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Can Criminal Law Do without Moralism?

Review of Hyman Gross, *Crime and Punishment: A Concise Moral Critique* (Oxford: Oxford University Press, 2012)

Youngjae Lee*

Hyman Gross announces at the beginning of this book that he will "revisit the fundamentals of criminal jurisprudence" and that he hopes to encourage through the book a view that is "less smug, less self-righteous, less detached, and less chillingly vindictive about crime and punishment" (p. vii). The main target of Gross' criticism in the book is the school of thought that views prohibitions of criminal law in moral terms. He says that "while crimes may indeed be morally wrong, it is a source of mischief for theory and practice to deal with them as such under the law" (p. viii). He criticizes academics who treat crime and punishment "as a moral concern" and argues that such an approach "results in fundamental misconceptions about crime and punishment" and "has the unfortunate effect of giving support to regressive tendencies in the public domain by encouraging the belief that criminal justice is some sort of exercise in righteousness" (p. xiii). Gross thus states the aim of this book to be "to dislodge the moral evaluation of criminal conduct from the dominant position it occupies in philosophical discussion of crime and punishment" (p. 145). The book fails to achieve this aim.

Gross' starting point is that "punishment for any serious crime is an awful business," (p. 1) and that "we must invoke a strict standard of justification that requires a convincing demonstration of the indispensability of punishment" (p. 14). From these considerations, Gross articulates his own view of punishment this way: "We need to know with certainty that crime without punishment . . . would be, or would produce, an intolerable state of affairs" (p. 2). More specifically, he argues that "criminal punishment . . . should be carried on generally at the lowest level at which it can still be effective in playing its part in preventing the evils of impunity" (p. 5).

And what are "the evils of impunity"? He defines "impunity" as a situation where a person "has been allowed to commit a crime without being called to account, and without a reason for that dispensation that is recognized as legitimate in the legal system" (p. 2). "[I]mpunity as a general state of affairs would be intolerable," according to Gross, because "[c]rime with impunity would leave us no choice but to take the law into our own hands by whatever means we could, to retaliate and even to strike pre-emptively, with the prevailing state of violence making life together as we now know it impossible" (p. 3). With these articulations of "the evils of impunity," his formulation that "criminal punishment . . . should be carried on generally at the lowest level at which it can still be effective in playing its part in preventing the evils of impunity" starts to become more comprehensible.

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What remains unclear, however, is how such evils of impunity can be combated by appropriately attending to emotions of "fear, anger, resentment, and indignation that . . . a crime produces not only in victims but in all those who allow themselves to react to it emotionally" without engaging in the kind of moral evaluation that Gross argues should not take place. Punitive passions, while frequently appropriate, can be excessive and driven by other less desirable sentiments such as cruelty, sadism, inhumanity, and racial hatred or prejudice. The government, as it responds to and provides an outlet for such emotions, then, must be careful not to reproduce the more unsavory and excessive aspects of punitive passions. The kinds of emotions that Gross describes as being felt by victims are at their core the emotion of having been *wronged*. Therefore, in order to know which punitive passions are legitimately felt and which are not, the government has to engage in moral evaluations and separate the legitimate from illegitimate emotions.[1] The kind of anti-moralism that Gross advocates cannot be sustained if one seeks to reduce the evils of impunity through punishment.

That his anti-moralism cannot be sustained becomes even more evident in Chapter 6 of the book. Gross argues in it that "criminal punishment . . . . must be carried on in a way that does not produce injustice in individual cases" (p. 47). There are several possible forms of injustice according to Gross. For instance, says Gross, "[i]njustice may consist of a failure to respect innocence" (p. 49). By "innocence," he does not just mean legal innocence but also moral innocence because he says that people are often "unjustly blamed for things that were not their fault" (p. 49). He concludes that to "protect innocence we recognize a principle of desert and say that only those who deserve to be punished . . . may be punished" (p. 50). He also endorses in the chapter the principle of proportionality and states that "[t]he principle of just deserts imposes a limit on the severity of punishment" (p. 51) and that "[a] sense of proportion between crime and punishment must be maintained if injustice is not to overwhelm the proceedings" (p. 52). He is in favor of the principle of relative proportionality as well and says that "[i]f we find that shoplifting and rape are punished in much the same way, there is then an abuse of power . . . ." (p. 52). Finally, he mentions as another form of injustice "unwarranted disparity in sentence," which he defines as a situation where "there is no relevant difference between two cases, yet the sentences are not the same" (p. 53).

So, Gross believes that we should avoid punishing the innocent, refrain from punishing disproportionately, respect the principle that crimes of different seriousness should be punished at different levels, and avoid differential treatments of crimes of same seriousness. It is unclear, however, how he proposes that we respect all these principles without engaging in the kind of moral reasoning that he condemns throughout the book.

Gross continues his attack on moral evaluation of criminal conduct in Chapter 7 by scrutinizing the relationship between criminal wrongs and moral wrongs. More specifically,

[1] See Youngjae Lee, Desert and the Eighth Amendment, 11 U. Pa. J. Const. L. 101 (2008).

he asks "which crimes are morally wrong; why are they morally wrong; and to what extent, if any, is the criminal law concerned about them as moral wrongs?" (p. 62)

In addressing these questions, Gross concedes that some "core crimes" are "most certainly moral wrongs" but denies that they are "being dealt with by the criminal law" for that reason (p. 62). The argument for this denial is, however, elusive. First, he argues against his own position by saying that "[i]f basic rights are not recognized and protected by our criminal law, we may rightly argue on moral grounds against this political failure" and that "if the law fails to take note of the suffering inflicted by some on others, the complaint against that failure is grounded in moral argument" (pp. 62-63). He tries to distinguish his view from that of those he disparages by saying that "in all of these cases it is the morality of the criminal law that is being criticized, not the morality of criminal conduct" (p. 63). But if criminal law is being criticized because of its failure to address serious moral wrongs people do to others, that comes very close to the position that certain crimes should be punished *because* of their moral wrongfulness, which in turn means "the morality of criminal conduct" is of course going to be a central issue. The distinction he makes here does not help his thesis.

His subsequent arguments against the view that criminal law is concerned about certain core crimes as moral wrongs are difficult to follow. First, he changes the subject, mentions Adolf Hitler, and starts discussing the "the social obligation thesis," which "posits an obligation to abide by the law that is binding upon each member of society in the interest of protecting everyone" (p. 63). It is unclear what this has to do with the "core crimes" that are "moral wrongs" and criminal law's treatment of it. Second, he decries what he perceives to be an "[i]mmoderate concern about harm" and "a triumph of feelings over moral sophistication" in thinking about criminal harm (in the process ignoring his own admonition not to engage in moral analysis of criminal conduct) (p. 65). Third, he discusses the crime of rape, complains that the law thinks "lack of consent" is the only thing "that matters," and calls the law "morally impoverished" (again in the process doing the kind of moral evaluation of criminal conduct that he thinks we ought not to do lest we become smug and self-righteous) (p. 66).

In the rest of the chapter, Gross talks about crimes outside the core – such as environmental and financial crimes -- and asks what they have to do with morality in order to conclude that "there are many crimes that are simply not morally wrong" (p. xiv). The discussion here is a bit superficial at times and lacking in concrete examples that would make it instructive to those unfamiliar with the debate, but the point he is making is clear enough. However, this discussion provides only limited support for his broader anti-moralism thesis. The fact of the matter is that *no one* believes the proposition that *all* crimes are punished because they are moral wrongs and *only* because they are moral wrongs. The question is what follows from the fact that criminal wrongs and moral wrongs overlap in some places and not in others. The conclusion Gross wants us to draw is that we should stop doing moral evaluation of criminal conduct altogether and recognize that "there are many crimes that are simply not morally wrong, though since there are good and sufficient reasons for having them on the books, imposing criminal liability for committing them is not wrong" (p.

xiv). A different conclusion we can draw is that we should continue to do moral evaluation of criminal laws and use it as a basis for criticizing existing laws for unwarrantedly placing blame on conduct that ought not to be blamed through criminal law and punishment.

Chapters 8 through 11, under the general topic of culpability, walk through numerous topics in criminal law, such as attempt (pp. 73-78), mens rea (pp. 79-81), degrees of homicide (p. 82), motive (pp. 82-83), control and excuse (pp. 87-89), proximate cause (pp. 89-90), justification and choice of evils (p. 90), mens rea and degrees of homicide (again) (pp. 91-94), ignorance and mistake (pp. 94-95), feelings of guilt (pp. 96-98), the act requirement (pp. 99-100), mens rea (yet again) (pp. 100-102), intentions (including "specific intent" and "transferred intent") (pp. 102-107), attempt (again, this time on Lady Eldon's lace) (pp. 107-110), mens rea and intentions (yet again) (pp. 110-111), hate crimes (p. 114), provocation (p. 115), self-defense (p. 115-116), duress (116), character (pp. 116-119), police abuse of power (p. 119), prosecutorial abuse of power (p. 120), Bill Clinton and the Independent Counsel Act (pp. 120-121), hate crimes (again) (pp. 121-122), provocation (again) (p. 122), mercy killing (pp. 122-123), self-defense (again) (p. 123), duress (again) (p. 123), and insanity (p. 124).

These chapters often meander, but if there is to be found an organizing principle in his discussion of various topics listed above, it is that he is trying to defend the following three propositions. First, criminal culpability, as reflected in criminal law doctrine, is distinct from moral culpability and has more to with preventing harm than passing moral judgments. Second, we should think about criminal culpability in terms that Gross prefers (explained below). Third, it is odious for the government to be in the business of making moral judgments about people and their conduct through criminal law, and we should therefore stop thinking about criminal law in moral terms.

I have the following comments about these three theses. First, as stated above, everyone is aware that criminal wrongs and moral wrongs overlap in some places and not in others, but that does not produce the conclusion that moral evaluation of criminal conduct is inadvisable. What may be needed instead is to articulate why some parts overlap and others do not. Given that criminal law and morality are two distinctive modes of setting, articulating, regulating, and enforcing norms, they will obviously differ in many respects.[2] However, merely pointing out that there are frequent gaps between law and morality in insufficient to demonstrate away the need to engage in moral evaluations of criminal conduct as appropriate.

Second, Gross' own preferred formulation of culpability, contrary to his apparent belief, engages in moral evaluation of criminal conduct. His definition of criminal culpability runs as follows: "When a harm that concerns the criminal law occurs, or when there is some threat of it, it is prima-facie appropriate to blame a person for that occurrence if, but only if (1) he had the ability to control the events that produce the harm or the threat of it; and (2) he had a duty to exercise that control to prevent or avoid the untoward occurrence; and (3)

[2] See Youngjae Lee, What is Philosophy of Criminal Law?, 6 Crim. L. & Phil. (forthcoming 2013) (review of John Deigh & David Dolinko eds., The Oxford Handbook of Philosophy of Criminal Law (2011)).

he failed to exercise that control" (p. 86). He explains his preference for this formulation by saying that "[i]n viewing crimes as a failure to do one's duty, the emphasis is shifted from those supposedly wicked or otherwise untoward states of mind that conventionally loom large in explaining why the crime was committed by that person, and instead the emphasis is placed on the failure to exercise self-restraint by employing those mechanisms that people normally use to keep themselves law-abiding when crime beckons. . ." (p. 95). Whether Gross' description of different places of emphasis is correct or not, it is unclear why he fails to see that putting his principle to use in judging conduct would, too, involve moral evaluation of criminal conduct, which, in turn, completely undermines his third thesis that the state should not be in the business of making moral evaluation of criminal conduct.

So, is moralism bad for criminal justice? Should criminal law do without it? These are valid and important questions. Unfortunately, however, we should look for answers to those questions elsewhere, as Gross' book, while obviously well-meaning, disappoints with its poor treatment of an important topic.