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# TWO THEORIES OF CRIMINAL JUSTICE

*Alden D. Miller\**

A THEORY OF CRIMINAL JUSTICE. By *Jan Gorecki*. New York: Columbia University Press. 1979. Pp. xv, 185. \$15.

A THEORY OF CRIMINAL JUSTICE. By *Hyman Gross*. Oxford: Oxford University Press. 1979. Pp. xviii, 521. \$6.

Both Jan Gorecki<sup>1</sup> and Hyman Gross<sup>2</sup> see criminal justice — the criminal law as applied by the police, courts, and prisons — as the product of a society acting out of consensus to guard its integrity. They disagree, however, as to the ideal role of criminal justice. Professor Gorecki calls it moral education. Professor Gross sees it as the exacting of a fair market price for any violation of the rules. While the writers understand that law does not always follow their ideals of criminal justice, they nevertheless regard their ideals as practical guides to action rather than as descriptions of Utopia.

## I. CRIMINAL JUSTICE AS MORAL EDUCATION

Professor Gorecki believes criminal justice to be the most important determinant of criminal behavior (p. xiii). He complains that people who try to solve the problem of crime by discovering and eradicating its social causes overlook this importance. Even those people who understand the importance of criminal justice misunderstand its functions to be incapacitation, rehabilitation, and general deterrence by fear. While Gorecki sees merit in these functions of punishment, he insists that its greatest value lies in its potential for moral education. He believes that a properly constructed criminal justice system will create moral aversion to wrongdoing, and thus transform prohibitions into moral norms. Only in this way, he says, can a civilized society control crime (p. xiv).

Gorecki believes that fear is an inadequate deterrent to crime both because it is a less admirable motivation than morality and because it fails to discourage uncalculated crimes. Gorecki argues that

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moral feelings are real and that they flourish in a stable, free society. Moreover, he asserts that a severe moral aversion will operate even in the heat of passion, and will deter crimes even when there is no threat of retribution. Gorecki would bring about the desired aversions by arranging punishments according to psychological learning theory.

Gorecki cites two fundamental mechanisms of learning to explain where moral evaluations come from: We can experience the consequences of our own actions, and come to associate those consequences with the actions, or we can observe other people's experiences and the consequences that follow from their actions. In either case, we come to feel as good or as bad about the actions as we do about their consequences (pp. 10-13).

What if the consequences of an action are variable, sometimes rewarding and sometimes not? Intermittent reward leads to more persistent occurrence of the behavior, just as the occasional pay-offs of a slot machine encourage persistent gambling. The actor, knowing he will get a reward eventually though not every time, persists. Intermittent punishment, on the other hand, does not eradicate the behavior. The times when there are no punishments are perceived as times of reward; intermittent punishment is thus intermittent reward and the behavior becomes entrenched (pp. 14-15).

While it might therefore seem more productive to attempt to influence human behavior through rewards rather than punishments, Gorecki's concern is with the criminal law. He chooses punishment as a device for promoting moral learning. Obviously, to work, punishment must follow nearly every occurrence of the proscribed behavior. This is how Gorecki comes to the time-honored conclusion that criminal sanctions must be a certain consequence of criminal behavior if the criminal law is to be an effective deterrent. To this basic argument Gorecki adds one major element. To be moral, as opposed to just plain powerful, the law must be just. To be just, the law must be applied equally to all persons and it must conform with what most people in the society think is "right." To conform with what people think is right, the law must match their moral experiences. Thus, there can be justice only when the moral experiences of the people converge sufficiently to produce in the society a consensus about moral evaluations. Just law must therefore be consistently applied in conformity with the moral consensus of society (p. 21).

Armed with this conception of how the criminal law could be an instrument of moral education, Gorecki turns to the American crimi-

nal justice system. He finds three things wrong with it. First, it contains laws that proscribe activities about which there is no moral consensus, such as homosexuality and drug abuse. Second, judges apply the law inconsistently, and both plea bargaining and the indeterminate sentence have institutionalized inconsistency. Finally, the system fails to provide certainty: officials fail to punish every violation,<sup>3</sup> and constitutional constraints such as the exclusionary rule offer the guilty a hope of going scot-free.

What should be done? Gorecki considers first the two classes of crimes that should not be crimes because they do not reflect a moral consensus. The first class, including crimes such as homosexuality, should simply be taken off the books, because doing so would remove injustice without risking any harm (p. 95). Of course, not everyone will be as convinced as Gorecki is that society will reach this view as a consensus in the near future. The other class of crimes that should not be crimes includes offenses like drug abuse that are too complicated to prevent through criminal sanctions. Gorecki considers drug abuse an unjust crime because the addict is powerless not to be an addict. Nevertheless, Gorecki thinks the use of narcotics should be supervised, and he will not accept a need to maintain a drug habit as an excuse for street crime. Therefore a legislature cannot simply abolish drug-abuse laws and consider its work done. It should provide a cheap, or even free, supply of drugs to persons whom appropriate authorities certify as addicts. It should also aggressively root out the black market in drugs, so as to prevent the creation of new addicts. The sellers alone should be punished (pp. 96-101).

Much more important to Gorecki than decriminalization of unjust crimes is the eradication of sweeping judicial discretion and plea bargaining (p. 103). He would impose criminal sanctions on police who fail to enforce all laws, and on prosecutors who fail to prosecute all cases where conviction is likely. He would limit the discretion of judges as well, supervising sentencing with an appeals mechanism that could increase or decrease manifestly inappropriate sentences. We should retain some judicial discretion, Gorecki argues, because to fix sentences without consideration of mitigating and aggravating factors would be unjust. But the judge would have to state specific reasons for the sentence so the defendant would know whether to appeal. Finally, Gorecki would limit discretion by eliminating plea

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3. Many policymakers have become committed to rooting out the social causes of crime or to treating rather than punishing violators; Gorecki considers both goals impractical. Pp. 69-81.

bargaining, which he sees as vitiating the law as an instrument of moral education because it results in punishment that is unrelated to the actual crime (pp. 103-09).

Gorecki recognizes that his reforms might swamp the system with far more cases than it can handle. He reassures us that we can avoid this by eliminating unjust laws and relying more on fines instead of imprisonment to punish some crimes. He would impose draconian penalties only where a consensus of society clearly supported it (pp. 109-11). However, even the "real" crimes would overwhelm the system unless it were streamlined. Gorecki recommends such things as consolidation of police departments and improvement of recruiting and training, use of summary punishments for minor crimes, coordination of prosecutors' functions within states, centralization of state court systems and the adoption of modern management methods, elimination of pretrial detention except where the defendant would commit more crimes or hinder gathering of evidence, broader use of depositions, expedition of filing and hearing of motions, and creation of a "single, swift post conviction remedy for infringements of constitutional rights" (p. 112).

Gorecki's most controversial proposals are the elimination of juries and the use of means other than plea bargaining to induce confessions. Gorecki would not object to the time-consuming and costly use of juries if society were willing to pay for them in all trials. But the present system, he complains, offers perfect justice for only the five percent of defendants that get jury trials, and a travesty of justice for the ninety-five percent that plea bargain. Why not consider good justice — bench trials — for everyone, he asks (pp. 112-15).

Gorecki's approach to confessions may be the most controversial point in his proposal, and he is unyielding about it. Gorecki insists that the police must be able to elicit confessions if law enforcement is to be certain. He argues that police cannot elicit confessions unless they can interrogate the suspect without a lawyer present (since a good lawyer would advise him not to talk) and tell the suspect (truthfully) that if he refuses to talk they may mention that fact in court. All this was possible before *Miranda v. Arizona*<sup>4</sup> and other Supreme Court decisions of the sixties (pp. 81-89). Gorecki suggests that we reconsider *Miranda* by making explicit its underlying values, and then find other ways to provide for them. Gorecki points out that the majority of commentators believe that *Miranda* does not safeguard the privilege against self-incrimination as a value in itself but

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4. 384 U.S. 436 (1966).

rather it serves other values: "protecting the innocent, ensuring procedural fairness, maintaining equality, and protecting society from unjust law" (p. 118).

Gorecki has no quarrel with protecting the innocent, but he is less generous about the other three arguments. He notes that the Supreme Court has construed the prohibition against unfair practices very broadly, even to include things that may happen by accident in the course of any effective investigation. He returns to his earlier argument that moral evaluations reflect the needs of the society, and suggests that the needs of the society (to convict criminals) require a narrower exclusion. Gorecki criticizes the equality argument on two grounds: its advocates wrongly assume that only the poor do not know of their right to keep silent; and they are wrong in suggesting that society is obligated to teach all criminals to be as smart about their rights as some of them already are. As for the need to protect citizens from unjust law, Gorecki maintains simply that in a democratic society most laws will be just, and that it would be absurd to cripple the entire criminal justice system because of the few exceptions.

The solution, to Gorecki, seems simple. The Supreme Court restricted confessions in *Miranda* only after calls for legislation fell on deaf ears; thus, proper legislation would eliminate the need for the *Miranda* protections. Gorecki feels the state should simply require electronic surveillance of police interrogation rooms, and unannounced visits to those rooms by specially trained judicial officers. The police then could dispense with the *Miranda* warnings, the suspect's lawyer could be barred from the interrogation, and the interrogators could warn the suspect that they would inform the jury about his refusal to talk (pp. 122-26).

Gorecki's point is that the *Miranda* rights were not values in and of themselves, but a second choice means to prevent the police from resorting to physical and mental torture. Since he is providing for a way to keep tabs on those abuses, and since he believes lesser forms of police pressure to be justified by necessity, he is happy with this solution.

Gorecki realizes that many people are horrified at his proposals. They object that such a system would "wreck the lives of a large proportion of lawbreakers" (p. 128). Gorecki points out, however, that sentences sufficient to promote moral learning, unlike those necessary for general deterrence by fear, need not be overly long. He also rejects labeling theory, which argues that prisons breed more crime. Though popular, the theory has never been proved, and it

has the moral liability of teaching the criminal to feel that those who condemn him, not he himself, are responsible for his wrongdoing. Gorecki believes this undermines the condemnation process, and therefore impedes moral learning (p. 131). Finally, Gorecki promises that the carnage will be over after the first generation of criminals following the reforms meet just and certain punishment. The moral learning thus engendered will then greatly reduce the number of criminals (pp. 132-33).

## II. CRIMINAL JUSTICE AS SOCIAL CRITICISM

To Hyman Gross, criminal justice is social criticism. The law provides rules that must be taken seriously by the law-abiding, because they know that the law cannot be broken with impunity. That is, the law-abiding know that those who intentionally break the law will not "get away with it." Gross does not suggest for a moment that all law breakers will be deterred or reformed. He says that the point of the law is not to stamp out crime, but to reinforce the law-abiding ways of most members of the community.

Gross points out that for the law to function for such a purpose, it must distinguish between excusable and inexcusable breaking of the rules. Thus one can defend oneself against an accusation of wrongdoing not only by asserting that one did not do it, but also by asserting that one could not help it, or that one had a right to do it (for example, to save one's life). Only just and reasonable social criticism will encourage the law-abiding to respect the law; therefore it is only blameworthy breaking of the law that we should criticize (pp. 6-13).

In admitting that criminal justice cannot completely stamp out crime, Professor Gross is much less ambitious in his goals for criminal justice than Professor Gorecki. His book is also more narrowly focused — it is devoted mainly to clarifying the principles of the law itself, with relatively little discussion of the processing system. Gorecki, by contrast, devoted more of his discussion to the processing issues. The distinction is not as great as it might seem, however, because in both cases the authors' conceptions of proper processing flow from their conceptions of the nature and purpose of the law.

Like Gorecki, Gross begins by arguing the inadequacy of alternative approaches. Gross and Gorecki agree that removal and correction are not the law's primary functions, but they disagree about moral criticism. Gross argues that while most illegal acts are also moral wrongs, the law condemns these acts for reasons other than that they are immoral. This is shown by the fact that there are many immoral acts that the law takes no notice of, and many of these are

more immoral than those the law does take notice of, although they are not likely to be as harmful. Moreover, some crimes are moral wrongs only because they are violations of a rule and the person who violates the rules takes unfair advantage of those who comply. Such laws were not made to correct moral wrongs. Finally, the severity of punishment a law calls for does not correlate with moral gravity of its violation (pp. 16-17).

Gross's objection to the criminal law as a way of removing or treating dangerous persons is that the commission of a crime is a poor way of identifying dangerous people (p. 35). He points out further that, to the extent that we know how to identify seriously dangerous people, civil commitment is a more appropriate mechanism for removing them from society (p. 45).

Gross then turns to working out his own view in more detail. He first clarifies what a criminal act is. Both the common law and the Model Penal Code define a criminal act as a set of bodily movements accompanied by a mental state; only the coincidence of these two elements results in criminal liability (p. 49). Gross finds this unsatisfactory because it means that liability depends upon whether the person "meant it." Instead of entering this murky psychological territory, Gross argues that a criminal act is conduct — not necessarily a distinguishable set of bodily movements — that is culpable. It is culpable only if it is done intentionally, brings harm, is dangerous, and is not legitimate (pp. 77-81). An act is intentional, Gross says, not when accompanied by a particular mental state, but if the actor exercises control over it (p. 89). Harm is an "untoward occurrence consisting in a violation of some interest of a person" (p. 115). A violation of interest includes, of course, attempts to shoot at someone, whether or not the bullet went true. Dangerousness is the degree to which the actor should reasonably have expected harm to occur (p. 80). Harmful conduct is legitimate if the interests served by the conduct outweigh the interests that are violated by it (p. 80). The interest served could be anything from saving one's life to performance of an official duty to promoting the interests of society. Along these four dimensions, any two acts can be compared and contrasted, and relative criminal liability can be assessed.

Gross devotes a sizable portion of his book to excuses and justifications, which he collectively calls exculpatory claims. They of course turn on the four dimensions, and the discussion of how one escapes culpability does much to illuminate the four dimensions themselves.

In the final few chapters of the book, Gross turns explicitly to



what his theory means for the criminal justice system, and why we impose liability in the first place. After considering alternative views of the purpose of criminal penalties, he restates his own view: that criminal law and punishment protect society from disintegration by maintaining respect for its rules. What is essential is that all persons know that those who break the law do not get away with it. The criminal law is not expected to deter all crime, but it does serve to discourage most citizens from breaking society's rules.

Gross's justification for punishment explains why he examines the idea of culpability in such great detail: respect for the law is fostered only when we punish all — and only — culpable conduct. Either the punishment of inculpable acts or the tolerance of culpable ones would be disastrous in this respect. It follows that there must be no plea bargaining and no overly harsh or overly lenient sentences.

Still, condemnation does not mean that prison conditions should be cruel. To the contrary, if barbarous punishment offends people's sense of justice it will only cause disrespect for the law. Gross points out, in fact, that even if we believe that it is morally right to make prisoners miserable in retribution for what they have done, the state has no right to pursue such moral aims; it is limited by the purpose of punishment, which is condemnation, a change of status. Realistically, we need not fear that prisons will become attractive places to be, says Gross, because the law-abiding find the idea of going to prison quite terrible. It is irrelevant whether criminals find it attractive, since the law is not designed to affect them anyway (pp. 461-63).

Gross does not believe, however, that prison officials should provide therapy (beyond education and the opportunity for good health and social relations); just as the state has no right to pursue moral crusades through punishment, so it has no right to pursue them through treatment. The criminal justice system is not concerned with taking people apart and remaking them. Gross points out that it is just plain empirically wrong to assume that because people have violated the law they have something "wrong with them." The law is concerned with acts. A criminal act does not reveal at all accurately what kind of person the actor is. The state should, however, provide treatment when the need for it is established *independently*, whether the malady be physical or mental (p. 476).

### III. HOW MANY PROPOSALS?

Gorecki and Gross represent their theories as very different, and indeed upon first impression their ideal justice systems do appear to

be very different. One believes that by inculcating moral aversions in all citizens we can eradicate even crimes of passion. The other says outright that the justice system can have no effect on those who are not already committed to obey the law; it serves only to maintain the respect of the law-abiding.

But what are the essential features of the systems the writers propose? For both writers the justice system must condemn every criminal act in exact proportion to its culpability, no more and no less. The system must never let a single crime go unpunished, nor can it punish a single innocent person. Both writers think other approaches, such as treatment, simply do not work, and they are unwilling to impose therapy upon the convicted. Incarceration's only function is condemnation of the crime.

Even Gorecki's and Gross's apparent disagreement about the relation of law to morality evaporates when we look to their specific proposals. Gorecki believes that the main purpose of a criminal justice system is moral education. Gross says that the law will do violence to legitimate dissent if it tries to be an enforcer of morality (p. 32). This difference is one of terminology rather than substance, however. The "morality" that Gross distinguishes from law is the set of norms about which there is no broad consensus. And Gorecki would agree that these norms should not be legally prescribed. The two writers use different language to argue for the same position: that the justice system should enforce only norms that are founded on a broad consensus.

Thus, for most practical purposes, Gorecki and Gross propose the same justice system. But they disagree dramatically on what that justice system will accomplish. The two books are two dramatically different advertisements by two different horse sellers. Yet when we look at the teeth, the horse is the same. In view of the conflicting advertisements, perhaps we need some additional opinions about the horse.

Before turning to that, however, let us look briefly at one claim that both advertisers make: all other models for the justice system, they assert, are inadequate. In particular, both Gorecki and Gross are rather quick to dismiss attempts to help criminals, in part on the ground that such attempts cannot succeed. The evidence far from unequivocally supports that view. Most of the published studies of what works in corrections simply evaluate conventional therapies designed to rehabilitate individuals without interfering very much in their situation in the community. Yet since even the most innovative programs generally do not go far enough on a large enough scale to

indicate the true potential of the treatment approach, Gorecki and Gross are wrong to conclude all attempts to rehabilitate criminals must fail.

The problem is illustrated by the attempts at youth correctional reform in Massachusetts during the 1970s. A recent study reports that the massive juvenile deinstitutionalization and community-based correctional reforms during that decade failed to reduce the state's recidivism rate.<sup>5</sup> That is the kind of study that convinces Gorecki and Gross that treatment does not work. Yet the same study isolated a factor that did affect recidivism: the kind of relational networks the youth were involved in in the community — what kind of people they associated with, what these people did, and what they encouraged.<sup>6</sup> The study also showed that the reform programs, while making much progress, simply did not deal with the confederate problem for a great many of the youth.<sup>7</sup> Thus the study, while showing that the reforms did not reduce the overall recidivism rate, also gave significant clues as to what would have worked, and why the reforms fell short.

Gorecki and Gross might object that such discussion is pointless since the successful program has not yet been demonstrated. If that is so, we may as well ignore Gorecki's and Gross's work too, for their programs have not been demonstrated in full working order either. But if we wish to make progress, we cannot cavalierly dismiss any new ideas. There is more than one horse, and the race is not yet run.

#### IV. IDEALISM AND REALITY

In both Gorecki's and Gross's conceptions the criminal justice system must strictly adhere to the ideal model. Both writers believe that inconsistencies and lapses will result in the sense of injustice. For Gross that will breed disrespect for the law, and make it ineffective as a tool of social criticism. For Gorecki the injustice will rob the law of its moral force. Thus both men call for radical reforms in the present system. What are the prospects for such reforms? Both writers are optimistic, but neither has an empirical foundation for his optimism. For empirical evidence we must turn to the work of investigators who have studied how law is actually used in society and how changes in the law come about.

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5. R. COATES, A. MILLER & L. OHLIN, *DIVERSITY IN A YOUTH CORRECTIONAL SYSTEM* 147-74 (1978).

6. *Id.* at 159.

7. *Id.* at 91-94.

An example of a concerted attempt to study empirical variations in the use of law is the work of Donald Black.<sup>8</sup> His material is controversial but, being empirical, it is subject to further empirical study. Black has investigated when law is used in various societies. He defines law as governmental social control,<sup>9</sup> and the quantity of law as the degree to which law is invoked.<sup>10</sup> A complaint to a legal official, recognition or investigation of the complaint, hearings, arrests, prosecution, surrender, decisions in favor of the plaintiff — all represent an invocation of the law.<sup>11</sup>

Black also considers what kind of people within a society are most likely to invoke the law. His results suggest that, at least in part, law is a means whereby the “in-group” — those with power — keep the weaker outsiders in line. He finds that the superior tend to use law against the inferior, the more cultured tend to use law against the less cultured, the more conventional tend to use law against the unconventional, the more powerfully organized tend to use law against the weakly organized, and the upstanding of society (those who have not been subjected to social control) tend to use law against the deviant (the targets of earlier social control).<sup>12</sup> Black’s work does not necessarily suggest that law is an illegitimate social institution, but it does raise questions about its justice. It suggests that the relationship of justice and the criminal law may be very different than either Gorecki or Gross supposes. Until Gorecki and Gross demonstrate that the empirical patterns discerned by Black are not inevitable we cannot be sure that their ideal systems are not just utopian. Utopias are not necessarily a bad thing, but they should be clearly labeled as such.

If the patterns that Black found in the uses of law are not inevitable, we must still ask whether changes of the magnitude that Gorecki and Gross propose can actually take place. The results of the study of youth correctional reform in Massachusetts help to answer this question. That study identified five empirical patterns over a twelve-year period in the Massachusetts reform, and found evidence that these patterns were quite generally applicable to other types of reforms in other times and places: (1) To cause a widespread change in behavior one must simultaneously (a) facilitate the desired practices and impede the undesired ones, and (b) persuade key actors

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8. D. BLACK, *THE BEHAVIOR OF LAW* (1976).

9. *Id.* at 2.

10. *See id.* at 3.

11. *Id.*

12. *Id.* at 21-22, 65, 69, 92, 113-14.

that they would like to do the desired things and not the undesired things. A combination of coercion and persuasion is necessary. (2) To make it possible to develop new patterns one must overcome the great inertia of the existing ways of doing things. The most effective means are scandal, public investigation, and exposé. (3) It is important for reformers to get the formal decision makers on the side of change. These are the people who may not have much interest in the issues but who are very concerned with their prerogatives as decision makers. (4) Issue-oriented groups that favor and oppose reform tend to relax their efforts when they seem to be succeeding, thus becoming more vulnerable to attack, and to resort to extreme tactics when they get desperate, thus alienating their allies among the formal decision makers. (5) Extreme tactics frequently succeed in the short run but, since they leave the reformers with fewer allies, eventually lead to defeat. The defeat often follows after the reforms appear to be in place and functioning. The reformers may not clearly perceive that their earlier extreme tactics led to the final failure.<sup>13</sup>

These patterns portray a never-ending struggle. No one is right all the time. Temporary victories produce only shifting consensuses. There is little opportunity for the fine tuning that Gorecki and Gross call for.

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The literature of the Victorian Age began with the notion that there was truth, light, goodness, and understanding, and that life was a quest to find them. The age concluded in some disillusionment, with a feeling that the meaning of life was in the quest itself, not in the achievement of any imagined goal. Such disillusionment is perhaps not so terrible. In the Massachusetts reform the best time for the youth was probably during the height of the process of reform, rather than after the reforms were in place. It was during the struggle that everyone was paying the most attention to the children. And the children thrived on that.

Similarly, perhaps the importance of Gorecki's and Gross's books will be not in the solutions they propose, but in the controversy they provoke. That controversy may excite concern for what actually happens to real, live, human beings, both victims and offenders. The human beings would thrive on that.

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13. See A. MILLER, L. OHLIN & R. COATES, *A THEORY OF SOCIAL REFORM* 41-45 (1977).