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ASSESSMENT OF CURRENT ANGLO-SAXON PROPOSALS ABOUT CRIMINAL JUSTICE AND THE JUSTIFICATION OF LEGAL PUNISHMENT

Moore, Duff and Finnis on retribution, and the challenging compatibility with the up-and-coming Restorative Justice

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Abstract

In Spain, the discussion amongst Criminal Law scholars regarding the justification of legal punishment has largely misunderstood the retributive rationale. At the same time, Spanish academics seem not very much concerned with the study of the new Anglo-Saxon trends that are developing retributive theories of punishment. In order to make a first step in overcoming this situation, the present TFC will be devoted to the examination of several latest Anglo-Saxon proposals about criminal justice and the justification of state punishment. Therefore, we will deeply explain and assess three different approaches to a retributive understanding of legal punishment. After evaluating Michael S. Moore's and R. Anthony Duff's accounts, they will be completed and construed in the light of the restoration of Saint Thomas Aquinas's teachings about criminal punishment, currently endeavored by John M. Finnis. As a result, a unitary and global retributive rationale will be offered, based on the latter's foremost innovative contribution: questioning the concept of punishment as something intrinsically related to the emotions –since it is commonly characterized as the infliction of some kind of pain– and locating the very essence of such institution within the domain of the offender's will, as a coercive penalty directed to restrict that human faculty after an act which is taken to be excessively self-determined outside the confines of the law.

Another interesting and novel trend that has appeared in the Anglo-Saxon world during the last three decades, and which is now up-and-coming, is the so-called Restorative Justice. This movement promotes an alternative way of conceiving the resolution of criminal cases, asking for an active participation of all the parties with a stake, being the victim-offender mediation a well-accepted initial paradigm of this tendency. Again, this issue has not been studied in detail by the Spanish Criminal Law doctrine. But due to the originality of its suggestions and also to the implantation that it is gaining in North America, the United Kingdom and Australia, it is worthy to develop an investigation in order to understand what exactly means and entails. The point of connection with the previous part of the TFC is captured by the following question: is it possible to make compatible a retributive theory of punishment with a criminal justice system based –at least partially– on the principles that Restorative Justice enunciates, and with the programs that are undertaken by this latter movement? Since very often those two rationales are presented as opposed and competing, it is necessary to overcome this cartoon and find a model in which they both can coexist. After assessing the arguments given for and against the compatibility between restoration and retribution, we will conclude that a kind of agreement is possible, according to Duff's sketched proposal, albeit further development will be needed in order to achieve a coherent global account.

Resumen

En España, la discusión entre los académicos del Derecho Penal sobre la teoría de la pena ha caído en profundos malentendidos en lo referente a la justificación retributiva.

Además, la doctrina española no parece muy preocupada en estudiar las nuevas tendencias anglosajonas que están desarrollando teorías retributivas de la pena. Así pues, como un primer paso para tratar de superar esta situación, el presente TFC está orientado al examen de varias de las últimas propuestas que en el mundo anglosajón han surgido en relación al sistema penal y a la justificación del castigo estatal. Por lo tanto, vamos a explicar y a valorar en profundidad tres maneras diferentes de enfocar la comprensión de la pena desde una perspectiva retributivista. Después de evaluar las propuestas de Michael S. Moore y R. Anthony Duff, ambas se complementarán e interpretarán a la luz de la recuperación de las enseñanzas penales de Santo Tomás de Aquino, recientemente promovida por John M. Finnis. En consecuencia, trataremos de ofrecer una teoría retributiva global, basada en la principal aportación de este último autor: el cuestionamiento del concepto de pena como algo intrínsecamente ligado a las emociones –puesto que es comúnmente definida como la imposición de un sufrimiento– y la localización de su esencia en el terreno de la voluntad del delincuente, como una institución coercitiva dirigida a restringir dicha capacidad después de un acto excesivamente regido por su propia autonomía, fuera de los confines y los límites marcados por la ley.

Otra corriente interesante y novedosa que ha surgido en las últimas tres décadas en el mundo anglosajón y que está ahora ganando protagonismo es la llamada Justicia Restauradora. Este movimiento formula una manera alternativa de concebir la resolución de los casos penales, por medio de una participación más activa de todas las partes involucradas en el delito; la mediación víctima-delincuente es aceptada como su paradigma inicial. Tampoco esta tendencia ha sido objeto de un estudio detallado por parte de la doctrina penal española. Sin embargo, debido a la originalidad de sus propuestas y a la implantación que está teniendo en Norte América, el Reino Unido y Oceanía, vale la pena entender qué significa exactamente y qué implicaciones tiene. El punto de conexión con la primera parte del TFC se deduce de la siguiente pregunta: ¿es posible hacer compatible una teoría retributiva de la pena con un sistema penal basado –al menos en parte– en los principios enunciados y los programas desarrollados por la Justicia Restauradora? Dado que con mucha frecuencia se presentan estas corrientes como contradictorias y opuestas, es necesario superar el malentendido y encontrar un modelo en el que ambas puedan coexistir. Tras evaluar los argumentos a favor y en contra de la compatibilidad entre retribución y restauración, concluiremos que es posible lograr el entendimiento, a partir de la propuesta de Duff, a pesar de que será necesario un tratamiento posterior si se desea conseguir una teoría global y coherente.

Resum

A Espanya, la discussió entre els acadèmics del Dret Penal sobre la teoria de la pena ha estat captiva de profunds malentesos en relació a la justificació retributiva. A més, la doctrina espanyola no mostra molt d'interès en l'estudi de les noves tendències anglosaxones que estan desenvolupant teories retributives de la pena. Així doncs, com a primer pas per tal de superar aquesta situació, el present TFC està orientat a l'examen de diverses de les darreres propostes que al món anglosaxó han aparegut en

relació al sistema penal i a la justificació del càstig estatal. Per tant, explicarem i valorarem en profunditat tres modes diferents d'enfocar la comprensió de la pena des d'una perspectiva retributivista. Després d'avaluar les propostes de Michael S. Moore i R. Anthony Duff, es completaran i interpretaran a la llum de la recuperació de la filosofia penal de Sant Tomàs d'Aquino, recentment promoguda per John M. Finnis. En conseqüència, intentarem oferir una teoria retributiva global, basada en la principal aportació d'aquest darrer autor: el qüestionament del concepte de pena com una cosa intrínsecament lligada a les emocions –ja que és comunament definida com la imposició d'un patiment– i la localització de la seva essència en el terreny de la voluntat del delinqüent, com una institució coercitiva dirigida a restringir la dita facultat després d'un acte excessivament regit per la seva pròpia autonomia, més enllà del límits establerts per la llei.

Una altra corrent interessant que s'ha desenvolupat al mon anglosaxó a les darreres tres dècades, i que a dia d'avui està guanyant protagonisme, és l'anomenada Justícia Restauradora. Aquest moviment planteja una manera alternativa de concebre la resolució dels casos penals, per mitjà d'una participació més activa de totes les parts involucrades en el delicte; la mediació víctima-delinqüent és acceptada com el seu paradigma inicial. Tampoc aquesta tendència ha estat estudiada amb detall per part de la doctrina penal espanyola. Tot i així, degut a la originalitat de les seves suggerències i a la implantació que està tenint a Nord Amèrica, el Regne Unit i Oceania, és convenient entendre què significa exactament i quines implicacions té. El punt de connexió amb la primera part del TFC es pot deduir a partir de la següent pregunta: és possible fer compatible una teoria retributiva de la pena amb un sistema penal basat –almenys parcialment– en els principis enunciats i els programes desenvolupats per la Justícia Restauradora? Ja que amb molta freqüència es presenten aquestes corrents de manera contraposada, es fa necessari superar el malentès i trobar un model en el qual ambdues puguin coexistir. Després d'avaluar els arguments a favor i en contra de la compatibilitat entre retribució i restauració, conclourem que és possible aconseguir l'entesa, a partir de la proposta feta per Duff, tot i que serà necessària una investigació posterior si es desitja assolir una teoria global i coherent.

Keywords / *Palabras claves*

Retribution – Retributivism – Restorative Justice – Punishment – Atonement – Secular penance – Moore – Duff – Finnis – Saint Thomas Aquinas

SUMMARY.

INTRODUCTION.

The introduction of this Paper must first of all place it in its context, in order to make the reader understand the underlying topics and the pursued scope. The *Trabajo Final de Carrera* (TFC) is a required subject of the Law Degree in Universidad Abat Oliba, so that every student must fulfill this investigation in order to obtain the qualification. As it is not an undermining effort, one must thus choose a matter of his great interest, for lots of hours are spent in preparing and carrying out this work. Since I first took Criminal Law in the second course of the Degree, my genuine interest has been the justification of legal punishment. A parallel problem, which I learned from Dr. Carlos Pérez del Valle, is the misunderstanding of retributive theories that characterizes Spanish penal doctrine.

I do not want to take for granted that there is great worth in deepening in the justification of punishment. Hence a methodological explanation seems necessary to understand why the scholars are so concerned –and, if this is not the case, they should worry more– with the Theory of punishment. As we know, the penalty is the consequence in the criminal justice system, the state's reaction in front of the illicit behavior of the offender. As a result, if we consider a teleological framework of reasoning to be rationally upheld, the very definition of Criminal Law depends on the significance of punishment which is its later outcome. Besides, every institution within the criminal justice system is linked to (furthermore, stemmed from) the concept of punishment one thinks to be appropriate.

Therefore, I started the investigation regarding the proposed issue, focusing on the study of several current trends that in the Anglo-Saxon world are using a retributive approach to justify penal sanctions. We chose specially two authors – R. Anthony Duff, Scottish, and Michael S. Moore, American– that in the last 20 years have developed highly interesting retributive theories of punishment, largely known and discussed in the field of influence above mentioned. However, the reception of their main ideas has been scarce in Spain, obviously not in accordance with the merit and originality of their proposals.

Duff's account led my investigation to a movement called Restorative Justice, which in the last three decades has been confronting criminal systems of the Common Law area with innovative principles and practices. Duff manages to welcome most of these new tendencies within the aegis of retribution. As opposed to John Braithwaite, who has been largely devoted to the external and internal consequentialist justification of legal punishment and radically insists that the model of conflict-resolution proposed by Restorative Justice is absolutely incompatible with a retributive theory. My first intuition, lately confirmed, was more on Duff's side. Yet the matter is much more complex.

Thus, the present Paper is concerned with some latest Anglo-Saxon trends that have emerged with reference to the Philosophy of Criminal Law. A deep and thorough examination will be carried out to analyze the justification of legal punishment that lies under the accounts given by M. S. Moore and R. A. Duff, then focusing on the main criticisms that they have received regarding their chief claims. Some further investigation will be undertaken in order to acknowledge and assess the main challenge that John Finnis's justification of punishment (which wants to return Saint Thomas Aquinas to the core of the discussion) raises, and whether his right proposals are already at the foundations –or at least tacitly recognized– of the retributive theories before sketched.

Moreover, an ultimate underlying question is whether is it possible to make compatible a retributive theory of punishment with a criminal justice model based –at least partially– on the principles that Restorative Justice enunciates, and with the programs that are undertaken by this latter movement. This is not a negligible challenge. The intention is to give an initial answer to this broad and controversial issue –which is doubtless of the utmost interest, since in the last decades we have experienced a fruitful resurgence and an increased expansion of both trends. For doing so, we will develop a conceptual approach to establish the theoretical framework of analysis, in order to identify, comprehend and assess the confronted positions concerning the above posed topic.

Before dealing with the issue at hand, we should first briefly refer to the main structure of the TFC, divided in three stages. After an introductory chapter (which will locate contemporary Anglo-Saxon retribution in its context), the first part will be primarily devoted to the examination and evaluation of Moore's and Duff's proposals on justifying legal punishment (including their claims and the most important criticisms). A second part will allow Finnis to enter in the debate with his challenging ideas, and we will see to what extent are they already compatible with the analyzed accounts. Finally, time will be to discover whether retribution and Restorative Justice are compatible or competing. Two possible answers to the above mentioned query will be given, concisely exploring the main reasons held by the champions of both positions, before summing up the chief points that we will be in a position to conclude from our investigation.

To finish with this introduction, I would like to especially thanks to my tutor, Dr. Carlos Pérez del Valle, for the brilliant guiding work that he has undertaken, patiently attending to my demands and giving me useful counsels and the light through which rightly understand the issues that I have had to deal with. Moreover, Dra. Elena Larrauri also deserves great recognition, since she helped me a lot with the study of Restorative Justice, and from whom I have as well learned to focus on the genuine value of each argument in order to critically comprehend it before trying to expound it and either accept or reject it.

I. RETRIBUTION, PUNISHMENT AND CRIMINAL THEORIES.

1. The retributive justification of punishment in Spanish Criminal Law doctrine.

In Spain, most of the debate about the different theories of punishment –which are all engaged in justifying what should the proper reaction against a criminal illicit be– is often reduced to this plain explanation: we can divide such accounts between absolute and relative. The former focuses on punishment as an end in itself, since it is anything more than the sanction imposed on who committed the offense for its own sake (regarding the motto putted in Plato's words, *quia peccatum est*). On the other hand, the latter justifies punishment thanks to further elements extrinsic to the penalty (*sed ne peccetur*). Albeit retribution has been largely misunderstood by almost all the Criminal Law academic discussion in Spain, it is not the main purpose of this Paper to overcome that problem.

We can acknowledge, however, two main misinterpretations which are central to our following elucidations. First, when trying to spell out what a retributivist approach stands for, Spanish authors almost always connect any attempt to justify punishment as a penalty for a past offense with the theories developed by German idealists, especially Kant and Hegel[1]. As Carlos Pérez del Valle rightly points out, retribution as an absolute justification of punishment was certainly assumed by a historical particular philosophical standpoint, "but in a critical consideration of Idealism retribution and punishment are [taken to be] relative to the welfare [common good] of a polity"[2] (Pérez del Valle, 2005: 35). Thus it appears clear that a retributive theory of punishment

> […] is not looking for isolation of the aim but for determination of a rational aim for the punishment itself. The thesis that retribution means necessarily that punishment is irrevocably justified in itself is not a consequence of the retributive character of punishment but of its consideration as an imperative categorical *strictu sensu* (Pérez del Valle, 2005: 35-36).

Second, the distinction between *quia peccatum est* and *sed ne peccetur* rests on a basic controversy: it is assumed that a retributive theory must accept as an intrinsic starting point the former option. But this must not be necessarily and acritically maintained. As John Finnis (1999: 96-103) does his best to notice, retribution is not purely backward-looking but also (even primarily?; we will face this point below) forward-looking. Also R. Anthony Duff acknowledges this twofold character of punishment several times in his interesting account[3]. We will have the opportunity to largely discuss these issues by focusing on those theories later on this Paper (in chapters VI and III, respectively).

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[1] Cfr. PÉREZ DEL VALLE, Carlos. 2005. *¿Castigo sin venganza? Reflexiones sobre la pena como retribución*. Barcelona, Universitat Abat Oliba CEU: 33. Cfr. also his endnote number 51 in page 57.
[2] This and the following translations from the original text (and also from other sources by Pérez del Valle) in Spanish are mine, but they have also been revised and consequently authorized by the author.
[3] Cfr., for all, DUFF, R. A. 1995. "Penal Communications. Recent Work in the Philosophy of Punishment". In TONRY, Michael (ed.). *Crime and Justice. Vol. 20*. Chicago, The University of Chicago Press: 1-98.

2. The recent Anglo-Saxon trends in the retributive justification of punishment.

Now we are going to deal with the most important features of the movements that in the last decades have argued –within the Anglo-Saxon world– in favor of a retributive-based justification of punishment. In contrast with the diverse consequentialist groundings for explaining criminal sanctions, which all lay the imposition of such an evil in the effective achievement of further and higher social goods, a retributive theory justifies punishment[4] as a burden (not necessarily the mere infliction of pain, as we will see below) institutionally imposed on the offender because he deserves it, since he has committed a public wrong, a kind of conduct which is condemned by some purportedly authoritative legal norm.

This notion of crimes as public wrongs, which is central to a retributive approach, has been recently sharpened by R. A. Duff. According to his view, public wrongs are those acts which flout the community's essential or most basic values, in which all members of the polity should see themselves as sharing. Hence the offense is done to 'us', not merely to the individual victim, in the sense that we identify ourselves with the harmed as a fellow citizen (cfr. Marshall and Duff, 1998; also Duff, 2001). Thus the misdeed is taken to be collective since it is one for which the malefactor must answer not just to the individual victim but to the whole political community through its criminal courts. Whatever else or more we can do, we must recognize and declare that there is a victim who has been seriously wronged, and we must be ready to censure the offender's illicit action.

2.1 Four central questions that challenge positive retributivism.

A striking feature of Criminal Law Philosophy during the last three decades of the 20th century has been the revival of positive retributivism –of the idea that the constructive justification of punishment is to be found in its intrinsic character as a merited response to crime (cfr. its basic origins in Morris, 1968; Murphy, 1973; von Hirsch, 1976). Positive retributivism holds not merely that we must not punish the innocent (or not punish the guilty more than they deserve), but that we should punish the guilty (to the extent that they deserve). Hence penal desert constitutes not just a necessary, but a sufficient reason for punishment, or at least –some would say– a strong affirmative motive for it.

To sum the above mentioned up, the so-called positive retributivism does not explain the fair punishment as a simple limit in the pursuit of a utilitarian goal (deterrence, rehabilitation or incapacitation) but as a general, necessary and sufficient justifying aim. Thus the retributivist seeks, in Jeffrie G. Murphy's illuminating words, "not primarily for the socially useful punishment but for the just punishment, the punishment that the

[4] For explicatory purposes in this first chapter, we can give a short definition of criminal penalties: legal punishment involves the imposition of something that is intended to be burdensome (in a sense painful), on a supposed offender for a supposed crime, by a person or body who claims the authority to do so.

criminal (given his wrongdoing) deserves or merits, the punishment that the society has a right to inflict and the criminal a right to demand" (Murphy, 1992b: 21).

Retributivism comes in very different forms (cfr. Cottingham, 1979; Walker, 1999); all can be understood, however, as attempting to answer four central questions: a) what is the justificatory relationship between crime and punishment that the idea of desert is supposed to capture –why do 'the guilty deserve to suffer' (cfr. Burgh, 1982) and what do they deserve to suffer?; b) whom to punish?; c) how much to punish?; and d) why should it be for the state to inflict that suffering on the guilty through a system of legal punishment (cfr. Murphy, 1992b; Hampton, 1992; Husak, 1992)? Setting aside this latter inquiry, which nonetheless is extremely important, let us focus on the other three.

2.2 An agreement on whom to punish and how much to punish.

As Andrew Ashworth rightly points out, a retributivist firmly believes that only those who have been proved to have committed a misdeed ought to be punished, but also that "the seriousness of crimes should be, on grounds of justice, the chief determinant of the quantum of punishment" (Ashworth, 1998a: 141). Thus the main distinctive feature of desert theory in sentencing is the principle of proportionality: "sentences should be proportionate in their severity to the seriousness of the criminal conduct. […] [Hence] crimes must be ranked according to their relative seriousness, as determined by the harm done or risked by the offense and by the degree of culpability of the offender" (Ashworth, 1998a: 143). Another notable factor is the idea of parsimony, meaning "that the state should act with moderation in inflicting deprivation on its citizens" (Ashworth, 1998a: 144). This led desert theory to defend restrained punitivity within criminal systems.

2.3 Three different responses to the question "Why punish?"

Let us put here to one side a supposedly retributivist version which was before popular (conceiving crime as taking unfair advantage over the law-abiding, and punishment as removing that profit by imposing some additional burden on the malefactor[5]) in order to deal with three other genuine retributivist answers arisen in the last twenty years.

a) <u>Emotional retribution: the experience of own guilt (M. S. Moore)</u>

A different retributivist account appeals not to the abstract notion of unfair advantage, but to our emotional response to crime: to the guilt, involving the judgment that I ought to be punished, that my own wrongdoing would arouse in me (cfr. Moore, 1997: ch. 4). Such explanation tries to answer the first of the questions noted above: crime deserves

[5] Although this view is largely taken to be a retributive one, there are several reasons to question that interpretation (cfr., for a further critique, DUFF, R. Anthony. 2001. *Punishment, Communication and Community*. New York, OUP: 21-24) –or at least to call for a construe of that position in the light of the considerations that we are going to make in chapter VI, regarding Saint Thomas Aquinas's doctrine.

punishment in the sense that it makes appropriate –and rightly responds to– certain emotions (blame) which are satisfied by or expressed in such institution. However, it does not yet show why it should be the state's task to provide a formal expression for such feelings; moreover, its response to the first query is also problematic, as we will see in chapters II and IV. Several critics would object that, even though criminal wrongdoing definitely should provoke certain kinds of emotions, e.g. self-governed guilt, and such feelings might typically involve a desire to make those at whom they are directed suffer, at the least we need to know more than we are initially told by this account about just what offenders deserve to undergo, and why the infliction of suffering should be an appropriate way to express and deal with such proper experience of own culpability (cfr., for all, Dolinko, 1991: 555-559; Knowles, 1993; Murphy, 1999).

b) Criminal sanctions as censures (A. von Hirsch)

According to the summary made by Ashworth, the second considered approach regards desert-based legal punishment as twofold: a) in its censuring function, "as an integral part of everyday judgments of praise and blame, which is institutionalized in state punishment to express disapprobation of the conduct and its perpetrators" (Ashworth, 1998a: 141); and b) in its additional preventive purpose, the criminal penalty "provides a disincentive against engaging in certain conduct" (Ashworth, 1998a: 141). In line with this view, then, "the notion of deserved censure is necessary but not sufficient as a justification [of legal punishment]. [Thus] General deterrence must also be invoked" (Ashworth, 1998a: 142). Consequently, there is an attempt to make the sanction both backward-looking (directed to the wrongfulness of the illicit behavior) and forward-looking (as it intends to provoke abandonment in future crimes).

c) Punishment as communication (R. A. Duff)

A portrayal of punishment as a mode of moral communication has been central to some recent versions of retributivism. The core meaning and purpose of punishment here is to communicate to offenders the censure or condemnation that they deserve for their crimes. How can such accounts answer the questions that all retributivists must face? First, there is an obviously intelligible justificatory relationship between wrongdoing and reproach, as a response which is intended to bring a species of pain (the burden of condemnation by one's fellows) to a lawbreaker for his misdeed. Second, it is appropriate for the state to ensure that such censure is formally administered through the criminal justice system: for offenses are public wrongs, breaches of the political community's authoritative code; as such, they merit public reprimand by the whole society.

Furthermore, whilst internal to censure is the intention (or the hope) that the person condemned will accept it as justified and will thus be motivated to avoid crime in future,

this kind of accounts can avoid the charge (as brought against consequentialist theories) that it seeks to coerce or to manipulate offenders into obeying the law. For censure addresses, and respects, the convicted malefactor as a rational and responsible agent: it constitutes an appropriate, deserved response to the wrong that he did, and aims to bring him to modify his future conduct only by reminding him of the good moral reasons that he has for refraining from illicit behavior (cfr. von Hirsch, 1998; also Duff, 2001).

2.4 The inescapable question of justifying penal hard treatment.

But these general justifying explanations must then deal with the following inescapable question: which kind of censure must the criminal system use in imposing the offenders their deserved punishment? Purely symbolic one, civil reparation of the harm, informal controls within the community, formal conviction in courts or even harsh penalties such as imprisonment, compulsory community service, fines and like? If so, why should we choose these latter methods of communication rather than the less severe ones? A possible answer is that we should communicate reprimand through hard treatment because this will give those who are insufficiently impressed by the moral appeal of penal reproach some further prudential reason to refrain from crime. Thus the prospect of such punishment might deter those who are not susceptible to ethical persuasion (cfr. von Hirsch, 1998; also Narayan, 1993). This idea makes deterrence firmly a secondary goal to censure.

A different answer to the question explains penal hard treatment as an essential feature of the enterprise of moral communication itself. For this reason, punishment should aim not merely to communicate censure to the offender but primarily to persuade him to recognize and repent the wrong he has done, and so to be aware of the need to reform himself and his future conduct, and to make apologetic reparation to those whom he wronged. His punishment then constitutes a kind of 'secular penance'[6] that he is required to undergo for his crime; its hard treatment aspects, the burden it imposes on him, should serve both to assist the process of repentance and reform, by focusing his attention on his misdeed and its implications, and as a way of making the apologetic reparation that he owes both to the victim and the community (cfr. Duff, 2001: ch. 3).

This kind of explanation, which has some relation to accounts that portray punishment as a species of moral education (e.g., cfr. Morris, 1981; Hampton, 1984), faces serious objections (cfr., for all: Ten, 1990; von Hirsch, 1999; Bagaric and Amarasekara, 2000): in particular that it cannot show penal tough treatment to be a necessary facet of a communicative enterprise which is still to respect offenders as responsible and rational

[6] This concept was first introduced in DUFF, R. Anthony. 1986. *Trials and Punishments*. Cambridge, Mass.: Cambridge University Press. However, it was later developed with more accuracy in his major work *Punishment, Communication and Community* (DUFF, 2001: chapter 3). We will deeply study this innovative and challenging account afterwards, in chapter III.

agents who must be left free to remain unpersuaded; that apologetic reparation must be voluntary if it is to be of any real value; and that a liberal state should not take this kind of intrusive interest in its citizens' moral characters. However, being so sketched, chapters III and V will be the appropriate place to discuss and weigh up these opportune claims.

3. Is retribution a civilized and institutionalized form of revenge?

Some critics try to consider retribution equal to revenge[7]. However, Pérez del Valle rightly notices that a retributivist punishment should not be related to vengeance. Indeed, a theory of retribution "could manage to disregard revenge or even be opposed to it" (Pérez del Valle, 2005: 32). Thus, *lex talionis* is placed most fairly under the aegis of retribution, insofar as it is conceptually different from vengeance. A basic demand of the former is the intrinsic proportionality of the reaction to the wrong, since in the latter that requirement only appears to be an external limiting feature. According to the Italian philosopher Mauro Ronco (1996: 177ff), talion is a retributive principle which is original and inherent to the impulses, the feelings, the thought and the activity of human beings regarding their reaction against the experience of harm.

Robert Nozick (1981: 366-88), C. L. Ten (1987: 43) and Nigel Walker (1991: 4) make us easier to understand the above mentioned distinction acknowledging six differences between retribution and revenge[8], which can be synthesized by the claim that the former is a manifestation of a reflective judgment that the guilty should be punished, as opposed to the latter's expression of our primitive urge or desire to see wrongdoers suffering. Moreover, Jeffrie G. Murphy sketches this retributive argument to affirm that any criminal way of sentencing that takes account of victim hatred violates the fundamental right of offenders not to be punished in excess of their just deserts and, therefore, it is unjust and wrong in principle:

> […] sentencing should be based on what is morally blameworthy about the defendant; one is blameworthy only for that which is one's fault or which one brings about under one's control; the degree to which a victim will be upset or outraged by what is done to him or will be able to articulate feelings is subjective and variable; it is thus not within the defendant's control (Murphy, 1992a: 81).

[7] Cfr., for acknowledging the beginning of this mistaken assimilation, NIETZSCHE, F. W. 1887 (1996). *On the Genealogy of Morals*. New York: OUP; DURKHEIM, E. 1893 (1987). *La división del trabajo social*. Madrid: Akal; OLIVER WENDELL HOLMES Jr. 1881 (2005). *The Common Law*. Brand: Kessinger Publishing.

[8] According to the summary gathered by Bagaric and Amarasekara, the disparities are essentially the following:

> "a) retribution is for a wrong, whereas revenge is done for a harm which need not be a wrong; b) retribution sets an internal limit to the amount of punishment, commensurate with the seriousness of the wrong, while revenge has no such internal limits; c) revenge is not general, since it need not commit the revenger to avenging in the future in similar circumstances; d) retribution is inflicted only on the offender, whereas revenge may be inflicted on an innocent person who has an association with the offender, such as a relative; e) in the case of revenge the revenger often obtains pleasure in the suffering of another; and f) revenge is personal, in that the revenger is typically the person wronged, but retribution generally lacks this connection" (BAGARIC and AMARASEKARA, 2000: 163-164).

II. MICHAEL S. MOORE: THE MORAL WORTH OF RETRIBUTION.

1. The main function of attaining retributive justice by punishing moral wrongs.

Michael S. Moore starts arguing that the "criminal law is a functional kind whose [only] function is to attain retributive justice" (Moore, 1997: 33). According to his view, there is a basic consideration that suggests this claim: the tension that exists between crime-prevention and retributive goals, which is precisely due to retributivism's inability to share the stage with any other end. As a result, in order "to achieve retributive justice, the punishment must be inflicted because the offender did the offense. To the extent that someone is punished for reasons other than that he deserves to be punished, retributive justice is not achieved" (Moore, 1997: 28). For the American philosopher, such a strain is not a bad one, since it prevents us from any kind of supposedly comfortable mix of chased goods. Indeed, he thinks that aiming at the accomplishment of retributive justice means necessarily to miss the pursuit of any other purpose of punishment.

The sometimes argued existing gap between crime and punishment (i.e., the question of why to impose a penal sanction is explained by the making of an offense) is tried to be bridged by Moore. According to his account, if the exclusively retributive function of the criminal law demands that moral evils be legally prohibited, then "the only legitimate legislative motivation is one seeking to prohibit morally wrongful action because it is morally wrongful" (Moore, 1997: 67). But what makes an action wicked: its intrinsically wrongful nature, the bad consequences to which it leads or both? For a retributive theory such as Moore's, the criminal law must punish those who have voluntarily, intentionally and without excuse caused a legally prohibited state of affairs to obtain if and only if it is also a moral evil.

Thus a person deserves to be punished if he is responsible for committing a deed which is morally wicked, for retributive justice is achieved only when such kind of actions are punished. Hence Moore advocates for a new elaborated connection between legal moralism and criminal retributivism[1]. Within this view, legislators have reasons to pass statutes prohibiting all acts that are morally wrong; and even the consideration that only actions that a legislator may prohibit are those which are considered morally evil can also be welcomed if we also concede that "citizens have no moral obligation to obey a

[1] A proposal which is mainly based on four fundamental principles:
"1. The retributivist principle proper: that the function of criminal law is to exact retribution in proportion to desert. 2. The meaning of desert: that the desert that triggers retributive punishment is itself a product of the moral wrong(s) done by an individual, and the moral culpability with which he did those wrongs. 3. The principle of justice in legislation: that the achieving of (distributive, corrective or retributive) justice is always a valid reason continuing in favour of legislation. 4. The principle of legality: that criminal liability can only fairly be imposed for conduct that was clearly prohibited by statutes at the time the accused acted" (MOORE, 1997: 71-72).

law just because it is a law" (Moore, 1997: 72), for it must be adequately in accordance with antecedent ethical duties.

2. A little space for forward-looking considerations as a restraint.

A limiting feature of the criminal law is derived from the ideal of Kantian autonomy. According to Moore's account, "even if the function of the criminal law is [essentially] backward-looking –to punish those who deserve it– one of its predicable effects gives legislators a forward-looking reason to restrain their enacting every moral wrong into a criminal prohibition" (Moore, 1997: 76); since the coercive effect of the law to conform to a behavior which we will not be otherwise inclined to act inevitably impairs autonomy in a Kantian sense. In the example of gift-giving, "the moral worth of those 'givings' motivated solely by fear of sanctions seems very small when compared to true charity (autonomous giving)" (Moore, 1997: 76). There should be also a space for some utilitarian concerns restricting the scope of the criminal law:

> Behaviour that is usually done in private, that has limited impact upon others […], and that is so deeply motivated that if prohibited it will be done anyway, is very costly to criminalize. […] The result in those cases where the wrongdoing is not severe should be that such behaviour is not criminalized even though it is morally wrongful (Moore, 1997: 77-78).[2]

3. What Moore considers retributivism distinctively to be?

According to Michael Moore, retributivist is plainly one who believes that the justification for punishing a criminal is simply that the lawbreaker deserves to be punished. Thus he provocatively considers that almost everyone is actually a retributivist, for he will later show that we share the common intuition that "the good that punishment achieves is that someone who deserves it gets it" (Moore, 1997: 87). Hence the punishment of the guilty is an intrinsic good, not the merely instrumental means it may be to the utilitarian or rehabilitative theorist. Moreover, the American philosopher identifies so what he judges distinctive about retributivism: "[…] that the moral desert of an offender is a *sufficient* [not only a necessary] reason to punish him"[3] (Moore, 1997: 88). As a result, Moore takes retributivism to be a very straightforward theory of punishment:

> We are justified in punishing because and only because offenders deserve it. Moral responsibility ('desert') in such a view is not only necessary for justified punishment, it is also sufficient. Such sufficiency of justification gives society more than merely a *right* to punish culpable offenders. […] For a retributivist, the moral responsibility of an offender also gives society the *duty* to punish […] [, i.e.] an obligation to set up [legal] institutions so that retribution is achieved (Moore, 1997: 91).[4]

[2] Cfr. also MOORE, 1997: 187 to see how to balance goods involved in achieving retributive justice: the values of pluralism, autonomy, tolerance or privacy outweigh punishing minor moral wrongs.
[3] Italics are in the author's original text.
[4] Again, italics are in the author's original text.

Of course, Moore also acknowledges that the punishment of deserving offenders may provoke beneficial consequences other than giving them their just desert. It may deter future crime, incapacitate dangerous persons, educate citizens in the behavior required for a civilized society, reinforce public cohesion or even make victims feel better. Yet for a genuine retributivist "these are [simply] a happy surplus that punishment produces and form no part of what makes punishment just; for a retributivist, deserving offenders should be punished even if the punishment produces none of these other, surplus good effects" (Moore, 1997: 153). Thus retributivism has two implications: that all punishment institutions in general are justified by the giving of just deserts and that the concrete penalty imposed on each offender is also justified by the fact that he deserves it.

An important distinction is made by Michael Moore which is worth noting, since it helps to clarify the discussion. He undoubtedly states that "what *is* distinctively retributivist is the view that the guilty receiving their just deserts is an intrinsic good"[5] (Moore, 1997: 157), i.e. not valued in function of other useful states of affairs that punishment causes to exist. But to reject the instrumental goodness of punishment is not to close the door to a consequentialist version of retributivism. Indeed, both deontological[6] and consequentialist[7] views of right action are recognizable and acceptable accounts. The punishment of the innocent may surely force us to choose, but that is not so much of a worry for neither conception (cfr. Moore, 1997: 155-159).

Moore's effort is also praiseworthy in detaching retributivism from common confusions. He says that retribution as a justification of punishment is separated from *lex talionis* since it answers a question prior (why punish?) to the concern of the latter (focused on how much to punish). Furthermore, it does not need vengeful citizens to be in use, since retribution urges punishment in deserving offenders even if no victims want it. Either is not justified as a means to prevent private violence of people which will take the law into their own hands if no state punishment is imposed –in fact, this explanation is taken to be utilitarian. Nor is retributivism to be confused with a mere theory of formal justice (the treating of like cases alike), since this basic principle says nothing about punishing anybody for anything; rather, it only dictates that if we punish, we must do it so equally.

4. Punishment, retribution, morality and the emotions.

One might say that the originality of M. S. Moore is both his way of justifying retribution on the grounds of basic human intuitions and his provocative and ambitious claim that

[5] Once more, italics are in the author's original text.
[6] Meaning that the rightness of an action is (sometimes at least) a function of the action's conformity with 'agent-relative' norms addressed to all individuals and not concerned with the maximization of the conformity to such norms by oneself or others.
[7] Meaning that the rightness of an action is exclusively a function of the goodness of the consequences that the action produces; thus a function of maximizing a good future state of affairs.

everybody will find himself, perhaps surprisingly, to be a retributivist. Anyway, he is fully devoted to give reasons and motives in order to justify retributivism, facing the charge made by Hugo Bedau (1978: 616) of being circular and futile –in short, that punishment as inherently right is something only to be believed or not, since the explanation does not call for something else. Indeed, in order to validate a retributive principle positive arguments can be provided that do not appeal to some good consequences of punishing.

In Moore's portrayal, this leads us to a kind of coherence theory of justification in ethics, which allows two non-consequentialist possibilities: we might either justify the retributive principle by showing how it follows from some yet more general principle of justice that we think to be true or by showing that it best accounts for those of our more particular judgments that we also take to be right. Actually, "in a perfectly coherent system of our moral beliefs, the retributive principle would be justified in both these ways, by being part of the best theory of our moral sentiments, considered as a whole" (Moore, 1997: 106). In this short declaration of intentions, we can find the main shift that Moore introduces and that later will count as the best-grounded criticism[8]: he locates the justification of legal punishment in the field of sentiments and beliefs, rather than under the aegis of the reason and the will.

But this is a charge which Moore does not avoid; indeed, he straightforwardly faces it. According to him, that objection is fully overcome by thinking about the connection between our feelings and morality: "We need our emotions to know about the injustice of racial discrimination, the unfairness of depriving another of a favourite possession, [or] the immorality of punishing the innocent. Our emotions are our main heuristic guide to finding out what is morally right" (Moore, 1997: 115-116). He also claims that we do both feelings and morality a strong disservice when we accept the old shibboleth that sentiments are opposed to reasonableness: "Emotions are rational when they are intelligibly proportionate in their intensity to their object, when they are not inherently conflicted, when they are coherently orderable, and instantiate over time an intelligible character" (Moore, 1997: 116)[9].

To sum up Moore's view, he takes feelings to be important but not essential in our reaching moral truths. Thus, contra Kant, there is certainly a weak and tinged epistemic connection between morality and our emotions. They are indeed "an extra source of insight into moral truths beyond the knowledge we can gain from sensory and inferential capacities alone" (Moore, 1997: 132). But it is not indispensable to the unfairness of an institution that anyone feel negatively towards it. As the American philosopher notices,

[8] This point will be afterwards developed in chapter IV, and also taken up again in chapter VI.
[9] We will go on later in chapter IV with a deeper explanation (and the consequent appraisal) about such charge.

even if our typical judgments about justice may be reached via some strong feelings, "the usual route to knowledge […] [of morals] is not to be confused with what mental states or moral qualities are" (Moore, 1997: 132).

In Moore's weak epistemic approach, "we are not seeking to judge the moral worth of an emotion as a virtue; rather, we seek to learn from such emotions the correct moral judgments to make about some other institution, practice, act or agent" (Moore, 1997: 134). But he does not totally reject a substantive connection between sentiments and morality, since it is in fact possible to place feelings –at least partially– as objects of moral evaluation. "If the possession of an emotion makes us more virtuous, then that emotion is a good heuristic guide for coming to moral judgments that are true" (Moore, 1997: 134) and vice versa, even though Moore also acknowledges that several counter-examples can show that the virtue (or lack of it) in the possession of a sentiment is not an infallible guide to its possessed epistemic import.

5. An account based on the own experienced feeling of guilt.

The moral claim that must be held to validate the retributive principle of punishment is that "our obligation to punish offenders so as to give them their just deserts is justified […] if the practice meets whatever epistemic standards we impose to justify any of our moral beliefs" (Moore, 1997: 160). Thus note that the upshot of all the above explained is that the second possible justification for retributivism (based on our particular judgments about punishment in several individual cases) is the appropriate, since there is a connection between the virtue of possessing an emotion and the truth of the judgment that such feeling generates. But Moore also wants to rest on a construed view of how retribution is justified because of its coherence with other, more general moral beliefs we are prepared to accept as truthful.

In ethics, the first principle/second principle division is an epistemological distinction between two sorts of principles through the grasping of which values are known to us. Consequently, a first principle is taken to be the undeduced most general description of what it is intrinsically right to do or what state of affairs are inherently good to cause. But Moore affirms that this self-evidence nature is nothing more than question begging. Rather, "first principles are to be justified as abductive inferences from more particular principles and judgments" (Moore, 1997: 162). Within this framework, then he will try to validate the following argument:

> (1) the retributive principle is a first principle; (2) the suffering [which] punishment entails is an intrinsic good when inflicted on those who deserve it; and (3) we each have an agent-relative obligation to punish the guilty (even if other guilty […] escape punishment) because the intrinsic goodness of such punishment is not to be maximized by our actions (Moore, 1997: 163).

Therefore, the next step is clear: retribution must be shown to be a first principle describing an intrinsic value that we each categorically are enjoined to realize in our actions. In order to prove so, Moore calls us to participate in a Kantian-like thought experiment. For that reason, we have to imagine this situation: a fellow citizen commits a serious wrong in a very culpable way when circumstances are such (e.g., in the well-known Kant's island society about to disband) that no non-retributive purpose would be served by punishing this criminal. According to the author, both when that offender is taken to be oneself or someone else, a clear intuition pointing to an affirmative response in punishing the malefactor "runs deep for most people" (Moore, 1997: 163), even though no other social good will thereby be achieved.

In fact, the main motive "that thoughtful people often give for disavowing their own [inescapable] retributivist intuitions about such cases is that they think such impulses to be unworthy of them" (Moore, 1997: 163), as byproducts of mere emotional responses to brutal facts. This is the reason why Moore takes the first person thought experiment to be central about the validity of the retributive principle. If we are to imagine that we have culpably done some great wrong, one emotion clearly predominates (in front of some variations of the feeling of *ressentiment* when the offender is another individual): blame. Therefore, "a virtuous person would feel great guilt at violating another's rights by killing, raping, assaulting, etc. And when that emotion of guilt produces the judgment that one deserves to suffer because one has culpably done wrong [–as it does–], that judgment is not suspect" (Moore, 1997: 164) because of its sentimental origins in the same way that the corresponding third person verdict is.

The case seems clearly made for conceding that in one's situation: a) one would indeed feel very guilty if one culpably did such a wrong; b) that emotion would be virtuous to have –in fact, the only tolerable response of a moral person; c) thus the consequent judgment (that one is guilty and deserves punishment) is true. But even Moore himself acknowledges that it would be also usual to refuse a generalization of this conclusion to others, since the standard that we apply to ourselves should not be applied to others. Though this sounds like a very generous way to think, Moore makes here a radical (and certainly rather convincing) statement in order to affirm precisely the opposite with this allegation:

> To grant that you will be guilty and deserving of punishment, but that others who do the exact same wrong with the exact same culpability would not be, is to arrogate yourself a godlike position. Only you have those attributes of moral agency making you alone a creature capable of being morally guilty; others are simply lesser beings, to be pitied perhaps, but not to be blamed as you would blame yourself. This is not moral generosity. Rather, it is an élitist [sic] arrogance that denies one's common humanity with those who do wrong. Such élitist [sic] condescension is no virtue, and provides no basis for refusing to endorse the last step in the

> first person of the Kantian thought experiment, which generalizes one's own potential for guilt and deserved punishment to other persons (Moore, 1997: 165).

6. The rationality of emotions and the emotional basis of Moore's account.

Michael Moore does his best to answer the following challenging question: how do the emotions operate as our truthful guide to what is morally right? Of course he wants to avoid an extremely intuitionist account of morality, which would tie it too closely to our feelings, but he nonetheless wants to preserve the epistemic connection between both concepts. Even if emotions are inconclusive guides to our morals, subject to error, they still permit us to learn from such feelings the correct moral judgments to make about several social institutions such as punishment. As long as we need our sentiments about justice in our path of finding out what is morally right, Moore affirms, above all, that there is a 'rationality of the emotions' that can make them trustworthy guides to moral insight. Thus, as we saw above, feelings "are rational when they are intelligibly proportionate in their intensity to their objects, when they are not inherently conflicted, when they are coherently orderable, and instantiate over time an intelligible character" (Moore, 1997: 116).

Alan Norrie places the heart of Moore's account in the emotional basis of punishment. This leads us to advance a criticism. Even when conceding that the American theorist tries to rationally found his scheme, the objection remains: since the data being cohered into more general principles are our own judgments and feelings, the principles that result are only a coherent expression of our own sentiments; they can have no claim to ethical impartiality. Moore puts so the objection: "The best explanation for the reactions we have to such thought experiments does not lie in the causal power of any objectively existing moral qualities of desert, but rather in certain psychological facts about us and certain sociological facts about our society" (Moore, 1997: 177). But he indeed has the following well-based counter already prepared:

> There exists in the world a moral property of relevance to punishment, namely, desert. Desert is a property of an actor, consisting of the two moral properties of the wrongness of the act done and the culpability with which it was done […]. [This] cause most of us to believe that, when we culpably done wrong, such acts are evil and that we are guilty. Given the duty to suffer brought into existence […], our belief that we are guilty includes a belief that we must suffer (i.e. be punished). […] then our punitive reaction to Kantian-like thought experiments gives us good evidence for the truth of the retributive principle that culpable wrongdoers must […] suffer (Moore, 1997: 180).

Moreover, the retributive principle that stems from criminal desert is considered to derive from a more general standard of desert which will cover all the situations that overlap in contract, tort and property remedies. The unity of this principle does not lie in the species of legal coercion to be justified or in the intrinsic goodness of giving people what

they deserve, but in the common conditions of culpability and wrongdoing: the elements of voluntariness, causation, justification, intention and excuse (cfr. Moore, 1997: 171).

7. A summary: what Moore points to? Punishment as a kind of atonement.

Thus retribution is proved to be a first principle –justified as an abductive inference from particular judgments in Kantian-like thought experiments–, an agent-relative obligation to punish the guilty. Some plain and illuminating words of Michael S. Moore will summarize his position, above sketched. Falling back on the well-known example of Dostoevsky's Russian nobleman in *The Brothers Karamazov*, who turns loose his dogs to tear apart a young boy before his mother's eyes, a graphic conclusion is drawn to justify the retributive principle based in the particular judgments that Moore's thought experiment calls forth in us. According to the American philosopher, of course that fictional character

> […] should suffer for his gratuitous and unjustified perpetration of a terrible wrong […]. As even the gentle Alyosha murmurs […], in answer to the question of what to do with the nobleman: you shoot him. You inflict such punishment even if no other good will be achieved thereby, but simply because the nobleman deserves it. The only general principle that makes sense of the mass of particular judgments like that of Alyosha is the retributive principle that culpable wrongdoers must be punished. This, by my lights, is enough to justify retributivism (Moore, 1997: 188).

As Pérez del Valle rightly affirms, Moore conceives the suffering of the guilty as a positive and intrinsic good, an end in itself which is no necessarily subordinated to the fulfillment of any other proposal or social goal, insofar as "the intensity and ubiquity of our retributive impulses –which he considers to be common intuitions about punishment– is a sign of the moral reality that retribution is both intrinsically good and the primary aim of the law; [since] emotions are our main principle guide for the discovering of moral truths" (Pérez del Valle, 2005: 28-29). Hence our feelings, in any case, are decisive in justifying the moral worth of retribution, for our shared retributive inclinations reflect an objective morality in which the proper punishment deserved by offenders is required to satisfy the demands of justice.

Moore's proposal could be correctly construed in Pérez del Valle's terms: "[…] there is no monopoly of revenge sentiments as the primary [intrinsic] emotion or reaction of human beings" (Pérez del Valle, 2005: 29). Instead, together with hatred and vengeance there is a retributive feeling which is prevalent as a psychological human state, understood in the light of *lex talionis*; i.e. "based on a 'just pain' and therefore on the suffering of an unjust evil caused by another [previous] wrong and limited in its reaction against the former" (Pérez del Valle, 2005: 29-30). The Spanish criminal philosopher steps a bit forward in presenting a related facet of the issue: thus punishment should be envisaged as a species of secular atonement. And this notion leads us to our second chosen author, R. Anthony Duff. Let us focus henceforth on his thought-provoking theory.

III. R. ANTHONY DUFF: PUNISHMENT AS A SECULAR PENANCE.

1. A starting premise: the relationship between morals and politics.

A remarkable starting point in Duff's portrayal of criminal punishment, which certainly permeates all his retributive-communicative theory, is the rejection of the idea that our secular framework requires "outlawing the use of moral notions or values in accounts of the proper role or function of state institutions" (Duff and von Hirsch, 1997: 111). Thus there is no radical distinction between political theory (and of course the philosophy of punishment) and moral theory, as long as the question of what principles or values should guide the state's activities or institutions is itself in part a moral question: any adequate answer must resort to values (such as liberty, privacy, tolerance, pluralism, etc.) which, "even if their precise meaning and implications undergo some change when we translate them from the personal to the political sphere, ought to underpin our political as well as our personal lives" (Duff and von Hirsch, 1997: 113).

2. A normative ideal of community and crimes as public wrongs.

Duff is also well aware about his own claim that "since criminal punishment is an activity of the state, its justification must appeal to political theory" (Duff and von Hirsch, 1997: 110). Therefore, he starts his development of a justifying theory of punishment with an account about the polity which will endorse a determinate criminal law[1]. We need some substantial description of political community if we later want to argue that retributive criminal punishment can be consistent with it. Just as Aristotle stated in *The Ethics* that no political regime could be properly qualified without assessing the conditions, traditions and peculiarities of the population which will be under its rule, the same believes the Scottish philosopher with punishment: there is no abstract theory that could be valid universally to all societies. On the contrary, his particular innovative theses demand a certain kind of community, whose normative ideal is to be sketched below.

Duff characterizes his necessary political basis as liberal-communitarian, since he finds that both approaches bring valuable features to a normative description. He takes a polity to be a group of persons that accomplishes two aspects: a) it requires a mutual commitment by the community's associates to certain defining values, which structure the community's basic activities and identify its collective and shared goods; b) its members

[1] In his own illuminating words, "a normative theory of punishment must include a conception of crime as that which is to be punished. Such a conception of crime presupposes a conception of the criminal law –of its proper aims and content, of its claims on the citizen. Such a conception of the criminal law presupposes a conception of the state –of its proper role and functions, of its relation to its citizens. Such a conception of the state must also include a conception of society and of the relation between state and society" (DUFF, 2001: 35).

must have such a regard for one another as fellow citizens that is itself ordered by the significant values. They must understand and pursue their own good, and others', in terms of the public good that composes the society. In Duff's view, the members of a liberal-communitarian polity constitute such a specific normative kind of community precisely

> […] insofar as they aspire, and know that they aspire, to share the community-defining values of autonomy[2], freedom[3] and privacy[4] (values that underpin a plurality of specific, substantive conceptions of the good, which not all will share) and insofar as they aspire, and know that they aspire, to an appropriate mutual concern for one another in the light of those values. That mutual concern will involve a readiness to assist one another in pursuing and preserving the community's distinctive goods […]. [They must also treat others as fellow citizens with the same status and avoid treating them] in ways that infringe their autonomy or legitimate freedoms (Duff, 2001: 48).

Obviously such concern and respect must also, even more, inform the state's institutions and activities. For the state must be so structured and organized that it fosters and complies with the community-defining principles, and must treat and address its citizens in ways that embody those values. That includes, of course, recognizing certain restrictions on the use of state coercive powers, used as a weapon of last resort, set in part by a proper deference for its citizens' freedom. Regarding the Criminal Law of a liberal-communitarian polity, Duff claims that it must endorse only its essential characterizing and shared values, prohibiting the kind of conducts that flout them. Besides, its scope must be limited to just criminalizing "conduct that attacks or injures or threatens important individual rights or interests, or social goods and interests that cannot otherwise be adequately protected" (Duff, 2001: 67).

Furthermore, a necessary distinction must be drawn between actions *mala in se* and *mala prohibita*. With respect to the former, the law only declares their wrongfulness in terms of the community's goods, since reasons for avoiding such acts are prelegal prima facie moral obligations largely acknowledged and at everyone's first grasp. However, the law also claims authority to make wrong conduct that might not be such independently. For *mala prohibita*, content reasons for obeying legal prohibitions or requirements (designed to serve some aspects of the common good) are needed for citizens' acceptance of such constraints on their conduct, in order to address them as moral responsible agents.

So considered, the criminal law can genuinely be conceived as a Common Law, the law of the community itself, since it embodies the shared values and normative understandings

[2] Understood as "a set of capacities for rational thought and action [about ends or goods and the means to such ends or goods] […] to participate in forms of social life and thought, within the structures of reason and of norms embedded in such forms of life" (DUFF, 2001: 54).
[3] Taken to be not only the absence of some external constraint on the actions of individuals but mainly "the opportunities that social agents have to act in their social space" (DUFF, 2001: 54).
[4] Which concerns "a sphere that is socially defined by a particular community" (DUFF, 2001: 55) through several structural values, not a realm of the 'private' existing a priori of any public context.

of the polity: “It flows not from the will of a separate sovereign but from the traditions and practices of the community” (Duff, 2001: 59). Such ideal normative account relies also in the concept of crimes as public wrongs, which was explained in chapter I. We may only remember here its three main features: a) misdeeds are not simply matters of private conscience –rather, the whole community should take a stand through the law, since shared values have been flouted; b) such wrongs merit a public response: offenders should be called to account and censured by the polity, since their bounds with the community as fellow citizens had been damaged; and c) crimes are wrongs in which all members share, for they are also ‘our’ wrong. Therefore, in these three ways we refer to crimes as public wrongs.

3. Punishment as a kind of moral communication.

Duff (2001: ch. 3-5) intends to offer a justification of criminal punishment consistent with his above sketched polity. According to that proposal, it is conceived as an exercise in moral communication which should convey to offenders the censure they deserve for their crimes and should aim through that process to bring lawbreakers to face up to their illicit acts and persuade them to repent such wrongdoings, to try to reform themselves, and thus to seek their reconciliation with those whom they wronged. Criminal trial is the proper method to engage in such matters, since the due rights it embodies allow treating those subjected to it as members of the polity, respecting their autonomy, freedom and privacy.

3.1 Punishment and coercion.

For Duff, coercion seems an obvious or even defining feature of criminal punishment, at least in the sense that it is imposed on offenders whether they consent to it or not. This is how we distinguish penalties that are simply inflicted on a lawbreaker (e.g. a fine or imprisonment) from those that are required (to report regularly to a probation officer or to undertake community service). But to accept the part coercive character of a sanction does not imply that it should aim to compel the delinquent’s moral understanding or assent. Since state punishment must address the wrongdoer as a rational, responsible moral agent, and as a fellow citizen of the normative political community. This consequently means that whilst punishment

> […] should aim to persuade him to recognize and repent his wrongdoing, it must in the end be left up to him to attend or to refuse to attend to that moral communication, and to be persuaded by it or not. We must not seek to bully […] the offender into submission, but only to persuade him, as a moral agent, to recognize that he has done wrong. I am thus not committed to ‘morals by force’ –to an attempt to beat better moral values into offenders. Punishment requires, and may in the end force, them to undergo what is intended to be a morally persuasive process and to hear a moral message, but it should not aim to force them to accept […] [it] (Duff, 2000: 414).

3.2 Rights and autonomy.

As we saw in last epigraph, deference for autonomy –for citizens as rational, self-directed moral agents– is central to Duff's kind of liberal-communitarian political perspective. As he takes seriously the demand of respecting and fostering the autonomy of all citizens, a basic question about criminal punishment must be whether it can be consistent with (or even more ambitiously, expressive of) a proper deference for that value of those who are sanctioned or threatened with sanctions. According to Duff, punishment –an exercise of moral communicative purpose, involving a reciprocal and rational engagement[5]– must be coherent with continuing respect for the offender's autonomy. So, it must be argued that the kind of coercion which punishment entails does not necessarily infringe that principle

> […] if it can be justified as an appropriate response to the other's actions. Punishment […] can be justified in precisely this way if it is a matter of forcefully censuring the offender, of requiring him to undertake (or if necessary imposing on him) the apologetic reparation that he owes to those he has wronged, and of trying to persuade him to recognize and repent of his crime (Duff, 2000: 417).

Therefore, punishment is ideally a process of rational and transparent persuasion, far from a means to bully or manipulate the lawbreaker: "The demand that I respect her[6] as a moral agent determines the ends I can pursue, as well as the means by which I can properly pursue them. My aim must be that she does what is *right because she sees it to be right*"[7] (Duff, 2001: 81). Furthermore, the Scottish philosopher claims that the law should aim to bring offenders to recognize and to repent the wrongdoing "not just because that is a method of persuading him not to repeat it, but because that is owed both to him and to his victims" (Duff, 2001: 81-82), and also to the community's shared values he has flouted. In short, Duff's account of criminal punishment is primarily justified as an attempt to persuade the delinquent through a process of communicative censure, which would address him as a member of the normative polity.

3.3 Backward and forward looking features of punishment.

For Duff, a penalty is justified as a communicative enterprise "focused on the past crime, as that for which the censure that punishment communicates is deserved; but also looking to a future aim to which it is related, not merely contingently as an instrumental technique, but internally as an intrinsically appropriate means" (Duff, 2001: 89) toward it. Thus, the punishment that is deserved for the previous illicit act (its backward-looking approach) is itself the inherently suitable way of pursuing the forward-looking goals that

[5] These features make communication different from expression, since the latter is unidirectional (only requires one who expresses) and addresses the offender as a mere passive (not rational and moral) agent.
[6] Duff usually refers to a female imaginary wrongdoer; some say it is to overcome political correctness. However, due to their prevalence in criminal statistics, it is reasonable to presuppose a male offender.
[7] Italics are in the author's original text.

it should serve –the repentance of the offender, the reconciliation with the polity and the consequent possibility of refraining from engaging in such criminal conduct.

4. A communicative endeavor aimed to reconcile the offender with the polity.

R. A. Duff believes that the main aspiration of punishment is ultimately to integrate law-breakers back into the community, since it seeks to induce repentance (the remorseful acceptance of guilt), self-reform, reparation (of a damaged relationship with the rest of the polity by genuine recognition of the wrong) and finally reconciliation. Punishment, he argues, is a means through which we engage in a punitive dialogue with the offender, as long as penal sanctions serve to bring "the criminal to recognize the wrongfulness of her past conduct; to induce the kind of pain which flows from an understanding of the condemnation which they express" (Duff, 1986: 242). The delinquent is then reconciled with the community by expressing his repentant understanding through being punished (cfr. Duff, 1986: chapter 9). So punishment also communicates to the rest of the society the wrongfulness of the illicit action. Besides, to victims it represents an "authoritative disavowal of such conduct" (Duff, 1986: 236).

However, these latter purposes are only subsidiary, for punishment is essentially a means of engaging in a punitive dialogue with the lawbreaker "which aims to persuade (but not to coerce or manipulate) her to recognize and repent that wrong, and thus to restore her relationship with her victim and with the community" (Duff, 1996: 28). Thus, it is sometimes claimed that Duff's account is far more ambitious than other retributive-communicative ones (such as von Hirsch's), since he pretends "that through punishment we should aim to alter the moral sentiments of offenders" (Bagaric and Amarasekara, 2000: 171). The Scottish philosopher contends that punishment aspires to communicate to the delinquent the condemnation of his conduct and seeks for the offender to

> […] condemn himself, and to modify his future conduct accordingly; and thus to persuade him not merely to obey the law, but to accept its justified demands and judgments. Punishment, like moral blame, respects and addresses the criminal as a rational moral agent: it seeks his understanding and his assent; it aims to bring him to repent his crime, and to reform himself, by communicating to him the reasons which justify our condemnation of his conduct (Duff, 1986: 238).

5. The justification of hard treatment in imposing state punishment.

Duff's punishment is a communicative censure for the wrong done aiming to make the lawbreaker repent and reconcile with the polity whose values he flouted. But reproach can be communicated e.g. by direct speech of the judge or by purely symbolic penalties, which are burdensome only by virtue of their condemnatory meaning. Of course censure can also be communicated through harsh sanctions (imprisonment, fines, community

service or probation orders) which are burdensome or painful independent of that significance. Yet how can the resort to hard treatment –depriving the offenders of their time and liberty and subjecting them to confrontational challenges intended to be unlikable– be justified? Duff suggests that it must be seen as the proper method of communicating the reprimand that the illicit behavior deserves. Three dimensions are required to explain why the message must be communicated through hard treatment punishments, rather than just through direct speech or by means of a system of purely symbolic penalties.

First, "it is a way of focusing the offender's attention on her crime, of trying to bring her to face up to her crime and its implications, and of overcoming our familiar tendency to turn our attention away from matters that are uncomfortable or that we do not care about as we should" (Duff, 2000: 419). Hence the aim, or hope, is that this will bring the law-breaker to recognize and to repent of his illicit act as a wrong; so punishment is justified since it provides a structure within which such endeavor could properly flourish. Moreover, Duff claims "that we should make that attempt even if we are sure that, given the offender's intransigence, it will fail: we owe it to the offender to continue to treat her as someone who is within the reach of moral communication, and not to dismiss her as beyond redemption" (Duff, 2000: 419-420).

Second, suitable hard treatment penalties can assist the process of moral self-reform that communicative punishment also aims to turn into: they can be vehicles through which offenders can come, and be helped to come, to see how they can so reform themselves as to avoid such wrongdoing in the future. Third, harsh sanctions can serve as reparation for the moral evil that was done, made to those whom the delinquent wronged. They constitute a kind of enforced or required apology that is given greater weight by being thus expressed and, therefore, also apply to reconcile criminals with those whom they have wronged. Let us focus now on Duff's chief innovation.

6. Duff's main original contribution: punishment as a kind of secular penance.

6.1 Penance involves the combination of backward and forward-looking features.

Duff portrays legal state punishment as ideally a species of secular penance, "a burden imposed on an offender for his crime, through which, it is hoped, he will come to repent his crime, to begin to reform himself, and thus reconcile himself with those he has wronged" (Duff, 2001: 106). This conception is, therefore, threefold. First, it provides an appropriate account of why we should use penal hard treatment to communicate censure (cfr. epigraph 5 above). Moreover, it makes sense of the retributive claim that punishment must be deserved, while also giving it a future-directed goal which meets the concern that such sanction should be intended to bring some intrinsic good: persuading delinquents to repent their illicit acts. Third, the suspicion of consequentia-

lism is avoided since the relation between the penalty and its ends is not contingent nor instrumental but internal: the very aspiration of communicative persuasion makes the former the appropriate method of pursuing it.

Punishment, on this account, should be a communicative process between the lawbreaker and the polity; it aims (1) to communicate to the offender the censure that his misdeed deserves, (2) to bring him to recognize and repent that crime as a wrong for which he must make moral reparation, (3) to bring him to make that reparation by undertaking or undergoing a burdensome penalty which constitutes and communicates a forceful type of apology to those he has wronged, and (4) thus to reconcile him with the community whose values he flouted. Punishment is also a reformative enterprise: the offender who is brought to repent his crime is thus brought to recognize the need to reform his future conduct –and his concrete penalty should, when appropriate, assist him in this process.

6.2 The three R's of punishment: repentance, reform and reconciliation.

Duff's portrayal of punishment aims at the goals of repentance, reform and reconciliation by a communicative process of imposing penitential burdens on criminals. Repentance is internal to censure, as well as necessarily painful, "since it must pain me to recognize and admit (to myself and to others) the wrong" (Duff, 2001: 107). In aspiring to induce repentance, punishment seeks to bring offenders to suffer the remorse they deserve. Besides, reform is precisely an implication of the former, since recognizing the need to avoid misconduct in the future stems from that first step. But this means "not to re-form the wrongdoer as an object that we must mold to our wishes, but to persuade her of the need to reform herself" (Duff, 2001: 108). Therefore, this second goal is best explained as a commitment to self-reform.

Third, reconciliation is what the repentant lawbreaker should look for with those he has wronged, and also what all members owe to him if considered as a fellow citizen. Thus some form of apology is required, more than merely verbal expression, especially in cases of serious crimes. So penitential punishment constitutes a forceful and weighty kind of excuse that "can take the form of reparation, of burdensome work undertaken by the offender for the benefit of the individual victim or of the wider community, which in some material way repairs the harm (or the kind of harm) she did" (Duff, 2001: 109). Sincerity is not an important issue in public, less intimate context; what really matters is that the criminal formally apologizes through punishment. To sum up all the hitherto explained, let us resort to Duff's own words:

> […] penitential punishments as I have portrayed them address not just offenders' conduct, but their moral attitudes, dispositions and feelings. They seek not just to dissuade, or to condemn, criminal conduct, but to bring the offender to repent it; and what he must repent is, it seems, not just the conduct itself, but the motives, attitudes and moral dispositions from which it flowed.

> They are also meant to constitute modes of moral reparation –expressions of an attitude of remorseful apology, and of a desire for forgiveness and reconciliation (Duff, 2003: 301).

However, the fact that criminal punishments are imposed on the delinquent against or at least regardless of his will does not imply necessarily a contradiction with the ideally voluntary character of penances. Even though it might be objected that to require lawbreakers to make public apologies is to fail to treat them with the respect due to them as members of the polity, this charge could be avoided if the kind of penal practices we carry on have such a content and context that the offender is not degraded merely by making apologies. For he is not forced to mean what he is representing; he is only required to take part in this public ritual "whose apologetic dimension has a formality that is intended and known to leave the question of sincerity open" (Duff, 2001: 110). But at least punishment is still justified, given the other two aspects, as an attempt to induce the criminal to repentance and self-reform, albeit

> A punishment inflicted on an unwilling offender […] can hope to persuade him to attend to the communicative content of his punishment and to attend in what becomes a repentant spirit to his crime. […] What began as a punishment inflicted on him in order to induce repentance becomes a punishment […] that he accepts or wills for himself as an expression of that repentance. This is the proper aim of punishment as penance. The offender comes to recognize and repent his crime as a wrong […], to realize that he must […] so reform himself as to refrain from such crimes in the future […] [and also] to accept his punishment as a justified response to his crime […] (Duff, 2001: 111-112).

6.3 The issue of who owes what to whom when a crime is committed.

In Duff's account, criminal punishment is not just a source of recognized public goods (repentance, reform and reconciliation) but something that is owed and that a liberal-communitarian state has a duty to do. Obviously the state owes to its citizens to protect them from crime, and also to the whole polity whose public interest is thus affected. Nonetheless, Duff's original contribution is to say that the state must develop institutions of legal punishment regarding not only potential victims but also potential offenders; so, it owes to treat and address them as fellow members of the normative community, as autonomous moral agents whose freedom and privacy must be properly respected. Punishment must appeal to their consciences bust must also leave it "in the end up to them to be persuaded" (Duff, 2001: 113). But, again, what is owed, by whom and to whom, when a crime is committed?

Certainly the offender owes the victim –not only the direct wounded but also the wider community– an apology that recognizes the nature and seriousness of the wrong done, achievable through a secular penitential kind of punishment (as sketched above), even including hard treatment. But does the polity owe it to the victim to extract such an apology by requiring the criminal to undergo a penalty? Surely the community must

recognize the injury caused to victims, through different ways of support. But if legal organs of the state are to take seriously the public wrong done to a citizen, they owe it to the victim (whose harm the community shares), to the whole society (whose values have been flouted) and to the offender (as a moral agent, member of the polity) to censure the latter, to try to get him to recognize that wrong and to force a suitable apology for it.

There still remains a question: what the victim owes to the lawbreaker and even to the community, if anything? Obviously the former owes to his fellow citizens to assist in the offender's detention and prosecution, since his suffered crime is a public wrong attacking polity's shared values. But Duff suggests that the victim also owes it both to other members of society and to the wrongdoer "to be ready to be reconciled with the offender through his punishment: to treat him as a fellow citizen who has paid his penitential debt. [However,] This is not to say that she should be expected to maintain or restore any [prior] intimate or personal relationship" (Duff, 2001: 114). In short, punishment is justified as a legitimate attempt to protect citizens from crime, to preserve the polity and to bring back civic balance by persuading delinquents to repent their illicit acts.

6.4 Understanding the claim through an example: Community Service Orders (CSO).

When a CSO is imposed on an offender, he must undertake several hours of burdensome work which communicates to him the society's formal judgment that he has committed a serious wrong for which he must make this reparation. The sanction provides a structure which can focus his attention on the misdeed and its implications (especially, but not only, when the nature of the work is related to the character of the crime), and can thus help to induce or to strengthen a repentant understanding of it as a wrong against the polity. And this burdensome work can also be seen as a material and forceful expression of the apology that he owes to those whom he wronged –to the direct victim of the offense, if there was one, and to the wider community whose values he flouted. Thus the central point

> […] is not to make material reparation for the material harm –if any– that the crime caused (although it could sometimes include such material reparation). It is rather to make moral reparation for the wrong that was done; and such reparation is made not by a merely verbal apology, but by a burdensome penance which can do justice to the seriousness of the wrong (Duff, 2003: 300).

7. An inclusionary account of state punishment.

Duff's proposal takes punishment to be an essentially inclusionary activity: the offender is called to account at a criminal trial for his alleged violation of values that are supposedly his as a member of the political community; he is required to answer to his fellow citizens through the court. He is censured for that violation, if proved; "and his punishment, as a secular penance, is supposed to constitute a mode of moral reparation through which he is to be reconciled with those he has wronged –by means of which the bonds

of society are to be repaired and strengthened" (Duff, 2003: 305). As a result, instead of a state institution that divides between 'we' (the law-abiding) and an alien offender, punishment treats and addresses the latter as a member of the polity, as a fellow citizen to whom we owe respect and concern.

However, this proposal raises a difficult further question: are there any crimes whose distinctive character is such that we need not, or should not, or cannot maintain that kind of community with the lawbreaker? Duff sets a general principle in trying to answer the challenging problem posed by the potential inclusionary nature of his communicative-retributive account: with at least the vast majority of misdeeds and delinquents, we should continue to see and to treat them as fellow members of the normative community who must be punished, but whose moral standing as members is not to be denied or disqualified. Besides, "this remains true even if we are confident, on good empirical grounds, that punishment will not bring or has not brought an offender to repent her crime or to make any sincere apology for it" (Duff, 2003: 306)[8].

Nevertheless, the question is yet whether there are limits to such community. Two examples might seem to raise this issue quite sharply. First, could there be individual offenses so horrible in their cruelty and inhumanity that they make any continuation or restoration of social community with the criminal impossible? Duff confesses to be "fairly confident" that the answer should be a categorical 'no': "No single deed, however terrible, should put a person beyond civic redemption. […] if he [the perpetrator of a horrific wrongdoing] is a responsible agent, we must treat him as such –as someone who could, and who should be given the chance to, repent his crime and redeem himself" (Duff, 2003: 306) in the public sphere.

Second, could there be criminal careers, involving the persistent commission of violent and dangerous misdeeds, which display in the end such an incorrigible rejection of the community's central values that the lawbreaker should be excluded –be taken to have excluded himself– from that polity? Duff's response is not so unconditional here; indeed, he recognizes finding hard to give an equally confident 'no' although he still would like to. But if he absolutely states that no constant individual criminal career could warrant irrevocable isolation (e.g. imprisonment without prospect of parole), since the wrongdoer must still be left with the chance to redeem and restore himself, he will be escaping the inevitable dilemma: "Could there not come a point at which the need to protect other potential victims against the offender could warrant his presumptively permanent detention –detention for life unless and until he shows that he can be safely restored to ordinary community?" (Duff, 2003: 307).

[8] Note here the clear non-consequentialist argument that the Scottish philosopher gives in justifying the imposition of legal (even a harsh kind of) punishment on the offender.

IV. CRITICISMS TO MICHAEL S. MOORE: INTUITION AND DESERT.

1. Is Michael S. Moore a determinist? The charge of incoherence.

Pérez del Valle warns about a suspicious Moore's starting point to qualify his theory as both original and disconcerting. The charge is being a determinist, "which indeed clashes with an old retributivist tradition, since this approach precisely seems to demand the opposite presupposition" (Pérez del Valle, 2005: 28). However, this characterization needs to be further and deeper analyzed (on contrary cfr. Norrie, 1999: 120-122). Thomas W. Clark, in his critical review of *Placing Blame*, considers the American philosopher as his mate under the aegis of naturalism in the understanding of human behavior. And he stems two conclusions from that initial standpoint. First, that Moore's account is counter-intuitive within a naturalistic outlook, since this latter doctrine appears to largely undercut retributive attitudes by showing that the causal story behind crime involves numerous factors outside the individual, which must be taken into consideration.

Second, although Moore defends in his book that all human behavior is caused (fully a function of the genetic and environmental situation as it unfolds), his determinism is only maintained "since a special indeterministic, a-causal exemption for human persons seems so patently *implausible*"[1] (Clark, 2003: 467). So he identifies rationality –meaning acting for reasons, even under the effect of several inevitable decisive causes– as the key element of responsibility and culpability. But what puzzles Clark is the way in which Moore uses the reasonableness criterion to justify the intrinsic goodness of chastising the guilty, whereas a naturalist will definitely take it to "show the *functional necessity* of punishing the culpable, if in fact such punishment serves essential social ends unachievable through means that produce less suffering"[2] (Clark, 2003: 469). As a result, the tinged determinist component in Moore's account must be readdressed to a less compromising –even a positive feature– charge of naturalistic incoherence.

But for Clark this is a central objection. If Moore is entirely naturalistic –actually, is he?–, he has not taken this doctrine far enough to understand the modest natural function of retribution. Since the likely purpose of morality is to socially contour conduct advantageously, it is possible to admit an imperfect role for retribution, but this means that the goal it aims at –the shaping of behavior, concreted in the ending of criminality and the prevention of victims' suffering– is itself an aspiration to which retribution appears subordinated. As we see, naturalism inevitably leads to consequentialism. Thus "it is only by ignoring the functional, forward-looking nature of morality that Moore can portray retribution as an intrinsic good and the reigning moral principle of criminal justice" (Clark, 2003: 466).

[1] Italics are in the author's original text.
[2] Again, italics are in the author's original text.

2. The slight scope of application that stems from Moore's justification.

David Dolinko, one of the main philosophers who had developed largely critical attacks against the new versions of retributivism (cfr. Dolinko, 1991; Dolinko, 1997), argues that Moore stacks the deck in his favor by exemplifying the most savage forms of crimes, and also suggests that his theory would not apply to less cruel deeds, or to acts that are morally neutral, such as breaches of *mala prohibita* statutes. The examples that Dolinko gives concern insider dealing or driving on the wrong side of the road. However, Moore (1997: 184-187) has a ready counter for this objection: that minor moral misdeeds deserve to be punished just like major moral misdeeds, though in proportion to the wrongdoing. Much of what is not obviously morally evil is still morally evil, so that offenses of deceit, minor cruelty to animals or breaches of generally accepted solutions to society's coordination problems all involve a certain amount of censurable moral wrongdoing.

Moore is clever enough to not falling in Dolinko's (1991: 557) pitfall about acts that are morally neutral or good but have been made criminal by statute (e.g. the ban of giving food to the homeless): offenders against such ordinance have done no wrong and thus do not merit a penalty, insofar as "retributivism justifies punishment only when people deserve it, and desert requires both wrongdoing and culpability. In a legal regime whose criminal statutes criminalize morally neutral or even virtuous acts, retributivism cannot justify punishment (and neither can any other moral principle)" (Moore, 1997: 185-186). This stems from a basic Moore's premise: his justified retributive principle assumes a system following 'natural law' theory of legislation and a criminal law whose function is to achieve retributive justice (cfr. chapter II above; also Moore, 1997: 64-78).

Albeit Alan Norrie considers this response fair enough, in his view Moore still misses that misconduct "is a highly contingent and contested social and historical concept as social historians have often pointed out" (Norrie, 1999: 120). Moore's theory assumes that the contours of wrongdoing are agreed by all in a variety of contexts and also removes the difficult issue of conflicting social perceptions about justice and injustice. According to both Norrie (1999) and Dolinko (1991), this is not trying to excuse horrible violence; however, "an adequate moral account must reflect the totality of the moral experience […]. Dreadful crimes understandably evoke passionate responses but it must be the aim of a moral theory to locate the particular moral reaction within the whole" (Norrie, 1999: 132; cfr. also Dolinko, 1991: 537-559). The charge, therefore, is that the American fails to see the links between what an individual did and what was done to him in the past.

3. Moore's supposed two fallacies: circularity and inductive reasoning.

Further, Dudley Knowles criticizes the innovative way of justifying the retributive judgment. According to him, Moore's account falls into a very common fallacy: circularity. When we

intend to vindicate a general standard, "one can't use the principle in specific cases [and] then use these cases as support for the principle in some quasi-inductive fashion" (Knowles, 1993: 51). For if in each of the particular cases one reached a judgment by first seeking the appropriate general rule (punishment is justified if and only if it is deserved), then examining the cases (and all the examples are clearly deserving cases), and then pronouncing a verdict (they ought all to be punished), the theory would be hopeless. This naïve method is not exactly what the author of *Placing Blame* is accused to use, since he does not overtly assume the principle in the conclusion he puts forward for its defense. Instead, he claims to recognize, in each case, a feature of the example that permits the generalization, viz. the desert of the murderer. Thus the ground for the deep circularity in Moore's argument is so captured:

> It is a commonplace of discussions of desert that it is a backwards-reaching concept, calling for support in its application to facts concerning what the agent has done as the ground of her putative desert. [But] […] the concept is forward-looking too; its applications call for a further elaboration of how (in the case of crime) the criminal is to be paid back (Knowles, 1993: 53).

Actually, Moore is charged of not making out his case for desert being an independently identifiable feature of those examples where we call out for punishment. For Knowles's central objection is that desert simply means a fit subject for punishment, so that the retributive principle is not vindicated but "entirely empty, reading something like this: all actions similar in appropriate (*but unspecified*) respects to those instanced in these cases ought to be punished"[3] (Knowles, 1993: 51). Yet the American scholar counters that desert has a clear content: culpable wrongdoing. Consequently, inasmuch as wrong-doing (meaning a voluntary causation of a state of affairs that instantiates a moral norm that prima facie prohibits such acting, and without moral justification) and culpability (meaning the mental state with which an action is done with lack of excuse for the otherwise liable doing of a criminal action) "are far from empty concepts, neither is desert" (Moore, 1997: 168). As a result, this charge seems mostly avoided.

4. The suitability and validity of generalizing Kantian thought experiments.

Knowles also attacks what he considers to be the heart of Moore's account: his "distinctive contribution to retributivist theory" (Knowles, 1993: 55) is the six step though experiment[4] which demands that we imagine ourselves to be the perpetrators of the crime. The critic raises two main objections to that methodology, since generalizing from

[3] Italics are in the author's original text.

[4] It is appropriate here to systematically remember how this method works: supposing that we are the offender, we are required to investigate what we would feel like if we did such an action and judge that we would actually feel guilty and deserving of punishment. Feeling guilty is claimed at the third step to be a virtuous emotion in those who have done a wrongful deed. Hence emotions of blame typically cause us to judge that we are culpable and that we deserve to be punished. At step five we conclude that the first-person judgment that we deserve to be punished is correct. That deduction must consequently be extended to others if we are not willing to fall back on the avoidable elitist god-like position.

particular judgments to the retributive principle cannot properly justify the latter. First, Knowles confesses not being able to assume the Russian nobleman's stance if he does not previously envisage himself to have the character's psychological history: "Perhaps […] I could then imagine what my response to the crime would be –callous indifference. Contrariwise, I don't think I could imagine myself, with my psychological history and emotional dispositions, doing what he did" (Knowles, 1993: 55).

Second, while in real cases our emotional reactions may drive our cognitive avowals, in hypothetical, thought-experimental situations matters are the other way round: it is our beliefs which explain the ways we judge we should feel. Just as Dworkin said, in a very different context, that an imaginary contract is not even its pale shadow –since it is not a contract at all–, Knowles concludes that a hypothetical retributive emotion is not the pale shadow of such a feeling, which is usually cast by the attenuated subtle nuances of real life. Indeed, "it is not an emotion at all. Since I don't actually feel it, it doesn't cause any beliefs" (Knowles, 1993: 57). Due to the confusion between hypothetical reasoning and the etiology of sentiments and their concomitant judgments, Knowles finds yet the next kind of circularity in Moore's argument:

> In seeking to vindicate the general retributive principle he unwittingly assumes the truth of that principle as he guides us through the thought-experiment. If we didn't already believe the retributive principle to be true, we couldn't conjecture what emotional responses our wrongdoing would provoke in us and what judgments we would make on that account concerning the punishment which would be our just deserts (Knowles, 1993: 57).

The sharpened version of this objection is from Dolinko (1991: 543-4), who claims that even if we accept desert to be found in the common requisites of culpability and wrong-doing, this does not give a sufficient reason to punish. But Moore directly counters that we must attend to the context-sensitivity in talking about sufficient conditions. Then, we can construe the position in the following terms: "*Within the set of conditions constituting intelligible reasons to punish*, the retributive asserts, desert is sufficient, i.e. no other *of these* conditions is necessary"[5] (Moore, 1997: 173). However, this statement is properly tinged further when the American philosopher affirms that other circumstances outside the set of the former requirements may also be necessary to a just punishment, such as the clause that the sanction not violates any non-forfeited rights of an offender.

5. The emotional base of retributive judgments: is his account merely intuitive?

Moore's retributivism, as we saw in chapter II, seems to be anchored in a description of our emotional responses to wrongdoing. That leads T. W. Clark to raise the subsequent question: if we divorce the desire for retribution from any socially desirable function or outcome, how to justify acting on it? His answer introduces the objection "that the intrinsic

[5] Italics are in the author's original text.

moral worth of retribution can only be a matter of instinct, of desire. But why should we agree that something is a moral good if its only justification is to satisfy a desire that someone should suffer? There has to be more to it" (Clark, 2003: 476). According to the reviewer, when claiming that emotions are our main heuristic guide to discovering moral truths, Moore is so to say illogically stepping forward, pretending to "move from an undeniable psychological fact –that we have retributive inclinations– to the moral fact that retribution reflects an objective moral reality in which giving offenders their just deserts is required to satisfy the demands of justice" (Clark, 2003: 469).

Hence Moore faces the objection based on a distrust of the reliance upon feelings to justify retributivism. The worry, so acknowledged and construed by the author of *Placing Blame*, is "that the particular judgments Kantian-like thought experiments call forth are suspect because they are both caused and accompanied by strong emotional responses" (Moore, 1997: 181), which could contaminate the rationality of the conclusion. Moore here counters that what is needed to overcome such a criticism is to strengthen the case for recognizing cognitive content to emotions. For there is a reason to think that feelings obey a proportionality principle, and "these laws of appropriate and proportional emotional response are not simply products of cultural conditioning alone, but that the reason we *feel*, for example, guilty is often in part because we are in fact guilty of having culpably done some wrong"[6] (Moore, 1997: 183). Therefore,

> The moral fact of the matter often causes our moral beliefs through the intermediate causing of our emotional responses. Our emotions in such case become good evidence of the underlying moral landscape. […] Our emotions, thus, should not be seen as impediments to the rational justifiability of our moral judgments. Far from hampering our insights into the truth, our emotions are often our best route to discovering that truth [–indeed, they help in doing so] (Moore, 1997: 183).

As Bagaric and Amarasekara (2000) correctly point out, Moore's theory certainly relies on an intuitive appeal, in the view that 'the guilty deserve to suffer' –or, as John Kleinig puts it, "the principle that wrongdoers deserve to suffer seems to accord with our deepest intuitions concerning justice" (Kleinig, 1973: 13). Even though we may surely concede to Moore's commentators that his approach is perhaps too intuitive and emotion-based, that says nothing about the validity of such an argument, within the field and the scope in which it is founded. Indeed, the intuitions from which Moore stems his justification of the retributive principle rightly hit in the mark, and the thought experiment he challenges us to join in is not a bad attempt in reasonably justifying retribution, with the nuances recognized in this chapter. Moreover, his idea of the rationality of the emotions is definitely a great guide to avoid becoming purely emotivist.

[6] Italics are in the author's original text.

6. Only few considered virtuous emotions for preserving internal coherence.

For Moore, any mitigation of retributive judgments is unwarranted: retribution is such an intrinsic good that we should discard our sympathies for disadvantaged offenders as "moral hallucinations" (Moore, 1997: 132). Hence any lessening is simply a *non sequitur*, since carrying out retributive justice –the infliction of suffering on culpable wrongdoers– is an inherent good which constitutes the essential function of the criminal law; and no considerations of causality can or should deflect us from this goal. Indeed, according to the American philosopher, even if the suffering of the malefactor involves no utility in terms of deterrence, incapacitation or reform, it is still necessary to impose it to satisfy the demands of justice. Thus, no softening of our retributive attitudes towards delinquents, nor any corresponding de-emphasis of retribution in favor of other ameliorative responses, is justified by appreciating the manifold causes leading up to criminal acts.

Even when acknowledging that retributive emotions often compete against other reactions –such as a sympathy that might offset to some extent the desire to inflict suffering on the offender–, Moore limits only to virtuous feelings our reliance upon them as heuristic guides to moral reality, since just virtue leads us to coherence. Then retributive emotions are considered to be virtuous while the distorting sympathy we feel for certain malefactors is not. So, why this feeling must be discarded? Because "the moral judgment it seems to support does not fit with the much larger set of judgments about responsibility that we make in daily life" (Moore, 1997: 544); moreover, it is explained in terms of some extraneous factors –such as "our own guilt at not having done enough to alleviate 'unhappy' causes of crime, or […] our sense that those who became criminals because of adverse circumstances have 'already suffered enough' […]" (Moore, 1997: 545).

Perhaps most importantly, Moore says that these sympathetic judgments may simply have to be jettisoned since we must also seek the maximally coherent expression of our moral findings considered as a whole. But this rejection for the sake of upholding the internal consistency of his account is open to two serious objections. First, the divergence between retributive and sympathetic feelings (even when only the former are regarded as virtuous) reflects a real moral clash, "and to discount one side of the conflict in order to preserve theoretical coherence might well compromise theoretical accuracy" (Clark, 2003: 471)[7]. Besides, "we must admit the legitimacy of emotions that counteract purely retributive judgments against an offender" (Clark, 2003: 472; cfr. also Norrie, 1999: 117), since sympathy can be morally good (it stems from an accepted moral virtue, com-

[7] As also Alan Norrie points out, Moore's rejection of the whole range of judgments that stem from several feelings just to maintain the consistency of his proposal "is buying coherence at the price of detotalizing moral experience. More bluntly, he is making his theory by excluding the inconvenient counterevidence" (NORRIE, 1999: 122; cfr. also NORRIE, 1999: 120).

passion) and accurately reflects a significant aspect of moral reality (the punitive and distressing conditions associated with increased criminality). Thus if, as Moore argues,

> […] our virtuous emotions are reasonably good heuristic guides to moral reality, and if virtuous compassion and sympathy therefore reflect morally significant facts about an offender's circumstances, why shouldn't they compete with retributive emotions in determining our response to a crime? […] [Especially when] by denying ourselves retributive satisfactions in favor of constructive approaches to both offenders and the circumstances that produced them, we serve a better purpose: the creation of a less punitive, more flourishing culture in which we and those that follow us are less likely to face the temptations of retribution itself (Clark, 2003: 472-473).

Consequently, Pérez del Valle (2005: 29) is right to accuse Moore of only qualifying the retributive emotions as virtuous; an account completed with the assessment that any kind of compassionate or sympathetic feeling for wrongdoers, regarding their personal or social background, is merely a moral hallucination. Also Thomas W. Clark agrees in this objection, since the retributive impulse is not our only morally acceptable reaction to the facts of misdeed: "The mitigation response –the sympathy, compassion, and forbearance we feel when learning of the causes behind criminality– has an equal role to play in determining how we should deal with offenders; it is not a moral hallucination" (Clark, 2003: 476), and thus we can and should consider other more efficient and less punitive means to attain the ends that retribution originally served. The criticism is so completed:

> Our retributive impulse is lessened because other, more basic, and heretofore hidden causes have come into view, and it is these that now demand attention. It is these that must be addressed to make any real progress in reducing the future prevalence of the crime we are responding to. The rough and ready punitive judgment which unreflectively takes the individual as the uncaused originator of behavior, and therefore the primary retributive target, is attenuated and deflected by a naturalistic, scientific understanding of ourselves into far more productive avenues of response. […] Since our desire for retribution is just one aspect of our creaturely disposition to shape behavior advantageously, and is not morally more real or virtuous than the compassionate, preventive and restorative responses to crime inspired by a scientific understanding of behavior, we are entitled to ask whether this desire should any longer remain, either in rhetoric or reality, one of the central motives of criminal justice (Clark, 2003: 475-477).[8]

7. Three additional consequentialist criticisms.

Douglas N. Husak does his best in applying to Moore's account two common objections usually made to retributivism from a consequentialist stance. First, arguing that legal institutional punishment is not the only possible means by which the demands of retributivism might be obtained: insofar as "our retributive beliefs only require the culpable wrongdoers be given their just deserts by being made to suffer" (Husak, 2000: 972) –i.e.

[8] Bagaric and Amarasekara also share this objection: "We frequently must set aside our natural human responses ([…] jealousy, lust, rage and anger) and adopt more considered and reflective dispositions, because of the harm which they cause" (BAGARIC and AMARASEKARA, 2000: 159).

to receive a hardship or deprivation–, these viewpoint do not necessarily require the imposition of such a penalty by the state. Thus, we get to the conclusion that "devices other than state punishment can satisfy the demands of retributive justice" (Husak, 2000: 973), since there are cases in which suffering is inflicted but the former is not. As long as the fit we intuit is not really between crime and punishment but between culpable wrongdoing and suffering, our retributive beliefs do not really show that an institutionalized kind of sanction (deprivation or hardship) is necessarily deserved.

Thus Husak considers that our retributive convictions only validate the mere infliction of suffering; so what else is required to justify the institution of legal punishment[9]? It could not be, as Moore affirms, only a means to achieve the intrinsic value of giving guilty offenders what they deserve, since one must also show that the benefits of state sanctions exceed its inescapable costs[10] –the so-called drawbacks of punishment. Then the justification of punishment must incorporate consequentialist elements if willing to prove "not only that giving culpable wrongdoers what they deserve is intrinsically valuable [something retributivists actually do], but also that it is *sufficiently* valuable to offset the drawbacks that inevitably result when an institution of punishment is created"[11] (Husak, 2000: 975). This is not simply solved by claiming the society's duty to impose deserved punishment in order to satisfy justice, as Moore does; for the burden remains to show "that it is a duty of sufficient weight or stringency to justify an institution with the [formidable] drawbacks" (Husak, 2000: 976) above sketched.

As a result of all the hitherto acknowledged, Bagaric and Amarasekara summarize that "in evaluating the morality of any practice, consequences cannot be totally ignored" (Bagaric and Amarasekara, 2000: 160). Together with these objections we must place a comment that Dolinko sharply makes in order to show that intrinsic retributivism, such as Moore's one, is really defending a *non sequitur*: even if it can be shown that punishing the guilty is an inherent good, it does not necessarily follow that punishment is justified. For as Dolinko shrewdly points out with a graphic analogy, an intrinsic good need not be a particularly important end or objective to pursue:

> I have an itch; I scratch myself; the itching ceases. The cessation of the itching sensation, I believe, is an intrinsic good. Yet it is surely a quite unimportant good, and if for some reason I could not scratch myself without creating a high risk that innocent people would die, it would be unconscionable for me to scratch anyway on the ground that doing so would bring about 'an intrinsically good state of affairs' (Dolinko, 1997: 521).

[9] The same question arises with an avowal by Bagaric and Amarasekara: even if intrinsic retributivism "shows that the guilty deserve to suffer, it cannot support the claim that the suffering should be deliberately inflicted on wrongdoers by the state" (BAGARIC and AMARASEKARA, 2000: 164-165).
[10] Briefly considered by Husak, he mentions basically the following three: the astronomical expense of the criminal system, the susceptibility to grave error and the danger that authority will be abused.
[11] Italics are in the author's original text.

8. The movement from first to third person in Moore's thought experiment.

According to Alan Norrie, Moore has left undone some necessary work in his move from first to third person judgments in the Kantian-like thought experiment that founds his account. He objects that this translative method does not attend to the possibility that a wrongdoer may, for example, have experienced disadvantaging conditions that make him relevantly different from those who are virtuous, even in the first person version of the thought experiment. Norrie claims that the American philosopher is attackable in not properly addressing "the issue of the relationship between punishment and broader social and political principles, although he has both recognized the necessity to do so and tentatively endorsed one important theory that does" (Norrie, 1999: 118). Indeed, Norrie turns around Moore's accusation: "[…] his exclusion of the social background that so strongly –and differentially– influences conduct is the non-virtuous exclusion: just who is the elitist here, masquerading as the egalitarian?"[12] (Norrie, 1999: 118).

Thus Moore's statement that it is elitist to withhold punishment for the individual from the structurally unjust social background "is insufficient without some further argument as to why it is just to treat our abstract, universal ability to be the 'subjective seat of a will' […] as *the* egalitarian criterion for responsibility and blame"[13] (Norrie, 1999: 118). Besides, we must appropriately bring here one affirmation of the author of *Placing Blame* that paradoxically supports this objection. He considers epistemic caution (modesty caused by the fact that whatever one can be right about one can also be wrong about) to be a limit of Criminal Law. But this epistemic caution seems to be unapplied by Moore regarding the movement from first to third person judgments in his Kantian-like thought experiments. Hence he would be ignoring his own advice: that the true implication of

> […] realism about morality is not some self-righteous attitude that leaps at every opportunity to cram one's view of the good and the right down to other people's throats. Rather, […] is one of humility in the face of hard moral questions, […] accompanied by a curiosity about the differing answers to those hard moral questions discovered by others (Moore, 1997: 78).

9. The 'genetic fallacy' objection identified and responded by Moore.

Moore decides to go a step further in proving the validity of his account by construing and responding a (more or less common) charge made against the rationality of the retributive emotions that give rise to retributive judgments. If the former are taken to be "always pathological –not in their intensity and consequent ability to unhinge our reason and not in their lack of any point that they have or can serve, but in their moral nature" (Moore, 1997: 119)–, just as racial prejudice, then the negative moral worth appears to be evident. Insofar as the retributive urge is based on such feelings, or causes to

[12] Bagaric and Amarasekara (2000: 158) share this objection when they show intrinsic retributivism's difficulty of explaining whether deserved suffering is actually influenced by past undeserved affliction.
[13] Italics are in the author's original text.

instantiate traits such as self-deception, is better to avoid the latter, for it is natural to think that the kind of judgments that stem from them "are contaminated by their dark emotional sources" (Moore, 1997: 125).

But this charge is identified by Moore to be a form of the 'genetic fallacy' objection, which affirms that it is misleading to deduce the inaccuracy of a proposition from some truths (no matter how unsavory) about the genesis of people's trust in that proposition[14], since "it infers the falsity of retributivism from the unnice emotional origins of people's beliefs in retributivism" (Moore, 1997: 127). To properly reply this criticism one must mainly refuse Nietzsche's identification between retributive emotions and the feeling of *ressentiment*[15], which was taken by the German thinker to be the source of retributive beliefs in most persons. The problem for this claim is to show that judgments stemmed from the latter are inevitably motivated by the dark sentiment of anger. So the counter is three-stepped:

> […] first, that the inevitability of linking *ressentiment* emotions to retributive judgments is weakened when one notes, as Nietzsche […] did, that anti-retributive judgments are also often motivated by some of those same non-virtuous emotions; second, that in our individual cases we can imagine being motivated to make retributive judgments by the virtuous emotions of guilt and fellow-feeling; and third, that because punishment is a social institution, unlike private vengeance, it can help us to control the emotions retributive punishment expresses by controlling the aspects of punishment that all too easily allow it to express *ressentiment* (Moore, 1997: 140).[16]

10. The charge of not appropriately justifying hard treatment.

Albeit we have hitherto analyzed the validity and the correctness of Michal S. Moore's justification of the retributive principle through a generalization (i.e. using a kind of inductive method) of particular judgments, there is one conceptual claim –acknowledged by the author of *Placing Blame*– that still remains insufficiently dealt with. It is the assertion that "only when harsh treatment is imposed on offenders in order to give them their just deserts does such harsh treatment constitute[s] *punishment*"[17] (Moore, 1997: 159). Even when recognizing that this avowal is made about our concept of state penalty, and moreover presupposes that the notion is captured by the purpose for which punishment is imposed as much as by any other structural features that it may possess, further explanatory references are missing in the account of the American philosopher.

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[14] For example, to infer the falsity of our moral beliefs from facts like they are caused by our second-Oedipal resolution, or they are caused by our impotence in the face of other's power, etc. (Cfr. MOORE, 1982: 1097-1101).

[15] Indeed one of Nietzsche's deepest insights into moral genealogy is how much the retributive urge is based on resentment. As Max Scheler explains, revenge, based upon an experience of impotence, "is always primarily a matter of those who are 'weak' in some respect" (SCHELER, 1961: 46). Deserved punishment, as Nietzsche warned, can give us the satisfaction of being allowed to vent our power freely upon one who is powerless: the voluptuous pleasure of doing evil for its own sake. Thus "our retributive judgments, in such a case, look like a rationalization of, and excuse for, venting emotions we would be better off without" (MOORE, 1997: 122).

[16] Cfr. also the further discussion in MOORE, 1997: 141-152.

[17] Italics are in the author's original text. Cfr. the older form of this argument in QUINTON, 1954: 133-142.

V. CRITICISMS TO R. A. DUFF: RESPECT OF AUTONOMY, HARD TREATMENT AND THE LIBERAL STATE.

1. An initial unfounded charge: retributive punishment only hurts the recipient.

Bernard Williams claims that for retributivists "nothing is essentially *done* by punishment except to hurt the recipient"[1] (Williams, 1997: 100), a charge derived from the author's failure to distinguish different versions of retributivism. Whilst all varieties hold that criminals deserve to suffer, and that punishment should inflict that suffering, each one offers a distinctive explanation of just why, what and how much do offenders ought to have. For instance, in the communicative theory of retribution, the primarily censuring feature of punishment –which is indeed internal to the account– restricts its scope of application only to voluntary wrongdoings: if "a criminal act was in a relevant sense 'involuntary', or 'non-voluntary', would […] be reason for supposing that its agent did not deserved censure" (Duff and von Hirsch, 1997: 108). Voluntariness (a condition of moral responsibility and criminal liability) requires someone with whom we can intelligibly try to engage in punishment's communicative enterprise. We need, thus, the notion of rational agency,

> [meaning an] action which is in principle susceptible to being guided by reasons, done by an agent who would be capable of recognizing whether such reasons are good ones [an action which he could properly acknowledge as his own in its character as wrongdoing]. […] what we condemn the agent for is a failure to recognize, to accept, or to be adequately motivated by, reasons for action (those offered by the law) which were within his grasp (Duff and von Hirsch, 1997: 110).

2. The existence of a gap between the Ideal and the Actual.

Another shortcoming frequently stemmed from Duff's theory is that it lacks practical relevance: "He admits that the sanctions which are typically imposed by our penal system are unlikely to achieve repentance, reform, reparation and reconciliation, and that the concept of punishment he propounds is only justified and appropriate in an ideal society and legal system" (Bagaric and Amarasekara, 2000: 172)[2]. Again, Duff's counter is not difficult: his account is not offered as an explanation or validation of our existing penal practices, since it would be absurd to suggest that current penalties (especially imprisonment) aim or serve to induce repentance, reform and reconciliation, and even "hard to deny that they often amount (in fact if not by design) to […] oppressive bullying or terrorizing" (Duff, 2000: 415). However, he has always insisted that he proposes a normative theory of punishment: a report of what punishment ought to be, not merely a

[1] Italics are in the author's original text.
[2] Indeed, Duff's notion of penitential punishment is accused to rest "on a number of idealizations about the surrounding society and […] its members" (BAKER, 1992: 313).

comforting substantiation of the penal status quo. The current divergence between the ideal and the actual situations shows not the inadequacy of his account as a normative theory "but the radical imperfections of those penal systems" (Duff, 2000: 415).

Further, the ideal of punishment as an exercise in moral communication has a twofold practical relevance: a) it should, by reminding us of the drastic deficiency of our penal practices, induce a salutary caution, humility and restraint; and b) it should motivate us to work towards the types of radical moral and political changes which would make it possible for punishment to become what it ought to be. Moreover, even without Duff's confessed optimism (about the extent to which his ideal conception could directly guide current systems), his account would have the kind of normative theories' utility: a basis not necessarily for justifying, but for judging, our existing practices; a critical standard against which they must be assessed; and an ideal to which we should in the end aspire.

3. Negotiation versus imposition: is punishment really communicative?

Bagaric and Amarasekara (2000: 173-174) also object that, since punishment is imposed instead of negotiated, it cannot be portrayed as a communicative dialogue[3]. But what is imposed on a person can still constitute an attempt to communicate with him; it can still address his understanding and seek a thoughtful response. So Duff's counter here is that punishment is not coercive in its intention: it involves an appeal to the rational and moral nature of the wrongdoer, in pursuing the acceptance of the penitential message. However, critics put a further challenge: the Scottish thinker must explain how an apparently coercive institution promotes, rather than violates, individual autonomy, since "sanctions aimed at an offender's internal moral reform are arguably akin to brainwashing and, hence, pose an even more serious threat to […] autonomy than those which aim to provide prudential reasons for desistence" (Bagaric and Amarasekara, 2000: 174).

But R. A. Duff insists that there should surely be room in the criminal process for the lawbreaker's voice to be heard: at his trial, in deciding his penalty, and through his response to the punishment. There are of course strict limits on what he will be heard to say and, in the end, neither verdict nor sentence are up to him; the court, speaking for the law and for the community, alleges the authority to determine these matters. One might thus ask what kind of 'dialogue' is that. However, enforced claims to effective authority do not make any attempted conversation of a morally significant kind just impossible. Duff illustrates this statement falling back on a graphic and own-experienced daily example: "I can, for instance, engage in philosophical dialogue with my students, addressing and respecting them as rational beings, whilst still claiming the authority to require work from them, and to assess and grade that work" (Duff, 2000: 415).

[3] In fact, they claim that "given the weakness of the criminal's position, punishment is the antithesis of a communicative institution" (BAGARIC and AMARASEKARA, 2000: 174).

4. Is there a right to be punished? Two opposed conceptions of rights.

As it appears to be a problematic relation, a way to reconcile punishment with respect for autonomy would be to argue that lawbreakers have a right to be punished, or that it accords with what they ideally want, since the sanction expresses a proper response to the wrong and a proper concern for their moral well-being as fellow members of the political community. In Duff's account, thus, to talk of a 'right' to be punished means that punishment is something owed to the delinquent (not just to victims or the wider society), and as something that is aimed to be for his own good (not just as something that he deserves for his past crime). Indeed, "perhaps it is also to imply that punishment is something that the offender would claim for herself, if she realised the truth. That might indeed sound strange. However, it will seem less strange when we look at the alternatives to punishing the offender" (Duff, 2000: 418).

One likely alternative would be simply to ignore the misdeed, "but that is not a morally available option. For if her crime is, as crimes under a morally justified system of criminal law must be, a public wrong that properly concerns the community as a whole, to ignore it would be to condone it" (Duff, 2000: 418). And remember that, in Duff's view, we owe it to the victim, to ourselves and to the defining values which structure our political community (that are flouted by the illicit act), not to overlook such wrongs. And we could also say that we owe it to the lawbreaker to take him seriously as a rational fellow citizen, which includes censuring his wrongdoing, since to ignore that act would be implicitly to deny his standing as a responsible moral agent. Another alternative would be to subject him to some kind of measure which simply aimed to prevent him from repeating misconduct –such as deterrence, rehabilitation or incapacitation. However, as Duff sharply points out, a central argument

> […] in favour of retributivism in general, and of the communicative version of retributivism that I espouse in particular, is that other methods of coercive, preventive treatment for offenders […] fail to respect their status as responsible moral agents, whereas retributive punishment respects that status. If that argument is sound, and if ignoring the offender's crime is not an option, then we can say that we owe it to the offender, out of respect for her as a responsible moral agent, to punish her for her crime –which is to say that punishment is her right (Duff, 2000: 418).

Bagaric and Amarasekara further object that the Scottish author misconceives the nature of having a right, supposed to at minimum entail a plus, a benefit for its holder. Thus to inflict unpleasantness upon someone is the direct opposite of a right. Duff's proposition that punishment ultimately helps offenders by improving their moral outlook and reconciling them with the polity, and therefore it is something that criminals should have to embrace as their own good, "is totally at odds with the surface nature of punishment as being an evil imposed upon wrongdoers" (Bagaric and Amarasekara, 2000: 176). Definitely penalties could not be seen as harsh day-to-day sacrifices that people undertake for a

further good, since the latter are not inherently seriously harmful and their positive long-term effects are voluntarily pursued through the imposition of several detriments –conditions that are not fulfilled by legal punishment. However, Duff's conception of rights is not exactly the same as his critics'; insofar as he locates the explanation in what is owed to lawbreakers as responsible moral agents, in that sense we can –at least partially– talk about a right to be punished –that is, to be treated as a fellow citizen.

5. The charge of inappropriately justifying hard treatment.

As we saw above, Duff's justification for harsh sanctions in legal punishment is threefold[4]. Bagaric and Amarasekara then object that such claims lack empirical support: "The high rate of recidivism amongst those who have experienced hard treatment suggests that hard treatment is more likely to cause anger, frustration and a regression in one's moral health rather than repentance and reform" (Bagaric and Amarasekara, 2000: 181). However, the Scottish philosopher counters that such a disavowal does not have force against his assertion that suitably designed and administered kinds of harsh penalties should, and in principle could, serve those aims. In response, critics argue that sincere apology in itself should suffice to provide the necessary reparation, and that hard treatment punishments are ill-suited to the expression of the sincere regret that reconciliation requires, since we cannot ensure whether the offender is sincerely remorseful[5]. But Duff also provides a sharp respond to those observations:

> [Again,] The answer to the first objection is that something more than a merely verbal apology is needed to make it clear to the victim, and to the wider community, that the wrong done is being taken seriously –just because a merely verbal apology can all too easily be superficial, glib or less than serious. The answer to the second objection is that, with a proper liberal respect for the offender's privacy (for the privacy of his conscience), the state should not try to determine whether the offender's purported repentance is sincere (Duff, 2000: 420-421).

6. What to do with already repentant and 'beyond saving' offenders?

Further on, Bagaric and Amarasekara object that Duff cannot justify punishing criminals who have already repented, or those who are 'beyond saving'. However, apart from the fact "that undergoing punishment can deepen and strengthen a repentance that might otherwise be shallow or incomplete, the punishment of an already repentant offender can assist in her self-reformation, and in reconciling her with those whom she has wronged" (Duff, 2000: 419). As for the malefactor who for sure will not be brought to remorse, Duff has insistently claimed that we should never give up on a fellow citizen as

[4] It is necessary because human nature is such that we would probably not willing to face our wrong-doing by ourselves, undergoing hard treatment provides a means through which repentance can be expressed, and the community will only recognize tangible evidence in order to accept reconciliation.
[5] Certainly "[…] there is no method for distinguishing between genuine repentance and expedient compliance" (BAGARIC and AMARASEKARA, 2000: 182). Cfr. also BAKER, 1992: 323.

'beyond saving'. Bagaric and Amarasekara thus argue that this commits the Scottish academic to a kind of intrinsic retributivism which seeks no end beyond the infliction of punishment. But it seems clear that this is largely to misinterpret Duff's view. Even though when the two critics might not agree that we owe it to lawbreakers this continuing respect and concern as responsible agents, members of the polity, however, by trying to ascribe an intrinsic retributivism to Duff's central justification of punishment[6] they ignore the role that this conception of the offender's moral standing, as someone who is redeemable, plays in his account.

7. Not justifying the close relation among individual's good and polity's values.

Brenda M. Baker objects that even if we can articulate a set of moral priorities and values –relative to a given social culture– which would be core ingredients in a morally good life, "we cannot go on to say that any citizen's well-being must consist in some association with this morally good life. Individual citizens may reject this conception of a good life as determining their personal idea of […] a worthwhile life" (Baker, 1992: 320), for the intimate connection between individual well-being and subscription to community has little scope of application in secular political societies. Baker also finds lacking Duff's possible counter that offenders have failed or refused to see how criminal pursuits are inconsistent with the existence of a community within which any worthwhile life is possible and so are injurious to their true well-being (cfr. Duff, 1986: 256-257). For we are still owed a further argument to show the moral superiority of a state in which individual members' conception of their own good is so close to the acceptance of community values that delinquents must desire to be reunited with the polity and its shared goods through undergoing punishment. Indeed, it is hard to spot how a type of society

> […] meeting this description would be able to adequately respect individual self-determination in its many expressions, given that these would not doubt include the expression of dissenting opinions about what is morally correct and about the relative supremacy of moral reasons in relation to reasons of other kinds [e.g. faith, self-interest and so forth] (Baker, 1992: 321).

In addition, Baker also raises a parallel objection to Duff's claim that the law respects citizens' autonomy insofar as it addresses them directly as rational responsible agents, seeking their acceptance of a moral obligation to obey the law, even if we are sure that the attempt will fail. The consequent affirmation that the state has a duty to impose punishment in order to bring offenders to understand their wrongdoing, repent and reconcile with the community is not self-evident for Baker, who asks for further development: Duff "fails to give an adequate explication of how to show respect for fundamental moral dissent among rational autonomous individuals over moral questions" (Baker, 1992: 328).

[6] One which maintains that "the only answer seems to be that the victim or the community demand more pain; otherwise the desire for revenge remains unsatisfied" (BAGARIC and AMARASEKARA, 2000: 183).

In short, it is far from obvious that the duty to bring citizens to moral truth must always take precedence over the duty to recognize and respect the possibility of fundamental moral disagreements amongst them.

8. Penance and legal punishment have totally different objectives.

According to Brenda M. Baker, penance and punishment are not alike in their primary aims. While the former is supposed to assist the self-reform of the wrongdoer and to bring about his reunion with the community whose values he flouted, the latter "is not directed principally at securing certain benefits for the one punished" (Baker, 1992: 322); its objectives are mainly civic and political. Legal punishment provides an assurance to the public that individuals cannot break the law with impunity and offers social protection by removing lawbreakers and discouraging future crime. Moreover, while a penance necessarily needs some form of cooperation from the individual, punishment can achieve its social objectives even if offenders do not accept their own sanction as morally deserved deprivations or as a vehicle for expressing remorse. Duff's counter was sketched in chapter III: we do not demand (even though it is obviously hoped) a sincere apology from the criminal but only engaging in a formal ritual of expressing such message the system did its best to make him understand.

9. Does Duff's penitential punishment respect the limits of a liberal state?

We saw above that Duff's communicative system of penitential punishment is pretended to express the core values of a liberal political community. It is inclusionary rather than exclusionary. It addresses actual and potential offenders as members of the normative polity, as peoples who are both bound and protected by the society's public values and who need to be reconciled with their fellow citizens. It takes their crimes seriously as wrongs, but does not take those acts to exclude them from community. It addresses them as self-directed responsible moral agents, therefore embodying the central liberal value of autonomy. For though it seeks to induce repentance and reform, these goals are to be achieved by persuading them to recognize for themselves that they have done wrong.

9.1 The charge of improperly invading the realm of privacy of offenders.

But some liberals insist that penitential punishment infringes lawbreaker's autonomy, the privacy that a state must allow its citizens (cfr. Baker, 1992; Lipkin, 1988; von Hirsch, 1998 and 1999). In attempting to persuade malefactors to repent their crimes, it creates a rather intimate community between the punished and the punisher: it intrudes coercively into the deepest aspects of his moral character. Since penitential punishment is something that seeks to invade the offender's conscience and moral condition, it is something that a state concerned to respect the citizen's privacy should not do. Such objection seems not allayed by a reminder of Duff's insistent claim that while penitential penalties are

coercive, imposed on delinquents regardless of their will, they must not aim to compel their understanding or moral attitudes (cfr. Duff, 2003: 302); i.e. they are forced to hear but not to listen, since they are left free to reject the rational force of their punishment.

Apart from the danger that forceful moral persuasion could easily turn out to be oppressive attempts to compel lawbreakers into moral submission, liberal critics still insist that moral beliefs and attitudes, like matters of conscience, are not the proper concern of the criminal law, being part of the private sphere of individual freedom that the state must allow and respect. However, Duff challenges his critics to justify this conception of privacy: "The 'private' is not a metaphysical given […]. What counts as 'public' or as 'private' depends on the nature of the community in which the distinction is drawn" (Duff, 2001: 127; cfr. also the further discussion on this issue in Duff, 2001: 48-51). Then, he asks them to explain why a liberal polity should define such matters as private instead of grounding the objection that penitential penalties invade the 'private' realm of conscience on some a priori premise in accordance with the former conclusion.

Moreover, the Scottish author also counters with a positive affirmation: in addition to prevention of crime, "penitential punishment might also be of moral benefit for the offender. It might be for her good, as a member of the community, that she repents the wrong she has done and reconciles herself to her fellow citizens" (Duff, 2001: 127). But then a further objection arises: even if the state can have some proper concern for its citizens' moral good, it should not pursue that purpose through the coercive, intrusive methods of criminal punishment. Duff's reply is pretty subtle here. He finds this argument based on an inadequate conception of harm, since crimes not only –even not mostly– provoke physical, material and psychological damaging effects but they rely on the fact that victims are attacked in their legitimate interests: the harmfulness and wrongfulness of such acts is to be found primarily on the malicious, contemptuous or disrespectful intentions and attitudes that they manifest. Thus such conducts are a proper object of the criminal law, since the latter is concerned not merely with conduct

> […] externally conceived in terms of its actual or likely consequences but with actions as thus more richly conceived. Its response to crimes must also be a response to them as wrongs of this kind […]. The offender therefore cannot claim that the intentions and attitudes manifested in his criminal action are 'private' –[…] no business of the criminal law (Duff, 2001: 128).

So, penitential punishment focuses on practical and actualized criminal attitudes since they are culpably harmful to the delinquent's fellow citizens. What justifies this focus is not the claim that the state can correctly take, through the criminal law, a coercive interest in its citizens' general moral character[7], but "that it can properly hold them answerable for

[7] Certainly criminal punishment, within Duff's account, "should not try to engage the offender's innermost spiritual concerns or moral character or to impinge on the innermost 'citadels' of his soul. […] [Thus,] what must be censured, what he should repent as a wrong, need not be identified in a way that involves the deeper aspects of his soul or character" (DUFF, 2003: 303).

and demand that they themselves attend to those attitudes which, as manifested in their criminal conduct, flout the central values of legal community" (Duff, 2001: 128-129). As a result, those manners and intentions, when adequately proved to have been actualized, cannot be said to belong to the private realm of individual thought or conscience in which the law has no proper interest. Therefore, penitential punishment has not been proved to unacceptably invade offender's privacy, as liberals object, since it is consistent with and expressive of a proper regard for the lawbreaker as a fellow member –albeit perhaps a recalcitrant or at least unwilling one– of a liberal-communitarian polity.

9.2 Morals by force: Duff's penitential punishment is not voluntarily undertaken.

Bagaric, Amarasekara (2000: 182) and Baker (1992: 316) demur that penance, unlike punishment, is genuinely assumed voluntarily. But for Duff, the latter is ideally a penance which a wrongdoer self imposes –a painful burden to which he subjects because of his misdeed. And that voluntary requirement could be first neglected, since such purposes can be served as well by penalties which are inflicted on initially unwilling malefactors: a compulsory penance on the delinquent whose aim "is to persuade him to confront and repent his wrongdoing, to force his attention onto his offense, to bring him to understand its nature and implications and to see that it was wrong, and why it was wrong" (Duff, 1992: 53). But this prospect, in the form of hard treatment, is taken to be "illsuited to play a penitence-inducing role" (Baker, 1992: 323)[8], for it is argued that "it is extremely doubtful that [such kinds of] punishment could serve as a vehicle for improving the moral values of offenders. Coercive measures can at best only produce prudential reasons to modify behavior, rather than internal ones" (Bagaric and Amarasekara, 2000: 178).

10. Autonomy as a collective principle to respect or as a personal moral virtue.

Bagaric and Amarasekara also criticize Duff's underlying conception of autonomy, which they take it to be his ultimate justification for punishment. According to the commentators, autonomy is a collective principle that involves a duty to respect people being able to do as they want; thus it is totally in line with personal wishes. Hence the Scottish philosopher cannot avoid the conclusion that punishment is coercive and therefore a violation of the offender's autonomy, even though he tries in vain to justify this institution in "whatever 'virtue' it is that prescribes that people ought to do what others think it is their interest" (Bagaric and Amarasekara, 2000: 178). For the former authors, doing so is to advocate a practice which indirectly impinges on the autonomy of criminals in order to protect the 'autonomy' of the rest of the society. However, this is to misunderstand Duff's conception of moral autonomy, which he does not take it to be the opportunity for citizens to do totally as they want but to act in pursuing their personal goods –which are indeed intrinsically connected with public shared community-defining values.

[8] In the next chapter we will develop the reply to this criticism.

VI. J. FINNIS: THE RESTORATION OF SAINT THOMAS AQUINAS.

Being this chapter the final step in the first part of the Paper (devoted to the study of the new retributivist trends in the Anglo-Saxon world), we are going to face here a slightly different understanding of a retributive rationale for the justification of punishment, and then to confront it with the preceding ones explained above. Moreover, we will further develop some replies to several shortcomings of the former theories based on this novel account, before connecting a final concern with the topic of the second part of this TFC.

1. C. S. Lewis urged to return to retribution in front of the Humanitarian theory.

In the mid 50's, the prevalent theory of criminal punishment in England was the one called Humanitarian. It was supposed to avoid the revengeful, barbarian and immoral character of prior retributive approaches that claimed legitimacy to punish a man because he deserves it, as much as he deserves. Thus it was maintained that the only justifiable motives for punishing were the desire to deter others by example or to mend the offender. Combined with the belief that all crime is more or less pathological, the idea of mending tailed off into that of healing or curing and punishment became therapeutic. However, Clive Staples Lewis, a Catholic writer, reacted against this rationale warning that "when we cease to consider what the criminal deserves and consider only what will cure him or deter others, we have tacitly removed him from the sphere of justice altogether; instead of a person, a subject of rights, we now have a mere object, a patient, a 'case'" (Lewis, 1994: 288). As a result, this doctrine, merciful though it appeared to be, really meant for the British poet that each one of us, from the moment he breaks the law, is deprived of the status of a human being.

Moreover, the fact that Humanitarians were taken to have no evil intentions made them much more dangerous, according to C. S. Lewis[1] (1994: 292): "To be 'cured' against one's will […] is to be put on a level with those who have not yet reached the age of reason or those who never will; […] infants, imbeciles, and domestic animals". Rather, the English author demanded "to be punished, however severely, because we have deserved it, because we 'ought to have known better', [since it] is to be treated as a human person made in God's image" (Lewis, 1994: 292). Thus the interest of society, victims and even primarily offenders required a return to the retributive theory, insofar as the concept of desert is the only connecting link between punishment and justice: "It is only as deserved or undeserved that a sentence can be just or unjust. […] We may very proper-

[1] In his illuminating words: "Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. […] [Indeed,] those who torment us for our own good will torment us without end for they do so with the approval of their own conscience" (LEWIS, 1994: 292).

ly ask whether it is likely to deter others and to reform the criminal. But neither of these two last questions is a question about justice" (Lewis, 1994: 288).

2. John Finnis and the restoration of retribution through Saint Thomas Aquinas.

Two decades after this desperate yell of Lewis, John Finnis asked for the restoration of retribution[2] from a Catholic perspective, which was lately developed by him through the recovery of St. Thomas Aquinas's doctrine regarding criminal punishment. In the following epigraph we will focus on the main features of this original and challenging account.

2.1 Redefining the very essence of punishment: a matter of the will instead of feelings.

It is commonly assumed by philosophers –even several retributivists claim so– that punishment genuinely entails the infliction of some kind of pain[3] or burden in order to make the criminal suffer[4]. This is largely to allocate the very essence of punishment under the domain of the sensory, sentient and emotional, implying for sure "an efficient way of blocking all understanding of its real point and operation, which is in the level of the will, that is to say of one's responsiveness to the *intelligible* goods one *understands*"[5] (Finnis, 1999: 98). Hence Finnis here advocates the restoration of Saint Thomas Aquinas's teachings, where the substance of criminal punishment is that it subjects criminals to something contrary to their wills –*contra voluntatem*[6]. Since the core of offenses is that in their wrongful acts lawbreakers followed their own will excessively –or ascribed too much to their own preferences–; the measure of excess being the relevant law or moral norm for preserving and promoting the common good. So the proposition foundational of Aquinas's entire account:

> […] the order of just equality in relation to the offender is restored –offenders are brought back into that equality, precisely by the 'subtraction' effected in a corresponding, proportionate suppression *of the will which took for itself too much* (too much freedom of autonomy, we may say). In this way punishment 'sets in order' the guilt whose essence was wrongful willing […][7] (Finnis, 1999: 98-99).

Although this account of legal punishment resembles to the 'unfair advantage' theory (since it portrays crime as the willing of wrongly gaining a benefit of freedom from external constraint in choosing and acting, relative to all the offender's fellows in the

[2] Cfr. FINNIS, John M. 1972. "The Restoration of Retribution", in *Analysis*, Vol. 32, No. 4: 131-135.
[3] Although we should here worthily recall that the Latin word for pain is *dolor* not *poena* (punishment).
[4] The paradigmatic account is Hart's: "I shall define the standard or central case of 'punishment' in terms of five elements: (i) it must involve pain or other consequences normally considered unpleasant […]" (HART, 1968: 4). Cfr. also, for all, QUINTON, 1954: 133-142; DAVIS, 1972: 136-140; KLEINIG, 1973; BEDAU, 1978: 601-620; NOZICK, 1981; BAKER, 1992: 311-331; DUFF, 1992: 43-68; MOORE, 1997; BAGARIC and AMARASEKARA, 2000: 124-189; DUFF, 2001; TASIOULAS, 2006: 279-322.
[5] Italics are in the author's original text.
[6] Cfr., for all, AQUINAS, Saint Thomas. *Summa Theologiae*, I-II q. 46 (art. 6); I-II q. 87 (art. 2c and 6c); I q. 48, art. 5c.
[7] Italics are in the author's original text.

community whose law and common good are flouted), it differs from Morris and Murphy, for the latter did not spot the precise advantage gained by the delinquent relative to the law-abiding. Thus "when that benefit was identified as being what Aquinas had pointed to –indulgence of will–, the point of punishment, its general justifying aim, became once again clear" (Finnis, 1999: 101-102). Not only John Finnis is aware of that; also Gerard Bradley interestingly makes an integrative assert when he considers the essence of legal punishment to be "imposing [a restriction] upon the criminal's will, to make him suffer some deprivation of liberty to do as he pleases, to be entirely the author of his own actions. In doing that, […] society is eventually restored to a pattern of equality with regard to liberty" (Bradley, 1999: 107). His entire claim is so summarized:

> Depriving the criminal of this ill-gotten advantage is therefore the central focus of punishment. […] Punishment must also include sensory deprivation, even transient pain, which likely be experienced by the criminal as 'suffering'. […] however, the essence of punishment is to restrict a criminal's will by depriving him of the right to be the sole author of his own actions. The goal of punishment, in short, is the undoing of the criminal's bold and unjust assertion of his own will. Punishment assures society both that crime does not pay and that observing the law is important; by doing so, it restores fundamental fairness and equality (Bradley, 2003: 23).

This latter observation leads us to another central feature of Finnis's account on criminal punishment, which is as well founded on the teachings of the so-called *Doctor Angelicus*.

2.2 Retributive punishment as twofold: its backward and forward-looking characters.

The Australian thinker also rightly points out that this sketch of a retributive theory based in the restoration of Saint Thomas Aquinas's doctrine is not purely backward-looking, as it is so often objected. Instead, the purpose of retributive punishment is genuinely future-oriented: "to secure that over the span of time which extends from before the crime until after the punishment, no one should have been disadvantaged […] by choosing to remain within the law's confines" (Finnis, 1999: 102). The underlying truth is that there is some worthy value, merit, fittingness, in thus restoring equality between offenders and law-abiding, and cancelling the delinquent's unfair profit. Hence the retributive shaping point of punishment, like other purposes to which it can be adapted, is forward-looking. The 'medicinal' or 'healing' function envisaged by Aquinas involves "not only reform and deterrence and restraint and coercive inducement to decent conduct, but also [even primarily] the […] redressing of the disorder caused by the offense" (Finnis, 1999: 97). In short, the future-oriented character of punishment is the repairing of an unjust inequality introduced into a whole community by the wrongdoer's criminal choice and action. Or, as Bradley puts it, if the goal of retribution is to reestablish the balance of the polity,

> [it] is at least as forward-looking as deterrence, in that both theories of punishment attempt to positively affect society after the incidence of criminal activity. Indeed, retribution is significantly

> superior to deterrence in this regard, since retribution attempts to restore social balance instead of seeking only to discourage similar criminal behavior […] (Bradley, 2003: 29-30).

3. Moore's review in the light of former thoughts: the proper place of intuition.

We saw in chapters II and IV that Moore's retributive theory of criminal punishment was largely –perhaps excessively– based on an intuition, even rightly identified and proved. As a result, his account lacks consistency and theoretical support, since it is not very much founded on further solid rational arguments. However, some considerations that stem from the approach just above sketched are able to complete Moore's explanation in order to overcome the shortcomings and place his sharp intuition in a global coherent theory of retributive criminal punishment. Finnis inestimably helps us in this issue, when he acknowledges that our most inner leanings and beliefs are not by definition opposite to moral reasoning. Indeed, our reactive inclinations –such as the retributive judgment outlined by Moore–, like our desires and aversions generally, can well be constitutively ordered and directed by our understanding, our capacity to reason about opportunities and benefits, and the corresponding defaults or losses, common to all us. Moreover,

> Our reactive instincts, even when they are interior to our intellectual capacities, our will, can be and, for truth's sake, should be integrated into this constitutional order in the soul, which is the source of all constitutional, decent order between persons, all society (Finnis, 1999: 96).

Also Gerard Bradley has a valuable contribution in the task of relocating Moore's intuition. Remember that the former's account of punishment is a species of an 'unfair advantage' theory, although well focused on considering sanctions primarily directed to the offender's will. According to him, the unjust appropriation of liberty that the criminal act entails is a relational term. Since there is no abstract, universally or unconditionally correct metric for penalties, the morally proper measure depends upon the extent of unfairness, and that has something to do with how community actually feels: "Given what punishment aims to do –to restore harmonious cooperation among freely choosing persons, so that over the long haul none is foolish for observing the law– the degree to which law-observing people consider themselves disadvantaged is [hence] relevant to sentencing" (Bradley, 1999: 114). Yet the author clarifies that recognizing the community's appraisal of the gravity of an offense does not imply that such illicit act may be defined without regard for the moral truth of the matter.

4. Duff's review: retribution as the central justifying aim and the common good.

We acknowledged in chapters III and V that Duff's theory of punishment takes retribution to be the central aim of a morally justified system of penalties. But central does not mean sole or exclusive, since there could be other legitimate secondary purposes. So deterrence, rehabilitation and even incapacitation –in little extreme cases– must also be

taken into consideration when determining the concrete measure of punishment for an offense. This is precisely what Finnis means when he explains that, according to Aquinas's teachings, "in proceedings of the kind we call criminal, the court can be authorized to impose, relax, remit or withhold penalties with a view to wider considerations of public good [*publicae utilitati*]" (Finnis, 1999: 100). Therefore, in both accounts retribution is only one element in the general function of government[8], since –as Bradley nicely puts it– "retribution is not the source of [the] criminal law; it is simply a theory of punishment. Notably, the content of [the] criminal law is rooted in the whole ensemble of conditions that comprise the common good of political society" (Bradley, 2003: 21).

Being stated that retribution is the core moral account of criminal punishment but not an overriding principle of action by public authority, Bradley also affirms that its operation is limited and permeated by the overarching *publicae utilitati* of the polity[9], which includes the leading derivative ends of punishment: "By constant reference to the common good, especially to the principle of fairness to criminals, their victims and the community, these secondary aims can be integrated into a system of punishment centrally determined by retribution" (Bradley, 1999: 123). The above mentioned author also steps a bit forward here in stating that the moral authority that the state claims in inflicting some sort of suffering or deprivation on an offender "exists solely to preserve the common good of society" (Bradley, 2003: 30), insofar as the purpose of retribution is not to make the wicked suffer but to restore social order. In a short summary,

> The adoption of retribution as the philosophical basis for punishment therefore provides a powerful, multi-faceted justification far beyond that proffered alternatives. Retribution certainly includes elements of deterrence, incapacitation and rehabilitation, but it also ensures that the guilty will be punished, the innocent protected, and societal balance restored after being disrupted by crime (Bradley, 2003: 31).

Besides, Finnis argues that retribution (the only genuine and justified form of punishment) places whatever other functions that may rightly be pursued on the occasion and, in a sense, by means of it. This is the same sort of relation that Duff gives to retribution as the central defining aim of his account and the consequent effects that could arise after the imposition of a penalty, being the latter instrumental –not intrinsic– to the justification of punishment. But Duff also asserts that his communicative-penitential features are internally connected to punishment, since the former ends are pursued through the latter.

[8] In John Finnis's view, this assertion implies that the state has the duty "to uphold the proportionate equality of a just distribution of advantages and disadvantages, benefits and burdens, among the members of (and sojourners within) a political community" (FINNIS, 1999: 101).

[9] He even claims that a system of punishment "determined only by retributive aims would not serve the common good of society" (BRADLEY, 1999: 123). Thus it would be an injustice to those who observe the law e.g. not to sometimes increase sentence in light of the need to deter others, since deterrence plainly serves the common good by promoting relatively less crime than more.

5. The voluntary feature in penitential punishment and antecedent repentance.

5.1 The proper role of voluntariness in punishment as a secular social penance.

We know that Bagaric and Amarasekara misinterpret Duff's claim –rightly construed in the light of the former considerations– that the offender really seeks his own good and thus wills punishment as a means of restoring him to it. Placing his statement in the level of desires –rather than will– they see no possible justification for Duff's account, since the former are not driven by reason and urge us to avoid the infliction of pain (cfr. Bagaric and Amarasekara, 2000: 175-178). Yet the problem here is akin to the above identified: the critics misunderstand the essence of punishment as being directed to the criminal's unrestraint will, not to his mere emotions or feelings. By the way, the Scottish author guesses to glimpse this idea, albeit he requires further development.

As we saw in chapters III and V, Duff's theory can accommodate the preventative role of punishment without making the use of harsh treatment depend on its deterrent effect[10], since the penitential account maintains that prevention –as well as repentance, reform and reconciliation– is aimed through the infliction of a deserved tough penalty. But one of the main criticisms to that view –in fact, its supposed principal shortcoming– is that penance is genuinely voluntarily undertaken, whilst Duff's sanction is imposed –although it is ideally accepted by the offender and even benefits him since it seeks to restore him to the good. However, the former considerations, together with some further Catholic implications, allow us to overcome this objection, since Judeo-Christian tradition explains punishment as a social penance –analogous to the divine *poena*– aimed to make the lawbreaker repent and atone through his secondary victimization (as a defendant during the trial), the imposition of the resultant sentence and the subsequent fulfillment of the penalty.

Indeed, the idea of atonement –even in Catholic theology and Canonical Law– does not exclusively imply voluntary components but it entails also several aspects distinct from the will of the subject[11]. Moreover, Dr. Carlos Pérez del Valle sharply notices that the criticism made to the penitential content of punishment is based on an inexact idea of the very concept of expiation. Apart from acknowledging its Classical roots[12], the author claims to be able to propose a notion of atonement totally compatible with a secularized legislation. Thus it is possible to conceive punishment as a social penance aimed to stabilizing the law. This account will not rely on the will of the subject to undertake the penalty, since the internal attitude of the offender is independent of the achievement of the former purpose. In short, the story goes as follows: the criminal is imposed a

[10] The same has also been sharply defended in TASIOULAS, 2006: 293-305.
[11] Here we can only enunciate this interesting and fruitful idea; cfr. for a further development PÉREZ DEL VALLE, 2003: 617-623.
[12] The Socratic claim that when somebody needs correction, the infliction of punishment –related to some extent with mathematic equality– is required to make him happy (cfr. one of the most famous Platonic dialogues, *Gorgias*, in PLATO, 1999).

sanction through which he socially atones for the breach of the law; in its communicative meaning, this penitence involves the reestablishment of the trust in the consistency of legal order. The process of inflicting a concrete penalty (trial, sentence and sanction) is a coercive expiation that socially reacts in front of the infringement of the law (cfr. Pérez del Valle, 2003: 624-625). Finally, we must also remark the following reflection:

> From the submission of the delinquent to the punishment will stem certain further effects related to the expectations of the offender's acknowledgement of the norms –his repentance or the conscience that it also exists a personal kind of atonement–, albeit these effects are not necessary for the society to recognize the public atonement as the restoration of the legal order (Pérez del Valle, 2003: 625).

5.2 What place should antecedent repentance have within penitential punishment?

In considering the case of already repentant offenders, Duff claims that they must also be punished since they should perform the formal, ritual public expression of apology in order to take them as completely reconciled with the community whose values they flouted with their criminal act. This account preserves the integrity of the retributive norm by positing a constitutive, rather than a merely instrumental, relationship between desert and remorse. Thus the penalty enables the lawbreaker to repent precisely through undergoing the deserved punishment as a penance. However, John Tasioulas appeals to another value –mercy– which is distinct from the considerations of justice captured by the norm of desert[13] in order to give reasons for punishing malefactors less severely than they strictly deserve. But they still do not have a right to mercy –as to retribution–, since it

> […] embraces reasons for leniency that arise out of a charitable concern with the well-being of the offender, in particular, the compassion we rightly feel towards him as a potential recipient of deserved punishment given various other facts about his life and circumstances whose salience is not captured by the retributive norm (Tasioulas, 2006: 312; for a previous extended account, cfr. Tasioulas, 2003: 101-132).

Thus Tasioulas sees antecedent regret as a potential ground for mercy, partly because the hoped-for outcome of punishment is repentance. Albeit nothing alters the fact that offenders deserve to be punished and how much, remorse –the correct moral response to the crime– "defeats to some extent, or is incommensurate with, the [retributive] considerations of justice […]" (Tasioulas, 2006: 313). Conceived as a distinct rationale, though internally linked to the unifying formal aim of punishment, prior atonement equips that institution to communicate to the lawbreaker in a more nuanced, and potentially more compassionate way. Consequently, mercy on the grounds of repentance is taken to be intimately related to retributive desert –despite the inherent conflict–, in order to allow both justice and charity to find an integral place in this institution of the state's *ius puniendi*.

[13] Retributive desert is a strict norm of justice since "it embodies a norm of proportionality that operates interpersonally […] and, perhaps more importantly, it is tightly bound up with moral rights" (TASIOULAS, 2006: 312) such as the claim that it is only wrongful acts that deserve to be punished.

But Pérez del Valle (2003: 625) would still object that the concept of atonement is not formally but substantially assimilated to repentance. However, he construes penitential punishment in order to lay the foundations of the attenuation of the sanction regarding the sufferings imposed on the accused as a result of an undue delay of his criminal trial (cfr. Pérez del Valle, 2003: 632). Also Bradley provides a retributive justification for the mitigation of lawbreaker's penalty: by his prior willingness to accept his responsibility for the wrong and its consequences. According to him, the pleading defendant, for instance, is on the path of moral reform, as well as he promotes the common good –since he permits the limited means he would otherwise consume to be devoted to other causes. As a result, that kind of symbolically already repentant offender anticipates some of his deserved punishment: "He gives back to the community a scarce resource […] and thereby diminishes the disequilibrium he created by usurping another scarce resource" (Bradley, 1999: 113) such as liberty.

6. Summary: the case for portraying punishment as a kind of secular atonement.

Before we get to deal with the topic of the last part of this TFC, it is worthy to remember the main ideas we have developed in this chapter. Thus we are going to synthesize the case for conceiving criminal punishment as a kind of atonement, an account which rests on the best proposals of the above studied authors –especially Duff and Finnis– whilst seeking to construe a whole unitary theory –here only sketched– in the light of Aquinas's teachings. First of all, we need to elucidate an initial problem. Albeit it seems clear that the notion of expiation has an original religious meaning, we must nonetheless acknowledge that "the use of the word atonement when talking about legal punishment does not entail identity but only analogy with that primary significance" (Pérez del Valle, 2005: 31). But we may properly raise a further question: exactly what kind of analogy?

As Dr. Carlos Pérez del Valle rightly points out, the genuine sense of atonement when we lay the foundations of a theory of state punishment "is much more about an expiation of meaning that allows the reestablishment of the trust in justice" (Pérez del Valle, 2005: 31) and the social order. Indeed, the imposition of a penalty shows two related aspects of institutional punishment. From the offender's standpoint, the sanction serves to pay back the public wrong that he caused by placing in doubt the current validity of legal norms. Moreover, from a public stance, the penalty forces the criminal to atone for the unbalance that he introduced in the whole political community, and thus restores legal stability and societal trust. Being so conceived, the significance of this kind of secular expiation serves to complete the notion of retribution[14].

[14] According to Pérez del Valle (2005: 31-32), it also permits a particularly proper way of differentiating this retributive-atoning conception from mere revenge.

Remember that we have above recognized, in several occasions, that a retributive rationale does not necessarily entail to defend that criminal punishment is justified in itself, without regard to further considerations of public values or the common good. Indeed, only an idealistic retributivist would affirm so, since the absolute character of that account stems from the categorical imperative requirement. Yet Duff and Finnis –more or less aware of St. Thomas Aquinas's doctrine– maintain that there is not an objective unconditional necessity of imposing a penalty, since the reliance on concerns of *publicae utilitati* could prudentially counsel the court to impose, relax, remit or withhold the sanction. Thus retributive punishment does not mean the total avowal of the obligation to inflict and carry out a concrete penalty without any possible way of lessening or removing it. Falling back on an example, Pérez del Valle counters a frequent objection as follows:

> […] to assert that the theory of punishment is absolute [retributive] does not entail to maintain that he who serves a prison penalty cannot take advantage of the possibility to access to an open regime, or that he who is sentenced to life incarceration will never be able to be freed (Pérez del Valle, 2005: 37).

As a result, retributivism does not inevitably involve always an absolutely unforfeitable sanction. But there is a little more to clarify in order to see if we can make the case for a retributive way of renouncing the execution of an already imposed penalty. If we acknowledge that punishment, "from the perspective of the common good, could be regarded as a good [not an evil or something which is essentially painful, as we developed above] insofar as it guarantees the stability of the norms protecting the former" (Pérez del Valle, 2005: 43), we would be able to extract the following conclusion: with a view to wider considerations of *publicae utilitati* there are for sure grounds to affirm that a retributive-based penalty must not be seen as totally and unconditionally executable. However, if we want to properly hold this position, we might here recall the very essence of punishment, its distinctive core: it subjects the offender to something *contra voluntatem*, since the crime entails ascribing exclusively to his own will and preferences[15].

7. Retribution needs a further development for justifying concrete punishments.

A retributive theory does not provide a 'natural' measure of concrete punishment, since in fact there is "no rationally determinable and uniquely appropriate penalty to fit the crime" (Finnis, 1999: 103; cfr. also a partial counterargument in Davis, 1983: 726-752). Using the words of Bradley (1999: 114-5), "retribution as the justifying aim of punishment does not dictate any specific form or degree of punishment", apart from the rough proportionality requirement that it entails. Thus, as Finnis sharply notices, this is a clear example of the need for *determinatio*, a process of free judicial decision from a variety of reasonable penalties none of which is simply rationally superior to the others. Insofar as retribution

[15] Review the second epigraph of this chapter (especially paragraph 2.2). Cfr. also AQUINAS, Saint Thomas. *Summa Theologiae*, II-II, q. 108, art. 4c: "*peccando nimis secutus est suam voluntatis*".

tells us little about what a particular sentence ought to be, or even how to define a range of acceptable sanctions for a given crime, "legislative and judicial authorities necessarily […] make the important choices in sentencing about fairness and proportionality" (Bradley, 2003: 22). The requisite of further research about the justification of proper concrete penalties is also a distinctive feature of Duff's account, as we will see in chapter IX.

8. Finnis's final considerations in order to face the study of Restorative Justice.

Finnis's reliance on Aquinas gives us also the proper guide in order to understand and place the challenges that Restorative Justice poses to current criminal justice systems. This leading point provided by the *Doctor Angelicus* is identifying the basis of an old –yet rightly marked by Aristotle or Roman law– distinction between civil and criminal laws: the difference between one's duty to compensate and one's liability to punishment. Besides, equally clearly Aquinas spots the fundamental similarity of purpose, which makes both compatible within a legal order: "Each of these branches of law concerns the restoration of an upset equality, the elimination of an unjustified inequality between persons; [indeed,] the restoration which justice requires can in either branch be called a recompense" (Finnis, 1999: 100). But the former looks to the losses incurred by specific people, while the latter to a kind of advantage gained over all the other members of the community.

Despite the underlying likeness that we have already acknowledged, each branch should remain in its field of scope and respect the other's autonomy. For civil compensation is essentially a matter of restoring to specific losers what they have been deprived of, while criminal punishment (*poena*) is basically about removing from wrongdoers a sort of benefit they obtained, precisely in preferring their own will to the requirements authoritatively established for that polity's common good. "So in litigation of the kind we call civil, the court has the duty to give plaintiffs their right […], everything to which they are entitled as compensation for their injurious losses" (Finnis, 1999: 100), whist in criminal cases the court is authorized to downplay penalties regarding the *publicae utilitati*. We may certainly retain these similarities and differences when facing the study of Restorative Justice.

John Finnis also takes to be a distinctive feature of punishment that it cannot be rightly imposed on behalf of the victim as such, but only on behalf of the community willing to abide by the law. Thus "any practice of giving victims some role in the criminal proceedings other than as witnesses, amongst other witnesses, to the fact of the offense must be highly questionable" (Finnis, 1999: 102-103). However, since retributive punishment may rightly include an order of restitution or some other act of reparation to the person specifically harmed by the illicit act, we must thus consider whether –and if yes, why and how– the former kind of rationale –as above sketched– could be appropriately placed together with a restorative approach to criminal justice systems.

VII. RESTORATIVE JUSTICE, THE LAST GREAT CHALLENGE FOR CRIMINAL JUSTICE SYSTEMS.

1. The emergence of a new movement: its origins and concept.

It is well-accepted by the theorists of Restorative Justice (from now on, RJ) –and also by their opponents– that the academic emergence of this movement was due to Nils Christie's article in *The British Journal of Criminology*, titled "Conflicts as Property". Here the author regretted that modern criminal conflicts –this is the term he uses instead of crime–, taken away from the directly involved parties, "have either become other people's property […] or it has been in other people's interests to define conflicts away" (Christie, 1977: 5). According to this view, the state illegitimately removes the conflict from their involved parties –the offender, the victim and the neighborhood. The enumerated positive consequences of reintroducing the victim and the wrongdoer in the case are not in doubt; as stated by Christie, they founded the rapidly spread restitution paradigm:

> […] if the situation was staged in such a manner that the central question was not meting out guilt, but a thorough discussion of what could be done to undo the deed, then […] serious attention will centre on the victim's losses. That leads to a natural attention as to how they can be softened. It leads into a discussion of restitution. […] We might as well react to crime according to what closely involved parties find is just and in accordance with general values in society (Christie, 1977: 8-9).

The academic origins being those, we can also focus on further background of this movement, which was born thanks to the convergence of several different concerns and trends. Only to mention the most important, we can identify four antecedents: a) the largely acknowledged loss of prestige and legitimacy of a criminal system based on the rehabilitative ideal, which was beginning to decline (cfr. Allen, 1981) in the 70's under the attack and criticism from both conservatives (charging the lack of proportionality and fairness stemmed from undetermined sentencing) and progressives (objecting harsh treatments suffered always by the same poor and needy people, whose rights were violated); b) the innovative just deserts-based claim that several concrete intermediate penalties between imprisonment and probation were needed to impose on some types of offenders; c) the impact of Victimology, a movement that asked for the participation of the victims and the resultant satisfaction met by them through the penal system (which of course included a compensation for the suffered harm); and d) a number of existing practices already orientated to restorative goals, such as the community service orders (beginning in the late 60's) and some programs of victim-offender mediation (which started primarily in North America in the middle 70's).

2. Abolitionism and *garantismo penale*[1] in the process of defining RJ.

To sum up, we can say that RJ is a broad movement that emerged because of a kind of tacit agreement between abolitionism and *garantismo*. As Elena Larrauri rightly points out, "to assume the need of subjecting the power of the state to several limits warranted by norms does not entail to assume the entire punitive model" (Larrauri, 1997: 149)[2]. Thus RJ scheme is an alternative strategy which accepts both asserts: to regulate *ius puniendi* through a restricted decrease of state's power. This reduced criminal system, properly subjected to legal limits, will be concreted in "vetoing certain types of punishments such as prison (because of its exclusively punitive character) and conceding a larger protagonism to the victim (in sentencing and in determining the response [to the criminal conflict])" (Larrauri, 1997: 150). Obviously the influence of abolitionism is highly important in RJ, since it was "the forerunner of the so-called victim-offender conciliation, an attempt to return to civil society the possibility of regulating its own conflicts" (Giménez-Salinas, 1999: 77)[3]. Hence the victim should be recognized and in fact protected in its interests, and the community is seen as the potentially perfect place to restore the prior balance, altered by the infringing act. Accordingly T. Marshall gives this model definition:

> *Restorative Justice is a process whereby all the parties with a stake in a particular offense*[4] *come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future*. […] [Furthermore, and as a consequence,] Restorative Justice is centrally about *restoration*: restoration of the victim, restoration of the offender to a law-abiding life, restoration of the damage caused by crime to the community. Restoration is not solely backward-looking: it is equally, if not more, concerned with the construction of a better society in the future (Marshall, 1999: 5-7).[5]

Therefore RJ programs bring together the offender, the victim, their respective families, friends and community representatives, attempting to engage them in a process of reconciliation and reparation. The aim is to allow criminals and victims to meet in a face-to-face context (though indirect contact is also in use), to voice their experiences and understandings, and to achieve a mutually agreeable resolution. Several different modes of practice take part in a RJ scheme, but victim-offender reconciliation, family-group conferencing and sentencing circles are three popular models –and these vary in terms of the facilitator's role and the number and type of participants included.

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[1] Cfr. FERRAJOLI, Luigi. 1989 (2005). *Derecho y razón. Teoría del garantismo penal*. Madrid: Ed. Trotta.
[2] Translation is mine, with the consequent review and permission of the author.
[3] Translation from Spanish is mine. The original text says the following: "[*El abolicionismo fue*] […] *el precursor de la denominada conciliación víctima-delincuente, en el intento de devolver a la sociedad civil la posibilidad de que regule sus propios conflictos*".
[4] Parties with a stake in an offense include, of course, the victim and the offender, but also the families of each, and any other members of their respective communities who may be affected, or who may be able to contribute to prevention of a recurrence.
[5] Italics are in the author's original text.

3. Three defining characteristics of the RJ scheme.

In a great effort to synthesize the core of the RJ proposal sketched in the last paragraph, we can identify three central features. First, the importance of endeavoring a dialogued procedure, which must at least face and frame the discussion around the following questions: what is the harm caused by the offense?; what should be done to restore it?; and who is responsible for doing so? Of course this initial element leads us to the participation of all the parties with a stake in the conflict, which in fact involves surely the criminal and the victim. It is also agreed that a mediator must be present in order to guide and moderate the dialogue. But the question is raised when considering the further participation of the community[6]: which should be the scope of its intervention?

However, there is a large agreement in considering that the state should –at least– intervene in establishing a set of legal principles and standards in order to ensure the respect to procedural rights and to avoid the violation of fundamental normative values. The third key feature is the restorative agreement with which RJ programs are supposed to end. This will bring about the restitution of the victim –both symbolically (by means of an apology) and materially (an economic compensation or some kind of work undergone by the offender)– for the suffered harm, and of the community, since civil society will be invigorated, the social order will be repaired and some community service could be imposed depending on the kind of crime. And also the lawbreaker will be reintegrated through his assumption of responsibility and some other related proper rehabitative measures.

4. Values, aims and effects of RJ.

Another remarkable characteristic of RJ is being a movement that brings together adherents who hold widely different aims. We can mention the most important ones by answering to the following question: what is to be restored? According to the republican perspective endeavored by Braithwaite (1996), we can talk about a set of core normative principles[7] that are so concreted in three complementary ways: a) the victim is restored in property loss, suffered injury or harm, dignity, a sense of security, public empowerment and participation, social support given to him by community and harmony based on a feeling that justice has been done; b) the offender is institutionally restored in his dignity through the apologies given (confronting the shame and accepting his responsibility for the crime), a sense of security and hope in the future, harmony based on a feeling that

[6] While there are certain advantages in allowing it (the possible informal control regarding the offender, the revival of the community and the social support to the victim and the criminal), some challenging questions must be faced: how to delimit the group that would take part in a conference and who will represent it?; what if this group has values different from normative ones?; to what extent would the community be restored?; how much publicity is acceptable in RJ programs?

[7] Such as healing, moral apprenticeship, community participation and care of the victim, respectful dialogue, forgiveness, responsibility, apologies and amendment.

justice has been done and unofficial control; and c) the community is restored in social cohesion, participation and debate through several institutions of deliberative democracy, public organization, informal self control of crime and revitalization of civil society.

Braithwaite (2003: 8-14) also offers three different levels of values that RJ should attempt to promote. First, as fundamental procedural safeguards that ought to be enforced as constraints, RJ programs must include active prevention of domination (i.e. to minimize power imbalance), honoring limits (to seek reintegrative shaming but avoiding stigmatization), respectful dialogue between parties involved and appealability (the possibility to fall back on a court if the conflict is not agreeably solved). Second, as democratic and communitarian values to encourage, RJ must pursue effective restoration of victim and offender, prevention of crime (as evaluating criteria) and social support in order to achieve real shame and reintegration of the lawbreaker. Last but not least, remorse over injustice, apology, censure of the act, forgiveness and mercy are humanitarian ideals whose moral power of being a gift should not be denied by trying to impose such expectations.

Moreover, an optimistic account –as the one almost naïvely predicted by Braithwaite (1998: 324-325)– imagines RJ practices to attain the following positive effects: to satisfy and restore victims, offenders and communities better than existing criminal systems; to reduce crime more because of reintegrative shaming and procedural fairness (which will guide the delinquent to a law-abiding life); to deter and incapacitate crime better than punitive measures; to rehabilitate wrongdoers better than welfare practices; to be more cost-effective; to secure justice better than just deserts; and to enrich freedom and democracy through deliberation and citizen empowerment.

5. A great current opportunity of recognizing the multiple harms of crime.

As we have already seen, this relatively recent phenomenon that is RJ is still in the process of being totally defined. However, it has been growing in popularity with policy makers and academics alike, at least in part because RJ contains elements pleasing both conservatives and liberals. The formers like it because it pays attention to victims – indeed, a large amount of scholars affirm that the concept was born out of the right-wing victims' rights movement (cfr., for all, Bilz and Darley, 2004: 1246; also Strang, 2001: 69-75; Dignan and Cavadino, 1996: 156)–, while progressives envisage restorative paradigm less punitive than jail (cfr. Bazemore, 1998: 768-813). Precisely thanks to this broad-based appeal, the growth of RJ programs (mainly victim-offender mediation) has been rapid since their reception in the mid 70's. Before the arrival of the 21st century, Mark S. Umbreit and Jean Greenwood (1999: 235-251) accredited more than 1.000 of those kind of practices throughout North America and Europe.

According to Bilz and Darley, RJ's originality lies in its 'harm-oriented' character, since it is "about seeking redress for the multiple harms inflicted by crime, while being cognizant of the myriad harms inflicted by punishment as well" (Bilz and Darley, 2004: 1247). Consequently the main utility of the restorative process is its ability to acknowledge the broad sweep of damage inflicted by the wrong and the sanction, both in type and in who suffers: "Because it recognizes an array of criminal harms, RJ also enables and demands an equally diverse assortment of responses and actions designed to address them. It allows for creative, precisely tailored, and therefore more deeply satisfying resolutions to criminal offending" (Bilz and Darley, 2004: 1247). Precisely thanks to the expansive character in its understanding of the plurality of evils, RJ's approach also easily accommodates concrete penalties that vary along more than just one dimension.

Further, RJ is taken to be genuinely neutral regarding the theory of punishment, and thus it has a potential attraction for defenders of retribution, rehabilitation or deterrence. By refusing to endorse one or other view, and focusing instead on the harms of particular crimes and punishments, RJ could be embraced by different –even opposed– theorists. Bilz and Darley also warn that "so long as RJ can avoid the philosophy trap [i.e. being located under the aegis of one theory of punishment], it offers stunning potential to the criminal justice system" (Bilz and Darley, 2004: 1248). Unfortunately, several scholars –such as John Braithwaite– are striving to make it their own, causing great trouble: connecting RJ to a purist account of punishment will make those who ally with a different rationale reject it altogether, whilst also erodes its asset of appealing across political dividing lines. As the former authors sharply notice, neutrality (its refusal to settle on an exclusive theory of punishment) is the greatest strength of RJ, at least as originally conceived: "By embracing a harm-approach to crime and its resolution, it is [a] flexible, transparent and creative" (Bilz and Darley, 2004: 1251) alternative. Thus they also claim that it is in fact compatible with each of the bases above mentioned, e.g. retribution:

> […] a RJ procedure that refuses to 'hurt' offenders cannot give full consideration to all of the harms suffered by victims and against communities. […] [Thus] RJ procedures are […] retributive […]: victims get to 'face down' their offenders, inflicting a measure of humiliation on them that responds to the humiliation they themselves felt as victims (Bilz and Darley, 2004: 1249-50).

6. Some of the most important criticisms made to RJ.

We should not avoid here, nonetheless, if we want to attain a complete introductory understanding of what RJ is, several objections made by some opponents. Normative claims are mostly four: a) it is a response to crime that adds no extra punitive value to the economic burden derived from the civil reparation of the harm caused; b) basic legal principles are violated, such as proportionality (since RJ causes the lack of an objective

connection between the wrong and the sanction), impartiality (since the attitude of the parties involved becomes relevant in sentencing) and equality (as same acts could be punished in different ways depending on each victim-offender agreement); c) it is unclear why the victim should have a decisive role in sentencing, since the court is acting in the name of public interest to decide the lawbreaker's punishment because of an act against the whole society (Ashworth, 2002); and d) it is also said that RJ shows to be inadequate regarding certain types of crimes (especially those in which the values of some communities could be confronted with legal ones, as occurs in domestic violence).

Other arisen criticisms could be labeled as criminological, being mainly the following three: a) RJ entails the danger of widening the crime control net, and this could lead to increasing the punitiveness of the criminal system[8]; b) a concern about what happens when the reparative agreement is not fulfilled, and thus the victim is not restored[9]; and c) it has been also proved that RJ does not achieve a substantial decrease of recidivism (cfr. Daly, 2003: 230-231). This latter statement is countered by defenders with the claim that three elements are likely to reduce it: i) the fact of being treated fairly by the penal system is related with a subsequent law-abiding behavior (cfr. Bottoms, 2001: 102); ii) offender's moral reasoning could be facilitated by the confrontation with the victim, which could lead to a less illicit tendency (cfr. Bottoms, 2001: 91); and iii) participation of the family, friends and near communities could exert an effective informal control upon the delinquent that will expectedly benefit his future straight conduct (cfr. Larrauri, 2004).

7. The challenges that RJ needs to face in order to become a real alternative.

To finish with this sketch of RJ, it is important summing up the great challenges that it gives rise to. First, there is a need for an adequate equilibrium between the interests of all the parties involved in an offense: victim, lawbreaker and community. Thus the victim-driven approach that characterizes RJ must be properly tinged by the rehabilitation of the criminal, the avoiding of second victimization and the community involvement. In addition, RJ must adjust its scope, (1) concreting how will actually apply its pretended potentially inclusive character regarding each wrongdoing and (2) deciding which level of formalization it wants to have and what the relation with the traditional criminal system should be. Hence RJ seems to seek the building of a multifunctional model which provides different responses and procedures to offenses. Finally, there are obvious structural and cultural changes required to implement RJ practices, such as the prior existence of a structured community, citizens' awareness of the worth of their participation in solving conflicts and the subsidiary role of state and the formal criminal system.

[8] This objection is easily countered by RJ advocates arguing that the system should properly ensure a range of clear criteria of diversion to restorative programs.
[9] Which is replied with the empirical fact that those accords are usually satisfactory and with the claim that the traditional criminal system will deal with the breaches (cfr. LARRAURI, 2004: 439-464).

VIII. TWO OPPOSED RATIONALES ARGUING FOR THE INCOMPATIBILITY BETWEEN RJ AND RETRIBUTION.

In the following two chapters we will give an answer to the query of whether is it possible to make compatible retributivism with a model based on the principles and the programs of RJ. For that purpose we are going to focus on the chief arguments given by the most important experts in the matter, some of them defenders and some opponents of this emergent movement. Henceforth, we will meet two different rationales to reject the possible combination of retributive and restorative elements in a coherent and harmonized approach of justifying criminal punishment. One set of reasons are from the consequentialist John Braithwaite, which will be used to summarize a whole inclination within RJ advocates. On the other hand, Andrew Ashworth and Andrew von Hirsch will provide us a just deserts-based explanation for a (recently tinged) separation of both paradigms.

1. The thesis of incompatibility from a consequentialist approach.

1.1 The irreflexive caricature of contrasting RJ and retributive justice.

Restorative Justice is frequently represented as innovative and thus to be differentiated from more established criminal approaches (cfr. Morris and Young, 2000). For example, Graef (2000) considers RJ to be a 'third way', distanced from both retribution and rehabilitation. But H. Zehr was the first to create a really integrated and comprehensive model of RJ, firstly in a pamphlet titled *Retributive Justice, Restorative Justice* (Zehr, 1985), and then in his main book *Changing Lenses* (Zehr, 1990). He presented RJ as an alternative standard, opposed in all key respects to the principles underlying retributive justice. Thus since the very beginning of the complete conceptualization of RJ the relationship between the two tendencies was made particularly difficult by the apparent antagonism between their fundamental values, as represented in Zehr's two paradigms.

What does this oppositional contrast look like? It is said that RJ focuses on repairing the harm caused by crime, whereas retributive justice concentrates on punishing an offense; RJ is characterized by dialogue and negotiation among the involved parties, whereas retributive justice is illustrated with adversarial relations amongst them; and RJ assumes that community members or organizations must take a more active role, whereas for retributive justice the state represents society[1]. In sum, all the elements associated with "the good" (and the superior justice form) are in the RJ scheme whereas those associated with "the bad" (the inferior justice form) are in the retributive model. Therefore,

[1] For the complete account of this way of explaining the pretended opposition between restoration and retribution, cfr. DALY, 1999).

as K. Daly is not yet weary of reiteratively warn, a common analytical device used by RJ advocates is to draw contrasts between 'retributive', 'rehabilitative' and 'restorative' justice paradigms (cfr. Bazemore, 1996; Walgrave, 1995; Zehr, 1990), which are respectively connected with punishing the crime, treating the offender and repairing the harm. Thus

> In deploying these contrasts, RJ advocates demonstrate the superiority of their model over the other two, and especially over the retributive model. Such contrasts are not only self-serving (i.e., everything in the 'retributive' column seems nasty and brutish, whereas everything in the 'restorative' column seems nice and progressive), they also foreclose a discussion of the merits of each, of how the principles of each might be ranked in a hybrid model, or of how each could operate along side each other in a criminal justice system (Daly and Immarigeon, 1998: 32).

1.2 Consequentialist RJ and the resulting opposition with retribution.

According to John Braithwaite, for most RJ advocates this movement "is consequentialist [and therefore radically opposed to retributivism; cfr. Dolinko, 2003: 329] philosophically, methodologically and politically" (Braithwaite, 2002: 564). Precisely because of this assumed consequentialism, many of the limits that retributivists regard as central are also found to be important standards of RJ. Besides, despite the early traditional confronted way of presenting the matter, recently the movement is being seen as having both retributivist and reductivist ambitions, although reductivism is taken to be enacted via the mechanism of rehabilitation rather than deterrence. However, there are significant divisions within academic supporters of RJ on this issue. Braithwaite (2003: 1-20), for instance, argues that the alliance can only be with the latter aim. That is because his well-known account of reintegrative shaming (Braithwaite, 1989), which he has recently incorporated in the republican theory (Braithwaite and Pettit, 1990) of criminal justice and which he views as a form of RJ, is a consequentialist justification (cfr. Dolinko, 2003: 323-329). Thus he openly affirms not to see

> […] Restorative Justice embracing retribution, another intuition of great resonance and history. […] Compared with restorative dialogue, even non-restorative dialogue, punishment is less respectful. That is not to say that we should never resort to it. But when we do it should be on consequentialist grounds –because there is no alternative way of resisting injustice (Braithwaite, 2003: 2).

Braithwaite's claim that his RJ approach (and mostly the whole movement) is a call on "transcending North Atlantic Jurisprudence" is not simply a vain slogan. At least for him, since the author links a set of puzzling consequences to that demand. Even though he recognizes that some ideas from European and North American liberal legalism have proved particularly important and useful to all the world's peoples,

> […] there are many features of it we should reject. […] Unlike some RJ advocates I suspect we should totally reject proportionality as a criminal law doctrine. We should abolish just deserts,

> retribution and stigma as doctrines. While I do not think we should totally abolish mens rea and intention as the fundamental doctrines that guide the allocation of criminal responsibility, such casual notions of fault should be relegated to a subsidiary role (Braithwaite, 2003: 17).

What does this whole challenging refusal mean? There is enough ground to conclude that Braithwaite's RJ approach is not likely to be reconciled with a retributive justification of punishment. By plainly rejecting proportionality and any discussion about embracing it in sentencing, he is then closing the door to any possible agreement with most current versions of retributivism. Also the denial to accept any moral truth (the retributive slogan –that 'the guilty deserve to suffer'– and the consequent duty of the state to ensure punishment) leads him to make the case for the opposition between restoration and desert. Willing to appear as categorical as a collective volume may allow him to be, he makes this final statement, calling just deserts theorists to a total surrender in front of the obvious consequentialist superiority: "Until there is professional and popular clarity of understanding that retribution means upper limits while making the enforcement of lower limits on punishment an evil, the marriage of retribution and Restorative Justice is not a wedding we should want to attend" (Braithwaite, 2003: 18).

2. The thesis of incompatibility from a retributivist approach.

2.1 The initial total rejection made by Ashworth and von Hirsch in 1998.

We are now going to focus on the most important criticisms made by Ashworth and von Hirsch to RJ, which lead to this conclusion: because of the implications that RJ scheme has, it is not possible to make it totally compatible with a retributive approach of criminal punishment. They begin recalling that even Nils Christie –the academic founder of the movement– recognized that the victim's interest is not the only one involved in the facts of offenses: also the whole society has something in stake. As Andrew Ashworth rightly deduces, "this suggests that each crime is a wrong against the direct victim and against the community, and that each therefore has some consequential right to participation in the criminal justice process" (Ashworth, 1998b: 302).

The following two preliminary objections made to RJ in general will not yet lead us necessarily to the thesis of incompatibility. First, liberal (politically contractarian) desert theorists claim not to deflect attention from the question of the nature of the victim's interest. According to Ashworth, some basics in Modernity are that the state takes over the responsibility for government and law in order to ensure efficiency and consistency, and especially to displace vigilantism and to prevent people from 'taking the law into their own hands'[2]; and that therefore the state ought to control adjudication and

[2] For a critical review of this enlightened assumption, cfr. LARRAURI, 1997: 141-150.

sentencing; but that its doing so ought not to deprive victims of their right to restitution. Moreover, both Ashworth and von Hirsch consider a familiar weakness of RJ that it asserts "the need to ensure both compensation for the victim and some form of reparation to society at large, and yet fail to specify what the latter consists of and how it differs from punishment according to desert, the pursuit of a deterrent strategy or whatever" (Ashworth and von Hirsch, 1993-1994: 11).

Four additional key objections will definitely lead us to the thesis of incompatibility between a desert approach and RJ principles. First, in facing the proposal made by Braithwaite and Pettit, retributive theorists claim that some questions about the absence of safeguards against excessive penalties are raised, since the former authors do not propose any clear proportionality limits on sentencing, and appear to leave open the possibility of stern incapacitative and deterrent sanctions. According to the British philosopher Andrew Ashworth, the statement that what rectification requires will vary with the character and circumstances of the offender "suggests few practical constraints and, having jettisoned the punishment paradigm, their writings offer no clear rationale for upper limits on sentence severity" (Ashworth, 1998b: 306).

As a result, being proved that RJ offers no space at all for two central features of a desert-based account of legal punishment (proportionality and parsimony), especially in sentencing, it appears to be no possible reconciliation between those supposedly contradictory tendencies. Also the issue of societal restoration through RJ programs remains rather unclear and puzzles a proportionalist approach: "By what metric is it to be decided how much damage has been done to the community and how it needs to be restored?" (Ashworth, 1998b: 305). The British author proudly claims that the only satisfactory answer to this question would be to embrace a kind of just deserts scale, taking account of both harm and culpability (in fact, a close solution is adopted in Van Ness, 1993).

A third argument against the compatibility between the mentioned schemes follows from the objection that RJ, being based on the conflict-resolution paradigm, depends mostly on the willingness of victims to become involved, when some are legitimately unwilling. There is also a more general demand for clarity "about whether the victim's involvement in these processes is justified insofar as it may help the victim, or as a part of a reintegration process for the benefit of the wider community, or chiefly for the offender's future well-being" (Ashworth, 1998b: 306). The lack of equal treatment for equal wrongdoers that stems from the former observation, together with the latter suspicion of consequentialism posed by the fact that victims are really being used in the service of lawbreakers, or even of the whole polity, serves as powerful arguments in favor of the incompatibility thesis.

In addition, some retributivists see RJ programs as permitting such large participation of the wronged that they will unavoidably lead to the violation of basic procedural rights of the offender. The critics consider not enough justified giving victims power in deciding to prosecute, on the acceptance of a plea of guilty or above all on sentencing. According to Ashworth, victim-centered approaches often seem to assume, without much argument, that victims have some such entitlement. Thus this threatens to vice the criminal system with "a rogue individualism, which might make decisions depend on whether the particular victim is forgiving or vengeful" (Ashworth, 1998b: 306). This dreadfully combined lack of proportionality, moderation, impartiality and fairness is consequently opposed to a desert-based theory of punishment[3].

2.2 The 2003 'Making Amends' Model, a first attempt toward a fruitful encounter.

Notwithstanding the early seemingly radical refusal of any likely coexistence, Ashworth and von Hirsch left a little door ajar in 1998, thanks to some restorative writers who recognize that criminal offenses do have a double aspect, impinging on the rights of a victim and constituting some kind of wider harm. Thus it would be necessary to ensure that the restorative approach applies not only to the direct wronged but also to that secondary victim. The slight possibility of encounter ended up with the famous 'Making Amends' Model designed by Ashworth and von Hirsch, together with Shearing. First of all, we must note that five years later the prior hard criticisms were refined and tinged (cfr. von Hirsch, Ashworth and Clifford, 2003: 22-24). The new way of facing their own critique is trying to specify aims and limits better than RJ advocates, summed up in four slogans: a) establishment of consistent and adequately prioritized goals; b) guidance for deciding individual cases; c) sufficient fairness constraints on the severity of dispositions; and d) evaluation criteria regarding the relevance of the restated aims.

Henceforth we are going to explain why 'Making Amends' is not a complete engagement in the call for considering retribution compatible with restoration, whilst it is a first attempt. This model proposes a response negotiated between the offender and his victim, which involves (1) the implicit or explicit acknowledgement of fault and (2) an apologetic stance on the part of the lawbreaker, ordinarily conveyed through having him to undertake a reparative task. This is obviously a shift from the purely desert ideal, where penal censure is authoritatively conveyed through the imposition of the sanction. However, the model is 'retributive' in the sense that it is primarily responsive to past wrongdoing. As it is also a species of informal moral discourse, the probably granted consequential effects are neither the sole nor the central point of the repentant action. In proponents' words,

[3] There has also been empirically proved that while RJ and retribution are able to co-exist in theory, this may not be so easy in practical situations. Drawing on their knowledge of the practice of RJ in Canada, Roberts and Roach (2003: 243-244), for example, suggest that 'circle sentencing' may lead to violations of three retributive sentencing principles –proportionality, restraint (parsimony) and equity.

> The making-amends model is victim/offender-focused: it is conceived as a certain kind of discursive interchange between them. As a result, other possible goals are given less emphasis, if any; the model is not explicitly aimed at maximizing crime control effects, or reducing fear of crime, or the like. This kind of trade-off is inevitable: trying to accomplish all goals simultaneously is tantamount to having no meaningful goals at all (von Hirsch, Ashworth and Clifford, 2003: 32).

The real limitation of this 'Making Amends' Model for considering it a coherent account of a plausible coexistence within a mixed retributive-restorative scheme is its restricted scope of application. According to the authors, this proposal is addressed only to a certain kind of case: "one in which there is an identifiable person who is the offender, another identifiable person who is the victim and a victimizing act which infringes the latter's rights" (von Hirsch, Ashworth and Clifford, 2003: 28). Not willing to set aside none of the just deserts basic principles in courts decisions –proportionality, impartiality, parsimony and fairness–, the final proposition is to give restorative approaches, using a making-amends rationale, a more modest role within a larger structure provided by a proportionalist sentencing system. Our intuitions are so confirmed by the complementary development of von Hirsch, Ashworth and Clifford (2003: 38):

> This [making-amends scheme] would apply to a specified range of victimizing offenses –say, property offenses not involving significant violence. For such cases, guilt or innocence would continue to be determined by the courts, with traditional procedural safeguards. Upon a determination of guilt, the case would be referred to a victim-offender conference, with a facilitator presiding, which would seek a negotiated disposition […]. The dispositions would be deemed to be punishments, and hence subject to proportionality requirements. These latter requirements, however, would be loosened somewhat (although not a great deal) to allow the participants additional leeway for agreeing upon a disposition.

Of course this alternative proposal avoids most of the desert-based objections that RJ must deal with, since the victim-offender negotiation is only endeavored after an impartial institutional (respectful of the procedural safeguards within a due process) declaration of guilt and would still operate through firm proportionality limits, based on the system's assessment of seriousness and appropriate severity. But it fails to engage more deeply with the underlying philosophy of the RJ movement, and therefore it must not be seen as a satisfactory way of claiming the coherent and harmonized encounter between the rationales of restitution and retribution. To sum up, this account manages to keep mostly untouched the basic principles of just deserts theory in sentencing while giving some presence to certain RJ programs within the traditional scheme. However, it does not show a sufficiently consistent and coordinated foundation for defending the compatibility of the two discussed paradigms. Thus the problem remains unsolved, at least until we arrive to the following chapter, where a systematic explanation of the case for a mixed retributive-restorative criminal system is intended to be given.

IX. THE CASE FOR A MIXED RETRIBUTIVE–RESTORATIVE PENAL SYSTEM.

We have discussed above one possible answer to the question of whether restoration and retribution are compatible both philosophically and in practice. The two different kinds of rationales explored are to reject –in spite of the last attempt of joint– the combination of retributive and restorative elements in a coherent and harmonized approach of justifying criminal punishment. The main point of divergence could be placed in the striking stress that RJ proponents put on its forward-looking, future-oriented capacity –remedying the effects of the offense as the touchstone of a just response to crime[1]. By contrast, we are going to give a narrative account to make the case for a mixed retributive-restorative system, collecting arguments from a set of authors that belong to different lines of thought and sensibilities (we will especially focus on Lucia Zedner, Kathleen Daly and Anthony Duff) and placing them within a consistent discourse to sustain the thesis of compatibility.

1. The systematization of a right intuition by Lucia Zedner.

Lucia Zedner was the first scholar to claim the need for a sincere encounter between two supposedly opposed (as presented before the publication of her article) paradigms: retribution and restoration. She asked herself, more than a decade ago, whether it was possible to reconcile RJ and just deserts. After analyzing the purposes and principles of legal punishment, her answer was a qualified albeit conditional 'yes'. Zedner's careful consideration of the points of overlap and difference is reinforced by the empirical study of what occurs in practices that may be termed 'restorative'. Let us synthesize her argument.

1.1 An attempt to overcome the opposition between reparation and retribution.

Zedner first acknowledged that where adversary champions of retributive and reparative models of justice have entered into battle with one another to expose the inadequacies or undesirability of the other's model, the result is "that positions have become polarized. Retributive and reparative justice are posed as antinomies whose claims rival one another and whose goals must be in conflict" (Zedner, 1994: 228). However, willing to overcome this vain and futile contrast, Zedner's aim is to discover whether the penal system can or should embrace both punitive and reparative aims simultaneously. After giving an account of what retribution and reparation paradigms mean –which slightly

[1] Howard Zehr, for example, says that "when a wrong occurs, the central question ought not to be 'What should be done to the offender?' or 'What does the offender deserve?'"; rather, "the primary question ought to be, 'What can be done to make things right?'" (ZEHR, 1990: 186). Indeed, he would define justice as restoration with the following expression: "When someone wrongs another, he or she has an obligation to make things right. This is what justice should be about" (ZEHR, 1990: 197).

differs from the ones sketched in the first and seventh chapters of this TFC–, the author makes out the chance of a harmonized and fruitful encounter between reparative and retributive justice.

1.2 How to make reparation compatible with retribution?

So Zedner is convinced that reparation can fulfill the purpose of punishment; thus it is to have a place if three basic elements of the prevailing paradigm are satisfied. First, RJ must face the objection that it has no intrinsic punitive quality added to the enforcement of civil liabilities. But the requirement of a painful imposition is accomplished by the reparative model, since compensation orders extort money which lawbreakers would not in other ways have been required to pay and so it may been said that they inflict "pain which is additional to that which civil law would otherwise exact" (Zedner, 1994: 240). More-over, the experience of mediation in other areas suggests a further penal character captured by the following question: should offenders be brought back to court if they fail to fulfill their part of the bargain?

Second, a broader conception of RJ "which recognizes that the rights infringed by crime are not those of the victim alone but are held in common socially" (Zedner, 1994: 241) will surely overcome the objection of not distinguishing a public wrong. Even where there is no identifiable victim, reparation to the wider community for actual harms or social endangerment is owed. In a mediation scheme, such a communal dimension is achieved by elevating the intermediary "from the position of go-between in an essentially bilateral negotiation to that of a third party representing the public interest" (Zedner, 1994: 242). As a result, the requirement that the offender's crime be socially known and censured is fulfilled through a restorative outlook.

Third, RJ is also charged to shift the focus on to harm and thus ignore the fundamental basis of criminal liability for serious misdeeds (*mens rea*). But to pose culpability and harm as antinomies fails to recognize the intimate relationship that generally exists between them. According to Lucia Zedner (1994: 243), "whilst [in a reparative paradigm] culpability would no longer be the primary determinant of punishment, the offender's state of mind would nonetheless remain integral to the choice of disposal". The gravity of the wrong, then, must be settled by both criminal's culpability and harm caused, since the lawbreaker, threatening the victim's presumption of security, is effectively or at least potentially (e.g. in attempts or conspiracies) inflicting damage upon us and should be held liable for so doing.

1.3 Can reparation comply with the principles of punishment?

If RJ is to claim a full place within a penal system, Zedner also demands that it must accord with the three principles which delimit the intrusive powers of the state. First, the

requirement of fairness is supposedly neglected by the reparative approach since it would create a range of penalties which would have little regard to the means of the offender and so impinge differently on rich and poor. This objection is scarcely solved by Zedner, whose main reasoning here is to ask for a weighed up mode of adequately balancing the rights and interests of both criminals and victims. Something similar happens with the charge that RJ does not fulfill the desert-based proportionality principle. The author appeals to this counterargument rather than to a founded judgment:

> Deciding how many years of imprisonment are merited by a rape or a robbery [as desert theorists sometimes try to do] is no more or less contrived than fixing on some value (monetary or other) in relation to the harm. And even if the calculation is based on a series of inadequate equivalences, at the very least reparation provides for some tangible or symbolic compensation to the victim, whereas punishment alone provides none at all (Zedner, 1994: 247).

The third condition apparently ignored is consistency, since RJ would allow the victim to largely influence on sentencing. But, as Zedner rightly notices, reorientating the system around 'making good' must not inevitably entail allowing the injured to usurp the state role in determining the appropriate sentence. Reparation is owed not just to the wronged but also to all whose interests are threatened, and it is not appropriate for the victim to determine the nature or extent of restoration. The harm suffered is a public one and it is for society to legitimately establish what is necessary to effect reparation. Thus the case is made for the state retaining the right to decide on the penalty within a restorative model.

1.4 Conclusion: the necessary integration of retributive and reparative rationales.

Lucia Zedner correctly notes that reparation and retributive punishment coincide in a central point: both derive their authority from the offense itself and impose penalties according to the seriousness of the particular crime, thus excluding the utilitarian resort to take into consideration factors beyond the wrongdoing (deterrence, recidivism or the criminal record) as a strict constraint on the *ius puniendi*. But "if reparation and retribution were to be wholly reconciled, then it would be necessary to devise a measure which integrated intent and harm in setting offense seriousness" (Zedner, 1994: 248-249), since the adequate requirement of proportionality needs to harmonize both demands of *mens rea* and damage inflicted on the victim. As a result of all the hitherto stated, the author's conclusion is at the same time optimistic and cautious:

> […] whilst 'making good' entails certain difficulties within a [retributive] criminal justice system, reparation is quite capable of fulfilling the basic demands of punishment and, thus far, is reconcilable with retribution. The basic danger, however, is that the attempt to accommodate reparative justice to the rationale of punishment so perverts its underlying rationale as to strip it of much of its original appeal, not least its commitment to repairing ruptured social bonds (Zedner, 1994: 250).

2. An insistent claim by Kathleen Daly: punishment's place within RJ.

Lucia Zedner's urgent demand had latter acceptance in academic discussion, seeking to reconcile retribution and restoration. Four years later Daly and Immarigeon argued that, in order to attain the new paradigm of RJ, "scholars and activists must get beyond oppositional retributive-restorative caricatures of justice models, address the relationship of retributivism and consequentialism to RJ, and use more precise terms and promise less" (Daly and Immarigeon, 1998: 23). Later, Daly (2000: 33-54) then tried to respond what the role of punishment might be within RJ, suggesting that proponents of this renewed rationale should not attempt to disassociate themselves from a number of common-place understandings about what to do in response to crime, including the need to punish lawbreakers, prevent them from further offending, separate them from the community, and aid them to reform themselves.

Given the regret that the oppositional contrast between retributive and RJ has become a permanent fixture in the field, a case is made for stop the cartoon of so presenting the debate. Both philosophical arguments and her empirical experience lead to the view that "RJ is best characterized as a practice that flexibly incorporates 'both ways' –that is, it contains elements of retributive and rehabilitative justice; but, at the same time, it contains several new elements that give it a unique restorative stamp" (Daly, 2000: 35). Specifically, RJ practices do focus on the crime and the offender; they are concerned with censuring past behavior and with changing future conduct; and they seek to agree on sanctions or outcomes that are proportionate and that also 'make things right' in individual cases.

As a result, it should not be removed that there are chief innovations within RJ: victims are to take a more central role in the process; the emphasis is on repairing the harm between offender and victim; community members or organizations take a more active role in the justice process, working along with state institutions; and the process involves dialogue and negotiation among the major parties with a stake in the dispute. Hence the novelty brought by this outlook is that "reparation to the victim (or to the community) are the primary aims, and punishment is minimized. Thus, a key difference in the stated aims of retributive and RJ turns on the meaning and purpose of punishment" (Daly, 2000: 38). But Daly's main argument in sustaining the case for the compatible and harmonized relationship among retribution and restoration is that we should embrace (not get rid of) the concept of punishment as the main activity of the state's response to crime and then RJ processes and sanctions must be seen as 'alternative punishments'[2] rather than principally 'alternatives to punishment'. Holding a largely inclusive definition

[2] This concept is originally from DUFF, 1992: 43-68, and will be later discussed in epigraph 4.

of punitive practices[3], "it would be impossible to eliminate the idea of punishment from a restorative response to crime" (Daly, 2000: 39).

2.1 Does punishment have a place in RJ? Definitely.

Therefore, Kathleen Daly confidently states that both the weight of philosophical and legal arguments, together with empirical study, suggests that punishment, broadly considered in order to include retributive censure, should form part of what occurs in a RJ process. This is to say that the ability of victims to be generous and forgiving and for offenders to 'make amends' to those whom they wronged –elements that are desirable objectives in a RJ scheme– "can only come about during or after a process when punishment, broadly defined, occurs" (Daly, 2000: 41). Hence the case is made for the compatibility between desert and restoration when the concept of criminal reproach, as retributive and backward-looking, is connected to its forward-looking capacity.

Albeit Daly's theoretical arguments are convincing enough, the main force of her claim is the empirical background which her experience adds. That allows her to overcome the contrast between retributive and RJ by means of her experimental research: "Having observed many conferences, I find that elements of censure, paying back the victim, and helping the offender can all feature in a conference discussion[4]" (Daly, 2000: 45). Thus retributive, restorative and rehabilitative principles and terms are intermingled, or they may shift in emphasis, depending on the conference phase. As the author also stated in another illuminating article:

> [Having observed] close to 60 conferences […] I find that routine practices do not reflect a model of strong contrasts. Instead, I see conferences as a flexible incorporation of some elements of retributive justice (in particular, censure for past offenses), some elements of rehabilitative justice (in particular, what shall we do to encourage future law-abiding behavior?), together with new terms that give the process a particular restorative justice stamp (by asking, for example, how do we repair the harm? [and] how can the offender make amends to a victim?) (Daly, 1999: 2).

2.2 Daly's conclusion: the centrality of RJ's process in order to allocate punishment.

> The symbolic reparation sequence is at the heart of a RJ process. It may be induced by (or occur simultaneously with) retributive-based censure or denunciation of the act. […] Although it may seem paradoxical to some RJ advocates, the conclusion I draw is that punishment, defined broadly to include retributive censure, should not be excised from a RJ process. Rather, punishment can be seen to make RJ possible (Daly, 2000: 48).

[3] As "anything that is unpleasant, a burden, or an imposition of some sort on an offender" (DALY, 2000: 39), compensation is considered a punishment, since it is having to attend a counseling program, paying a fine, or having to report to a probation officer on a regular basis (cfr. also DUFF, 1992 and 2001).

[4] "[…] when conference participants talk about the offense and its impact, why the offense came about, and the ways an offender can restore the harm, elements of censure, paying back the victim, and helping the offender to reform are all invoked" (DALY and IMMARIGEON, 1998: 33).

In order to do so, the author understands that the RJ procedure is the most important feature, the place where these twofold backward and forward-looking approaches could be adequately achieved. For it is the process, not the penalties per se, that most distinguishes informal (and restorative) from formal (and retributive or rehabilitative) justice. It is within this process where the meaning and purpose of a restorative accord can be forged, agreed upon, and taken on by a lawbreaker for a victim (or, where relevant, others). In her words, "it is the understanding between an offender and a victim (and often others present) of how a sanction connects meaningfully with a harm that can make a process and outcome in part 'restorative', at least ideally[5]" (Daly, 2000: 48).

3. Consequentialist acceptance of punishment within RJ processes.

David Dolinko also turns to some interesting consequentialist justifications of the need for a place for punishment within RJ, which undoubtedly complement Daly's brilliant account. He notes that Daniel Van Ness (1993), like John Braithwaite (1999), champions RJ while refusing to do away with the concept of crime, based on two chief grounds: a) to rely solely on civil or tort law would do nothing to vindicate the rights of secondary victims of misdeeds; and b) the fact that the "criminal law «provides a controlled mechanism for dealing with those accused of crossing the boundaries of socially tolerable behavior» [Van Ness, 1993: 263] and thereby restrains the [uncontrolled and vengeful] retributive impulse[6]" (Dolinko, 2003: 341).

The curious feature of both of these arguments is that they call not merely for retaining the concept of crime as a distinct category of behavior, but for continuing to punish offenders, even with penalties (like incarceration) that go well beyond simply 'repairing the harm' to victims. As a result, the conclusion is obvious: "Van Ness's reasoning thus supports retaining […] the practice of retributive and deterrent punishment and suggests that the restorative justice goal of 'repair' should at most supplement such punishment rather than displacing it" (Dolinko, 2003: 342). The reconstructed claim sustained from a consequentialist stance, fully adopted by Dolinko, is that even where victims declare to be fully repaired,

> […] it may well seem wrong to treat that as the end of the matter and permit the offender to escape any penalty or punishment at all. We may not, after all, believe that society's response to crime can or should be limited to repairing the particular harm that a particular crime inflicts on its particular victims. We may believe instead that minimizing the likelihood of future crimes

[5] Because, as she recognizes afterwards, "for a restorative/reparative process to work effectively, there needs to be a genuine admission of responsibility, remorse, or guilt for a wrong. Unless that symbolic reparation occurs, the rest will not follow easily" (DALY, 2000: 48).

[6] It seems that Van Ness appears to mean that if the notion of crime were abandoned altogether and wrongdoing carried only tort-law penalties, enraged citizens would likely vent their retributive hatred of such boundary-crossers through uncontrolled private acts of vengeance.

> and giving offenders their "just deserts" are independently significant goals. Repairing the harms inflicted by crime would then be seen as a separate and additional goal, supplementing but not displacing the traditional aims of deterrence and retribution (Dolinko, 2003: 339).

4. R. Anthony Duff, the first move toward a retributive-restorative system.

Duff is also aware of the importance of overcoming the apparent contrast between RJ and retribution: it is a mistake to assume that looking for restoration implies abandoning punishment. In his view, when we ask what it is that requires repair, the answer must refer not only to whatever material harm caused by the crime, but to the wrong that was done. That fractured the relationship between the offender and the victim (and the broader community), and that is what must be acknowledged and made up for if a genuine reconciliation is to be achieved. A restorative process that is to be appropriate to crime must therefore be one that seeks an adequate recognition, by the lawbreaker and by others, of the wrong done –a recognition that must for the offender, if genuine, be repentant; and that looks for an appropriate apologetic reparation for that wrong from him.

4.1 Punishment as a communicative and retributive penance aspiring to restore.

Thus Duff tries to break down the commonly accepted opposition between punishment and the notions of reparation, reconciliation and rehabilitation. He suggests that RJ should be seen as containing 'alternative punishments' rather than as an alternative to punishment, since he wants to retain the latter concept while valuing the development of substitute modes of sanctioning. His proposal is a communicative process "whose very punitive aspects are designed to serve, and are appropriate as punishment because they serve, those reparative, reformative and reconciliatory aims" (Duff, 1992: 50). This is why Daly likes to "place Duff on the continuum between a mainly desert-based view of censure (von Hirsch, 199[8]; Narayan, 1993) and a highly consequentialist view (Braithwaite and Pettit, 1990), although he is closer to a desert-based position" (Daly, 2000: 41)[7].

Remember that Duff's secular penance must retain the communicative character, according to the respect which is owed to the offender as a moral agent. This is to justify the attempt of achieving punishment's purposes, since the last word is in the wrongdoer's free will to accept or reject the message and to come to repent his crime or not. So we can see, as Daly graphically explains, how Duff imagines that a lawbreaker would be involved in the determination of his own penalty, in discussion with legal authorities and, where appropriate, a victim: "Although he does not have the conferencing model specifically in mind in his 1992 publication, his scenario of 'communicative punishment' is what ideally is supposed to occur in the conference process" (Daly, 2000: 42).

[7] We need to bear in mind, at this point, Duff's full account explained on chapters III and V.

4.2 A proportionality objection and the need for justifying concrete forms of punishment.

An objection that Duff acknowledges and does not avoid, since he consciously declares to be a retributivist, is the desert-based claim that punishment must above all be proportioned to guilt. Yet to allow the delinquent's sentence to be determined by a discussion between involved parties and the court will inevitably result in larger disparities than actual ones. But Duff assures that his sketched explanation "certainly entails a principle of proportion between the offense and punishment […] [insofar as it] communicate[s] to the offender an appropriate condemnation of her crime –a critical judgement which is appropriate to the character and seriousness of that offense" (Duff, 1992: 61).

As drafted above, Duff's theory of punishment as a process of communication and secular penance can make good sense of various kinds of community sanctions. Although those penalties were first conceived as a means to achieve the rehabilitative ideal, we agree with the following claim made by Mantle, Fox and Dhami (2005, 18): "[…] there is no reason in principle why re-socialization could not include some form of dyadic encounter between offender and victim, or supervision by community mentors". Indeed, Duff calls for the probation service to be much more closely allied to the aims of RJ, through the remolding of that institution. And it would be reasonable to suggest that RJ's long-term contribution could be in spurring the development of a renewed kind of rehabilitation within the penal system.

This leads to another central demand in Duff's writings, an urgent request for scholars. He warned in 1992 that "philosophical discussions of criminal punishment usually focus on such issues as why or whether we should punish at all, whom we should punish, and how much we should punish" (Duff, 1992: 43) whilst setting aside the issue of how we should punish: what material forms can punishment properly take? The need for an accurate justification for the use of concrete forms of penal sanctions is guided by the sincere worry of finding out how the infliction of a painful measure by the state could be grounded in terms of respectful treatment and human rights. But also by more pragmatic concerns such as the worrying increase of the world-wide prison population in the last 20 years (in Spain, e.g., the current 67.314 persons in jail more than double the existing number in 1990 –33.035).

4.3 A model of victim-offender mediation as a species of penitential punishment.

Duff's sketch of victim-offender programs provides an appropriate model of punishment as a communicative enterprise; indeed, part of his recent concern is to show "that we should shift [part of] our orthodox paradigms of criminal punishment in this direction" (Duff, 2001: 92), while subjecting that current practices to certain refinements. Above all, victim-offender mediation meets the standard accounts of what punishment is: a) it is intentionally and integrally painful or burdensome in its procedure and its outcome, for

"the process of being confronted with and having to listen to the victim should be painful for the offender, as is the remorse that that process aims to induce" (Duff, 2001: 97); moreover, undertaken reparation must also be burdensome if it is to give weight to the apology it is meant to express; b) it is self-imposed on lawbreakers for their crimes; c) the scheme is authorized by the law, organized by an official mediator and its outcome must be approved by a court; and d) censure is internal to the process, thanks to the blame that the wrongdoer receives.

Moreover, criminal mediation can serve the appropriate aims of legal punishment and should be thus conceived, organized and justified, "even if this requires us to modify conventional understandings of both reparation and punishment" (Duff, 2001: 97). First, mediation is a communicative process between the victim and the delinquent about the nature and implications of the crime. It aims to bring the offender to face up to his illicit act and its consequent reparation as a way of expressing his apology to the one he mistreated. It is also punitive since it involves censure and intentionally burdensome amends[8]. Second, it is retributive in that it seeks to impose on the lawbreaker the deserved suffering for his crime in such a way that he will come to understand why and that he deserves it, bringing him to recognize and repent the wrong.

Third, criminal mediation is also future-directed: it aims to reconcile victim and offender through apologetic reparation and to dissuade the latter from future crimes after a regretful recognition of the wrong. The relation between the process and the pursued goods is not merely instrumental, since the ends themselves specify the means that are appropriate to them. Fourth, the reparative burden undertaken by the lawbreaker can be seen as a species of penal hard treatment which is itself integral to the communicative purpose of criminal mediation as a kind of penalty. Fifth, it is clearly inclusionary, since "it brings the offender and the victim together, and seeks to reconcile them as fellow citizens" (Duff, 2001: 98). To sum up, the process aims to convey the former to confront and to respond adequately to his wrongdoing. However, the problem is yet to see when this model is practicable or appropriate.

4.4 Probation and community service as communicative and penitential punishments.

Duff accepts his own challenge and tries to justify concrete penalties that are in use in our criminal systems. Here we will focus on two forms of state sanctions which are slightly readjusted by Duff in order to make them properly fit to his normative account of punishment and as a proposal of what material structure a mixed retributive-restorative system is supposed to have. Taking the example of probation, the author finds out that its proper aims are not in conflict with, indeed that they match, the ends of punishment

[8] Yet a problem remains unsolved: mediation entails a kind of voluntary participation of the offender, in a way that defies Aquinas's substantial requirement of punishment –being something *contra voluntatem*.

as a mode of communicative censure. First, the element of supervision –the offender is required to report regularly to his probation officer– enables a formal check on the former's conduct, and provides a structure within which he can receive advice and help in avoiding future criminal behavior. Second, further conditions can be attached for making the control more intense and effective, whilst the reproach more burdensome. But

> […] this is not to say that they are imposed […] *simply* in order to burden or pain offenders […]. It is rather to say that they are imposed *for* their offences, as responses that aim to bring home to them the character and implications of those offences as public wrongs and thus to persuade them to see that they must (and how they can) modify their further conduct (Duff, 2001: 102).[9]

Then a combination of victim-offender mediation and probation is envisaged by Duff for certain crimes with direct victims. In such a proposal, the court could make a probation order including a requirement to take part in the mediation that the probation officer will organize and conduct, whilst afterwards will also have to approve whatever reparative measures agreed in the process. So conceived, mediation is taken to be a fully fledged punishment within the penal system: it presupposes the offender's conviction of a crime; the process aims to bring home to the lawbreaker the censure that his public wrong deserves; and the probation officer makes clear that the reproach comes not just from the victim but from the whole polity which shares in the harm caused. Moreover, "by undertaking reparative work for the victim or paying compensation, the offender communicates to the wider community, as well as to the victim, his apologetic recognition of the wrong he has done" (Duff, 2001: 104).

Albeit this is a remarkable attempt of putting together the legitimate demands of both restorative and retributive claims and a notable step forward in the way of finding out such a mixed model, sometimes there will be no individual victim. But community service can bridge the former gap, as a penalty that involves reparation to the whole polity. This sanction, as a burdensome task that the offender would not otherwise have undertaken, serves two basic roles in Duff's proposal, apart from any material benefit. First, it constitutes a forceful public apology required on a criminal for an offense, providing an authorized expression of the repentance to the fellow citizens and a kind of commitment to avoid wrongdoing in future. But it is also a means by which an unrepentant malefactor can properly be brought to do so, for intrinsic to it is the censure the crime deserves and seeks to focus his attention on such act and its implications, hoping to induce remorse.

But still one problem remains partially up in the air: for what kind of criminal deeds this mixed retributive-restorative model must apply and exactly what sort of concrete penalties must thus be connected with each type of offense? Even though useful steps have been made in order to find out a proper solution, further investigations will be needed.

[9] Italics are in the original text. Duff's proposal, albeit thought-provoking, raises an unsolved question: such measures are mainly about the individualization of punishment or, instead, a penitentiary concern?

CONCLUSIONS.

Once finished the development of the TFC, in this last section we will concentrate on the conclusions that must be drawn after the comprehension of the nine former chapters. We assessed above some current Anglo-Saxon trends about the criminal justice system and the justification of punishment. Particularly we studied two different kinds of approaches (retributivism and restoration) and whether there is a possible way of promoting an encounter and understanding between them. First we deeply examined Moore's and Duff's theories of retributive punishment –focusing on their main strengthens but also presenting and dealing with their major shortcomings. Then we introduced Finnis's innovative restoration of Saint Thomas Aquinas's teachings regarding legal punishment and confronted some derived considerations with the former accounts. Finally we got to explain what RJ is and tried to reply whether it is compatible with retribution by thoroughly evaluating the most significant arguments given for and against. As a result, we are able to conclude the following decalogue, in order to summarize the main points of our thesis:

1. In the last 30 years we have experienced in the Anglo-Saxon world the emergence of two parallel tendencies concerning the justification of punishment and criminal justice systems. Apart from RJ, a group of several renewed and revised retributive theories has taken a central position in the academic field, first challenging the previous well-accepted dogma of rehabilitation and later developing consistent and suitable proposals in order to establish as the prevalent paradigm. Far from the currently old-fashioned accounts given in the Enlightenment by Kant and Hegel, some contemporary versions of retributivism have appeared to use a desert rationale in justifying the imposition of criminal sanctions, being three of the latest and most original the ones by the American Michael S. Moore, the Scottish R. Anthony Duff and the Australian John M. Finnis.

2. Moore's account on the retributive justification of punishment is largely based on the developed and rather reasonable idea that such a principle is stemmed from our natural punitive judgments, which we make out of our emotions and beliefs when a crime is committed. However, Moore offers an argument that is not founded on the resentment or anger we feel at the wrongdoings of others –indeed, he insistently manages to overcome Nietzsche's critique of the retributive urge based on such a barbarous reaction. Instead, he makes a sharp and subtle move from a third person to a first person stance in order to challenge us to answer what we ourselves may feel at our wrongdoing. His reply is based on the common experience of self guilt: if we were to commit a horrific misdeed –but also a kind of *mala prohibita* act–, we would undergo –Moore hopes– blame to the extent of the nature of our offense or misdemeanor (in proportion to its wrongfulness).

Thus a further step comes when we assess that, given that feeling, we would judge that we ought to be punished. Since that emotion of guilt is virtuous and virtuous emotions are good heuristic guides to the truth of the moral judgments they generate, we can therefore justify the verdict that we ought to be punished if we commit such an illicit act. But how can we move from this own-applied deduction to others? If we are to respect actual and potential criminals as human beings –moral rational persons–, we must then make the same judgment about their penal desert as we would do about ourselves: that they should be punished in proportion to the wrongfulness of their offense. As a result of the kind of argumentation in which this conclusion is based, this approach is taken to be too intuitive to lay the foundations of a whole theory of state legal punishment.

3. Duff's theory of penitential punishment brilliantly affirms that it should be twofold: a) communicative, not merely expressive, since it is ideally a two-way enterprise, not a one-way directive aimed at a passive wrongdoer; and b) retributive in that it aims to impose on the offender the suffering (the pain of condemnation and of recognized guilt; the burden of reparation) which he deserves for his crime. Such an innovative and suggestive way of putting together the double backward and forward-looking characters of punishment merits high recognition. But Duff's mixture of those two features is neither merely incidental nor simply naïve. Precisely because punishment is backward-looking (retribution for a past offense), he argues that it is also future-oriented in that it seeks to induce and to manifest that process of repentance, reform and reparation which will restore the lawbreaker's moral standing in the community whose values he flouted. Thus it is the painful condemnation he receives (which is itself internal to the penalty) that should bring him to understand and to accept responsibility for his crime, to repent the illicit act, and in doing so to realize that he should avoid such misconduct in the future.

We can sum up the following five conclusions from Duff's account: a) legal institutional punishment should be an enterprise that aims to communicate to offenders the censure they deserve for their crimes, and thus bring them to repent, to reform themselves and to reconcile with those they have wronged; b) this conception is a morally plausible rationale for penal hard treatment as part of this communicative endeavor –as a secular penance, serving the former goals; c) it makes sense of the retributive concern that punishment must focus on and be justified by its relation to the misdeed for which it is imposed, but also partially to the consequentialist urge to achieve some further good; d) this theory properly revisits the mentioned claims, by portraying punishment as both backward and forward-looking, albeit insisting that it is not to be justified as a contingently efficient instrumental means to the ends it aspires to attain –rather, as a method that is intrinsically appropriate to attempt to pursue those purposes even if we believe that it will fail; and e) punishment thus conceived is consistent with –indeed expressive of– the defining values of a liberal-communitarian polity, since it addresses offenders as

responsible moral agents, it is inclusionary –treating lawbreakers as full members of the normative community–, and it respects their autonomy (by seeking to persuade not to coerce), freedom (insofar as it is finally up to the wrongdoers to be truly repentant and reconciled or not) and privacy (addressing only certain public aspects of their lives).

4. Despite its detail and complexity, Moore's argument appears to amount to little more than an appeal to the classic retributive intuition (expressed in first-person cases through the emotions of blame) that 'the guilty deserve to suffer'. Accordingly, some further development is needed in order to give a much more consistent and coherent rational justification about why they should suffer (what it is so particular about crime that makes such consequence appropriate or required), what they should undergo or why it should be a proper task for the state to inflict such punishment or burden upon them. However, this account rightly suggests that we should at least portray punishment as related to, or continuous with, our moral responses to wrongdoing, which are themselves structured by such rational feelings as guilt (at one's illicit deed) and indignation (at others' crimes). Thus such emotions point us towards, if not a direct justification of legal punishment, at least a clearer idea of what the thought that the guilty deserve to suffer might mean.

Duff's theory faces two main objections that need further response. First, it is argued that penance is genuinely undertaken voluntarily, unlike criminal punishment, which is intrinsically coercive –since it is imposed on the offender after the trial without regard of his willingness to accept or reject it. Duff's reply based on a compulsory penance (whose aim is to persuade the lawbreaker to confront and repent his wrongdoing, to force his attention onto his offense, to bring him to understand its nature and implications and to see that it was wrong and why it was wrong) needs to lie elsewhere in order to be properly justified. Besides, the Scottish author finds it difficult to give a consistent explanation about punishing delinquents who have already repented, or those who are taken to be 'beyond saving' –albeit this latter problem is mostly solved. Having acknowledged these shortcomings, however, the study of Finnis's restoration of Saint Thomas Aquinas's doctrine regarding criminal punishment gives us an opportunity to find the proper place for the original and challenging proposals by both Moore and Duff.

5. Finnis's main innovation is to question the commonly assumed claim that the very essence of punishment falls under the domain of the sensory and emotional –as the mere infliction of some kind of pain. In contrast, its real point and operation is in the level of the will, i.e. in one's responsiveness to the intelligible goods one understands. Hence the authentic substance of criminal punishment is that it subjects offenders to something contrary to their wills, since the core of offenses is that in their wrongful acts criminals ascribed too much to their own preferences, the measure of excess being the relevant law or moral norm for preserving and promoting the common good. In addition, he gives a more consistent explanation of the future-oriented character of legal punishment: the

healing function envisaged by Aquinas involves not only reform, deterrence and coercive inducement to decent conduct, but even primarily the redressing of the disorder caused by the misdeed. Thus punishment is forward-looking when seeking to restore an unjust inequality introduced into a whole community by the wrongdoer's criminal choice and action.

This approach offers a plausible rationale for accurately relocating Moore's excessively intuitive theory, in order to overcome the shortcoming: our most inner leanings and beliefs are not by definition opposite to moral reasoning. Indeed, inclinations –such as the retributive judgment– can well be constitutionally ordered and directed by our common faculty of understanding. Even being interior to our intellectual capacities, they should be integrated into this constituent order in the soul, which is the source of the whole society. Furthermore, Duff's main weakness is properly redressed since it is possible to conceive punishment as a social penance aimed to stabilizing the law, an account that will not rely on the will of the subject to undertake the penalty, as long as the internal attitude of the offender is clearly independent of the achievement of the former purpose. Even though the issue of what place to assign to antecedent repentance within retribution is not totally solved, the above fruitful discussion allows us to introduce two chief aspects: a) the possibility of accepting the charity-based value of mercy as internal to the theory of punishment, and b) the reasonable mitigation of an already imposed sanction to the pleading defendant (with a view to wider considerations of common good) or after an undue delay of the trial (taking into account the prior sufferings so caused to the accused).

6. As a conclusion, we are able to lay the foundations of a theory of secular penitential state punishment in which atonement involves a kind of expiation of meaning that allows the reestablishment of the social trust in legal order. Thus the sanction forces the offender to pay back his public wrong and to symbolically atone for the unbalance caused, then restoring legal stability and public reliance. So conceived, the significance of expiation serves to complete the notion of retribution. As a result, retributivism does not inevitably entail an absolutely unforfeitable sentence, since there is a way of renouncing the execution of a pronounced penalty. Acknowledging that punishment could be considered as a good (not an evil or something essentially painful) insofar as it guarantees the steadiness of norms protecting the common good, we are able to conclude that, in the light of broader concerns of *publicae utilitati*, there are for sure grounds to maintain that a retributive-based penalty must not be always seen as totally and unconditionally executable.

We must also bear in mind the distinction between civil and criminal laws, as well as the fundamental similarity of purpose –since each branch looks for the elimination of an unjustified inequality–, without forgetting that both should remain in its field of scope and respect the other's autonomy. For civil compensation is essentially a matter of restoring to specific losers what they have been deprived of, while criminal punishment is basically about removing from wrongdoers a kind of advantage they gained in preferring their own

will to the requirements authoritatively established for that society's common good. So in civil litigation the court has the duty to give plaintiffs everything to which they are entitled as repayment for their injurious losses, whilst in criminal trial the court is authorized to impose or downplay the penalties regarding some wider considerations of public good. In conclusion, we may certainly retain this similarities and differences between criminal and civil law when facing the study of RJ, insofar as this movement challenges that division.

7. In parallel with retribution, RJ has been growing in strength in the last three decades. Although there are different and conflicting conceptions of what RJ means and entails, the central theme is that crimes make necessary a procedure of reparation or restoration between offenders, victims and other interested groups. Also the characteristic rationale that this could be properly achieved not through a traditional criminal process of trial and punishment, but through mediation or reconciliation programs that bring together all the involved parties to discuss what was done and how to deal with it, agreeing upon the future consequences and implications. The emergence of RJ occurred simultaneously with the renaissance of a construed retributivism. Yet far from being presented as potentially good fellows, an ideological oppositional contrast was early drawn between them.

That tendency rapidly became a permanent fixture in the field. Even now it is made not only by RJ scholars, but increasingly one finds it canonized in criminology and juvenile justice text books. During the first phase of work in the field (until mid 90's), this conflict may have served a useful purpose in clarifying concepts, but now that we have moved into a second stage of consolidation and reflection, it is nothing but stymieing. Both convinced advocates of RJ and just deserts often contrast the two paradigms, arguing that we should look for either restoration or retribution, since punishment has no place within a RJ scheme. Then the thesis of the incompatibility is founded in both consequentialist and desert-based claims. Mostly because of the radical rejection of any deontological approach (the moral truth of the retributive motto that 'the guilty deserve to suffer') by the former and because of the latter's charge made to RJ programs of violating some basic principles of legal punishment –proportionality, fairness, parsimony and impartiality.

8. But such objections are proved to be misguiding and inadequate, for they do not really attempt to seek a satisfactory approximation to an underlying question of this Paper –are RJ principles and programs and the retributive paradigm compatible both philosophically and in practice? As it appears undeniable that any criminal system that wants to be justified in our diverse and democratic societies needs to attend to the demands of both rationales (for example, the desert-based requisite of proportionality as an strict limit in sentencing and respect for human rights, together with the restorative requirement of an appropriate role for the victim and the use of proper alternatives to prison), the scales seems to balance to the positive answer. In fact, the 'Making Amends' Model by Ashworth,

von Hirsch and Shearing was a remarkable substitutive proposal willing to endeavor a reconciliation. But it failed to engage more deeply with the underlying philosophy of the RJ movement, and therefore it must not be seen as a suitable way of claiming the coherent and harmonized encounter between the rationales of restitution and retribution. Even though the account managed to keep mostly untouched the basic principles of just deserts theory in sentencing whilst giving some presence to RJ programs, it did not offer sufficiently consistent and coordinated grounds for a compatibility thesis.

9. This kind of solution was deeply founded in the ninth chapter with the report making the case for a mixed retributive-restorative system, with convincing arguments from a set of different authors. According to Zedner, Daly and Duff, a restorative process that is to be appropriate to crime must therefore seek an adequate recognition, by the lawbreaker and by others, of the wrong done. This backward-looking approach is then completed with the following reasoning: precisely thanks to that process of acknowledgment and repentance for the past misdeed, the possibility is open to restore the harm caused (to the victim and to society) and to rehabilitate the offender into a law-abiding life within the community. Thus a kind of retributive-restorative rationale is both backward and forward-looking. As K. Daly rightly points out, Duff's argument is undoubtedly persuasive in characterizing the current meaning and place of punishment in the response to crime, including proposals termed restorative. Although further development is needed in order to give a largely coherent, complete and global theory, this opening step seems to sufficiently avoid Zedner's opportune worry –that the attempt to accommodate RJ to the underlying principles of punishment so perverts its fundamental attraction as to strip it of much of its original appeal, not least its commitment to repairing ruptured social bonds.

10. To finish with this TFC, we want to leave a door open to a likely further investigation –perhaps in the context of a doctoral thesis– acknowledging an issue stemmed from the sheer variety of crimes and possible penalties. Being obvious that we need a unitary theory of legal punishment as a whole, justifying such a state institution –and we have above sketched and assessed some retributive versions of it with their strengthens and weaknesses–, we shall not forget to develop the justification of concrete modes of criminal sanctions (imprisonment, fines, probation, community service, mediation…) regarding each type of offense. Although it is extremely interesting and urgent to give accurate reasons for the use of particular forms of penalties (and not only for the institution of legal punishment as a whole), it was not the place here for deeply dealing with that inescapable challenge. The main point now is to remember that Duff's account, despite the need of further improvement, surely makes the case for the real possibility of finding out a coherent and harmonized retributive-restorative criminal justice system, capable of justifying punishment under both complementary rationales, and putting in an adequately related way the best values of backward-looking and future-oriented approaches.

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