John Rawls has been a long-standing and effective critic of Utilitarianism (especially in his book *A Theory of Justice*). However, Rawls has also sought to rescue Utilitarianism from those criticisms which he believes spring from fundamental misunderstandings of this complex moral theory.

One of those misunderstandings concerns the Utilitarian view of punishment. As Rawls points out in the selection below, our moral intuitions tell us that we punish a criminal out of a desire for retribution. (In meting out punishment, we also try to ensure that the punishment “fits the crime”; e.g., we wouldn’t execute someone for jaywalking.) Moreover, we believe that we punish criminals in order to reduce crime in the future. The first belief is a backward-looking, “retributive” concern with justice. (Mr. Jones murdered his business partner and now has to pay the appropriate price.) The second is a future-looking, consequentialist concern with “deterrence”; that is, with the benefit that punishment may have for society in general.

For a long time, the standard interpretation of Utilitarianism has been to see it as supporting the latter, consequentialist view. Yet this interpretation faces many serious difficulties. For instance, if we are concerned only with future benefits for society, then in a criminal case where we can’t find the guilty party, we ought to convict and severely punish an innocent person—and widely publicize the event. In order to reduce car theft, for example, we should convict the first person we can lay our hands on and have him or her shot before a nationally televised firing squad on a Sunday afternoon.

Of course, this idea would seem wildly at odds with most people’s sense of justice. The captured person is innocent and therefore doesn’t deserve the punishment; moreover, the punishment doesn’t fit the crime. However, according to the traditional interpretation of Utilitarianism, such a practice might well prevent car thefts in the future by serving as an example of what could happen to anyone considering committing that crime.

Rawls argues that this understanding of Utilitarianism stems from a failure to distinguish between the way we justify a *practice* and the way we justify a particular *example* of that practice in action. This distinction led to the
act/rule variations of Utilitarianism introduced by recent defenders of the theory. Act Utilitarianism justifies an action by its tendency to increase the amount of happiness within a society; for example, damming a river to supply electricity. Rule Utilitarian justifies an action by its conformity to moral rules and then justifies those rules by the Utilitarian standard of the “greatest happiness for the greatest number.” To illustrate, despite exceptions, a society is better off encouraging truth telling. Rule Utilitarianism has been considered a more defendable version of the theory.

In general, Rawls claims, we justify an action on the grounds of backward-looking, retributive justice. This, he says, is the perspective of the judge. But we justify a practice—such as punishment for a crime—because it might indeed generate more happiness in our society. For example, punishing criminals swiftly, surely, and fairly does tend to control crime. As Rawls explains, this is the perspective of the legislator—and of the true Utilitarian.

This line of thought reconciles the forward-looking, consequentialist perspective and the backward-looking justice perspective. According to Rawls, true Utilitarians do not support the punishment of individual criminal actions through an act Utilitarian standard. Once a law is in place, Utilitarians believe that an individual should be punished only if he or she is found guilty of breaking that law, and that the punishment should “fit the crime.”

But Utilitarianism also has a proper place on the legislative side, in decisions about what actions ought to be punishable and how such punishment should be meted out. Is it socially beneficial, for example, to criminalize homosexual behavior, abortion, marijuana smoking, or adultery? Legislators might well decide that, if such laws are unenforceable, too controversial, too invasive of privacy, or too paternalistic, then it is unwise to enact such laws. Alternatively, if legislators decided that more severe punishments for trafficking in “hard drugs” would reduce drug use and the violent crimes associated with such trafficking, then such laws might be justifiable. Nonetheless, regardless of which laws are enacted, Utilitarians believe that individual cases must be decided by principles of fairness and justice, guided by a sense of retribution.

As you read this selection, consider what your moral intuitions are regarding criminal punishment. In your view, why do we punish those convicted of breaking a law? Are we trying to rehabilitate them? To prevent further crime? To make sure that justice is served? Or are we trying to accomplish a combination of “all of the above”? Finally, do you find Rawls’s sympathetic interpretation of Utilitarianism convincing? Why or why not?
In this paper I want to show the importance of the distinction between justifying a practice and justifying a particular action falling under it, and I want to explain the logical basis of this distinction and how it is possible to miss its significance. While the distinction has frequently been made, and is now becoming commonplace, there remains the task of explaining the tendency either to overlook it altogether, or to fail to appreciate its importance.

To show the importance of the distinction I am going to defend utilitarianism against those objections which have traditionally been made against it in connection with punishment and the obligation to keep promises. I hope to show that if one uses the distinction in question then one can state utilitarianism in a way which makes it a much better explication of our considered moral judgments than these traditional objections would seem to admit. Thus the importance of the distinction is shown by the way it strengthens the utilitarian view regardless of whether that view is completely defensible or not.

To explain how the significance of the distinction may be overlooked, I am going to discuss two conceptions of rules. One of these conceptions conceals the importance of distinguishing between the justification of a rule or practice and the justification of a particular action falling under it. The other conception makes it clear why this distinction must be made and what is its logical basis.

The subject of punishment, in the sense of attaching legal penalties to the violation of legal rules, has always been a troubling moral question. The trouble about it has not been that people disagree as to whether or not punishment is justifiable. Most people have held that, freed from certain abuses, it is an acceptable institution. Only a few have rejected punishment entirely, which is rather surprising when one considers all that can be said against it. The difficulty is with the justification of punishment: various arguments for it have been given by moral philosophers, but so far none of them has won any sort of general acceptance; no justification is without those who detest it. I hope to show that the use of the aforementioned distinction enables one to state the utilitarian view in a way which allows for the sound points of its critics.

For our purposes we may say that there are two justifications of punishment. What we may call the retributive view is that punishment is justified...

on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. That a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity his act. The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him.

What we may call the utilitarian view holds that on the principle that bygones are bygones and that only future consequences are material to present decisions, punishment is justifiable only by reference to the probable consequences of maintaining it as one of the devices of the social order. Wrongs committed in the past are, as such, not relevant considerations for deciding what to do. If punishment can be shown to promote effectively the interest of society it is justifiable, otherwise it is not.

I have stated these two competing views very roughly to make one feel the conflict between them: one feels the force of both arguments and one wonders how they can be reconciled. From my introductory remarks it is obvious that the resolution which I am going to propose is that in this case one must distinguish between justifying a practice as a system of rules to be applied and enforced, and a particular action which falls under these rules; utilitarian arguments are appropriate with regard to questions about practices, while retributive arguments fit the application of particular rules to particular cases.

We might try to get clear about this distinction by imagining how a father might answer the question of his son. Suppose the son asks, “Why was J put in jail yesterday?” The father answers, “Because he robbed the bank at B. He was duly tried and found guilty. That’s why he was put in jail yesterday.” But suppose the son had asked a different question, namely, “Why do people put other people in jail?” Then the father might answer, “To protect good people from bad people” or “To stop people from doing things that would make it uneasy for all of us; for otherwise we wouldn’t be able to go to bed at night and sleep in peace.” There are two very different questions here. One question emphasizes the proper name: it asks why was J punished rather than someone else, or it asks what he was punished for. The other question asks why we have the institution of punishment: why do people punish one another rather than, say, always forgiving one another?

Thus the father says in effect that a particular man is punished, rather than some other man, because he is guilty, and he is guilty because he broke
the law (past tense). In his case the law looks back, the judge looks back, the jury looks back, and a penalty is visited upon him for something he did. That a man is to be punished, and what his punishment is to be, is settled by its being shown that he broke the law and that the law assigns that penalty for the violation of it.

On the other hand we have the institution of punishment itself, and recommend and accept various changes in it, because it is thought by the (ideal) legislator and by those to whom the law applies that, as a part of a system of law impartially applied from case to case arising under it, it will have the consequence, in the long run, of furthering the interests of society.

One can say, then, that the judge and the legislator stand in different positions and look in different directions: one to the past, the other to the future. The justification of what the judge does, *qua* judge, sounds like the retributive view; the justification of what the (ideal) legislator does, *qua* legislator, sounds like the utilitarian view. Thus both views have a point (this is as it should be since intelligent and sensitive persons have been on both sides of the argument); and one’s initial confusion disappears once one sees that these views apply to persons holding different offices with different duties, and situated differently with respect to the system of rules that make up the criminal law.

One might say, however, that the utilitarian view is more fundamental since it applies to a more fundamental office, for the judge carries out the legislator’s will so far as he can determine it. Once the legislator decides to have laws and to assign penalties for their violation (as things are there must be both the law and the penalty) an institution is set up which involves a retributive conception of particular cases. It is part of the concept of the criminal law as a system of rules that the application and enforcement of these rules in particular cases should be justifiable by arguments of a retributive character. The decision whether or not to use law rather than some other mechanism of social control, and the decision as to what laws to have and what penalties to assign, may be settled by utilitarian arguments; but if one decides to have laws then one has decided on something whose working in particular cases is retributive in form.

The answer, then, to the confusion engendered by the two views of punishment is quite simple: one distinguishes two offices, that of the judge and that of the legislator, and one distinguishes their different stations with respect to the system of rules which make up the law; and then one notes that the different sorts of considerations which would usually be offered as reasons for
what is done under the cover of these offices can be paired off with the competing justifications of punishment. One reconciles the two views by the time-honored device of making them apply to different situations.

But can it really be this simple? Well, this answer allows for the apparent intent of each side. Does a person who advocates the retributive view necessarily advocate, as an *institution*, legal machinery whose essential purpose is to set up and preserve a correspondence between moral turpitude and suffering? Surely not. What retributionists have rightly insisted upon is that no man can be punished unless he is guilty, that is, unless he has broken the law. Their fundamental criticism of the utilitarian account is that, as they interpret it, it sanctions an innocent person’s being punished (if one may call it that) for the benefit of society.

On the other hand, utilitarians agree that punishment is to be inflicted only for the violation of law. They regard this much as understood from the concept of punishment itself. The point of the utilitarian account concerns the institution as a system of rules: utilitarianism seeks to limit its use by declaring it justifiable only if it can be shown to foster effectively the good of society. Historically it is a protest against the indiscriminate and ineffective use of the criminal law. It seeks to dissuade us from assigning to penal institutions the improper, if not sacrilegious, task of matching suffering with moral turpitude. Like others, utilitarians want penal institutions designed so that, as far as humanly possible, only those who break the law run afoul of it. They hold that no official should have discretionary power to inflict penalties whenever he thinks it for the benefit of society; for on utilitarian grounds an institution granting such power could not be justified.

The suggested way of reconciling the retributive and the utilitarian justifications of punishment seems to account for what both sides have wanted to say.