Book Reviews

Hyman Gross


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 those who think of 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” (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; in fact, if anything, it ends up doing the opposite by demonstrating the importance of moral evaluation of criminal conduct in criminal law.

Gross’ starting point is that, given its various human costs, “we must invoke a strict standard of justification that requires a convincing demonstration of the indispensability of punishment” (p. 14) (and, later in Chapters 4 and 5, applying this standard, dismisses standard theories of punishment). Gross’s own view of punishment is 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).

What is unclear 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 (p. 176). 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 state, 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. The kind of anti-moralism that Gross advocates thus 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 appears to be in favor of the principle of relative proportionality as well, where he 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).