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Book Review: A Theory of Criminal Justice

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BOOK REVIEW

JAMES R. ELKINS*

A THEORY OF CRIMINAL JUSTICE. By Hyman Gross. New York: Oxford University Press. 1979.

What is a theory of criminal justice? Jerome Hall, an eminent criminal law theorist, begins one of his treatises with the observation that "[a] theory of criminal law is constructed of a set of ideas by reference to which every penal law can be significantly 'placed,' and thus explained."[1] A theory of criminal justice, then, serves to systematize our knowledge of the way we devise and administer state controlled sanctions for wrongdoing in society.

A reader may seek out a theory or theories of criminal justice for a variety of reasons. In its broadest context, a theory of criminal justice can be seen as part of a more general theory of law or legal philosophy. A legal philosophy in turn constitutes a part of a more comprehensive view of society. A reader interested in the broader context may seek out the relationship between the criminal law and the theories of a just and orderly society. To what extent are criminal laws necessary for maintenance of order in society? How does the criminal justice system influence the nature and extent of any deviance from the prescribed social order?

One may turn to a theory of criminal justice for significantly different reasons. Perhaps the reader is looking not for a perspective, that is a broad vista, but for a description of the existing criminal law and an explanation for why it works the way it does. Jerome Hall suggests that indeed one of the functions of a theory of criminal law is "to elucidate certain basic ideas and organize the criminal laws."[2] The reader searching for a descriptive-explanatory approach imposes different criteria on an author. Such a reader seeks a theoretical approach which comprehends the existing body of knowledge by synthesizing, clarifying, and at times simplifying. Utilizing this approach, the theorist may also delineate significant issues for the reader without attempting to provide answers. Ideally, the reader should be able to determine where existing theories are unable to provide satisfactory answers.

Hyman Gross in his new book, *A Theory of Criminal Justice*,[3] has taken a descriptive-explanatory rather than jurisprudential

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[1] J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 1 (2d ed. 1960) (footnote omitted).

[2] *Id.* at 2.

[3] H. GROSS, A THEORY OF CRIMINAL JUSTICE (1979) (hereinafter cited as GROSS).

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approach to criminal justice. For the jurisprudential reader the book will be a disappointment. The author cautions in the preface that no attempt will be made to delineate the appropriate limits of criminal law.[4] The nonjurisprudential approach is further evidenced by the prefatory statement: "I do not invent a conception of criminal justice but discover it in the principles that are generally aimed at by the criminal law in every civilized society of a more or less liberal democratic complexion."[5]

Since *A Theory of Criminal Justice* is a comprehensive survey of substantive criminal law theory, it is difficult to review the work. The organization of *A Theory of Criminal Justice* is traditional from cover to cover and consequently leaves little to excite either the knowledgeable lawyer or lay reader. The book opens with the introductory chapter "Conceiving Criminal Justice" in which Gross attempts to deal with the broader jurisprudential issue. The following chapters cover criminal acts, culpability, intention and motive, harm and attempts, exculpation, and excuses. In Chapters Nine and Ten, Gross returns to the jurisprudence of criminal punishment and provides the reader with the best work of the entire book.[6]

A survey of the discussion of criminal acts and dangerousness will provide the reader with a representive view of the merits of the substantive aspects of the book. As a prelude to the survey of the "act" requirement in criminal law, Gross considers whether criminal justice should attend to socially "dangerous" persons.[7] If the purpose of the criminal law is to maintain order in society, will that goal not be served by removal of individuals who endanger the lives of others and their property? Gross deals with this issue (and others throughout the book) by confusing rather than synthesizing what we already know about dangerousness. He begins by describ-

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[4] GROSS, *Preface* at xvi. Professor Gross also notes that the book will not take up issues involving law enforcement and criminal trial procedure. *Id.*

[5] *Id.* at xv. Compare Professor Gross's statement in the text with the following caution of Jerome Hall:

> [L]egal theory and jurisprudence apply uniformly within a specified area. That area should be enlarged so far as is compatible with theory, and any theory is always subject to displacement by a better one. . . . But no mere assemblage of occasional uniformities, historical qualifications and practice exceptions can function as a theory.

J. HALL, STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY 17 (1958).

[6] The literature on punishment is voluminous. The reader interested in recent works in this area might see A. HIRSH, DOING JUSTICE (1976) and E. VAN DEN HAAG, PUNISHING CRIMINALS (1975).

[7] GROSS at 34-47.

ing "the popular view" which he ascribes to those who believe that that the criminal justice system helps to ferret dangerous people out of society.[8] Gross contends that this concept is inaccurate because the majority of crimes are committed by non-dangerous persons. In fact, "[t]he criminal law does not distinguish between those who are dangerous and those who are not; and though it allows room for prosecutors and judges to exercise some discretion in this regard, it subjects equally to criminal liability those persons who are criminal hazards and those who are not.[9] Moreover, the criminal law fails to promote this popular view since there are no proven means of correction which can be applied to the dangerous person,[10] and we often incarcerate those who are guilty of crimes but not dangerous.[11]

With a variety of arguments, Gross is able to show that the present criminal justice system is not preventive or protective but reactive. Would it be possible to "instead adopt procedures designed to identify, sequester, and correct criminally dangerous persons"?[12] Gross shows that the reactive nature of criminal law is a function of our commitment to egalitarian ideals and the inability to distinguish and diagnose criminal personalities.[13]

The treatment of dangerousness is flawed in two minor respects. Gross seems to suggest that while the criminal law cannot prevent harm to society, dangerous people can be civilly committed.[14] Civil commitment statutes in virtually every state, including West Virginia,[15] preclude any such idea. Involuntary commitment of dangerous persons is based on the presence of mental illness. Consequently, a person must be mentally ill *and* dangerous before civil commitment is permitted.

Finally, Gross offers the suggestion that one other method for dealing with dangerous persons is to bring them back within the

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[8] *Id.* at 34-35.

[9] *Id.* at 37.

[10] For a provocative view on a class of criminal actors who are truly dangerous, see Batt, *The New Outlaw: A Psychological Footnote to the Criminal Law,* 52 KY. L.J. 497 (1964).

[11] GROSS at 39.

[12] *Id.* at 41.

[13] *Id.* at 42-45.

[14] *Id.* at 45.

[15] *See, e.g.,* W. VA. CODE §§ 27-5-1 to 9 (Cum. Supp. 1978). Section 27-5-4(a), for example, requires that the usual application for involuntary hospitalization not only allege that a person has "symptoms of mental illness," but also that the "individual is likely to cause serious harm to himself or others."

community "by education and by having made available to them attractive opportunities in society as a rational inducement to live by its rules."[16] This remark suggests a fundamentally different approach to dealing with criminals but provides no details as to how it can be achieved. A Marxist socialist critic of the criminal justice system would undoubtedly seize on the absence of "attractive opportunities in society" as a significant inducement to commit crime. It is unclear whether Gross would be receptive to this Marxist view of crime in society.

Gross begins Chapter Two with some interesting and thoughtful questions about the nature of conduct that we label criminal.[17] The problem lies in the straw arguments Gross sets up to attack. Whereas in Chapter One, the straw argument is "the popular view" which sees the criminal justice system as a means of dealing with socially dangerous persons, in Chapter Two it is the "orthodox" view that a criminal act is body movement. While there is little argument today by modern theorists to confine criminal acts to body movements, Gross devotes six pages to rebutting the argument.

While Gross purports to provide a better understanding of criminal acts,[18] he actually confuses the issue. Turning our attention away from acts viewed as body movements, Gross asks what else an act might be. "The answer," Gross replies, "makes principles of responsibility fundamental and insists that acts are whatever satisfy certain basic requirements under these principles. . . . More particularly, an act consists of events or states of affairs for which a person might be responsible according to the principles of responsibility that guide such judgments; and so an act has taken place when such events occur or when such states of affairs exist."[19] In the redefinition of "act," Gross displays an overblown writing style and analysis common throughout the book. The quoted passage, in addition to being less than clear-cut, shows a penchant for verbiage. Of greater concern is the analytical effort. "Act" has been so thoroughly refashioned that Gross takes the word and the concept far beyond what it will bear. To call an "act" a "state of affairs" confuses the ordinary meaning.

The crime of possession poses a problem in devising a concept of criminal "acts." Gross again finds it convenient to devise a new

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[16] GROSS at 47.
[17] *Id.* at 48-49.
[18] *Id.* at 55.
[19] *Id.* at 56.

class of "acts" which constitute responsibility for a "state of affairs."[20] Gross contends that the "embarrassment" of the orthodox theorist faced with reconciling a theory of criminal acts with criminal omissions and crimes like possession "disappears immediately once he [the theorist] forms a conception of an act that genuinely suits the purposes of his theory."[21] At this point it is hard to determine what theory of acts the author is promoting and, for that matter, the significance of criminal acts which fit the theory. Gross has failed to provide an adequate conceptualization of acts which become crimes or a theory to delineate the overall purpose of such a concept.

While recognizing the need to reconceptualize the act element of criminal conduct, which together with *mens rea,* forms the crucial foundational elements underlying our substantive criminal law, Gross fails to see the theoretical consequences of the traditional act requirement.[22] By rigidly staying within the boundaries of traditional criminal law theory, and by merely redefining instead of designing a more radical critique, *A Theory of Criminal Justice* serves less as a theory of criminal justice than as a justification for existing theories.

The chapter on culpability, intention and motive is better organized and brings some understanding to a potentially confusing subject. To elucidate the subject, Gross describes four dimensions of culpability: intentionality, harm, dangerousness, and le-

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[20] *Id.* at 66.

[21] *Id.*

[22] Professor Henry Seney made the following obervation:

> Our focus on "conduct" or "act" has produced several unfortunate results: It has resulted in a corresponding myopic concentration on the individual, which has, in application, meant primarily lower-class individuals; it permits criminalization of conduct which a clear harm focus would not tolerate (consensual crimes) and thus makes possible the forcible imposition of moral standards which may be little more than class prejudice—and often historical rather than contemporary class prejudice; it permits criminal law to wander far from its job of protecting individuals, groups and society against specific harms; it concentrates on positive activity, minimizing attention to omissions and thus frustrating development of a system of positive geared-to-power duties to reduce or minimize harms; and finally, the focus on acts gives an arbitrary flavor to the criminal law, since it produces legislation phrased in terms of "Do not do X" rather than in terms of "Mimimize X harm," which would automatically supply the *reason* for the criminalization as well as simplifying the content of a deprivational code. Seney, *The Sibyl at Cumae—Our Criminal Law's Moral Obsolescence,* 17 WAYNE L. REV. 777, 829-30 (footnotes omitted).

gitimacy of conduct. He then uses a helpful example of a sailor's death which results from fumigation of a ship to illustrate each of the four dimensions.[23] The remainder of the chapter is of varied quality. While there is an adequate treatment of "motive,"[24] the distinction between general and specific intent is given summary treatment.[25] This short discussion of a perplexing concept may be a result of Gross's view that intent is not a mental state but rather a function of the criminal act. Gross conceptualizes specific intent as bearing on the descriptive detail of the prohibited act and the seriousness of harm threatened by the act.[26] In this view specific intent is not a legislative prescription for a particular mental state but a statement about the criminal act.

Upon reading *A Theory of Criminal Justice* one is left with a feeling of disquietude. The work is comprehensive, reflecting a thorough understanding of the theoretical aspects of substantive criminal law, and, in a few instances, providing a measure of conceptual clarity to areas of the criminal law which are traditionally muddled. Yet, where is the promised "theory" of criminal justice? If the "theory" is to be found in the present maze of principles which support our present criminal justice system,[27] then Gross has failed to make that obvious. The book goes to great lengths to explore the conceptual labyrinth of criminal law but ultimately fails to show the way to a more enlightened system or even "a theory of criminal justice." The reader is left with a lofty and at times annoyingly abstract discussion of theories which can be utilized to justify the traditional conceptual framework of criminal law. *A Theory of Criminal Justice* succeeds only if it is read as a primer to criminal law theory.

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[23] GROSS at 83-87.

[24] *Id.* at 103-13.

[25] If *mens rea* is, as Jerome Hall contends, the principle for "ultimate evaluation of criminal conduct," then a theory of criminal justice must pay particular attention to the concept. HALL, *supra* note 1, at 70.

The importance of *mens rea* in constructing a new theory of criminal justice takes on renewed significance in light of the following assertion:

> [T]he current *mens rea* system is long out of touch with social realities; rests on an obsolete model of the human personality; appeals for justification to faith rather than to empirical evidence; ignores important social harms; fails either to identify or to investigate the major factors contributing to social harms; and perhaps most importantly, it just doesn't work to reduce harm.

Seney, *supra* note 22, at 822.

[26] GROSS at 101.

[27] *See* note 5 *supra.*

The feeling of uneasiness as one tries to work through the book is exacerbated by the author's writing style. Gross rarely uses examples to illustrate the theories which he describes, an omission which is particularly egregious in light of the theoretical nature of the work. *A Theory of Criminal Justice* is not a book to be read from cover to cover.

The construction of a theory of justice is not a simple task. The obstacles to formulating an adequate theory are numerous. First, it is difficult to escape the temptation to accept the existing criminal justice system and to present theories of substantive criminal law as a starting point, in which case the theory merely serves to explain and justify orthodox and traditional notions of criminal law. An adequate theory of criminal justice must be founded on an understanding of:

> the current activities which are presently labeled crimes, that is, what are we criminalizing and with what effect;
> the process for determining what to criminalize;
> the values served and disserved by criminalization and punishment;
> the major harm producers in society and the nature of the interest affected by their harmful behavior and activities;
> the nature of punishment;
> the moral basis for social control of individual behavior.

A Theory of Criminal Justice provides no coherent theory founded on these fundamental elements.

Ultimately, *A Theory of Criminal Justice* fails because of the absence of a unifying perspective. Gross writes about the principles and theory of criminal law without resort to history,[28] psychology, sociology, philosophy,[29] or comparative law. As a result, *A Theory of Criminal Justice* is far less successful than a comparable work by Professor George P. Fletcher, *Rethinking Criminal Law*.[30]

Fletcher's *Rethinking Criminal Law* escapes the airy abstract-

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[28] For examples of the use of historical perspective in constructing or explaining criminal law theory, see G. FLETCHER, RETHINKING CRIMINAL LAW (1978); Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73 (1976).

[29] George Fletcher in RETHINKING CRIMINAL LAW contends:

> Criminal law is a species of political and moral philosophy. Its central question is justifying the use of the state's coercive power against free and autonomous persons. The link with moral philosophy derives from one answer to the problem of justifying the use of state power.

G. FLETCHER, RETHINKING CRIMINAL LAW xix (1978).

[30] *Id.*

ness of *A Theory of Criminal Justice* by premising the philosophical discussion on the "concrete and technical details about larceny, burglary, attempts and homicide."[31] With a sound basis in narrowly circumscribed criminal activity—110 pages on theft alone—Fletcher allows "[g]eneral propositions [to] emerge from these details but slowly."[32] Fletcher, unlike Gross, relies heavily on the development of theory as reflected in the common law.

In *A Theory of Criminal Justice* the doctrinal underpinning of the criminal law is elevated to a position of primary importance. Gross simply ignores the judicial struggle with substantive criminal law theory. Moreover, he does not explain this choice to overlook the judicial gloss on legal theory.

As a critical perspective on the principles of criminal law, *A Theory of Criminal Justice* provides no real insight and fails to furnish a "functional, value-impact stable-cleaning."[33] A rare but creative effort at such a stable-cleaning was attempted by the late Professor Henry Seney.[34] Seney argued that the term "criminal" itself was of no future use: "Its circumambient connotations, stereotypes and prejudices clog our thinking."[35]

A Theory of Criminal Justice by its structure suggests the possibility of theorizing about criminal law without ever looking at crime in society. The very nature of "crimes" and "criminals" is lost in the rhetoric of theory.[36] Gross has the unique ability to talk

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[31] *Id.* at xxii.

[32] *Id.* at xxii.

[33] Seney, *supra* note 22, at 778. George Fletcher argues that the refinement of American criminal law and its underlying theory has been inhibited by the prevailing utilitarian theory of sanction, the emphasis on identification and confinement of potentially dangerous offenders and increased reliance on prosecutorial and judicial discretion. G. FLETCHER, *supra* note 29, at xx.

[34] For a tribute to Henry Seney upon his death, see *Editor's Note,* 15 DUQ. L. REV. 161 (1976-77) and Peleaz, *Henry W. Seney,* 15 DUQ. L. REV. 163 (1976-77). Seney's work on the criminal law is a truly ambitious effort; appearing in the *Wayne Law Review* over a three-year period, it provides a thoroughgoing radical critique of the substantive criminal law. *See* Seney, *supra* note 22; Seney, *"A Pond As Deep As Hell"—Harm, Danger, and Dangerousness in Our Criminal Law, Part I,* 17 WAYNE L. REV. 1095 (1971), *Part II,* 18 WAYNE L. REV. 569 (1972); Seney, *"When Empty Terrors Overawe"—Our Criminal Law Defenses, Part I,* 19 WAYNE L. REV. 947 (1973), *Part II,* 19 WAYNE L. REV. 1359 (1973), *Part III,* 20 WAYNE L. REV. 41 (1973), *Part IV,* 20 WAYNE L. REV. 1269 (1973).

[35] Seney, *supra* note 22, at 785.

[36] In describing the author's approach as a "rhetoric of theory" I mean no disparagement of recent efforts to create a new rhetoric for understanding criminal law and procedure. *See* White, *Making Sense of the Criminal Law,* 50 U. COLO. L.

about criminal law as if it had nothing to do with crime and criminals. In contrast Seney's work emphasizes the social interactive setting in which crime takes place.

Professor Seney was a rare criminal law theorist who recognized the misdirected emphasis of our criminal law on the individual which ignores criminal misconduct by organizations.[37] Seney points out that:

> The harms which happen to people have changed dramatically in kind, scope and seriousness from those early days when lawmaking and enforcing people feared lower class individualistic transactions involving physical strength, crude weapons and enough guts to use them. Most important physical and economic harm are no longer the product of individualistic interactions; they are organizational. Yet we still concentrate our moralistic, futile and counter-productive efforts on these relatively minor, face to face encounters, and on their lower-class, individual, scapegoat, perpetrators.[38]

He adds:

> [O]ur inherited categories of crime are largely unrelated to the major harms of a complex technological society. These crime categories unequally condemn, and unequally focus law enforcement resources and public attention on lower-class deprivers while largely ignoring upper-class and organizational deprivors.[39]

In the rarified theory of Gross's work, there is no reference to the problem of the criminal conduct of corporate entities.[40] By ignoring actual social harms which result from criminal conduct, Gross is unable to provide a theory of criminal justice which reflects social as well as theoretical realities.

Gross, unlike Seney, does not force the reader to ask of criminal law theory "what difference it makes to society, what problems

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REV. 1 (1978); *The Fourth Amendment As a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165. White develops his approach to rhetoric more fully in J. WHITE, THE LEGAL IMAGINATION (1973).

[37] Seney, *supra* note 22, at 801-06.

[38] *Id.* at 854.

[39] *Id.* at 857.

[40] For a comprehensive account of the imposition of criminal sanctions on corporations, see Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73 (1976). *See generally*, L. LEIGH, THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW (1969); W. FRIEDMAN, LAW IN A CHANGING SOCIETY 207-212 (1972).

it creates or solves, and what effects it has on which values."[41] Gross is content to dabble with theories without confronting the value impact of the criminal law or questioning the gross disparity of substantive criminal justice in our society.[42]

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[41] Seney, *supra* note 22, at 778.

[42] In Chapter Four, Professor Gross informs the reader that in discussing the notion of harm as a part of criminal conduct the "normative questions" will not be addressed. GROSS at 115. Normative questions "are the questions of which activities the criminal law ought to make its business, and which it ought to regard as none of its business." *Id.*