

A Failed Refutation and an Insufficiently Developed Insight in Hart's *Law, Liberty, and Morality*

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Abstract H. L. A. Hart, in his classic book *Law, Liberty, and Morality*, is unsuccessful in arguing that James Fitzjames Stephen's observations about the role of vice in criminal sentencing have no relevance to a more general defense of legal moralism. He does, however, have a very important insight about the special significance of sexual liberty.

Keywords Legal moralism · Sentencing · Sexual liberty

Introduction

Hart's *Law, Liberty, and Morality* (Hart, 1963) was the first book that, more years ago than I care to remember, I read in contemporary legal philosophy, and it was one of the books that inspired me to start working in the area—particularly on the philosophy of crime and punishment. I taught from the book many times and, indeed, my first publication in philosophy of law was an essay (which I now regard as rather dreadful) in which I attempted to modify and expand Hart's argument. (Murphy, 1966)

As I reread Hart's book in order to prepare an essay for this symposium, I see that my early admiration for the book was not misplaced. It is in general a model of philosophical clarity and persuasive argument and reveals in the writer an intellect of insight and power. It is not perfect, however, and it on occasion shows failures of philosophical charity—failures to provide the most sympathetic interpretation of the view to be criticized before moving in for the kill. I have raised some of these issues in previous publications, and here I will draw on some of the general claims made in those publications. What I say here, however, will be specifically focused on Hart's text itself rather than on a general pattern of argument of which Hart's book is just one example.¹ (I will also correct some mistakes in

¹ For my earlier discussions see my "Legal Moralism and Liberalism" (Murphy, 1995, and reprinted in Murphy, 1998) and my "Legal Moralism and Retribution Revisited" (Murphy, 2007a, and reprinted in Murphy, 2012).

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