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# Some Familial Problems in the Retributivist Theory

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RESUMEN

El siguiente análisis comparte la defensa de Bennett del retribucionismo y, concretamente, de su versión denunciatoria. El problema es que, para resolver los problemas de estas versiones, Bennett confía en las teorías de la "justicia restauradora", y asume algunos de sus postulados doctrinales. El resultado es una teoría compleja que, tal vez, pueda reconstruir adecuadamente algunas prácticas morales, pero que tropieza con serios problemas de consistencia con la práctica jurídica.

PALABRAS CLAVE: *castigo, regla, práctica jurídica, retribucionismo, justicia restauradora.*

ABSTRACT

The following comments side with Christopher Bennett's defence of retributivism and his preference for a denunciatory version. Unfortunately, Bennett resorts to the so-called restorative theories as a theoretical complement of this version of retributivism, and borrows from them some important assumptions. The result is a complex theory that could be an accurate reconstruction of some moral practices, but has problems of adequacy regarding some features of legal practice.

KEYWORDS: *Punishment, Rule, Legal Practice, Retributivism, Restorative Theories.*

This paper contains an important level of agreement with *The Apology Ritual*. With regards to the philosophy of punishment I am also a retributivist, and the following ideas do not express a deeply confrontational approach. In coherence with this position, the first part of this essay contains a defence of the main theses of Christopher Bennett's book.

After the first section, I will add a second and a third part in which I will make explicit some disagreements with Bennett's position. It is relatively simple to outline the focus of the discrepancy. Bennett sides with a denunciatory version of the retributivist theory, and contributes with a sophisticated reconstruction of this version which apparently overcomes some of its traditional difficulties. This reconstruction borrows some assumptions from the so-called

restorative theories: the belief that any offender owes a sincere apology to the victim, which involves a disposition to make amends and to restore the relationships that have been damaged by his action. I agree with Bennett that the denunciatory branch of retributivism is partially correct, but also an incomplete explanation of punishment. We need a theoretical supplement to complete this explanation. However, the restorative models are not the best candidate to play this role.

Following this outline, the second part of my comments focuses internally on Bennett's answer to the question 'why punish?' I maintain that Bennett's theory could be an accurate reconstruction of some moral practices, but it has problems of adequacy regarding some features of legal practice. In the third part, I focus upon the source of many of the problems of the theory, the unnatural alliance of a retributivist theory with the restorative theories.

## I. In Praise of Bennett's Theory

A theory of punishment explores basically why, when, and how much we should punish. It is commendable that the book focuses on the first of these questions. In other terms, it does not dissolve the problem 'why punish' in the problem 'when we should punish'. We fall into one of these amalgamating theories when we maintain that the entire reasoning behind any justified punishment of an action is that this action is wrong, so that the real problem of a theory of punishment is to establish a list of moral wrongs.[1] However, these theories skip the relatively independent question of what is the legitimacy of the practice of punishment *as a whole*, regardless of the morality or immorality of any single action that might be classified as a crime by any single criminal law.

Bennett is clear and unambiguous on the nature of the theory he pursues: his book is a normative construction and not just a description or an analysis of the existing practices [Bennett (2008), p. 197]. This is again praiseworthy as methodological ambiguities are not uncommon in this subject.[2] But, assuming that the author and I agree upon the importance of normative theory, I will seize the chance to highlight one of the attributes of any normative theory. A normative theory must satisfy a dimension of minimal fit with the practice it refers to, and it cannot be incompatible with its necessary elements. We do not construct our theories under the dictates of reality; however neither do we write them on a completely blank paper. The aim of this warning is not to deny the aspiration to bind within our normative theory all the positive legal practices. I concur with Bennett that legal practice is a moral practice [Bennett (2008), p. 166]. However, we should also admit that legal practice is a peculiar moral practice and, if we suggest a moral justification of punitive practice, it must be a theory fitting with these peculiarities.

If the issue of minimal fitness is problematic for Bennett's theory it will be addressed throughout this commentary. But, for the time being, my conclusion is that this particular issue plays an important role in his favour. More specifically, the general description of legal practice fits very well with Bennett's strategies to reject scepticism and instrumentalism, for which he displays solid and convincing arguments.[3]

Ruling out scepticism, I also support the dedicated search for a moral justification of legal punishment. The book does not consist in a purely definitional strategy reduced to an analysis of general legal concepts. Moral strategy is necessary because law is basically a moral practice. But it is also necessary because we cannot make a purely legal theory of punishment without being involved in a vicious circle: in this case, we would probably define 'punishment' appealing to the notion of 'crime' or 'offence';[4] but, if we want to define 'crime' or 'offence' in purely legal terms, it would probably be unavoidable to resort to the concept of punishment [Kelsen (1960), p. 114].

And ruling out instrumentalism, my following comments regard retributivism. Bennett considers generally two retributivist roads of moral justification: firstly that punishment is based on the principles of fairness and secondly that punishment is conceived as an expression of our disapproval, reprobation or reproach for the moral wrong contained in the crime. Basically, he rejects the first road, and assumes that the moral answer to the question 'why punish?' must come from the second branch of retributivism, from a denunciatory theory of punishment.[5]

Denunciatory theories have traditionally been objected to for several reasons. Bennett focuses on the most important criticism:[6] that these theories may explain why we express moral disapproval, condemnation, resentment... but the question 'why punish?' still remains. Does moral denunciation really demand the imposition of pain and suffering?[7] There seems to be here a logical gap that should be filled with an additional justification which would inevitably be more urgent in legal punishments. Answers to this thorny question have many times been disappointing.[8] Bennett openly faces this challenge, and we will now consider if his accomplishments provide a convincing answer.

## II. BENNETT'S RETRIBUTIVIST PROPOSAL

For a legal philosopher, a good reason to enjoy Bennett's work is that it is easy to detect in its pages many echoes of some of the most important debates of contemporary jurisprudence.

Firstly, Bennett's strategy to justify punishment is an analysis of moral rules and practices constructed from the point of view of their participants, driven to grasp what he calls the 'normative expectations' of the participants

in an offence. This method reminds us of the analysis from the internal, hermeneutical point of view suggested by Hart to understand what sharing a social rule means. Following Bennett and Hart, we would say that, if we participate together in a moral practice under important moral rules, and if you break one of these rules, 'I do necessarily disapprove of your doing (If I don't disapprove, it turns out that I don't adhere to that standard)' [MacCormick (2008), p. 168],[9] and, if I really respect you as a moral agent with which I share the moral practice, I will have to express my condemnation, and to expect from you some feelings of blame, guilt and, finally, the acceptance of punishment as a justified response.

Secondly, Bennett's representation of the practice of punishment fits perfectly with one of the main claims of Ronald Dworkin's legal theory: that we have to portray any legal or moral practice in its best light. If we are going to reconstruct a social practice like the practice of punishment, we cannot simply focus on the empirical routines or the daily habits of most of the participants; we have to start putting in order the main principles and values that inspire it [Dworkin (1986), p. 52]. Bennett therefore attempts to draw on good examples of moral practice. We could define these examples as practices where the participants sincerely aspire to fulfil and satisfy the moral demands and expectations of the practice. Focusing on the best examples of punitive practices and its moral demands, Bennett concludes that the moral way of dealing with an offender is not by teaching him values or criticising morally his behaviour, which would offend his autonomy and full membership: it is by condemning him and demanding that he makes amends. On the other hand, a moral participant cannot simply accept his degradation in the practice; the moral way of redeeming himself is by saying sorry [Bennett (2008), p. 110]. And, when an apology is sincere, it expresses suffering, and involves a disposition or an expectancy of receiving it, which is equivalent to the acceptance of 'making some amends'. That is why our practice of punishing can be morally justified: this practice is justified because it represents or symbolizes this virtuous performance of our moral practices. It is useless to reply that most of our criminals do not intend to say sincerely sorry, or to object that, by presuming apologies or urges of redemption, we are taking for granted a strong moral consensus which is far from our contemporary pluralistic societies, where we do not appreciate social denunciation of all the crimes [Nino (1980), p. 277]. We reconstruct a theory of punishment from a virtuous example of moral practice, one that works out correctly the principles, demands and expectations that inspire it. The result is a normative procedure, a protocol or a ritual of imposing punishments that perfectly represents these principles, demands and expectations. Bennett's theory is not constructed from the point of view of the victim, because it does not forget the offender.[10] However, it is not made either from the point of view of the 'bad man': it is made from the point of view of a real moral agent in a moral

practice that, in the case of the offender, is named the 'virtuous offender' [Bennett (2008), p. 177].

I will start precisely with this point of view of the virtuous offender to challenge the adequacy of the theory in the legal domain. This model assumes in the offender not just the expression of a claim of forgiveness; if an apology is morally sincere, it must be the result of an internal attitude including an acknowledgment of the wrongness of the behaviour and some sincere states of shame, guilt and affliction. The virtuous offender does not only do the right thing (to express an apology): he does it from the right psychological impulses. The problem is that, as it is remarked from Kant, law is only concerned with the *forum externum*, and not with the *forum internum* [Kant (1907-1914), p. 214].[11] To obey a legal rule is related to external actions, and it does not include conditions such as the performance for the right reasons, or the personal adherence to the content of the rule. *Sensu contrario*, it does not require from the offender to recognize that he made a wrong action, or the mental states of guilt, shame... basically, we cannot construct a fitting theory of punishment on the presupposition of a sincere apology. Any theory dependent on internal states does not fit with the fact that many of our criminals are unable to satisfy these internal conditions. It could be replied that Bennett's theory is a normative theory constructed from what we demand morally each other, and we would not treat the offenders morally if we would not expect and demand from them these attitudes. But the answer is that legal practice cannot and actually does not demand these attitudes, and it does enough to respect citizens as moral agents just by demanding an external action of conformity and punishing them when this action is not performed. Two illustrations could show that legal practice cannot either expect or demand these internal attitudes. The first one is the offender we could define as recalcitrant or incorrigible: it is not that he wrongly abstains from showing the required feelings; he is in fact unable to show them, and it is unlikely to presume them. The second is clearer, and consists in cases where we can detect an incompatibility between the morally virtuous offender – from whom Bennett constructs his theory – and obedience to law. As we know, we live in very pluralistic societies respecting morality and conceptions of the good, so that our laws are in a substantial part a kind of overlapping consensus called for many authors a merely 'political' consensus. It is not an exceptional case – on the contrary, as our pluralism is deeper and deeper, it is a more and more frequent situation – that there is a serious discontinuity between the personal conception of the moral life and the demands of law.[12] Of course, I am not suggesting that all these individuals make a good exercise of practical reason by disobeying law; the only implication is that we cannot likely expect or demand from them sincere feelings of shame, guilt or sincere claims of apology. It could be true for many people that our emotional attachments are deeper respecting the public political values than the conceptions of the good

life, but I do not think we can generalize this assumption, and to construct a theory around it. Even in the most ideal of the contexts, you cannot expect or represent a sincere apology from a doctor that, for moral reasons, practices an abortion where it is a crime, or vice versa, or from an objector of conscience, or from a civil disobedient, or from any case belonging to the growing package of conflicts between law and moral conception of the good.[13]

Leaving aside the problems of elementary fitness with our legal practice, the complex framework of internal feelings and mental dispositions involves the theory in some ambiguities and conflicts that could have been avoided in a more economical model.

Bennett says emphatically that his theory does not pursue the offender's repentance as a psychological fact. More specifically, he says that his theory does not look for repentance because it is not a 'communicative' theory, a message to the offender in order that he can understand the reasons of the punishment and adopt the proper attitudes: it is simply an 'expressive' theory in which we try to represent the right terms of the relationship between state and offender. Bennett's precautions with the concept of repentance are explainable: some authors, even retributivists, hesitate to punish the repented offender,[14] and some others, because they link clearly 'punishment' to 'external imposition', consider that the central model of punishment does not involve the cases where there is repentance and voluntary disposition to make amends.[15] However, we heard before that Bennett's theory represents what he called the normative expectations and the emotional structure derived from the wrongdoing considering the virtuous participants in moral practice. If one of my normative expectations is that you should say sorry, why should a theory of punishment dispense with repentance? Which would in this case be the role played by the 'virtuous' offender? We know that often it is not realistic to expect from the offender a sincere repentance. However, in a theory where the attitudes of blame and apology are contemplated as the right attitudes, it is difficult to avoid the conclusion that repentance should be pursued whenever it is possible and as much as possible. Probably, this aim would require a dialogue with the offender and her active participation, as well as institutional arrangements to implement these demands. The conclusion is that the principles of Bennett's theory push the institutional demands much closer to the restorative models than Bennett avows. Nevertheless, Bennett tries to escape from a general and broad commitment in practice with the restorative models, and his elusive strategy is to adopt an expressive theory in which we simply represent 'the adequate symbols for condemnation' rather than the search for repentance, reform and reconciliation as 'something actually to be achieved' [Bennett (2008), p. 197]. But the first question is, once again, what would be the use of this concern with the proper attitudes of the offender if punishment is just an expression of whoever condemns. An expressive theory could have dispensed perfectly with all this complex internal background [Sigler (2010),

p. 386]. The second question is how we are going to claim the frustration of a normative expectation if it is not through a communication, a message addressed to the offender. If our legal system is a set of general norms, it is because our legal practice is an exchange of reasons where our actions and positions must be accounted for with the right reasons, with norms previously recognized as valid and binding. When the action consists in removing some fundamental rights and downgrading the status of one of our co-participants in a social practice, our duties of accountability are even more demanding. It means that this practical decision must be especially reasoned and supported with general arguments previously recognized by the own offender as rules of the game, and not just with simple expressions. We condemn with rules because we have a duty of accounting for and justifying our decision, and rules play this role because they are abbreviations of moral reasoning. An expressive theory jeopardizes the whole enterprise of justifying punishment, of giving appropriate reasons to the question 'why punish'. Against Bennett, it is apparent that a communicative theory is unavoidable; but a communicative theory does not need to go more deeply into the *forum internum* of the offender: it can restrict itself with the point of view of the sender of the message, regardless of the attitudes of the recipient. I think the purely denunciatory theory agrees better with this simple communication of a denunciatory message from the sender – the authority – to the wrongdoer.

Bennett's theory also embraces the concept of suffering as a necessary ingredient. To represent what we may call a sincere apology means to represent a mental state of affliction in which the wrongdoer accepts some unpleasant burdens [Bennett (2008), p. 121]. Punishment is not for Bennett a simple return of suffering: he only sustains that, morally speaking, a disposition to suffering is a necessary part in the ritual we call the practice of punishment. However, once again, the theory's internalism brings some problems. Especially in a legal practice, punishment is a deprivation of some rights, and if this normative and objective deprivation is subjectively or psychologically viewed by the criminal as a suffering is a contingent matter. We can assume that it will happen in most of the cases, but it might not happen in some others. At least for the recalcitrant offenders, punishment is the lesser of two evils, because for them it is worthwhile to keep on offending despite being punished, so punishment cannot be interpreted as a utility loss. Modern legal systems avoid degrading punishments; however, even when they forget this aspiration, they avoid presenting them as mere exhibitions of suffering and pain: lethal injection aspires to be a painless execution of a sadly degrading penalty. Punishment is not administered thinking about the infliction of subjective or empirical pain: it makes justice, estimates and imposes the right price or the right payment owed to society in terms of its legal measures of value; to add an ingredient of suffering in this description is unnecessary.

Finally, the internalism of Bennett's theory has further unwelcome consequences. For example, a theory of punishment coherently inserted in a whole theory of state coercion is preferable to another one in which principles of criminal law would be substantially different to the principles ruling the security and public order. Obviously, we are talking about different activities. But, although different, there are clear similarities: they both consist in limitations of rights for disturbances in the exercise of other people's rights and for which state does not have to compensate economically; repression must be proportionate to these disturbances, and we reject any instrumentalist view of public order in which the goal could legitimate any mean: on the contrary, these activities are surveyed later by the judges, who check if repression was proportionate and justified. However, because Bennett's theory of punishment is overburdened with internal attitudes, it has to separate drastically the practice of punishment and activities of public order: as Bennett cannot distinguish attitudes of sorry and shame in the last examples, he even compares these activities with the public decision of keeping some individuals in quarantine for medical reasons [Bennett (2008), p. 196]. This depiction reduces public order operations to crude instrumentalism.

The conclusion is that Bennett's theory does not provide a complete structure of reasons to justify legal punishments. The question 'why deprive the offender of some fundamental rights instead of simply expressing our disapproval?' still remains.

We said before that, respecting its institutional consequences, Bennett's concepts should lead to a more restorative theory he declares. In fact, restorative theory is the most important partner of Bennet's theory. However, this partnership is unable to solve the problems of denunciatory theories.

## III. Bennett's Non-Retributivism

In Bennett's Introduction we can read an unambiguous statement: punitive legal system should be 'as restorative as possible' [Bennett (2008), p. 5]. However, Bennett's doctrine is substantially different to the restorative versions we are accustomed to read: it is formalised, centralised and coercive, feels uneasy with the hypothesis of shows of repentance from the victim [Bennett (2008), pp. 139, 148], and does not leave a broad space for private arrangements in which state agents are just mediators.[16]

Bennett represents what we would call a deep application of restorativism in criminal institutions under the label *laissez-faire conceptions of restorative justice*. He rules out these conceptions as fundamental criminal answer; but, even when he rejects them, he remarks some advantages involved in its implementation: a) it enlarges our experience and information: for example, the offender is able to know the offensive consequences of his actions, and the

amends he could make; b) it promotes the recognition of the other [Bennett (2008), p. 176]. These advantages explain why he reserves a non trivial role to private arrangements between victim and offender, concretely the specification of the *quantum* of punishment: the judge could indicate the broad margins of the penalty, and victim and offender could privately pinpoint the exact amount within these margins [Bennett (2008), p. 180]. Finally, what underlies these concessions is the mediation of another view of punishment not exactly fitting with the retributivist one, and for which the aim of punishment is essentially restorative, because it tries to repair the relationships broken by the offense [Bennett (2008), p. 154].

Sadly, the marriage with restorative punishments reveals again important problems of adequacy with legal practice. We talk about making 'amends', which basically means to fix or to repair some damage, either the private damage inflicted to the victim or the public damage consisting in the loss of confidence in public relationships. The problem with this conception, especially regarding the relationships with the victim, is that it is a departure from the public nature of criminal institutions, and it is more like an approach to civil compensation that we can find in tort law. This restorative interpretation of punishment fits with the private law principles of corrective or restitutive justice, but not with retributive justice. In this interpretation, punishment is a way of compensating for damages. However, the wrongness of the criminal offence is not linked to a material or subjective harm, but to an objective violation of rights, or, in other words, an attack against the most important moral values of the community. The second problem, especially regarding the relationships with the community, is that the theory comes dangerously close to instrumentalism: at least the *quantum* of punishment does not look to the past, but the future, because how much we have to punish is a function of our purpose of re-establishing the relationships of confidence between offender and community, and not strictly the seriousness of the offence.[17]

Once this restorative view of punishment is rebutted, both supposed advantages of the *laissez-faire* models are not available. In a public law like criminal law and in public procedures like criminal procedures is a mistake to suppose that the more we hear from the interests of the victim the more we know of the crime and the most appropriate will be the punishment. These considerations are relevant for the civil compensation of a material damage, but not for a public criminal matter consisting essentially in the transgression of a community value. As we know, it is quite possible that the private victim did not suffer any damage,[18] did not feel any offence at all,[19] or felt the offence, but forgave the offender... and, despite all these circumstances, the criminal process starts and finishes with a punishment.[20] Bennett shows knowledge of these circumstances [Bennett, 2008, p. 136], but he does not take them properly into account: there is no room in the criminal context for the 'restitution contracts' talked about by the restorative theories [Zehr (1990), p. 164], a

category in which we could include the contracts on *quantum* of punishment suggested by Bennett.

This public nature of punishment and criminal procedure makes Bennett's concessions to dialogue and communication between private victim and offender irrelevant. As we have seen, the subjective feelings of victims are often misleading respecting the violation of law. In the example of Judith, Bennett regrets that, with our current methods, she would be involved in a very unpleasant duty of proving the culpability of the offender. I do not see how a process of face to face debate with the offender could be less unpleasant. Finally, a long discussion about nature of rules could be brought out here. It is only possible to hint that rules work as exclusionary or pre-emptive reasons [Raz (1979), pp. 21-23],[21] and, unlike other kind of norms, their application blocks any deliberation on their underlying moral reasons: as we said before, rules are the abbreviations and conclusions of a moral reasoning, and that is why they satisfy a need of accountability and justification; however, they also are conclusions because, due to the institutional dimension of law, they conclude the moral debate. A new debate within a court about the reasons of the rightness of the rules and the offensive nature of the behaviour is in my view completely at odds with a system of rules like criminal law.

As well as a conflict with the public nature of criminal law, to empower the victim with an entitlement to determine the *quantum* of punishment jeopardizes the strict interpretation of the rule of law in criminal law, captured by the principle *nullum crimen, nulla poena sine lege*. Restorative theories are a grievous departure from this principle.[22] We have to remember here that any return to 'private' justice blurs the differences between revenge and punishment [Nozick (1980), p. 368]: determination of punishment is a historical conquest of justice against public and private abuses, and any surrender to private agreements or to the imagination of the judge would be a step back in justice leading to different punishment in identical cases, Mikado style punishments,[23] incoherence and arbitrariness. Bennett avows some of these dangers in his *limited devolution model*, but accepts them as a price worth paying [Bennett (2008), p. 180]. In his Introduction, he judges as a danger our tendency to reduce punishments to jail and fines [Bennett (2008), p. 9]. However, we have reasons to be happy with the strict determination, and even with the historical process that contradicts his judgment: the unification and convergence of punishments in a small list.

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NOTES

[1] In my view, Michael Moore's theory is a clear example of this procedure. Moore also assumes a perfectionist theory of law and state according to which 'because an action is morally wrong there is always a legitimate reason to prohibit it with criminal legislation' [Moore (1997), p. 70]. Therefore, he willingly accepts a very disturbing consequence: there are reasons that moral misdemeanours or minor peccadilloes, such as family lies, should be punished by the state. It is true that other considerations can defeat the need of punishment, but this need is undoubtedly binding [Ibid. 640 y ss].

[2] Hart [(1968), p. 236], for example, is supposed to provide a purely normative theory; however, he refutes some views of the theory of responsibility offering a single argument: the existence of a positive and highly controversial institution of English law, the crimes of strict liability. For a 'normative' refutation of this figure, see Nino (1980), pp. 183 y ss.

[3] As the famous 'Jacques the Fatalist' said, 'rewards are just illusions of goodhearted people, and punishments the expression of fear of the mean people' [Diderot (2008), p. 229 (my translation)].

[4] Flew (1954), pp. 291 ss.; Hart (1968), pp. 4-5.

[5] 'Censure-theories are the most promising way of developing the retributivist tradition' [Bennett (2008), p. 186].

[6] Therefore, he does not consider other important objections. It could be said, for example, that denunciatory theories jeopardize the legal principle of retroactivity because immorality exists before and after the enactment of the legal rule. It could be said too that, being the only justification of punishment, these theories bear reasons to relax the principle *nulla poena sine lege* when moral condemnation in a particular crime would be especially and unpredictably intense.

[7] Feinberg (1970), p. 101; Hanna (2009), p. 242.

[8] For example, to say that punishment is necessary to reinforce social solidarity or to give cohesion to the moral practices turns the theory into a variety of instrumentalism in which we graduate the scale of punishment according to a prospective goal, and we view denunciation as a kind of stimulus to induce obedient behaviour [Hart (1968), p. 235; Moore (1997), p. 90]. Other versions search for a different goal: moral improvement of offender; they are included by Nozick in 'teleological retributivism' [Nozick (1981), p. 371]. Other ways of filling this gap between 'denunciation' and 'infliction of pain' are not more satisfying. To say that punishment works as a symbol of communitarian condemnation does not explain its necessity: Nino (1980), pp. 205-6. Some authors have given up any hope of a self-sufficient retributivist theory, and confess that, answering this question, retributivism must be completed with an instrumentalist model of general prevention [Von Hirsch (1998), pp. 39ff.].

[9] Following Hart's theory, we would add that primary social rules (rules imposing duties) require analytically a secondary rule imposing punishments to the breakers of primary duties.

[10] Von Hirsch (1998), pp. 28-9, warns against theories that interpret practice of punishment as something *we* do against *them.*

[11] Bennett separates his rituals from the exhibitions of 'inner attitudes' [Bennett (2008), p. 154]. However, his ritual is constructed on assumptions about appropriate

feelings and expected psychological attitudes: 'But it draws its symbols from emotions and expectations that are deeply intuitive' [Ibid., p. 149].

[12] On these concepts see Rawls (1991), pp. i-xxvii, 35-40, 133-168.

[13] The list of counter-examples is not vulnerable to the accusation of not being a list of central cases of legal punishment. It could be admitted if punishment were controversial in some or all of these situations. And it is true that a minority of these cases is controversial, but controversy is not about why punish, but about how much. Even in civil disobedience it is commonly required the disposition to accept the punishment as a bond or guarantee of the civility of the action, so that the disobedient could obtain a diminished penalty [Bedau (1961), p. 661; Nozick (1981), p. 390; Rawls (1969), p. 247; Wasserstrom (1963), p. 796].

[14] What Nozick calls 'teleological retributivism' is in trouble to justify this punishment, and the the rest of retributivists, according to Nozick, are uncomfortable justifying it [Nozick (1980), p. 365].

[15] Lucas (1980), p.125; Betegón (1990), p. 195.

[16] 'Restorative justice would not be the major or fundamental criminal justice response' [Bennett, (2008), p. 144]. Immediately after, he judges his theory as 'an alternative to restorative justice' [Ibid., p. 146].

[17] 'After all, restorative justice is in some way forward-looking' [Bennett (2008), p. 22].

[18] See 'profound offences' [Feinberg (1985), Vol. II, pp.50ff.].

[19] Feinberg enhances that *wrong* is an objective concept attached to a violation of rights, [Feinberg (1985), III, p. 2]. We see examples of a pro-active defense of the offender by his victims in many of the so called 'domestic violence' cases.

[20] There is an important exception in the so called Spanish law 'private' and 'semi-private' crimes. In the first ones (slander and libel), charges must be submitted to the tribunal by the victim (not by the public prosecutor), and punishment is excluded if she pardons the offender [see 215, 1 of Spanish Criminal Code]. However, these crimes are not less public in nature than the rest; what is private is the mean of proof: it happens that a third person cannot proof the happening of a real slander, and we need an action from the victim to confirm it.

[21] Even Dworkin [(1986), p.143] acknowledges that the exclusion of underlying moral reasons must be radical in a peculiar department: criminal law.

[22] [Zehr (1990), pp. 185-6)] even rejects the concept of crime, and suggest the broader concept of 'harmful behaviour'. The most, he adds, we can accept 'crime', although not in technical legal terms, but in full context: moral, social, economic, political, etc.

[23] This danger is visible when Bennett demands community services 'with symbolic link to the nature of the offence' [Bennett (2008), p. 178]. He even let restorative justice outweigh the demands of legal consistency in many situations [Ibid., p. 181].

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