



## Structural Problems of the “Cooperation Agreement”

### Problemas estructurales de la “delación premiada”

GUSTAVO A. BEADE\*

#### Abstract

For several years, the procedural legislations of Latin American countries have incorporated various practices that, in theory, allow for a more effective prosecution of certain crimes. Among them, there are the so-called "repentance laws," which allow individuals under investigation for serious crimes to provide information about other participants in the same act in exchange for receiving lighter punishments or immunity. The objective of this work is to present the most relevant criticisms concerning these practices and analyze them from the perspective of theories of punishment. I will attempt to demonstrate that there are theories of punishment that would permit laws on "repentance," but I shall focus on the proposal of communicative punishment theories.

**Keywords:** *Compensated Snitching; Theories of Punishment; Communicative Theories of Punishment.*

#### Resumen

Desde hace varios años las legislaciones procesales de los países latinoamericanos han incorporado distintas prácticas que, en teoría, permiten hacer más eficaz la persecución de determinados delitos. Entre ellas, se encuentran las llamadas leyes del “arrepentido,” que permiten a personas investigadas por delitos graves dar información sobre otros intervinientes en el mismo hecho a cambio de recibir castigos más leves o impunidad. El objetivo del trabajo es presentar las críticas más relevantes a estas prácticas y analizarlas desde el punto de vista de las teorías del castigo. Intentaré mostrar que hay teorías del castigo que permitirían leyes de “arrepentidos,” pero me concentraré en la propuesta de las teorías comunicativas del castigo.

---

\* Universidad Austral de Chile; [gustavo.bead@uach.cl](mailto:gustavo.bead@uach.cl); ORCID: <https://orcid.org/0000-0002-2258-4348>. Article received on September 8th, 2022 and accepted for publication June 29<sup>th</sup>, 2023. Translated by Mauricio Reyes.

How to cite this article:

BEADE, Gustavo (2023). “Structural Problems of the ‘Cooperation Agreement’”, *Latin American Legal Studies*, Vol. 11 N° 2, pp. 28-60.

---

**Palabras clave:** *Delación premiada; Teorías del castigo; Teorías comunicativas del castigo.*

The possibility that there are individuals who commit crimes and later pretend to "repent," confess their actions, and provide information in order to receive a milder punishment is a common practice in the criminal procedural systems that we broadly know.<sup>1</sup> In general, the proliferation of these practices shows that they have the approval of both citizens and members of the justice administration system. Citizens generally see them as an effective tool to dismantle drug trafficking gangs and organized crime groups that commit serious offenses and currently pose a significant threat to our societies. Members of the justice administration system understand that these tools contribute to making their investigations more effective. Otherwise, they believe it would be very difficult to bring to trial, for example, the perpetrators of crimes related to drug trafficking and "corruption".

As I mentioned, these practices are common in most of the criminal procedural systems we know. However, there are a few critical works that have severely questioned them. The central argument is that it has been deemed *acceptable* for the state to negotiate a portion of the punishment with defendants of certain crimes in exchange for them informing on others whose sanction would be more advantageous for the specific investigation. These criticisms point out that the State enters the business of what is most convenient, that is, it puts state punishment on the market.<sup>2</sup>

While I agree that it is not right to negotiate punishments in exchange for information that allows for the further punishment of other participants in a criminal act, I believe that the criticisms have some problems. It is not about the fact that a state cannot negotiate the punishment of an accused offender in order to obtain information that allows for the prosecution of participants in criminal acts who had more decision-making power. A state that regards the function of punishment as preventive could perfectly adopt those measures. If the function of state punishment is based on a preventive theory of punishment, grounded in utilitarian ethics, where what is good is prioritized over what is right, there would be no inconvenience in using less relevant members of a criminal gang as a means to bring to trial those who lead or control those gangs. The problem is that only those who support a preventive theory of punishment will be able to defend such decisions. In principle, defenders of a retributive theory of punishment could not

---

<sup>1</sup> I am referring, of course, in general to the countries of Latin America that have adopted these practices, such as Chile, Argentina, Colombia, etc., and have been influenced, in part, by the legislation and practices of the United States.

<sup>2</sup> In this regard, one of the authors who has presented the sharpest criticism of this institution is Marcelo Sancinetti. His arguments are globally significant for discussing “snitching”, regardless of the context and positive legislation. For this reason, in this work, I will attempt to discuss his arguments. See, among others, his works published in SANCINETTI (1998) and SANCINETTI (2022).

accept that the imposed penalty deviates from what the accused deserves, let alone for reasons related to the efficiency of the criminal process. However, my argument will attempt to present the objection from the defense of a retributive-communicative thesis in which “holding accountable” those who commit crimes opposes considering these practices.

### I. WHISTLEBLOWERS, INFORMERS AND REPENTANTS

Let’s assume that a law allows a person to receive a reduction in punishment or complete exemption from punishment in exchange for betraying their accomplices or providing relevant information for the progress of the investigation of the crime in which they themselves participated. In some countries, these laws have been called “repentance laws” because, in some sense—albeit misguided— someone who commits a crime regrets having engaged in a moral (and legal) transgression, and for this reason, we must consider this issue and perhaps forgive him.<sup>3</sup> Far from this ideal circumstance, according to these regulations, the concept of repentance within the framework of a criminal process has another connotation. Someone “repents” but expects to obtain an additional benefit by relieving their conscience of the burden of having committed a crime. For this reason, these projects seem more like rewards for informants or whistleblowers rather than a recognition of those who truly repent sincerely. Although there are weak defenses for “snitching” under the idea that new tools are necessary to combat new forms of crime, the truth is that, *a priori*, they have significant problems.<sup>4</sup>

### II. CRITICISM TO “COMPENSATED SNITCHING”

In what follows, I shall summarize some of the criticisms that have been made against “compensated snitching.” Perhaps it might be possible to group them in a single argument. Nonetheless, I am interested to differentiate them in this presentation in order to analyze them jointly thereafter.

---

<sup>3</sup> This is a mistaken sense of the use of the term 'repentant' because it equates it with betrayal, assuming that someone who regrets something can “snitch” on another person. Repentance has other connotations that are not necessarily linked to “snitching”. In truth, I believe that someone who repents for a wrong deed is not in the best moral position to accuse another. Regarding this matter, see MASLEN (2015). Another account in SANCINETTI (1998).

<sup>4</sup> See, for example, the proposals of NINO (2005), p. 228 and BÖHMER (1992).

### a) **The Criminal Law in the Market**

The criticisms of the decision to include legal figures such as “compensated snitching” point out that criminal law is currently dominated by utilitarian and efficiency-driven aspirations. They add that the state has entered into the most convenient business or what some perceive as such. The parameter is the market, not justice.<sup>5</sup> According to this view, it has been believed to be a good thing for the state to negotiate with the accused of committing a crime, offering a reduced sentence in exchange for informing on others. According to this criticism, we are not dealing with an agent who regrets their past and therefore cooperates with the investigation, but with the perpetrator of a crime who benefits from betraying the trust of their accomplices. Taking this into consideration, it has been said that “the punishment will no longer imply declaring ‘you have acted wrongly’ because precisely one of those who participated in the act is declared as the standard for what is right: kill, betray, and receive a prize.”<sup>6</sup> Thus, the perpetrator of a crime ends up showing that it is correct to inform on others and to be attentive to the possibility of distancing oneself from responsibility as much as possible, while assigning greater responsibility or relevance to the involvement of others in the events.<sup>7</sup>

In this regard, critics wonder where communal morality stands if rewards are offered to anyone who reports something relevant about a crime, and where does that leave the judge who has to take a statement from someone who “repents”? Apparently, any reward for those who cooperate in this manner implies a reversed penalty for those who remain silent, a coercion towards self-incrimination or the incrimination of others.<sup>8</sup> However, a decent state cannot resort to such behaviors.<sup>9</sup> Moreover, a democratic model of criminal justice prohibits any promise or direct or indirect pressure on the accused to induce them to repent or collaborate with the prosecution.<sup>10</sup>

If the State puts criminal investigation in commerce, as a commodity for exchange, it undermines the social function of punishment. For instance, if the state allows the ceasing of a criminal investigation in exchange for the payment of a significant amount of overdue or evaded taxes, it would prioritize lesser goals over higher ones, such

---

<sup>5</sup> SANCINETTI (1998), p. 796.

<sup>6</sup> SANCINETTI (1998), p. 797.

<sup>7</sup> SANCINETTI (1998), p. 797.

<sup>8</sup> Perhaps it would be possible to think that the argument of the commodification of punishment does not go so far, and that a different problem is being addressed here. However, I believe that the problem is the same if we understand that the incentive offered by legal regulations generates this type of behavior on the part of the defendants of criminal offenses. Coercion functions as the obligation that defendants have to “repent” and improve their own personal situation, harming others. I thank an anonymous evaluator for suggesting that I make this clarification.

<sup>9</sup> SANCINETTI (1998), p. 800.

<sup>10</sup> FERRAJOLI (1995), p. 608.

as reaffirming the validity of norms as a model for social cohesion.<sup>11</sup> In alternative solutions limited to such specific areas, the consequence is to cast doubt on the legitimacy of punishment for crimes within said area. Thus, one may question whether it is right for the extinction of criminal liability through payment to exist, or if, on the contrary, the existence of this possibility actually demonstrates that the offenses subject to penalty are not as serious as they are purported to be, since they can be redeemed with money.<sup>12</sup>

Critics of “compensated snitching” argue that the argument that the state should not rely on the disloyalty of “criminals” to each other is certainly not decisive. The state does not have to respect or uphold the code of silence among criminals. The code of silence can be welcomed if the means employed are legitimate. The problem arises when the state accepts to grant reductions in the state’s punishment, which, in the case of “compensated snitching”, are given in exchange for the breach of criminal loyalty. This is what lacks moral legitimacy.<sup>13</sup>

#### **b) Violation of the *Nemo Tenetur* Principle**

The second criticism has to do with the violation of the *nemo tenetur* principle, which implies that no one is obligated to testify against himself. This is a fundamental principle of the Rule of Law, which establishes that no one has to betray himself, provide weapons to their adversary against himself, accuse himself, or incriminate himself.<sup>14</sup> The offer of a prize or a reduction assumes that such an offer can motivate the co-defendant to say something, but this “saying something” must also lead the informer to acknowledge their own involvement in the matter. This involvement in the act, through a punishable behavior, will ultimately prevent the informant from going back on their own actions. The judge may grant a reduction or not, but in any case, the accused will have made a statement under the risk that, otherwise, they could face a more severe punishment.<sup>15</sup> This could only be avoided if the “repentant” individual were granted immunity for their behavior, rather than just a reduction. However, this also presents other problems, as it is difficult to analyze how to assess the contributions made by the accused. Therefore, certain doubts arise regarding the quantity and quality of information that someone should provide in order to receive immunity.

On the other hand, one of the ways in which this possibility of denouncing others arises is closely related to the idea of collaborating with the investigation. It is evident that the *nemo tenetur* principle prevents the state from coercively obliging an accused person

---

<sup>11</sup> SANCINETTI (2022), p. 148.

<sup>12</sup> SANCINETTI (2022), p. 148.

<sup>13</sup> SANCINETTI (1998), p. 814.

<sup>14</sup> SANCINETTI (2022), p. 189.

<sup>15</sup> SANCINETTI (1998), p. 816.

---

to collaborate with a public investigation. Moreover, it is morally reprehensible for the state to rely on the words of the accused individual to convict him.<sup>16</sup>

### c) The Principle of Equality and Culpability

Another problem that could be mentioned regarding criticisms of “compensated snitching” is the violation of the principle of equality before the law. Thus, if punishment is influenced by behavior within the criminal process, unequal and discriminatory treatment occurs against those who may not have any special information about the event in which they participated. In cases involving criminal organizations, it could happen that a participant with little power and influence in the events may not have the knowledge that could be of interest to the Public Prosecutor’s Office (*Ministerio Público*), while another participant with greater significance within the criminal association may have more information to provide in exchange for some benefit. This disrupts the proportionality between the various penalties imposed on the participants, as the imposed punishment does not reflect the intensity of their criminal involvement. Therefore, those with a higher degree of involvement in the events will be in a better position to provide the prosecuting authority with more and better information, and as a result, they will have a better probability of obtaining a reduction in punishment. Consequently, those with a lower degree of involvement in the event (and therefore less culpability) will be in a disadvantaged position to access relevant information that they could later offer, and they may even be punished more severely than those co-defendants with more intense involvement. Thus, these types of alternatives allow the manipulation of the importance of each participant in a criminal act based on certain political interests, also altering the principle of culpability.<sup>17</sup> Therefore, punishment will not be based on the degree of culpability of each participant in an act but rather on the information they could provide or the cooperation they could offer to the Public Prosecutor’s Office (*Ministerio Público*).

### d) The Moral Status of the State

The last issue I would like to mention here is related to the possibility of the state “sitting down to negotiate with the criminal.” Prosecutors and defense attorneys sit down to agree on the penalties for a specific offense in exchange for receiving information. This type of practice deviates from the ideal of the so-called “just punishment.” For some authors, the negotiation that involves a reduction in punishment in exchange for information is not inherently incorrect. It is only incorrect because it violates principles such as *nemo tenetur*, equality, and culpability. Furthermore, this exchange between revealing information and deserved punishment weakens the “validity of the norm itself.”<sup>18</sup> A reduction in punishment to punish more people, and to punish them more severely, implies not taking seriously the norm itself. Punishment would cease to function

---

<sup>16</sup> SANCINETTI (2022), p. 190.

<sup>17</sup> SANCINETTI (2022), pp. 192-193. See also ZIFFER (1996), p. 172.

<sup>18</sup> SANCINETTI (2022), p. 196.

as a judgment of reproach for the committed act and would become a reproach for the failure to provide information about someone more relevant.<sup>19</sup>

However, there is also the possibility of considering that the state is not in the best moral condition to impose a criminal punishment on a “repentant” individual who had to provide information that incriminated him for receiving a reduction in their own punishment. The state would also not be in the best position to attempt to punish others with the information obtained from the “repentant” individual. Despite its failure in investigative abilities, the state can still impose criminal penalties thanks to the facilitation of tools such as “compensated snitching.” These circumstances portray the state as hypocritical, disregarding basic principles of the rule of law by rewarding the crimes of some in order to punish those of others. For this reason, among others that I cannot develop here, the state would not be in the best position to act by imposing criminal punishments.<sup>20</sup>

### III. WHICH THEORY OF PUNISHMENT?

The four criticisms mentioned seem relevant to question “compensated snitching.” However, it is important to highlight the relevance of the function of punishment in the creation of tools like these. Although it may not be obvious, it is necessary to consider that the justification we give for imposing criminal punishment determines how we will structure the institutions associated with the criminal justice system. The way we think about punishment determines as well how we organize the criminal process institutionally. Thus, if theories of state punishment are based on different normative ethics theories, such as deontology and consequentialism, for example, it is possible to think that the construction of a criminal procedural system should be supported on similar foundations. In this sense, conceptually, a theory that tends to consider what is good over what is right would have no problem admitting that if the good is to dismantle criminal gangs, imprison powerful drug traffickers, or uncover large corruption networks, “compensated snitching” should undoubtedly be accepted.

Thus, someone who offers to provide information in exchange for a reduced punishment could eventually be used as a means to a greater end, which is the discovery of more significant crimes, the imprisonment of more dangerous criminals, or the dismantling of criminal groups. In fact, it would not be a problem if this “informant” were someone who is exempt from being punished. This would probably be the optimal solution.

---

<sup>19</sup> SANCINETTI (2022), p. 147.

<sup>20</sup> On this, see BEADE (2019a).

---

Again, the positive consequences of measures of this kind are verified if, indeed, the expected results are achieved.<sup>21</sup> In this way, the positive consequences that these legislative regulations could bring about are the basis for considering the validity of defending the arguments supporting criticism of “compensated snitching.” Although it is not the aim of this work, I assume that these positive consequences have been empirically corroborated by the authorities of countries that have chosen to include them in their procedural laws. Thus, it would be possible to verify that, despite ceasing to punish certain individuals, the achieved results are better than those set aside. Therefore, embracing these ideas about criminal punishment would lead us to set some “criminals” free, but in exchange, we would be in a position to more effectively combat organized crime. In this sense, it has been said that a utilitarian view of punishment—whether for general or specific deterrence—can open the door to compromising solutions, doing what is most convenient in each case: imposing a sentence here, dismissing a case there, or reaching a settlement agreement elsewhere, even though the facts are equal in all three cases.<sup>22</sup>

In contrast, and recurrently, it is argued that retributive punishment respects the dignity of individuals compared to its utilitarian rival, who uses people as means to certain ends. Every person is a responsible agent who should not receive punishment if they have not committed any crime. The *negative* version of retribution establishes that if someone engages in wrongful behavior, they lose that immunity to a degree proportional to their guilt. If an agent violates the rights of others, they cannot reasonably complain about it, and their rights will be intervened upon.<sup>23</sup> This negative version of retribution is based on a concept of desert, which states that it is wrong to punish an innocent person because if they did not commit any crime, they do not deserve to be punished. In this sense, and linked to “compensated snitching,” it is incorrect to punish criminals more harshly than they deserve. Therefore, if “compensated snitching” implies acknowledging a crime and cooperating in an investigation, there may be greater possibilities for the negative version of retribution to consider it. On the other hand, in a *positive* version of retribution, we must punish the guilty because they deserve it. The negative version of retribution does not tell us what we should punish, but rather that we should not punish innocents or punish the guilty more than they deserve.<sup>24</sup> Possibly, according to this classification, I understand that only a positive version of retribution would deny the possibility of implementing tools such as “compensated snitching.” If someone has committed a crime, he must be punished, and the possibility of negotiating their punishment would severely affect the chance of receiving the deserved punishment.

---

<sup>21</sup> A basic overview of Utilitarian Theories can be found in LACEY (1988), pp. 16-57. The most recent defense is in TADROS (2011), *passim*.

<sup>22</sup> SANCINETTI (2022), p. 160.

<sup>23</sup> MACKIE (1982), pp. 5-6. See also LACEY (1988), pp. 16-46; BENNETT & BROWNLEE (2020), pp. 255-257 and

FOCQUAERT *et al.* (2021), pp. 18-25.

<sup>24</sup> DUFF (2001), p. 12; MACKIE (1982).



This first distinction allows us to clarify certain issues that the original criticism of “compensated snitching” fails to capture. A utilitarian theory could easily disregard the obligations associated with the principles of equality and *nemo tenetur*, as well as the criticism of “commodifying” criminal law and acting without considering moral status when engaging in dialogue with criminals. If the consequences resulting from these decisions contribute to the generation of good outcomes, such as the discovery of significant criminal gangs or the prevention of serious crimes, there is no room to question them. The same applies if we believe we defend a negative version of retribution that prevents us from punishing the innocent. Within this framework, we can punish some guilty individuals less severely. However, the criticisms I presented in the first part of the text are reinforced if we also include desert as a central element of a retributive thesis. Deserving punishment is a central part of the positive version of retributivism and a concept that remains difficult to define in these contexts.<sup>25</sup>

#### IV. COMMUNICATIVE-RETRIBUTION

So far, I have focused on presenting the criticisms that have raised doubts about the importance of tools such as “compensated snitching” and briefly mentioned the possibility that these criticisms may have a more or less solid foundation from traditional punishment theories. A modest objective of this work could be limited to this issue. I could provide a warning that anyone who wants to defend or question “compensated snitching” should take a stance on a specific theory of punishment to ensure that the criminal process does not lack the necessary coherence demanded by any legal system. However, this would be insufficient for justifying this work.<sup>26</sup> In what follows, my interest is to attempt to further develop the criticisms against “compensated snitching” that I presented in the first part. I understand that the best way of doing it is through what I consider the most influential retributive theory in the last decades: the communicative theory of criminal punishment.<sup>27</sup>

Communicative theories of criminal punishment aim to communicate censure and disapproval to the person who commits the offense. The communication of punishment differs from mere expression of punishment because the accused of a crime has the possibility to respond to the accusation and offer arguments to explain and/or

---

<sup>25</sup> It is not part of the present work to discuss the concept of desert held by proponents of retributivism. In particular, I have some reservations regarding the concept of desert that I have developed elsewhere. BEADE (2021).

<sup>26</sup> On the other hand, the discussion regarding “compensated snitching” is much broader than what I have shown here. It is possible to analyze the practical implications of cooperation (SIMONS (2003)), its negative punitive consequences (NATAPOFF (2009)), its links with procedural agreements (HESSICK (2021)) and a specific variance linked to *whistleblowers* (CEVA & BOCCHIOLA (2019)).

<sup>27</sup> See among others, MORRIS (1981), DUFF (2001) and VON HIRSCH (1993).

---

justify their behavior.<sup>28</sup> Beyond this main purpose, which has a retroactive nature and therefore relates to retributive theories, communicative theories also have a forward-looking perspective. Thus, it is expected that the accused of a crime offers an apology and repairs, to the extent possible, the harm he has caused. One of the ultimate goals of these theories is to achieve reconciliation between the perpetrator of a crime and the rest of the community. Although this has generated some doubts and has received several criticisms,<sup>29</sup> I particularly think it is one of the most interesting features of these theories. This reparative aspiration that these theories have makes them particularly interesting and especially relevant for analyzing and better understanding the problem presented by “compensated snitching.” I will return to this matter later on.

A good way to try to understand these theories is to analyze criminal processes based on the premises presented by communicative punishment. First, we need to determine whether we have reasons to investigate a crime or not.<sup>30</sup> Thus, when we investigate a crime and have strong evidence that a person has committed it, we call them to be held accountable to the rest of his fellow citizens. In the process of being held into account, we must listen to what the defendant has to say. We must facilitate institutional arrangements so that this can work in this way and that their participation is not limited to stating whether they are guilty or innocent. The accused of a crime may have an excuse or a justification to explain what they did (and why they did it). Part of the obligations that a political community has when calling one of its citizens to be accountable is to be open to listening to what the accused has to say before imposing a punishment.

Many things have been said regarding communicative theories and there are many more still left to say.<sup>31</sup> However, and beyond this brief conceptual presentation, I would insist that many of the criticisms presented at the beginning would be better understood within this theoretical framework. Many of the criticisms presented at the beginning of the text are constructed from the idea of a liberal, rather traditional, criminal law. The development of these ideas is based on classical concepts that originate in the Enlightenment. The approach proposed by communicative theories is analyzed from a specific perspective called liberal republican. In some respects, and beyond theoretical distinctions, it resembles more republican visions than liberal ones. I cannot develop this issue here. Instead, what I intend to do in the remaining part of the work is to demonstrate that these liberal criticisms are much better interpreted from the approach offered by communicative theories.

---

<sup>28</sup> On expressive theories FEINBERG (1970) and BENNETT (2008).

<sup>29</sup> See BROWNLEE (2011).

<sup>30</sup> Recently, Antony Duff introduced the idea that there is a right to bring people to trial. See DUFF (2018), pp. 210 and ff. Critically, see BEADE (2019b).

<sup>31</sup> A detailed presentation in DUFF (2001).

---

### a) Moral Status for Punishing and the Criminal Law in the Market

In general, a communicative theory of punishment better aligns with the idea that communal morality plays a central role in the construction of our practices of state responsibility. On one hand, this is because we are dealing with a state that necessarily needs to be morally capable of imposing punishment. If a political community either favors or fails to limit conditions of inequality, for example, it is not morally in the best position to impose punishment and, of course, it is not in a position to hold a fellow citizen accountable for his transgressions. A political community without moral legitimacy cannot legitimately communicate that the questioned behavior is incorrect. Furthermore, a political community that lacks moral standing to condemn its own (and prior) transgressions cannot claim authority to punish illicit acts committed by its fellow citizens. In this way, the political community would lose its moral standing if it were willing to let some crimes go unpunished in order to punish others, perhaps more serious ones.

A political community that “pardoned” crimes committed by its fellow citizens without genuine repentance and in exchange for a benefit would have serious problems enforcing criminal punishments. If the objectives behind regulations like “compensated snitching” are to dismantle drug trafficking gangs and organized groups that commit serious crimes, this would continue to favor the crimes of the powerful, those who handle large sums of money and engage in transnational operations or those carried out by organized gangs. Those who commit less severe crimes or have no one to inform on would be in trouble. Furthermore, the incentive they would be offering would be to commit serious crimes because the reward is greater. These types of incentives, along with the possibility of putting criminal law in the market, seem to have no place within this theoretical framework.

None of this could be interpreted as something new. The idea that the state (or the political community) has a moral status is even part of traditional liberalism.<sup>32</sup> In the current context, the idea that it is not possible to violate citizens’ rights to investigate crimes and punish the accused is defended, for example -within a criminal process- by limiting the use of evidence obtained in a fraudulent or illegal manner. This means that the state has always had to fulfill certain moral obligations when investigating criminal offenses. However, the role of the state and its moral status are of great importance within

---

<sup>32</sup> For example, traditionally the state has had a role in the investigation of criminal offenses that has always been associated with honesty and the impossibility of carrying out certain behaviors. Thus, the state cannot torture to obtain confessions, it cannot rely on evidence obtained illegally to support criminal convictions, it cannot condemn based on presumptions, etc. These and many other guarantees have been considered essential parts of liberal criminal law. I thank an evaluator for suggesting that I clarify this point.

---

communicative theories.<sup>33</sup>

On the other hand, what is communicated by punishment in cases in which intervenes an informer or whistleblower who has been rewarded? Possibly, what is communicated to the defendant is that his information is valuable, and it allows him to obtain a milder punishment. However, none of this accomplishes the objectives that a communicative theory may have. The defendant does not repair the damage nor does he truly repent, he only exchanges information. True repentance would mean that the defendant wants to do what is right, not expecting anything in return, or also wanting to be a part of the community to which he belongs. Repairing the damage would mean that the person accused of being part of a drug trafficking gang should carry out tasks to repair some of the harm caused and attempt to rebuild the community ties that their behavior broke. It seems difficult for individuals who cause such diverse harm, who commit or contribute to the commission of so many public wrongs, to repair anything. However, repentance could be considered of great value for obtaining forgiveness from the political community. What is certainly not important to communicate is that, despite the serious damage caused by the crime, the defendant only benefits himself. I return to the question of repentance at the end of the work.

Finally, the role of suffering in a communicative theory of punishment is debatable. I believe it is possible to place it at different moments in a criminal process without assuming that suffering must be associated with imprisonment. However, it is necessary that there is censorship or condemnation for reprehensible behavior. It is clear that these practices generate suffering. If someone who provides information avoids these two circumstances, we have serious problems in justifying it within the framework of a communicative theory. The purpose of condemnation is to identify someone who has committed a moral offense, as well as a criminal one. We condemn those who commit crimes and do not reproach anything to those who are innocent. Forgetting reproach in exchange for information does not communicate the correct message.

In the last part of the paper, I will introduce an issue related to a variant within communicative theories associated with the closest version to contemporary republicanism.

#### **b) Civic Morality and Nemo Tenetur**

Recently, Antony Duff and Sandra Marshall have proposed a way of viewing punishment as a manifestation of civic virtues that emerge from their republican perspective on communicative punishment. Their proposal maintains that we should strive for a criminal justice system in which the understanding of punishment and the way in which one should engage with it also includes the “offender.” In other words,

---

<sup>33</sup> See among others, DUFF (2010).

---

according to this idea, criminals should engage with their own punishment.<sup>34</sup> Clearly, this aspiration of Duff and Marshall is presented as the way in which punishment should be regarded, not as a legal obligation but as a civic duty. This idealization is intended, of course, within contexts of equal consideration and respect.

In this context, the civic morality of a political community presents us with different civic roles that include responsibilities and duties.<sup>35</sup> These roles can only be carried out through informal, rather than legal, persuasion. Regarding criminals, Duff and Marshall identify them as citizens who have violated a civic duty.<sup>36</sup> This differs from those who label those who commit crimes as criminals or dangerous individuals. According to this proposal, if I know that I committed a crime, what crime I committed, and if I have identified a victim, I should unquestionably accept the responsibility to repair and apologize, regardless of what criminal law establishes. In summary, I have the civic responsibility to be held accountable for my crime in a public forum, which I can achieve by surrendering to the authorities and accepting my guilt in a criminal trial. This, of course, is characterized as a civic virtue, a type of behavior that citizens should exhibit under the ideal conditions described, to recognize and take responsibility for the committed infractions. These civic virtues are of interest to us as they constitute agreements with our fellow citizens within the framework of criminal law that helps us organize these agreements. Again, none of these civic virtues make sense in, for example, contexts of inequality and limited citizen participation in the creation of criminal norms. Nor is the purpose of this proposal to transform civic duties into legal duties. Thus, the proposal does not contradict what is established by the *nemo tenetur* principle. We are not legally obligated to self-incrimination. However, we should be obligated to do so in terms of public morality. These circumstances are best explained within the framework of interpersonal relationships in which the way we relate to each other coincides with these types of practices and diverges considerably from how the law regulates it.

Evidently, beyond the discussions that Duff and Marshall's position may involve, the truth is that it aligns with the idea behind the original criticisms of “compensated snitching.” We are not obligated to testify against ourselves, but we should accept our responsibility and not attempt to benefit ourselves by incriminating others. This also contradicts the notion that individuals who commit crimes lose all their rights because they remain citizens (and not enemies). Moreover, and more importantly, it opposes the idea that because criminals are outside the law, they are allowed to do anything, including lying, cheating, and implicating others in order to avoid punishment. Thus, the ethical component underlying civic responsibility allows for a better understanding of the criticisms I presented at the beginning of the text.

---

<sup>34</sup> DUFF & MARSHALL (2016), p. 34.

<sup>35</sup> DUFF & MARSHALL (2016), p. 36.

<sup>36</sup> DUFF & MARSHALL (2016), p. 39.

---

Although Duff and Marshall have focused on the obligations of criminals and victims, it would also be possible to consider the civic virtues that should be present in those members of the political community who fulfill the function of pursuing crimes. Along the same line, investigators and prosecutors should also uphold these republican ideals and act with certain civic virtues. These virtues, of course, limit the possibility of ensuring impunity for the commission of certain crimes with the purpose of guaranteeing the punishment of others. It also constitutes a resistance to investigating crimes based on the testimony of someone who participated in them. Furthermore, it also demands a more robust justification for deciding to apply these types of tools to certain crimes and not others.

The last issue I’m interested in reflecting upon is related to one of the objectives of communicative theories, namely the interest in reconciling the accused with the political community. I understand that part of the civic obligations of a political community are based on the need to reintegrate citizens who have committed crimes. In general, I believe that the commission of a crime should be understood as an “mistake,” although there are behaviors that are serious enough not to fall under this label. However, let me focus on those who are part of a group dedicated to committing crimes, particularly those targeted by tools such as “compensated snitching.” In a criminal organization, many people perform ancillary and interchangeable roles. I think of drivers, “mules” (drug couriers), and any other group of people who do not make decisions but only carry them out under some form of coercion. It seems inappropriate that the way to rebuild community ties with this group of people would be by promoting informant activity rather than demanding moral repentance and an attempt to remedy some of what they have done. “Compensated snitching” not only communicates an ethically questionable message but also creates a negative incentive for a political community. It encourages the possibility of false and exaggerated testimonies that attempt to harm members of the same criminal organization. In fact, it would allow the leaders of these criminal groups to benefit by accusing subordinates for quickly regaining their freedom. We can hardly morally demand that a political community reintegrate citizens who not only were part of criminal gangs that committed serious crimes but also ended up being favored by the law. In this context, the civic virtues of a political community must be accompanied by the civic virtues of those responsible for committing or participating in the commission of criminal offenses.

## V. CONCLUSION

This work has allowed me to clarify the way in which I agree with the more conventional criticisms of figures such as “compensated snitching.” Beyond the importance of those original criticisms, adjusting the focus of those criticisms towards theories that seek to justify punishment seems appropriate to me. Furthermore, within this specific approach, I tried to show that the theory that best explains these criticisms, or at least does so with a more solid foundation, is the approach offered by communicative theories of punishment. I hope that this will also provide better arguments against those who argue that the law should change (solely) to combat crimes in these times.

---

**CITED BIBLIOGRAPHY**

- BEADE, Gustavo A. (2021), “Punishment, rewards and the importance of desert”, *Bergen Journal of Criminal Law and Criminal Justice*, Volume 9, Issue 1, 2021, pp. 1-10
- BEADE, Gustavo A. (2019a), “Who Can Blame Whom? Moral Standing to Blame and Punish deprived citizens”, *Criminal Law and Philosophy*, (2019), 13: pp. 271–281
- BEADE, Gustavo A. (2019b), “Should Public Blame replace the Criminal Trial? A comment on R A Duff, The Realm of Criminal Law” Symposium on Antony Duff’s Realm of Criminal Law, *Law, Ethics, and Philosophy* (2019), Vol. 7, pp. 221-232.
- BENNETT, Christopher (2008). *The Apology Ritual: A Philosophical Theory of Punishment* (Cambridge University Press).
- BENNETT, Christopher & BROWNLEE, Kimberley (2020). “Punishment”, en TASIIOULAS, John (ed.), *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press), pp. 253–270.
- BÖHMER, Martin (1992), “La celada legal y los fundamentos del proceso penal”, *La Ley* (10 de abril de 1992).
- BROWNLEE, Kimberley (2011). “The Offender’s Part in the Dialogue”, en CRUFT, Rowan; KRAMER, Matthew H. & REIFF, Mark R. (eds.), *Crime, Punishment, & Responsibility* (Oxford University Press), pp. 54–67.
- CEVA, Emanuela & BOCCHIOLA, Michele (2019). *Is Whistleblowing a Duty?* (Polity Press).
- DUFF, R.A. (2001). *Punishment, Communication and Community* (Oxford University Press).
- DUFF, R.A. (2010). “Blame, Moral Standing and the Legitimacy of the Criminal Trial”, *Ratio*, Vol. 23, N° 2, pp. 123–140.
- DUFF, R.A. (2018). *The Realm of Criminal Law* (Oxford University Press).
- DUFF, R.A. & MARSHALL, S.E. (2016). “Civic Punishment”, en DZUR, A.; LOADER, I. & SPARKS, R. (eds.), *Democratic Theory and Mass Incarceration* (Oxford University Press), pp. 33–59.
- FEINBERG, Joel (1970). “The Expressive Function of Punishment”, en FEINBERG, Joel, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press), pp. 95–118.
- FERRAJOLI, Luigi (1995). *Derecho y Razón. Teoría del garantismo penal* (Editorial Trotta).
- FOCQUAERT, Farah; SHAW, Elizabeth & WALLER, Bruce (2021). *The Routledge Handbook of the Philosophy and Science of Punishment* (Routledge).
- HESSICK, Carissa (2021). *Punishment Without Trial. Why Plea Bargaining is a Bad Deal* (Abrams Press).
- LACEY, Nicola (1988). *State Punishment: Political Principles and Community Values* (Routledge).
- MACKIE, J.L. (1982). “Morality and the retributive emotions”, *Criminal Justice Ethics*, Vol. 1, N° 1, pp. 3–10.
- MASLEN, Hanna (2015). *Remorse, Penal Theory and Sentencing* (Hart Publishing).
- MORRIS, Herbert (1981). “A Paternalistic Theory of Punishment”, *American Philosophical Quarterly*, Vol. 18, N° 4, pp. 263–271.

- 
- NATAPOFF, Alexandra (2009). *Snitching. Criminal Informants and the Erosion of American Justice* (New York University Press).
- NINO, Carlos (2005). *Un país al margen de la ley* (Ariel, 3<sup>ra</sup> ed.).
- SANCINETTI, Marcelo (1998). “Observaciones críticas sobre el Proyecto de ley de tratamiento privilegiado al ‘testigo de la corona’ (‘árrepentido?’)”, *Cuadernos de Doctrina y Jurisprudencia Penal*, N° 7, pp. 791–818.
- SANCINETTI, Marcelo (2022). *Hacia un derecho penal más racional. Contribuciones sobre castigo estatal e imputación* (Editores del Sur).
- SIMONS, Michael A. (2003). “Retribution for Rats: Cooperation, Punishment, and Atonement”, *Vanderbilt Law Review*, Vol. 56, N° 1, pp. 1–54.
- TADROS, Victor (2011). *The Ends of Harm* (Oxford University Press)
- VON HIRSCH, Andrew (1993). *Censure and Sanctions* (Oxford University Press).
- ZIFFER, Patricia (1996). *Lineamientos de la determinación de la pena* (Editorial Ad-Hoc).