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## Comment on the Paper by Gladys Acosta

Martin D. Farrell

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## COMMENT ON THE PAPER BY GLADYS ACOSTA

MARTIN D. FARRELL

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I will merely mention three aspects of the paper by Gladys Acosta with which I disagree, without referring to the many arguments with which I do agree. Perhaps this will make my comment excessively critical, but I believe that polemic is academically more useful than praise, and hence the style that I have chosen.

### I. THE FAULT OF LEGAL POSITIVISM

Many partisans of feminism blame legal positivism for the current situation women face in many countries. I do not agree at all with this assessment.

Legal positivism is a theory that makes it possible to describe the law without recurring to moral concepts. If the laws that discriminate against women meet certain requirements, of course positivism will consider them provisions of law. Yet, how does this prejudice the feminist cause? Feminists know that there are legal provisions, and what they seek is to replace them by other provisions, also legal, but with a different content.

After identifying a provision as law, much remains to be done. Let us suppose that the positivist identifies a provision that discriminates against women as a legal provision, or a rule of law. In addition to identifying it as a rule of law, the conservative positivist may approve of it. The liberal positivist, however, will first identify it as a rule of law, but will object to its content on the basis of moral reasoning.

Contrary to what some imagine, positivism evaluates legal rules from a moral standpoint. What distinguishes it from natural law theory is that positivism evaluates the norm after identifying it as a legal rule.

Perhaps what certain branches of feminism wish to attack is not legal positivism, but ideological positivism, which holds that a rule should be obeyed simply because it is a legal rule. For the ideological positivist, moral evaluation is superfluous, but for the legal positivist this is far from being the case. If the target is ideological positivism, any attack is useless, since I don't know of any serious author who supports this theory.

## II. THE PHILOSOPHY OF PUNISHMENT

The issue of the moral justification of punishment is extremely important, and there is, of course, no agreement on the best theory of moral justification. Though some theories may be deficient, it is not because they are foreign to the Latin American context. All the theories for justifying punishment claim to be universal.

The problem with the retributive conception of punishment, for example, does not arise from the circumstance that Kant was not Latin American. It stems from the difficulties that theories of ethical duty have in accounting for the function of punishment.

Bentham was not Latin American either, but the deterrent conception of punishment seems more convincing. The task of feminism should not be to seek justifications of the penalty that reflects the supposed idiosyncrasy of some continent, but to seek the best justification of the penalty. My suggestion is to study the utilitarian conception of punishment in greater depth.

## III. CONSTITUTIONAL PROTECTIONS

Of course, feminists and non-feminists agree in repudiating sex crimes. The Millian principle of harm suffices to justify this condemnation for liberals. Yet liberals are also concerned with respect for constitutional guarantees, and the partisans of feminism should share this concern. Therefore, I cannot help but feel alarmed at the proposal to shift the burden of proof in sex crimes, jeopardizing the constitutional protection of the presumption of innocence.

Feminists may distrust the liberal theory of Rawls and argue that justice in the distribution of resources stops at the door to one's home. Yet one should not distrust the liberalism of Mill, a firm partisan of women's rights his whole life. Taking Mill as a model, feminism and liberalism have a long way to go together, each in good company.