forward-looking sentencing practices have simply failed to achieve their objectives. There is little reliable evidence that punishment is an effective deterrent. Neither has rehabilitation-oriented sentencing had for the most part its desired results.

The result of this process of evaluation seems to be a widely shared view at least among those responsible for advising on sentencing policy that neither of the traditional justifications of punishment is adequate taken by itself. Retributive accounts are unacceptable because they suggest that where serious wrongdoing has occurred, punishment may be justified and even required even


though there is convincing evidence that it will have no beneficial consequences. Forward-looking or utilitarian justifications of punishment are equally unsatisfactory because they subordinate principles of justice to utility. What this suggests is the somewhat paradoxical conclusion that backward-looking or retributivist justifications are unsatisfactory because they ignore forward-looking considerations, and forward-looking or utilitarian accounts are unsatisfactory because they ignore backward-looking or retributive considerations.

An obvious solution to this dilemma is to combine the two accounts. This option, however, poses serious difficulties since the principles that dominate the two distinct approaches seem incompatible. How then might this apparently fundamental incompatibility be overcome? Those seeking to construct a hybrid theory must first decide whether forward-looking or backward-looking values should dominate the account being constructed. Once this is determined, the challenge is to demonstrate that there remains legroom for the central values of the contrasting approach. For example, let us assume that our goal in punishing is backward-looking, that is just retribution. It would follow on this view that punishment was justifiable only if it was deserved. The challenge then would be to show how this approach could be rendered consistent with the view that nevertheless punishment should be inflicted only where it was likely to have beneficial consequences.

It is not surprising that, as the inadequacies of the two traditional accounts taken by themselves have become increasingly apparent, commentators have turned to a search for compromise solutions of the sort just described. The proposals that have emerged are too numerous to review here. For the most part, they have been shown to suffer from defects similar to those of the ‘pure’ theories they are designed to replace. However, one proposal merits special attention if only because of the influence it has acquired.

Hart’s solution—three questions distinguished

Perhaps the most influential attempt at a compromise solution to the problems of both forward-looking and backward-looking theories of punishment taken alone is that developed by H.L.A. Hart. His account is a response to what he described as a confusion caused at least in part by what he understood to be a “persistent drive towards an oversimplification of multiple issues which require separate consideration.” What is required, Hart suggested, is “the realization that different principles (each of which may in a sense be called a ‘justification’) are relevant at different points in any morally acceptable account of punishment” (Hart 1968: 3).

3. See for example Kant’s conclusion that: even if civil society resolved to dissolve itself with the consent of all its members, the last murderer lying in prison ought to be executed before the resolution was carried out. This ought to be done in order that everyone may realize the desert of his deeds.... From The Philosophy of Law. [Reprinted in Gertrude Ezorsky, ed., Philosophical Perspectives on Punishment (Albany: State University of New York Press, 1972) at 105.]

Hart proposes that we distinguish three questions. First, what justifies the general practice of punishment? Second, to whom may punishment be applied? And third, what amount of punishment should be inflicted? Approaching each question in a distinct step should allow us to see clearly, Hart argues, that endorsing retributive principles in the application of punishment in particular cases does not entail endorsing retribution as the general aim of punishment (Hart 1968: 9).

Before setting out Hart’s answers to each of these questions it is worth outlining his reasons for rejecting retributivism as the general aim of punishment while insisting that retributivist principles retain a central role in the sentencing process. The general objection has already been canvassed. However, Hart adds to this more detailed criticisms. Specifically, retributivism injects into sentencing a moral outlook that is unnecessary, inappropriate, and distorting. Let us look at each of these claims in turn.

First, retributivism distorts the sentencing process because it directs the court to do what no court can do, namely apportion moral blame. To do this requires that judges delve into the psyche of offenders with a view to determining moral guilt. But, Hart asks rhetorically, “can human judges discover and make comparisons between the motives, temptations, opportunities and wickedness of different individuals?” (Hart 1968: 162) If the answer to this questions is ‘no’ as Hart clearly thinks it is, then retributivism requires of judges something that they cannot do and which if attempted can only distort the sentencing process.

Second, the goal set for sentencing is inappropriate because it assumes incorrectly that legal guilt is a type of moral guilt when in fact the two notions are not conceptually linked. Hart, that is to say, is a legal positivist, someone who is of the view that the test of legal validity does not rest on moral criteria. What the law requires of those who fall under its authority may or may not reflect adequate moral standards. Yet the obligations it generates are real none the less. Sentencing is a response to legal not moral guilt.

Finally, Hart is of the view that the underlying appeal of retributivism is its endorsement of the principle of responsibility in particular, but also the place it makes for the principle of proportionality, the idea that punishment should fit the crime, and the requirement that like cases be treated alike. It is his view that all three principles ought to be accorded an uncontested place in sentencing. Any theory that ignored them would override in unacceptable ways values of primary and undeniable importance.

It is Hart’s view, however, that there are good non-retributivist reasons for retaining particularly the principle of responsibility. He argues that if this principle were eliminated, we would lose among other things:

the ability which the present system in some degree guarantees to us, to predict and plan the future course of our lives within the coercive framework of the law. For the system which makes liability to the law’s sanctions dependent on a voluntary act not only maximizes the power of the individual to determine by his choice his future fate; it also maximizes his power to identify in advance the space which will be left open
to him free from the law’s interference. Whereas a system from which responsibility was eliminated so that he was liable for what he did by mistake or accident would leave each individual not only less able to exclude the future interference by law with his life, but also less able to foresee the times of the law’s interference. (Hart, 1968: 181-82)

The argument, then, is that the principle of responsibility should be guaranteed a place in criminal justice because of the value we place on individual liberty. Hence the importance of insisting that only those whose actions were voluntary should be punished can be explained without appeal to retributivist principles.

Once the importance of retaining the principle of responsibility as a central requirement of punishment is established, the reason for distinguishing Hart’s first and second questions is readily apparent. If retributivism cannot supply the general aim of punishment, then presumably that aim must be forward-looking. However, if punishment is only forward-looking, the principle of responsibility cannot be shown to have a fundamental role in sentencing. The same will also be true of the principle of proportionality and the principle that like cases be treated alike. Hart’s arguments on this point are persuasive.

Let us assume, as Hart does, that the general aim of punishment is social protection. On this model the principal aim of sentencing would be deterrence, both general and specific. This being the case, there would be no reason to restrict punishment only to those who voluntarily broke the law, or even, for that matter, to those who broke the law.

Some people have argued, Jeremy Bentham among them, that this conclusion does not follow. Restricting punishment to those who break the law and break it voluntarily, they have argued, is the most efficacious method of achieving the law’s objective of social protection. Punishing the innocent or those not responsible for their actions “cannot act so as to prevent the mischief” (quoted in Hart 1968: 18-19).

As Hart points out, however, this view is not persuasive. In his discussion of Bentham’s argument for retaining the principle of responsibility on utilitarian grounds, Hart argues that insisting on responsibility as a condition for punishment is as likely to frustrate the pursuit of social defence as it is to advance it (Hart 1968: 20). The efficacy of strict liability offences in reducing incidences of undesired behaviour is good evidence for this point in Hart’s view. That is to say, punishing those not responsible for their actions can serve as an effective general deterrent. Further, though Hart does not recognize the point, it can also serve to condition the behaviour of those to whom it is applied even where the undesired behaviour is involuntary.5

It is equally true that if sentencing is aimed exclusively at social protection, little room is left for the principle of proportionality or the requirement that

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5. Anthony Burgess’ novel A Clockwork Orange, first published in 1962, illustrates this point well.
like cases be treated alike. Thus, for example, heavy penalties for speeding in at least some instances might be expected to reduce the incidence of speeding and as a result save lives on the highway. Equally, heavy penalties for minor offences might result in the virtual elimination of nuisance behaviour, for example, parking offences, to the benefit of very large numbers of people, thus justifying the penalty. Finally, where sentencing has exclusively forward-looking objectives, varying penalties to fit the offender and not the crime cannot be ruled out in principle, thus overriding the requirement that like cases be treated alike.

All of this suggests, as Hart points out, that punishment should reflect values other than those associated simply with social protection. Appropriate weight should also be give to the value of liberty or freedom from undue interference and with principles of justice. This can be done, and the relative place of these other values and principles can be established, he argues, if we distinguish and respond independently to each of his three questions.

What answers, then, does Hart give to each of these questions? The answer to his first question, Hart seems to suggest, is that the practice of punishment is justified by the belief that penalties are required as a threat to maintain conformity to the law (Hart 1968: 25-27). Who then are we justified in punishing? Hart’s answer is that we are justified in punishing only those who break the law voluntarily. To fail to limit punishment to those genuinely guilty of an offence would, he argues, be unfair and unjust and would undermine the capacity of people to live satisfactory lives within the coercive framework of the law. What is more, we should accept this constraint, Hart argues, even though it will inevitably hinder the pursuit of the general aim of punishment, namely to ensure conformity to the law.

It would seem to follow that by distinguishing these two questions, we can endorse what Hart calls retribution in the distribution of punishment, while rejecting retribution as the general aim of punishment.

We have then Hart’s answer to his first and second questions. But what answer does he propose for the third? That is, by reference to what values should sentencing authorities determine the amount of punishment that should be inflicted for particular offences? In particular, should retributive or utilitarian principles guide the sentencing process after guilt has been determined?

Unfortunately for those attempting to assess the strength of Hart’s proposal, it is not at all clear that an answer to this question is available. The focus of discussion is on the first two questions. Little attention is paid to question three. It is true that Hart does discuss particular sentencing practices like capital punishment. However, no clear general answer to the third question emerges from those discussions.

It would seem, therefore, that assessing the strength of Hart’s proposal requires that we attempt to construct and evaluate the answers to his third question that are available to him or to others adopting his strategy.
How should offenders be punished? A first interpretation

One obvious possibility is that the amount of punishment that should be inflicted on offenders for their offences should be determined by what they deserve. That is to say punishment should be inflicted in proportion to the moral gravity of the offence committed and that like cases should be treated alike.6

This first interpretation, however, is not consistent with Hart’s basic project. If the answer to the second and third questions is a retributivist one, no room is left for the view that the general aim of punishment should be forward-looking since in every case who is punished and how they are punished is to be determined by backward-looking criteria.

This first attempt at answering the third of Hart’s three questions, then, is unsatisfactory in as much as it is exposed to all the criticisms Hart directs at retributivist justifications of punishment.

How should offenders be punished? A second interpretation

A more plausible interpretation is that Hart thought that both principles of utility and principles of justice should play a role in determining the amount of punishment to be inflicted on offenders for specific offences. However, this suggestion is a perplexing one. Utilitarianism comes equipped with its own criteria for determining the appropriate sentence for specific offenders. But so too does retributivism.7 Further, as we have already seen, those two principles will frequently give rise to conflicting conclusions about the punishment that should be inflicted in particular cases. A judge cannot impose a sentence that is both an appropriate retributive and an appropriate utilitarian response to an offence where the two are in conflict. The central challenge for hybrid theories of the sort Hart is proposing is to show how this conflict should be resolved.8

There would seem to be only two ways out of this dilemma. The first is to take the view that insisting that punishment be assigned in particular cases in accordance with the requirements of justice is the most efficacious way of pursuing the utilitarian goal. There is some evidence that Hart was at least tempted

6. There are hints here and there in the text that point in this direction. For example, Hart says in the course of a discussion of capital punishment:
Some punishments are ruled out as too barbarous or horrible to be used whatever their social utility; we also limit punishments in order to maintain a scale for different offences which reflects, albeit very roughly, the distinction felt between the moral gravity of these offences. Thus we make some approximation to the ideal of justice by treating morally like cases alike and morally different ones differently. (Hart 1968: 80)
This passage, however, is also consistent with the view that the amount of punishment inflicted should be determined by utilitarian considerations, with retributive principles operating as side constraints, as Mark Thornton has pointed out to me in discussion of this point.
8. If there never was any conflict, the two approaches would be perfectly complementary and there would be no need to choose between them. The challenge for a hybrid theory is to propose modifications to each that bring them into substantial harmony in determining sentences for particular offences.
by this option. On the other hand, he also quite explicitly rejects this way around the problems of combining justice and utility in punishment at various points in his commentary and in ways that have direct application to this dilemma. It is Hart’s view, as we have already seen, that there are convincing reasons for accepting that principles of justice, particularly respect for the principle of responsibility, are as likely to frustrate the pursuit of utility as they are to facilitate it.

The second way out is to suggest that the role of the language of retribution is so important to the way we think about our social relationships that it should not be overridden or diluted excessively, even if and when it collides with the aim of social protection. This view gives to those values associated with backward-looking accounts of punishment a status that is independent of the general aim, which is a utilitarian one.

In practice it is certainly possible to direct sentencing authorities to use both forward-looking and backward-looking criteria when sentencing offenders. Indeed, there is a real sense in which modern systems of law do exactly this. However, simply insisting that both types of values have a necessary place in punishment does nothing to explain their relative place. If they come into conflict, and they cannot avoid doing so, which set of values should prevail?

Solving this problem is in fact one of the basic problems in law enforcement. In effect, Hart’s compromise solution on this interpretation appears to amount to little more than a direction that when conflict occurs, common sense should mediate. Sometimes that will result in a weakening of the role of justice and fairness. Sometimes it will result in sacrificing social protection in the interests of justice or fairness. However, in either case the outcome will vary with the particular judge who is called upon to make the decision, a decision which, unless guided by a coherent set of sentencing principles, must inevitably have an arbitrary quality to it.

Once it is clear what this interpretation requires of sentencing authorities, other objections emerge. First, the suggestion that punishment is to be apportioned to offenders using retributive criteria at least part of the time is open to all the objections that apply to retributivist justifications generally. Such an approach would require that judges determine the moral guilt of offenders in assessing how they should be punished. We have already seen that this requirement is one which in Hart’s view cannot be fulfilled. Second, to use retributivist criteria in apportioning punishment is to link legal and moral guilt in an inappropriate way, again for reasons already set out.

9. For example, Hart comments that “fairness between different offenders expressed in terms of different punishments is not an end in itself but a method of pursuing other aims which has a moral claim on our attention....” Hart 1968: 172. However, the appropriate interpretation of this passage would seem to be simply that Hart views fairness as a value which should be respected, except where it collides too vigorously with utilitarian considerations.

10. For example, see his discussion of Bentham’s justification for retaining the notion of responsibility in determining guilt. Hart 1968: 19-21.

11. He makes these points in his discussion of Bentham’s arguments in this regard, which is referred to in the previous note.
There are other difficulties as well. If sentencing authorities are guided sometimes by forward-looking and sometimes by backward-looking criteria, then what is the role of the principle of proportionality? At least some of the time it will have to be ignored. This in turn will require abandonment of the requirement that like cases be treated alike since at least some of the time, sentences will be determined by reference to forward-looking criteria. What this shows is that directing sentencing authorities to combine forward-looking and backward-looking sentencing criteria would seem to require that they breach principles that have an important place in what Hart describes as “common morality”.¹²

No doubt, common sense is what those responsible for making these decisions will normally rely on. We might expect the result to be a kind of uneasy equilibrium. Furthermore, this may turn out to be the best we can do.¹³ However, if this second way of interpreting Hart’s proposal is the correct one, it would seem to imply that a basic social practice is beyond understanding and analysis in a fundamental way.¹⁴

How should offenders be punished? A third interpretation

There is a third possible interpretation left. How much punishment should be inflicted on those found guilty of breaking the law should be determined by reference to utilitarian criteria, principally deterrence. The argument supporting this interpretation proceeds in four steps.

1. If the goal of punishment is deterrence, as Hart appears to believe (Hart 1968: 27), then punishment is unavoidably manipulative.¹⁵

2. To use people in this way requires that we override principles of justice that normally play a central role in human relationships.¹⁶

3. It is their decision to break the law when they could voluntarily have avoided doing so that gives us a licence to punish offenders and thus use them as instruments in the pursuit of a social good.¹⁷

4. However, we should exercise our moral licence to punish people in this way only if we need to do so in pursuit of the main aims of punishment.¹⁸

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¹⁴ In a recent Nordic Conference of the International Association for Philosophy of Law and Social Philosophy hosted by the Canadian Section, Mark Thornton and Gene Dais argued at length that combining retributive and utilitarian principles into a coherent theory of sentencing was indeed possible. Their approach to this task is set out in contributions to the proceedings of that conference, see Wesley Cragg, ed., Retributivism and its Critics (Stuttgart: Franz Steiner Verlag, 1992). It is my view, however, that no defence of a hybrid theory of the sort that Hart defends can be evaluated in the absence of a relatively detailed description of how it would work in a sentencing context. Since neither undertakes this task, what they are actually advocating is fundamentally ambiguous, as indeed is Hart’s own account, as this discussion shows.
¹⁵ This view is implied by passages from essays collected in Hart 1968: “Prolegomenon to the Principles of Punishment” at 22, in “Murder and the Principles of Punishment” at 80-81, and in “Punishment and the Elimination of Responsibility” at 183.
¹⁶ Again see discussion in Hart 1968: 183.
¹⁷ Hart implies this view in a number of places. See particularly Hart 1968: 22.
¹⁸ See Hart 1968: 172. It should be noted, what I think is in any case obvious, that these four propo-
If this is the correct interpretation of Hart’s position, it raises a serious problem. Why does the fact that someone has committed an offence give society a licence to use him in ways that are in conflict with principles of justice and fairness? Hart’s response to this question is not at all clear. On the other hand, his account of why we should not treat people this way is impressive, and deserves careful discussion.

The case against ignoring principles of justice in sentencing

Hart offers three interlocking reasons for not ignoring principles of justice in determining the punishment that should be inflicted on offenders for their offences in particular cases. First, if the goal of sentencing is social protection, and if we acknowledge the limitations of deterrence-oriented sentencing, then achieving social protection will require the extensive use of indeterminate sentences. The logic here is relatively straightforward. If the purpose of a sentence is to protect the public, and if it is not possible to determine in advance what is likely to be needed to ensure that particular offenders do not repeat their crimes, or commit other crimes, then the appropriate sentencing response is ensure that offenders are not released until those responsible for public safety are convinced that they are unlikely to become repeat offenders. Indeterminate sentences, however, make it virtually impossible for those on whom they are imposed to maintain any control over their lives. This is because indeterminate sentencing requires that officials charged with the responsibility of deciding when to release an offender must be given a great deal of discretion. On the other hand, there are no reliable techniques for predicting whether offenders have been rehabilitated or can be released with relative confidence that they are unlikely to recidivate. What this means in practice is that those given indeterminate sentences have no means of predicting the criteria officials will use in deciding when to release them. The frustration and alienation that results is now well documented.

19. Both Mark Thornton and Brenda Baker in private correspondence have suggested reasons for thinking that it is not. Their arguments are in many respects persuasive though there is imposing evidence to support the opposing case as well, as the footnotes to each of the four steps outlined above suggest. For the purposes of this discussion, it is not central to my argument that this third interpretation is the correct one. My argument is simply that it is a plausible interpretation, one that has been vetted in the literature and one that deserves scrutiny.

20. In preparing its recommendations on sentencing, the Canadian Sentencing Commission commissioned a thorough review of the available research on the deterrence effect of punishment. They concluded that it was virtually impossible to justify punishment in particular cases by reference to its value as a deterrent. They did concede, however, that the fact of punishment did have some residual value as a general deterrent. See the report Sentencing Reform: A Canadian Approach of the Canadian Sentencing Commission (Ottawa: Ministry of Supply and Services, 1987).

21. For a thorough discussion of the literature in this regard see the second chapter of my book, supra, note 2, entitled “The Point of Punishment—Forward-looking Accounts”.

Furthermore, if limiting the freedom of people to plan and predict the course of their lives is of fundamental value as a general principle, then surely it should also be respected in responding to the actions of offenders. The importance of this is well illustrated below.

Let us move then to a second point. As Hart points out, under normal conditions, people do not see each other:

as so many bodies moving in ways that are sometimes harmful and have to be prevented or altered. Instead, persons interpret each other’s movements as manifestations of intentions and choices, and these subjective factors are often more important to their social relations than the movements by which they are manifested or their effects. If one person strikes another, the person struck does not think of the other as just a cause of pain to him; for it is of crucial importance to him whether the blow was deliberate or involuntary. If the blow was light but deliberate, it has a significance for the person struck quite different from an accidental much heavier blow. (Hart 1968: 182-83)

What does this imply for the law? Hart replies:

If as our legal moralists maintain it is important for the law to reflect common judgments of morality, it is surely even more important that it should in general reflect in its judgments on human conduct distinctions which not only underlie morality, but pervade the whole of our social life. This it would fail to do if it treated men merely as alterable, predictable, curable or manipulable things. (Hart 1968: 183)

That is to say, to allow the goal of social protection to dominate sentencing could only result in a system of corrections that treated those who came under its control as ‘merely alterable, predictable, curable or manipulable things’. The likely effect would be to turn offenders treated in this way into hardened enemies of society, as Hart seems to acknowledges (Hart 1968: 27).

A third point. Hart argues persuasively that we ought to allow a central place in our criminal justice system to values other than those associated directly with social protection. The desirability of giving the principle of responsibility a central place in determining legal guilt is a good example. How can we expect those we punish to return to play a constructive role in a society that values freedom and responsibility, if we punish them for breaking the law in ways that explicitly ignore those central values, values around which we expect ordinary members of society to organize their lives?

Finally, Hart suggests that to depart in a significant way from the principle of proportionality, a backward-looking principle, and from the principle that like offences be treated alike, which would be necessary if sentencing were to be dominated by forward-looking considerations, would risk “confusing common morality or flouting it and bringing the law into contempt” (Hart 1968: 25). Yet this is exactly what the third interpretation seems to require.

Taken together these arguments seem persuasive. How could punishment be justified if it required such a substantial flouting of fundamental social values? The difficulty is that taken together they seem to have direct application to Hart’s own justification of punishment if we interpret it in this third way.
To conclude, on all three possible interpretations of the answer he might give to the question ‘how much punishment should be inflicted on offenders for particular offences?’, his hybrid account is exposed to just the criticisms that Hart himself levels against either purely forward-looking or purely backward-looking theories.

**The general aim of punishment. A final criticism of Hart’s forward-looking hybrid account**

The hybrid account Hart offers is subject to a second type of criticism. Hart assumes that the purpose of punishment is social protection. But is he consistent in this view and does he show that a justification of the practice of punishment can in fact be built on this assumption?

Two observations are relevant here, one very brief, the other more substantial. First, Hart does not in fact offer a justification of punishment. This is particularly obvious when we consider the costs that previous argument suggests attach to sacrificing offenders to the public good. To actually justify punishment, Hart would have to show that it was on balance the least harmful and most efficacious way of accomplishing what he says is its goal, namely the need for general deterrence. What appears a simple requirement hides an extraordinarily complex calculation. Hart avoids the calculation by appealing to what he regards as widely shared beliefs.23 This tactic, however, comes up against empirical research undertaken over the past several decades into the efficacy of punishment as a general deterrent; this research suggests that public assumptions about the efficacy of punishment as a deterrent are not a reliable foundation on which to build a justification of that practice.

Let us set this ‘quibble’ aside, however, and turn to what must surely be the fundamental concern. Does Hart provide us with a general aim that could in principle justify the practice of punishment? The answer is that he does not provide us with one general aim but with two. In some places he points to social protection as the general justifying aim of punishment. Elsewhere, however, his argument implies that the general aim of punishment is to maintain conformity to the law.

It is clear that it is the second general aim to which Hart is committed. There are two reasons for this. First, Hart makes it clear that the purpose of the law is “to announce to society that [prohibited] actions are not to be done and to secure that fewer of them are done” (Hart 1968: 6). The function of punishment is to encourage compliance with the law.

When we put it this way, we can see that Hart’s way of justifying punishment creates an illusion. The function of punishment is to deter people from breaking the law. Punishment is justified, on this account of the matter, if it ful-

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23. He makes this clear in *Punishment and Responsibility*, see Hart 1968: 27. As previous discussion shows, there are good reasons for doubting that this view is in fact well grounded—a conclusion that will be strengthened as the argument progresses.
fills its purpose. But this is a functional not a moral justification. It can work as a moral justification only if imposing a legal system can be shown to be justified as a moral good.

Hart is committed to the view that there is no necessary connection between law and morality.24 This is one of the basic reasons for his rejection of retributivism as a justification both for retaining the requirement of responsibility in the criminal law and as a justification for punishment. If we accept Hart’s view on the relation of law and morality, however, there is no reason to assume that enforcing the law in general or specific laws in particular will have socially valuable consequences. It follows that establishing that punishment helps to secure that the law is obeyed explains the rationale for punishment but does not justify it.

It is true, though he does not make reference to the fact in his discussion of punishment, that Hart is of the view that all legal systems come into existence in response to certain “natural necessities” of which vulnerability to violence is one of the most basic. However, as Hart himself acknowledges, this will not carry him the needed distance. A legal system could meet the basic requirements described in his account of the minimum content of natural law. But this would still not entail that the system provided social protection in a form that justified enforcement through punishment.25

Separating law and morality generates a quandary for Hart’s hybrid theory. If obeying a particular law is conducive to the general good, then punishing those who break that law will be justified, since punishment is necessary by hypothesis to ensuring that the law is obeyed. However, if the law is a bad one, punishing those who break it will not be justified. This of course implies that there is and can be no general moral obligation to obey the law. It also implies that there is and can be no general moral justification of the practice of punishment of the sort his own account assumes to be possible, even on the assumption that a particular legal system was on the whole a morally commendable one.

A concluding comment

Punishment is widely regarded as an inescapable feature of social life. Yet it is surely significant that of the many aspects of social life, the infliction of punishment on those who deviate from legally defined standards of behaviour is one of the most difficult to justify. Of course, it would be unfair to conclude from this rather brief examination of the type of justification to which contemporary philosophers are turning that more recent attempts (to provide what are known as hybrid accounts of punishment) will prove to be as unsatisfactory in

25. I discuss this point at more length in my “Law, Violence, and the Limits of Morality” (1989) 8 Law and Philosophy 301.
the end as the traditional justifications. For one thing we have not examined an alternative to Hart's approach that has recently garnered a good deal of interest, namely teleological retributivism. For another, it might well be argued that Hart's hybrid approach is amenable to sophisticated development of a sort that would make it immune from the kinds of criticisms developed here.

These debates underline the fact that most of us see punishment as a social necessity. But can it be a social necessity if a coherent justification or explanation for it is not available? The answer, it seems to me, is No. Evaluating why this is so, is however a task for another day.

26. Teleological retributivism differs from the approach examined in this essay by starting from the position that the general aim of punishment is a retributive one. Its strategy is to seek to incorporate forward-looking values into what is essentially a backward-looking justification. A recent interesting example of this kind of argument is offered by R.A. Duff in *Trials and Punishments* (Cambridge: Cambridge University Press, 1986). In his Critical Notice, Bickenbach supra, note 13, concludes that, while the account offered by Duff is of substantial philosophical interest, it does not succeed in the task it sets itself.

27. This is something I explore in *The Practice of Punishment; Towards a Theory of Restorative Justice*, supra, note 2, where I argue that while punishment is indeed an unavoidable concomitant of criminal justice, it is a mistake to think that infliction of punishment is an appropriate purpose of sentencing or corrections. Rather, the goal of both activities ought to be restorative not punitive. Why this is so is set out at length in the last five chapters of the book. The present paper combines ideas set out at greater length in the book, particularly in chapters two and three.