

**Hyman Gross – ‘Crime and Punishment: A Moral Critique’ pp. 219 (Oxford University Press 2012). ISBN: 978-0-19-964471-1. £50**

‘The sum of virtue is to be sociable with them that will be sociable and formidable to them that will not’ wrote Thomas Hobbes. For Hobbes, a willingness to punish wrongdoers was no less a part of virtue than being grateful to the helpful and charitable towards those in need. Nor was Hobbes alone in this. John Locke also thought we all have a natural right to punish, a right we transfer to the state in establishing it. And Kant insisted that, before a state can be dissolved, all those awaiting execution in its jails must be dispatched. It seemed obvious to these writers and to many others that those who refuse to play the moral game cannot claim the protection of its rules. Different authors placed different limits on how we may treat criminals but all regarded it as obvious that such people merit our hostility.

Times have changed, or at least they had. The Utilitarian reformers of the nineteenth century convinced enlightened opinion that punishment was a bad thing. Bad things can be justified by their good effects e.g. by their propensity to deter crime, to reform criminals and so forth. But, the Utilitarians argued, we should punish only in so far as the good effects of our punishment will likely outweigh the intrinsic badness of inflicting pain and suffering on the criminal. This new orthodoxy reined for more than a century. Its most distinguished twentieth century representative, Herbert Hart, mocked as ‘alchemy’ the traditional idea that we could produce something morally good simply by mixing together two thoroughly bad things, namely a criminal act and a painful punishment. Punishment was justified only where we could show that this intrinsically bad thing had sufficiently good effects.

The wheel has now turned. The idea of retribution is back in fashion amongst academic moralists – at least those associated with law schools. Our need to condemn the crime and/or to give the criminal their just deserts is once more a legitimate reason for punishing them. Hyman Gross is a firm opponent of this New Retributivism.. At many points in this book, he expresses horror and disgust

at the practice of depriving another human being of their liberty, freely comparing our system of imprisonment with the institution of slavery. For Gross, the idea that imprisonment might be justified as a way of expressing our indignation at the crime 'belongs to an earlier stage in our moral development'.

Not that Gross advocates the abolition of legal punishment. He admits with great reluctance that our carceral system is probably indispensable. Like his Utilitarian forebears he invokes the beneficial social effects of the criminal law to justify it. But, Gross claims, the Utilitarians gave these effects the wrong kind of significance. He describes them as 'meliorists', that is as people who think that justified punishment makes things better. In Gross' view what justifies punishment is rather the need to avoid social disintegration. A society without criminal punishment would be a society in which crimes were committed with impunity, an impunity that both encourages the wicked to do wrong and provokes unbridled vengeance from their victims.

One might wonder whether the difference between Gross' 'preservationist' justification for punishment and that of his 'meliorist' predecessors is largely verbal. Isn't the preservation of social cohesion just one more good effect that must be weighed in the Utilitarian balance to determine whether our system of punishment is justified? Utilitarians would be likely to endorse all that Gross says about the dangers of impunity. But Gross has a further point to make. Most of the good effects cited by Utilitarians (e.g. deterrence) involve 'great uncertainty'. There can be no assurance that a particular punishment will have any particular effect in reducing the level of crime. Yet, Gross says, to justify infringing someone's fundamental human rights by imprisoning them we need certainty of effect, just as we need proof beyond a reasonable doubt that the crime was committed in the first place. Since all we really know is that the complete abolition of the criminal law would have 'intolerable' social consequences, the preservation of a tolerable social life is the only good consequence relevant to punishment's justification.

I worry that Gross achieves certainty of effect and thereby justifies punishment only by pretending that complete abolition is the sole option. To establish a

system of punishment is *ipso facto* to establish some particular system, a system that assigns specific penalties to specific crimes. For example, we can't decide to punish tax evasion without also deciding how much to punish it. How is that to be determined with any certainty? The only guidance Gross provides is his reference to 'intolerable' social consequences. But intolerability is itself a matter of degree. Tax evasion in Greece has gone largely unpunished and Greece is in a mess. Is the Greek fiscal crisis intolerable enough to justify renewed penalisation of tax avoidance? If so, how much should it be penalised? I can't see how to settle these questions in a way that would be acceptable to Gross without going in for the sort of meliorist Utilitarian reasoning which Gross thinks vitiated by uncertainty. And to have any system of punishment at all is to settle these questions. Retributivists often observe that rejection of their view leaves us at the mercy of the criminologists and their speculations about the social effects of incarceration etc. Gross clearly shares that concern and I doubt his 'preservationism' avoids it.

**David Owens**