

A THEORY OF CRIMINAL JUSTICE. By Hyman Gross. New York: Oxford University Press. 1978.

Hyman Gross, in his *A Theory of Criminal Justice*,<sup>1</sup> puts forth his conception of *criminal justice as social criticism* and depicts it as the only view that "makes sense of the criminal jurisprudence that guides the law in any modern legal system." (3) The three stages of criminal justice so conceived, the

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1. Hyman Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1978). This review is based on an advance proof (without the author's notes) supplied by Oxford University Press. Hereafter, all citations to this work will appear in the body of this review as page numbers in parentheses, based on the page numbers of the advance proof.

accusatory, the testing (of the accusation), and the condemnatory, are all guided by "social rules of the highest authority—the law. . ." (4), and it is by reference to such rules that critical judgments peculiar to each stage are made.

Obviously, if one accuses another of committing a crime, he must have some guiding notions of, or rules for recognizing, criminal conduct or crime. Accordingly, Gross devotes to such matters Chapters Two ("Conceiving Criminal Conduct: Acts"), Three ("Conceiving Criminal Conduct: Culpability, Intent, and Motive"), and Four (Conceiving Criminal Conduct: Harm and Attempts"). Central to determining, in the second stage, whether the accused is liable are the principles of exculpation, and it is in Chapters Five through Seven ("Exculpatory Claims," "Conduct-Regarding Exculpation," and "The Limits of Excuse") that such principles and issues surrounding them are discussed. In Chapter ten, "Liability, Culpability and Punishment," Gross addresses himself to those principles that should govern the social criticism of the final, condemnatory stage of criminal justice.

Although the major portion of Gross' book and theory is concerned with developing the particulars of criminal justice as social criticism, another, and more philosophically interesting, aspect of his work is the *justification* of a system of criminal justice, part of which involves the justification of punishment. (Gross devotes his ninth chapter, "The Justification of Criminal Punishment," to the latter.) These matters, as we shall see, take us into interesting considerations of the nature of man and society. Since Gross' justificatory arguments have such enormous consequences for the success of the entire theory—they provide its *ratio essendi*, for without them we would be left with an unjustified theory of social criticism—I devote a section of this review to an explanation and evaluation of them. First, however, I adumbrate what I refer to as the substance of Gross' theory of criminal justice as social criticism, distinguishing its substance from its justification.

## I

The responsibility and culpability principles map out the essential features of criminal conduct. Gross alligns the ideas of responsibility and of the criminal act to replace the deficient, orthodox view. That view had it that the act was a bodily movement which, when coupled with the prescribed mental state, provided the essentials of criminal conduct and liability. Gross' responsibility principle requires that the agent be sufficiently in control of the elements of the crime such that he could have caused things to occur otherwise. The criminal act itself is then defined in terms of that for which the agent can be responsible, namely, events or states of affairs.

It is the culpability principle that spells out the other dimension of a crime. Basically, it demands that the conduct, to be criminal, involve "an intentional act that illegitimately poses a threat of the harm with which the law has concerned itself." (131)<sup>2</sup> Gross sums up this view of criminal con-

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2. What of crimes for which one may be strictly liable, where it is traditionally thought that there is liability without culpability? Are these clear violations of the culpability principle? Gross answers in the negative for the most part. He argues that there usually is blameworthy conduct involved, such as in crimes of statutory rape

duct and thus of the first stage of criminal justice as social criticism as follows: "In these three chapters our effort to develop a sound conception of criminal conduct has moved us away from mere bodily movements and mental states toward an open sea of events and states of affairs which may be attributed to persons in holding them answerable for things that take place in the world. Criminal acts are items of criminal conduct which give rise to accusations. They are fit subjects of social criticism because they threaten harm that is deemed socially intolerable." (124-125)

Gross then proceeds to work out an ingenious classificatory schema whereby most traditional and any justifiable exculpatory claims can be seen ultimately as denying the accused's responsibility or culpability. Gross thereby forges a pleasing fit between his conceptions of criminal conduct and of exculpation and thus between the first two stages of criminal justice. While the dynamics of the classification hinge on responsibility and culpability, the complete schema is more complex; various subheadings are introduced to further distinguish the varieties of legal defenses. For example, the defenses of infancy or compulsion may be seen as denials of responsibility, generally, but more particularly as "actor-regarding" denials, since we are focusing on something about the *agent* that kept him from acting otherwise as opposed to some feature of the agent's *conduct* that makes the denial of responsibility viable; an example of the latter would be the involuntary nature of some act. Similar and further headings appear as one further classifies denials of culpability.

Culpability plays an essential role not only in characterizing criminal activity and exculpatory claims, but also in determining punishment for the convict in the condemnatory stage of the criminal process. In this final stage, the convict's punishment, in general, should be directly proportionate to his culpability.<sup>3</sup> Gross recognizes that the scale for punishment is a shifting one—death by torture may at one time have occupied an extreme on the scale whereas that upper limit, at some other time, in the same society may provide only for imprisonment. By reference to reasoned argument and its social attitudes, a society adjusts the scale that matches the amount of punishment with any given degree of culpability. While one never ought to experience punishment beyond what he deserves, he may, justifiably, be

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and bigamy, that the threshold level of culpability is met, and thus, these are legitimate crimes: "If premarital sexual activity by adolescent females is the harm that concerns the law, and if the age requirement is included in the law simply to protect against the injustice made possible by vague legislation, it makes perfect sense to reject the proffered excuse of mistake about age. If the accused intentionally had intercourse with an adolescent female not his wife, he did what the law makes culpable; and if she is under-age he can be held liable for that culpable conduct." (349) Rare are those crimes that actually prescribe liability for non-culpable conduct. Gross refers to this liability as "absolute" and argues that it has no place in a system of criminal justice.

3. It is interesting to note that Gross does not correlate in any way punishment with degrees of *responsibility*. It would be of interest to know whether he rejects a view, such as Professor John Silber's, that it makes sense to speak of degrees of responsibility, or whether he feels simply that culpability alone is the only factor relevant for determining punishment.

given a lesser sentence based on a principle of mitigation. This principle allows for a diminution of sentence but not of offense. Difficult as it is to ascertain what factors should enter into a decision to mitigate, the acts of a good citizen, mercy, and expediency are colorable as candidates, while the goodness or badness of the convict, according to Gross, are always bad reasons upon which to base the decision. Further, mitigation of sentence is justifiable only when the utility of the sentence will not be impaired and no inequity results from the leniency.

What becomes of the convict who is to be punished? Gross argues that the convict's criminal liability, while it requires some form of treatment as punishment, need not involve punitive treatment (a prison sentence). Punishment without punitive treatment Gross describes both as enlightened and as having no harmful consequences to law and order. Again, some form of treatment *as* punishment is required simply by one's being criminally liable, but the treatment, Gross stresses, is not *for* punishment: "Once we recognize that treatment is not for the sake of punishment we must take up the challenge of providing a nonpunitive life for those who are being punished."(445)

## II.

Gross' justification of a system of criminal justice and of punishment are closely related. It is difficult to state precisely Gross' view, given the variations in what he identifies as a single position. At one point Gross indicates that we need the criminal laws to "enjoy life in society" because without them our true nature would show through and make that enjoyment impossible. We are creatures who cannot always be relied on to act in social rather than self-centered ways. And just as our nature is considered in justifying the criminal laws, so too does our nature enter into justifying punishment: without punishment the laws would not, on the whole, be followed: ". . . most of us could not be relied on in every situation to sacrifice our advantage and postpone our gratification simply because the law has prohibited as a crime what we wish to do. . . . The criminal law, then, establishes rules of conduct whose observance allows us to enjoy life in society, and in addition provides punishment for violation of these rules—since they could not be taken seriously enough by enough people to be generally effective if they could be broken with impunity." (7)

In the passage just quoted we saw how the criminal laws provide for the enjoyment of life in society. Later in the book, however, the criminal laws seem to be elevated considerably in importance; now society's very existence depends upon them: ". . . the rules of conduct laid down in the criminal law are a powerful social force upon which society is dependent for its very existence. . . ." (382) Questions over the precise nature of the relationship between the criminal laws and the society cannot help but arise when the reader is faced with these varying descriptions of presumably the same relationship. Is Gross invoking a strict notion of society whereby some large social organization in which life cannot be enjoyed is not a society? When Gross speaks of the existence of a society, is he merely referring to society as we know it, complete with a system of criminal laws? Is Gross changing his mind about the relationship between the criminal laws and society?

Similar problems arise over Gross' justification of punishment based on man's nature. Above we saw that most men, without the threat of punishment, would not take the criminal laws seriously enough, to keep the laws effective. That statement of man's nature seems quite different from the observation of human nature that emerges later in the work, that "most of us would sometimes succumb on occasion when the urge is particularly strong if getting away with it is a certainty." (382) This latter view seems to state much stronger conditions for one's breaking the law with no threat of punishment looming overhead. We would only *sometimes succumb on occasion* and only when the urge is *particularly strong*. This suggests, to my mind, that usually we would take the law seriously even with no threat of punishment. Again, the question arises as to which formulation Gross wishes to subscribe. Further, it might be noted that if it is the latter, it appears that Gross' justification of punishment, which derives its force from the extent to which citizens disobey the criminal laws when there is no threat of punishment, is weakened.

Regardless of which of these formulations Gross wishes to adopt, an important observation emerges from the foregoing discussion, namely, the significance of punishment in the justificatory aspect of Gross' theory. Let me bring this out more clearly. Gross' views seem to commit him to the following propositions (I here make allowance for his diverging expression of his views):

- (1) If a society is to exist (or if life in society is to be enjoyed), there must be a general observance of the criminal laws.
- (2) If there must be a general observance of the criminal laws, there must be punishment of those who break the laws.

Inferring (3) If a society is to exist (or if life in society is to be enjoyed), there must be punishment of those who break the laws (**by** hypothetical syllogism), we see that Gross is, in effect, predicating the existence of society or the enjoyment of life in society on *punishment*. Looked at in this way, the view has a counter-intuitive or at least unfamiliar ring to it. Legal theorists have seen a society's moral system, or moral sense, or sense of justice as being necessary for a society's existence. Some have argued that one of the *purposes* of organized society is to provide for institutional rather than individual punishment. But Gross is committing himself to an enormously powerful and, I believe, novel social generalization which rests, as we saw, on generalizations on the nature of man and of society of which we never got a single, clear articulation let alone any evidence (at least from the text) in their support. Nevertheless, Gross shifts the burden, before meeting his own, to those who would challenge his generalizations: "The burden of establishing these propositions<sup>4</sup> is very heavy, and it comes as no surprise that hardly anyone has seriously attempted to shoulder either of them." (392)

Gross seems to have ignored the vast philosophical literature on the nature of society and of man which, if consulted, might have facilitated his intensifying the issues impinging on his theory and his developing a more

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4. Gross is here speaking of propositions that run counter to his generalizations.

philosophically sophisticated justification. As it stands, the important justificatory feature of Gross' theory sharply contrasts with the carefully worked out and the solicitously worded substance of the theory which we considered in the first section of this review. I expect this is symptomatic either of the view that pervades some legal circles, that any discussion of imponderables such as the nature of man and of society is inevitably imprecise, or the fact that even our jurists, not to mention the larger portion of the American legal community, are not well versed in some important philosophical issues and views impinging on their own work.

Barring these criticisms of Gross' justification of criminal justice and of punishment, to which, again, Gross devotes relatively little time, the substance of his theory of criminal justice as social criticism is elegant, thorough, ambitious, innovative, and important. The criminal law, unlike other areas of the law, luxuriates in theory. This, to a large extent, undoubtedly accounts for the very fine, streamlined, and enlightened criminal codes in some American jurisdictions today. It is contributions such as Gross' that help to perfect our criminal laws and our understanding of them.

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