

**A THEORY OF
CRIMINAL
JUSTICE**

HYMAN GROSS

A Theory of Criminal Justice

HYMAN GROSS

New York
Oxford University Press
1979

Copyright © 1979 by Oxford University Press, Inc.

Printed in the United States of America

Library of Congress Cataloging in Publication Data

Gross, Hyman.

A theory of criminal justice.

1. Criminal law—Philosophy. 2. Criminal law. I. Title.

K5018.G7 345'.001 77-17049

ISBN 0-19-502349-8

ISBN 0-19-502350-1 pbk.

for
E.L.G., B.G., and J.M.G.

A Theory of Criminal Justice

Preface

When a crime is committed, justice must be done. Though it is easy to create an appearance of justice, mere appearance may turn out to be only an illusion. In this book I try to describe the real thing and examine its main features in detail. 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. Official deviations from these principles are abundant everywhere, but this need not embarrass the theorist so long as he remembers that he is not required to give an account of practices just as they are, any more than he is required to design an ideal jurisprudence for a utopian society. The theorist's job, I think, is to make clear the ideals that generally do guide practice and that make possible the very awareness of deviation. His job is also to show why those ideals are worthy of our acceptance, when indeed they are. The theorist thus provides the practitioner with guidance for sound practice and with a means of answering his critics when (but only when) they are not right.

In attempting to make a contribution along these lines I have found it necessary to deal critically with certain well-

entrenched theoretical positions that seem to me wrong. In doing this I have tried wherever possible to avoid singling out particular authors or citing particular tracts—this in the belief that shoes anyway end up only on the feet they fit, and in the hope that what is controversial in this work may prompt better answers than I provide rather than intramural debates about other authors and their views. Similarly, I devote little time to the pedigree of the ideas I present, though in the entire book there can hardly be a single idea that does not have important antecedents elsewhere. I confess a lack of zeal for intellectual genealogy and offer as a penance a bibliography after the notes at the back of the book. This will allow the reader to rummage as I have through much that provides useful provocation and much that is a source of illumination—often both in a single piece. To avoid unnecessary interruptions, all the notes are collected at the back of the book. Nothing in the notes is necessary to follow the argument in the text, though on a few occasions the notes do provide some elaboration of the text that may ease one or another of the difficulties that linger on at the end of a section.

Two further bits of explanation are in order.

A volume embracing all the concerns of a truly comprehensive theory of criminal justice would extend into two great regions not explored here. It would take up the question of bounds beyond which the law ought not to go in establishing criminal liability for conduct. Discussions in this book of harm and danger do not define those limits, though I should like to think that what is said here could be put to good use in dealing with those other matters. That same all-embracing work would also have to deal with the problems of justice that are created by procedures of law enforcement, including matters of fairness both in and out of court. In the United States these problems have received far more attention as

items of Constitutional law than have the more fundamental questions of criminal justice that are dealt with here. One hopes that, by reflecting on why we bother to enforce the law at all, we shall help to enlighten ourselves about what is and what is not the right way to go about it.

Finally, I must explain why some rather substantial topics are dealt with only superficially, while others are mined in depth. Defenses by way of justification, for example, only have their surfaces scratched even though rich veins lie beneath. Some neglect was made unavoidable by considerations of economy, and those topics that suffered least were those that seemed most important to understand our criminal jurisprudence as a whole and to reform the conceptual groundwork upon which it must stand.

I have profited much from discussion and criticism during the years of writing and rewriting, and find that my accumulated debts to friends and colleagues are far too numerous to be listed here. I should like, however, to acknowledge a general debt to the writing of H. L. A. Hart, since it drew me in a compelling fashion to the subject and then served to refresh even in the most tedious hours of my own work. There are two pieces of extended criticism that I cannot fail to acknowledge here with thanks. John Kleinig was kind enough to provide me with very useful comments on large portions of an earlier draft, and Don E. Scheid similarly commented with great care on the penultimate draft of the manuscript in its entirety. Both of them will of course recognize the many faults for which I alone am responsible and that remain in spite of their diligent efforts.

I am much indebted to Gertrude Schiller for long and faithful service at the typewriter, and to Patricia Rees for her very efficient help in proofreading and typing at the final stages. At Oxford University Press, James Anderson and Bethanie Alhadeff have been most helpful, and the role of

manuscript editor has been performed by Mary Ellen Evans with consummate skill. Finally, I should like to thank the Bear Foundation for support of work that in one form or another found its way into parts of this book.

H. G.

Cambridge

June 1978

Contents

Preface	xv
CHAPTER ONE	
Conceiving Criminal Justice	3
I. Criminal Justice as Social Criticism	6
II. Criminal Justice as Moral Criticism	13
Rules of conduct and their moral status	13
The moral standing of punishment	18
Moralism and the hinges of liability	21
Morality and criminal justice	32
III. Criminal Justice as a Feature of Removal and Correction	34
The popular view	34
The inaccuracies in this view	35
A radical change and the objections to it	41
CHAPTER TWO	
Conceiving Criminal Conduct: Acts	48
I. Acts and Bodily Movements	49
The orthodox view and its difficulties	49

Objections to the orthodox view	53
Toward a better conception	55
II. The Scope of an Act	57
An act, its consequences, and its attendant circumstances	57
Omissions	61
Possession	65
III. Voluntary and Involuntary Acts	67
Analysis of the various concepts	67
Orthodox theory and its flaws	70
CHAPTER THREE	
Conceiving Criminal Conduct: Culpability, Intention, and Motive	74
I. Culpability and Intention	74
Designation of culpability and the role it plays	74
The dimensions of culpability	77
Culpability in the first dimension	82
II. Some Clarifications Regarding Intention	88
What it means to act intentionally	88
Criticism of the orthodox view	90
Specific intent and the doctrine of transferred intent	99
III. Motives	103
How motives matter	103
Motives required expressly for liability	105
Criticism of the orthodox conception	107
What a motive is	109
Implicit motive considerations in the law	111
CHAPTER FOUR	
Conceiving Criminal Conduct: Harm and Attempts	114
I. Harm	115
The notion of harm	115
Varieties of criminal harm	119

<i>Contents</i>	ix
Crimes <i>mala in se</i> and <i>mala prohibita</i>	122
Conduct as harm	124
II. Attempts	127
What constitutes an attempt	127
Attempted attempts; and attempted negligence	128
The differing conception in orthodox theory	131
III. Criminal Conduct Reconceived	132
 CHAPTER FIVE	
Exculpatory Claims	136
I. Responsibility and Culpability	137
The responsibility principle	137
The culpability principle	139
The relationship of responsibility and culpability; and some preliminary clarifications	141
II. A Survey of Exculpatory Claims Denying Responsibility	143
Conduct-regarding claims	145
Actor-regarding claims	149
II. A Survey of Exculpatory Claims that Deny Culpability Directly	158
Conduct-regarding claims	159
Actor-regarding claims	167
Interest-regarding claims	169
Special interest-regarding considerations	187
 CHAPTER SIX	
Conduct-Regarding Exculpation	191
I. Insufficiency	192
II. Impossibility	196
The variety of claims; claims based on mistaken belief about the law, and about legally significant circumstances	196
Claims that something necessary for the crime was lacking	200

Claims that something necessary for the harm was lacking	207
Claims based on mistaken belief about what was being done	213
Claims based on a mistaken belief about what could be done	218
Further explanation of expectability and dangerousness	223
Rejection of liability without expectability	229
III. Causation	232
What causation issues are about	232
A different kind of theory, and its role	237
The situational construction of events and the exculpatory challenges	239
Causation claims and their resolution	245
Causation and the first dimension of culpability	251
CHAPTER SEVEN	
Actor-Regarding Exculpation	255
I. Ignorance and Mistake	256
Distinguishing ignorance and mistake	256
The mistakes that matter	259
Reasonable, unreasonable, and honest mistakes	262
Mistakes of law	268
II. Compulsion	276
"Couldn't help it"	276
Limitations upon exculpation	280
Critique of the conventional defenses	286
Moral wrongs and exculpation under the law	291
III. Mental Abnormality	292
The varieties of relevant abnormality	292
Versions of the insanity defense	295
Criticism of rationales that ignore responsibility	298
Responsibility-regarding and culpability-regarding exculpation: some difficulties	306

<i>Contents</i>	xi
Diminished responsibility	310
The pursuit of rational procedures	313
CHAPTER EIGHT	
Limits of Excuse	317
I. Persistent Themes	318
Some controversial claims	318
Determinism and exculpation	323
II. Questioning the Need	328
The argument for recognizing excuses	328
The argument against recognizing excuses	236
III. Strict Liability	342
What strict liability is	342
Varieties of strict liability	344
Objections to strict liability	346
Purported justifications of absolute liability	348
Justification based on administrative convenience	349
Justification based on encouragement of precaution	351
Justification based on supposed analogy to tort liability	352
Justification based on mildness of sanction	355
Testing the proposed criterion of justifiable strict liability	357
Strict liability and justice	361
Strict liability for serious crimes	363
A Summary	371
CHAPTER NINE	
Justification of Criminal Punishment	375
I. Preliminary Matters	376
The need for justification	376
Obstacles in the path of justification	379
II. Theories of Punishment	385

Removal of socially dangerous persons	385
Rehabilitation of socially dangerous persons	387
Paying one's debt to society	389
The intimidation version of deterrence	394
The persuasion version of deterrence	398
III. A Preferred Theory	400
Statement of the theory	400
Objections based on uselessness	402
Objections based on needlessness	405
Punishment of the innocent	409
Objections based on undesirable features	411
CHAPTER TEN	
Liability, Culpability, and Punishment	413
I. Culpability and Liability	414
The objection to liability without culpability in the law as it is	414
Obstacles to a system of liability without culpability	417
II. Liability for Negligence	419
Negligence and culpability	419
Negligence and punishment	421
III. Punishment of Attempts	423
The problem	423
"Abortive" attempts	426
The notions of dangerous conduct and of harmful conduct	427
"Completed" attempts and the varieties of impossibility	430
Adjustment of liability	433
Legislative formulation	434
IV. Proportional Punishment and Justifiable Sentences	436
Desert and sentence	436

<i>Contents</i>	xiii
Proportional punishment	438
Disproportionately small sentences	441
Disproportionately large sentences	442
Disproportionate uniformity	444
Inequitable disparity	447
The principle of mitigation of sentence	448
Mitigating considerations	453
Sentences in excess of culpability	455
V. Punishment and Liability	457
Distinguishing and relating the concepts	457
Nonpunitive treatment	461
The dangers of benevolent treatment	465
Notes	469
Bibliography	491
Index	517

A Theory of Criminal Justice