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ON GUILT, RESPONSIBILITY AND PUNISHMENT. By Alf Ross. Translated from Danish by Alastair Hannay and Thomas E. Sheahan. London, Stevens and Sons Limited, 1975. Pp. 183.

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*Cheney C. Joseph, Jr.\**

For those concerned with the underlying philosophical problems of criminal law, Professor Ross's book provides valuable insights. Not only does he present well reasoned views of his own, but his critical evaluation of competing theories introduces the reader to the thoughts of other thinkers, and entices him to further study.

Ross challenges those who see morality as totally foreign to the criminal law and its system of sanctions. Rather than rejecting a relationship between morals and the penal law, Ross develops in rigorous fashion the relationships between the two. He develops in detail his view of the "conduct influencing" role of moral judgments; and he argues that the *aim* of the criminal law's system of sanctions is to govern the conduct of those subject to it. Moral disapproval acts to influence conduct. Thus, moral disapproval is a significant factor in criminal sanctions. In Ross's words:

There can be no doubt that the moral stigma attached to punishment is of great importance for the preventive effect of the penal system, both as a deterrent and as a factor influencing moral attitudes. For many persons, certainly, the shame and infamy attached to punishment are a greater deterrent than the actual pain that it involves, or at least function as a very serious addition to it. Punishment, even a fine, is not experienced just as the price one has to pay for doing a crime in the way one pays for a cinema ticket. The moral stigma of punishment must be assumed to be of particular importance for the ability of criminal legislation to influence current moral attitudes.<sup>1</sup>

Particularly does Ross refute those determinist thinkers who take the position that because human conduct is governed by causal factors, moral judgments are meaningless. He persuasively urges that even those who assert that human conduct is determined by causal factors must admit

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1. Pp. 89-90.

that moral judgments are meaningful if they influence human conduct.<sup>2</sup> They become, in themselves, determining factors. Ross makes his point in opposition to those who argue that criminal sanctions should not reflect moral disapproval but rather should function as a "morally neutral cure."<sup>3</sup>

By "morality" Ross has reference to both "valuations and attitudes of a directly moral nature concerning certain forms of behavior" and "the attitude of respect for law because it is the law of the land."<sup>4</sup> Ross's reference is not only to our direct moral evaluation of the conduct itself, *i.e.*, our feeling that such conduct is morally reprehensible in itself (Ross's examples are murder and theft); he also has reference to the moral obligation to act or refrain from acting simply because to do otherwise is proscribed by law. This view is based on the theory that one feels an internal moral obligation to follow the law. One would concede that there are some criminal statutes where there is no moral duty involved other than a general moral duty to abide by the law. Examples might be statutes setting speed limits or requiring the report of income on tax forms.

Ross argues that it is not merely the fear of punishment that prevents law breaking. Does one, for example, not shoplift merchandise simply because if one is caught one will be subject to a \$500.00 fine (and the possibility of imprisonment—unlikely for a first offender)? Clearly not. Most people do not steal because of *internal* moral forces which simply proscribe doing such an act even if, under the circumstances, one has no doubt that he will evade apprehension. Is the same true of reporting income on one's tax form? If not, this provides a good example of the breakdown of adherence to the criminal law without the force of moral sanctions. The dangers of "getting caught" and the fears of penalties alone are often not enough for effective enforcement of the law.

Similarly, the moral stigma attached to punishment is a

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2. Ross admits that certain theories of the so-called "hard determinists" are incompatible with moral responsibility. Ross argues that such theories can be reduced to the absurd position that even moral judgments themselves are determined. *See* Chapter 5, sections 13 and 14, pp. 137-145. Ross attempts, however, to avoid becoming embroiled in the classic battle between "free will" and "determinism." *See* Chapter 5, Section 10, pp. 129-134.

3. P. 90.

4. *Id.*

significant factor in many cases. While there may be little moral stigma attached to paying a ticket for speeding, the lack of moral stigma may in itself be a factor which encourages one to speed if he is reasonably assured of either not being caught or a small fine if caught. However, take the case of a prominent citizen charged with driving while under the influence of alcohol (particularly if his arrest is publicized). Is not the moral stigma a greater penalty than the fine and possible loss of driving privileges? And further, does the moral stigma associated with the punishment not serve as a conduct influencing factor? If the reader disagrees, then he should read and challenge for himself Professor Ross's well developed logic in support of his position.

In his "pragmatic view of morality,"<sup>5</sup> Ross does not join issue with "a cognitivist philosophy of values."<sup>6</sup> Although the existence of the sense of moral obligation is assumed to be self evident his essay simply does not examine critically "the justification of the values which moral reactions defend."<sup>7</sup>

The core of this set of theses [Ross's pragmatic view of morality] is that morality has no higher "meaning" or "justification," than the pragmatic one of being instrumental in the defence of a presupposed system of values.<sup>8</sup>

Ross sees a parallel between the pragmatic theory of morality and the juridical theory of punishment: both have the practical end of guiding human behavior.

Ross's view of the role of moral values and their significance to the criminal law does not lead to a dissertation on the sources of those values themselves. While he agrees that "we cannot accept our spontaneous moral attitudes as manifestations of eternal truths," he makes it clear that the "attempt to rationalize our experienced morality"<sup>9</sup> is beyond the scope of his book. That is not to say that Ross discourages such analysis, rather he sees it as necessary:

We must believe that the morality which develops in a society and is experienced by its individual members as self-evident requirements is in reality (that is, without

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5. P. 156.

6. P. 157.

7. *Id.*

8. P. 156.

9. P. 92.

their being aware of it) directed by needs and interests. It is the moral critic's task, therefore, in his analysis and initial reflection, to test the positive, experienced morality in order to discover the purposes it was made to serve, and how it is to be evaluated in light of consciously accepted norms.<sup>10</sup>

His concern is basically with "morality's capacity to guide human behavior"<sup>11</sup> and with the function of morality, rather than with the values defended by moral reaction. Nevertheless, given the force of morality in a society, the writer agrees with Ross that its power must be recognized as a force serving society's interest in maintaining conformity with its social norms (often expressed as criminal statutes). As Ross says:

[U]ntil chemists have invented effective anti-crime pills, they [jurists] should insist that it is moral forces that cement society, and that it is therefore those very forces that criminal legislation must try to mobilise in the fight against crime.<sup>12</sup>

Ross eschews what he calls "arrogant scientific claims"<sup>13</sup> that moral judgments and theories of moral responsibility are merely outmoded prejudices with no place in modern penal theory. Punishments, for Ross, have not only an element of suffering but also an element of disapproval of the offender's conduct. He expresses a great fear of a morally neutral concept of punishment:

When the judge . . . is replaced by the manipulator and the therapist, when the criminal law is based on a philosophy of treating citizens like mice or patients without responsibility, the vista that opens up is not so much that of a criminal's paradise as that of a totalitarian state with its mechanical and unlimited power over the individual.<sup>14</sup>

Another aspect of Professor Ross's thesis which should interest Louisiana lawyers is his view of moral and legal responsibility for one's acts. To Ross, the basic question of

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10. *Id.*

11. P. 158.

12. P. 99.

13. *Id.*

14. P. 70.

responsibility (moral and legal) seems to be whether the defendant "could have acted otherwise than he did."<sup>15</sup> Certainly, as Ross points out, we do not hold responsible one who had no *opportunity* or *ability* to act otherwise. Similarly, Ross suggests, we do not hold one responsible where under the circumstances, he could not have been *expected* to act otherwise than he did.

The writer submits that Louisiana's defense of justification is significantly more restrictive and that the concept presented by Ross should be considered.<sup>16</sup> Suppose, for example, that a motorist notices that one of the tail or brake lights on his automobile has just then become defective and is in need of change. Suppose further, that as he is driving to the service station to have it repaired, an officer cites him for operating a vehicle not equipped in conformity with the requirements of the Highway Regulatory Act.<sup>17</sup> Given these facts, should the defendant have been expected to have acted otherwise? Should he have immediately parked his car and called for the tow truck to haul his vehicle to the station for repair of the lamp?

Some would argue that technically the answer is *yes* and that the motorist's failure to do so and his continued operation of the vehicle violated the statute. They would point to the discretion of the district attorney to dismiss the charge<sup>18</sup> and to the discretion of the court to suspend the sentence in the event of conviction.<sup>19</sup> The practical effect, they would

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15. P. 167.

16. La. R.S. 14:18(5) and (6) provide:

The fact that an offender's conduct is justifiable, although otherwise criminal, shall constitute a defense to prosecution for any crime based on that conduct. This defense of justification can be claimed under the following circumstances: . . .

(5) When the crime consists of a failure to perform an affirmative duty and the failure to perform is caused by physical impossibility; or (6) When any crime, except murder, is committed through the compulsion of threats by another of death or great bodily harm, and the offender reasonably believes the person making the threats is present and would immediately carry out the threats if the crime were not committed; or . . .

17. See La. R.S. 32:304(a) and La. R.S. 32:306. Of course, the driver's awareness of the infraction is immaterial in determining his criminal liability. This is an offense which imposes liability *without* requiring that the offender operate his auto knowing or having reasonable ground to believe that a piece of equipment is defective.

18. See LA. CODE CRIM. P. arts. 61, 691.

19. See LA. CODE CRIM. P. art. 894.

argue, is the same. However, theoretically there is a great difference between saying "he is not guilty under the circumstances because he could not have been expected to act otherwise" and saying "he is guilty but under the circumstances he should not be prosecuted (or if prosecuted, not required to pay a fine)." On the one hand the legal conditions for imposing responsibility (and sanctions) have not been met, whereas, on the other, those conditions have been met and it is only the exercise of discretion by the authorities which prevents an unjust result.

Professor Ross presents many thoughts about the nature and purpose of criminal law. He raises many interesting points in addition to those few which have been discussed here. They are well reasoned and should, at least, be carefully considered by those concerned with the underlying purposes and values of our criminal justice system. An evaluation of why we penalize for crime may indeed give some indication as regards fundamental questions concerning *how* we penalize for crime. For those interested in reading a philosophical treatise which will challenge and stimulate the intellect, Professor Ross's work is highly recommended.