RETRIBUTION AND THE DISTRIBUTION OF PUNISHMENT

It appears to be a commonly held view that some form of the retributive theory is essential to any satisfactory account of punishment. Utilitarian-oriented theories, such as the deterrence theory, are given their due as justifications for the institution of punishment, but the retributive theory is invoked to justify the distribution of punishment. I wish to argue that the retributive theory is not necessary even for this purpose.

Professor H. L. A. Hart presents, in my opinion, the clearest statement of the view I wish to criticize. From the retributive theory he salvages the principle that only persons who have voluntarily broken the law may be punished. I shall call this the Retributive Principle. It is retributive in the sense that it refers to the character of the offence rather than the consequences of the punishment; it is "backward-looking" rather than "forward-looking". Professor Hart thinks that although most retributivists have failed to recognize that a utilitarian justification of the institution of punishment will do quite well, retributivists are right to say that a utilitarian justification of the Retributive Principle will not do. The reason that it will not do is that utilitarians cannot satisfactorily account for the fact that we do not (and should not) punish some non-voluntary offences.

Why cannot the punishment of non-voluntary offences be defended on utilitarian grounds? Professor Hart rightly dismisses as a non sequitur Bentham's argument that punishment of non-voluntary offences is inefficacious and therefore undesirable. It is clear that Bentham has shown (at most) only that the threat of punishment is not effective in deterring abnormal persons, not that the infliction of punishment on them would not be effective in deterring normal persons from committing similar crimes.

But Bentham could have defended not punishing non-voluntary offences on other grounds—e.g. by an appeal to the fear and outrage likely to be caused by a system which does not take a lenient view of non-voluntary offences. Not only would such a defence have been quite compatible with his utilitarianism, but Bentham comes very close to stating such a defence himself: "The displeasure of the people . . . where they happen to conceive that the offence or the offender ought not to be punished at all, or at least ought not to be punished in the way in question" is a case where punishment is "unprofitable".


2This is just one of a familiar group of objections which suggest that utilitarianism does not exclude the possibility of unjust punishments. This particular objection is, I think, the most interesting because it refers to a feature of our actual system of punishment, instead of features of some conceivable (or historical) system.

3An Introduction to the Principles of Morals and Legislation, ch. XIII, sect. 4, para. 16.
Professor Hart anticipates this line of defence (although he attributes it to “modern” utilitarians). The principle that punishment should be “restricted to those who have voluntarily broken the law is defended [by utilitarians] not as a principle which is rational or morally important in itself but as something so engrained in popular conceptions of justice in certain societies, including our own, that not to recognize it would lead to disturbances, or to the nullification of the criminal law since officials or juries might refuse to co-operate in such a system”.

Professor Hart’s first objection to this sort of defence is that some offences are punishable in Anglo-American law even if the accused did not intentionally do what the law prohibits. (These are offences of “strict liability” such as the possession of an altered passport.) Therefore, utilitarians are wrong to assume that a system of law which punishes non-voluntary offences is “unprofitable” or unworkable. But utilitarians do not need to assume this. Indeed, one important advantage of the utilitarian approach is that it is sufficiently flexible to allow for some cases where non-voluntary offences need to be punished for special reasons. A utilitarian may argue, for example: (1) that it is reasonable for the law to assume that a person who merely possesses an altered passport does intend to use it; (2) that it is impracticable to require authorities to show intent in many such cases; and (3) that such mild infringements of the “popular conception of justice” will not cause disrespect for the law or public outrage. Moreover, it is open to a utilitarian to argue the opposite case if he feels the circumstances do not warrant such infringements. On the other hand, if one accepts the Retributive Principle as one which is “rational or morally important in itself”, one is committed to condemning as unjust all punishment of offences of “strict liability”.

The second objection Professor Hart makes against the utilitarian justification of the Retributive Principle is that to treat the principle as merely embodied in popular mores is to preclude our condemning legal systems which disregard the principle in societies where it is not embodied in the mores. This objection seems to me to be unwarranted. For we may always condemn unmitigated punishment for non-voluntary offences for the perfectly good utilitarian reason that all unnecessary suffering is undesirable. (‘Unnecessary’ does not conceal an appeal to the Retributive Principle since we decide what is necessary according to utilitarian criteria such as the preservation of the respect for law.)

However, it is possible to conceive of cases where it would be impossible on strict utilitarian theory to condemn punishment of non-voluntary offences. For example, we can imagine a society of masochistic sadists in which everyone enjoys seeing others punished for non-voluntary offences and also enjoys being a victim of this sort of punishment himself. As long as the

*It is interesting to notice that in Glanville Williams’ account of the argument for and against “strict liability” nearly all of the arguments on both sides are utilitarian. (The Criminal Law, second edition, pp. 258-60.)
members of this society hold the attitudes toward punishment which they are assumed to hold, the general happiness would not be maximized if punishment were distributed to conform to the Retributive Principle. But the fact that the utilitarian cannot on his own theory condemn the practices of this society does not seem to be a serious objection to his theory. It is likely that most people, confronted with such a society, would be so genuinely puzzled by attitudes so alien to theirs that they would not feel justified in condemning the practices. In this society, masochists and sadists are not abnormal.

Although this explanation seems plausible for really queer cases, it does not seem satisfactory for rather less queer ones. For example, we can imagine a society in which nearly everyone enjoys seeing a certain minority which commits non-voluntary offences severely punished and, further, that nearly everyone in the society would be extremely distressed if this practice were curtailed. Can a utilitarian condemn this society? He is prevented from condemning the distribution of punishment because, given the attitudes of the people in this society, the distribution tends to maximize happiness more fully than would a distribution which conformed to the Retributive Principle. But the utilitarian is not prevented from condemning the attitudes (or actions) which happen to make the system the most useful in the circumstances. In this imaginary society, the claims of a certain minority are not treated according to the same standards as those according to which the claims of the rest of society are treated. The utilitarian may condemn the attitudes which prevent impartial treatment because they violate the principle that “one person’s happiness is counted for exactly as much as another’s.” As many utilitarians since Sidgwick have realized, this principle of impartiality, though not itself utilitarian, is required to make utilitarianism coherent. With this principle added to a utilitarian theory, we are able to condemn the attitudes which create this unjust system of punishment in the imaginary society. And we are able to do so without invoking the Retributive Principle as “morally important in itself”. (The Impartiality Principle does not by itself do such a comprehensive job of condemnation as does the Retributive Principle. Non-voluntary offences may be punished impartially. Further utilitarian arguments are required to condemn this sort of practice.)

Despite the possibility and the advantages of a more thoroughly utilitarian theory of punishment, a theory like Professor Hart’s, which allows the Retributive Principle an important independent role, evidently retains an appeal. It is therefore necessary to try to expose the reasons for this appeal.

One reason is that some philosophers (though not Professor Hart) appear to be looking for a guarantee that no punishment which is unjust can be

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desirable. The only sort of guarantee which would do here would be a logical one. But if it is logically necessary that a punishment which violates the Retributive Principle is undesirable, then we cannot say (as we can on the more flexible utilitarian theory) that in some special cases punishment of non-voluntary offences is desirable. And surely we do wish to say this. Moreover, it is not clear what purpose the guarantee would serve, if we had it. It is not required to ensure that we do not in general find punishment of non-voluntary offences desirable. The reason that we condemn such punishment in general is that the Retributive Principle is given higher priority than most other principles embodied in the popular mores.

A second reason why some philosophers may wish to introduce a Retributive Principle into their theory of punishment is that there seems to be a temptation to set up a principle of justice in respect to the distribution of punishment (such as the Retributive Principle) to parallel a principle of justice in respect to the distribution of benefits (such as Sidwick's axiom of Rational Benevolence). Just as competing claims of all individuals in society are to be given just consideration in arriving at the most desirable distribution of benefits, so the mitigating pleas of all offenders are to be given just consideration in arriving at the most desirable distribution of punishment. This alleged parallel need only be stated to be seen to be misleading, as there is a logical asymmetry between the distribution of benefits and the distribution of punishment. Unlike benefits, punishments are not something in the distribution of which there can be a shortage. The Public Executioner is not prevented from hanging a convicted man because the available supply of punishment for that week is used up.

A third reason the Retributive Principle is brought into a theory of punishment independently of utilitarian justification is (according to Professor Hart) that law should reflect the fact that "persons interpret each other's movements as manifestations of intentions and choices". A utilitarian theory, which treats persons "as bodies moving in ways which are sometimes harmful and have to be prevented or altered", misrepresents the character of social behaviour. If a utilitarian theory of punishment were presented as an account of the whole of social behaviour, this objection would be warranted. But a utilitarian theory of punishment purports to serve only the less ambitious aims of showing how the institution of punishment is to be justified and what considerations are relevant in the distribution

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2H. J. McCloskey (Mind, Oct. 1963, p. 599) asserts that the fact that utilitarianism makes it logically possible that an unjust system of punishment may be useful is sufficient to expose the "inadequacy" of utilitarianism. Surely a theory is not to be called inadequate because it does not make logically impossible what is not only possible but in some circumstances desirable.


4In "Prolegomenon..." Professor Hart makes some assertions which sound as if he succumbs to this temptation. (See Laselett and Runciman, op. cit., p. 177 and Hart, Law, Liberty and Morality (1963), p. 60.) However, in Punishment and the Elimination of Responsibility (1962), it is clear that he considers the third reason I discuss to be the most fundamental.
of punishment. The fact that an offender acts unintentionally is a relevant consideration—but only insofar as consideration of that fact makes a difference in the promotion of utilitarian aims, such as the smooth working of the legal system. A utilitarian theory would be seriously weakened if it could be shown that any theory of punishment presupposes the voluntariness mentioned in the Retributive Principle. However, it is not clear how this could be shown since voluntariness is not a logically necessary condition of punishment. In any particular case, it is always possible that a non-voluntary offence is punishable.

If these are the reasons why some philosophers insist on introducing the Retributive Principle into their theory of punishment, then utilitarians may safely dispense with the Principle as an independent part of their theory of punishment—without sacrificing anything important. Furthermore, if we were to adopt a theory of punishment which is partly couched in the “backward-looking” language of the Retributive Principle, we might easily ignore, in making judgments about the distribution of punishment, the aims of the institution of punishment. A utilitarian theory keeps these aims before our mind by placing all discussion of punishment, including that of the distribution of punishment, in the “forward-looking” language of deterrence and reformation.