

Comments on Geoffrey Sayre-McCord, “Criminal Justice and Legal Reparations as an Alternative to Punishment”¹

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Geoffrey Sayre-McCord boldly proposes to substitute for criminal punishment a scheme of legally enforced non-punitive reparations. Punishment, he says, essentially involves intentional infliction of pain or suffering, and so what is non-punitive about reparations is that even though they might be burdensome, the burden is, he argues, no part of the aim of the institution.

Reparations, as Geoffrey Sayre-McCord conceives them, are not only a matter of perpetrators compensating victims, but also, perhaps even mainly, reparations consist in what Geoffrey Sayre-McCord calls “making amends”, or perpetrators acting so as to warrant a reinstatement of the bond between the perpetrator and society generally, a bond that is legitimately suspended

1 Version to publish in Spanish translation, lightly edited from Dec. 1999 presentation Jan. 2001, *From Sofia Conference, Mazatlan, Mexico, Dec. 1999*.

as a result of a crime. This idea of suspension and reinstatement of the social bond is the key, I think, to grasping the merit of Sayre-McCord's view. I want to argue that, contrary to what his presentation suggests, his view is committed to a retributivist justification of punishment after all, though with an important new twist.

I agree that the pain that is suffered by the offender who works to supply reparations is not aimed at by the system of reparations.¹ Since this pain is merely a side-effect the scheme can, so far, still be distinguished from punishment, which involves intentional production of suffering.

Nevertheless, Sayre-McCord's scheme involves retributive punishment at another point. To see this consider when an uncooperative offender is ordered by the state to work toward reparations, but refuses to do so. On this view, the scheme is legally enforced, and so coercion is employed, including the credible threat of incarceration. The threat itself, of course, aims at producing the reparations, not at any pain or suffering for anyone. *But the carrying out of the threat is plainly an intentional production of deprivation, the deprivation of the benefits of social membership.*

Of course, on this view the aim of incarceration is not simply to produce some suffering because the offender deserves suffering, but rather, a suspension of the benefits of social membership because the offender deserves such a suspension once he has refused to make reparations. Still, since this suspension is meaningless except as a deprivation of social benefits, this, it seems to me, is very much like punishment.

Moreover, incarceration is held to be justified on the apparently retributivist grounds that the offender's refusal to make reparations makes fitting the social response of imposing the

1 Geoffrey Sayre-McCord speaks of "making someone act a certain way where so acting happens to be painful for them" (p. 314). So he is not here addressing the pain produced by the carried out threat, but only of the act of reparation.

burden of social exclusion. This burden is intentionally produced, and not for deterrent or therapeutic or expressive reasons but because it is a fitting way of holding the offender responsible for the offense. As he says, the offender “forfeits the right”. This is, as far as I can see, a form of retributivism, whether or not the sanction technically counts as punishment on Sayre-McCord’s sensible definition.

But that doesn’t mean that the idea of purely non-punitive reparations has evaporated. On Sayre-McCord’s view, the crime warrants a suspension of the social bond *unless the offender acts so as to warrant its reinstatement*. This is the important non-punitive element of the view. He recommends a convention in which offenders warrant reinstatement of the social bond by working to contribute to a social fund, some of which goes to the crime’s victims and the rest of which is socially owned. There is a non-punitive and a punitive (or quasi-punitive) phase of the scheme, then, with punishment only entering *after* the offender refuses to perform the work of non-punitive reparations. The idea of non-punitive reparations as an alternative to punishment remains intact. However, it is not so much a social alternative to punishment, as it is part of a mixed institution in which the offender is given the choice between non-punitive reparations and retributive quasi-punishment. It is, I would say, a scheme of *punitively enforced non-punitive reparations*.

Now, if reparation is supposed to reinstate a suspended bond, what form is the suspension of the social bond taking at this early phase, before any punitive incarceration has been called for by a refusal to cooperate? If the offender is immediately given the choice between reparations and punishment, and chooses to make reparations, then is the social bond really suspended at all? But if not, what is being repaired by the so-called reparations? It is not clear why only a prospective suspension is called for rather than an immediate suspension in the form of punishment for the crime. This would not harm any of Sayre-

McCord's arguments that society should offer to the offender a way to work so as to reinstate the social bond.

Moreover, it fits his language of repair more literally. So, for example, an ordinary scheme of punitive incarceration might be supplemented by an arrangement in which time in jail can be reduced by efforts to make reparations, efforts to repair a social bond that is *already suspended*. That is, once we see that the proposed scheme condones punishment (or quasi-punishment) as a fitting suspension of the social bond, it is unclear what argument he has provided that this suspension must be put off until such time as the offender refuses to work to make amends. It is at least as plausible to think the suspension of the social bond is first called for by the crime itself, with a scheme of reparations to be made available as a method of repair rather than a strategy for evading such a suspension altogether.

Of course, there are probably enormous economic reasons for society to avoid the expense of incarceration. On the revised version of Sayre-McCord's view I'm proposing, this would just mean that society may have powerful reasons for waiving just punishment until it becomes clear that the offender will not work toward reparations. But if society should choose to incur the costs, it has available to it a retributivist justification for incarcerating the agent as a direct response to the crime, and then offering a deal in exchange for reparations only later.

So, first Sayre-McCord's own scheme is not a social alternative to punishment, but a punitively (or quasi-punitively) enforced scheme of non-punitive reparations. Second, since he condones punishment by incarceration as a way of suspending the social bond, his arguments in favor of enforcing reparations as a way of restoring that bond do not give any reason to put that punishment off in the way that he recommends. And his own vocabulary of breach and repair suggest that the breach comes first.

As a final point, it is worth seeing that an important point of Sayre-McCord's against much retributivist theory can be ac-

commodated by this novel form of retributivism. He says that social demands for reparations are appropriate whether or not the crime was morally wrong. This point counts against certain retributivist views that attempt to justify punishment as suffering that is deserved on the basis of moral transgression. But on that view the person who steals the bread in order to feed his starving family cannot be legitimately punished.

One problem for such a view is the inscrutability of such moral matters from the standpoint of the legal system. The good moral reasons that people might often have for violating laws can be far more difficult to discern than the simple case of bread stealing might suggest. We don't think the state can or should decide whether, in the final analysis, the person who got punched in the nose had it coming (even though we don't mind such matters entering into legal responses in more marginal ways). Anyway, I agree with Sayre-McCord that it is inadequate to justify punishment by law on the ground that the offender deserves it because what he did was morally wrong.

But notice that this doesn't require rejecting the idea that the punishment is justified because it is *morally deserved*. It might be morally deserved on grounds other than the legal violation being morally wrong. Even if we say that stealing the bread was not wrong, we can still say that it is nevertheless a transgression of society's laws, for which the thief is *morally responsible*. For instance, he might be morally responsible in a way that permits society to force him to make amends to the baker and to society generally even if what he did was not wrong all things considered. This is a retributivist view of a certain kind, as I've argued, and it is compatible with leaving aside the question of whether the legal offense was morally wrong.

Once we see that the offender might morally deserve the social response even if the offense was not wrong, nothing stops us from holding that the appropriate response to the crime might be incarceration. This has often been said about justified cases of civil disobedience, for example. So I agree that the social re-

sponse to violations of law does not depend for its permissibility on any moral wrongness in the offender. Nevertheless, this is not yet any reason for holding that the social response may not be punishment (or the quasi-punishment of incarceration as a method of social suspension) rather than, say, forced reparations.

One last point: Sayre-McCord finds it hard to see how punishment could serve as an appropriate basis on which to reinstate the social bond. He might seem to be inconsistent here. As we've seen his own view allows incarcerating uncooperative offenders, and usually restoring their full social membership after some finite term. So he may seem forced to admit that this punishment warrants reinstatement. But I see no need for him to say this. Why not just say the punishment is the suspension, period. That doesn't mean it must be permanent. It may end after some term, not because the offender has in any way come to warrant reinstatement, but rather because the suspension that was warranted from the crime in the first place was simply finite.

Now, granted, this could all have been said about the justification for limited (quasi) punitive incarceration even apart from any element of reparations. But I don't think this defeats the value of Sayre-McCord's mixed scheme. He ought, perhaps, to concede that incarceration can be justified as a fitting and punitive suspension of the social bond. But he can point out that this particular rationale calls for an account of what if anything the offender can do to reinstate the bond and so shorten the suspension. This is not yet enough to show that there is anything that would be reparative in this way, and I've left aside interesting questions about Sayre-McCord's own account of reparations through socially productive work. But his account makes the question of reparations salient and pressing. If there are acts that would be reparative then it is unnecessarily brutal to punish offenders without giving them any opportunity to perform those acts and thereby earn a reduction in their punishment. Sayre-McCord's view already has me looking at punishment in a new way.

In defending Sayre-McCord's view I have departed pretty far from his own presentation of it, and I've frankly denied some of his claims. In particular, I don't accept his claim that his scheme of enforced reparations is a social alternative to punishment, or even a theoretical alternative to retributivism. Nevertheless, in the adjusted presentation of the view I find it attractive and (though I am no master of the literature) novel. It is a humane and plausible retributivism in the way that it naturally calls for society to facilitate the making of amends at the same time as it vindicates society's natural interest in making the benefits of social membership conditional on certain forms of cooperation.

Sayre-McCord offers, in addition to his proposals about reparations, what I see as an enormously fruitful *retributivist theory of the justification of punishment*. In saying this, of course, I am recklessly undeterred by his claim to be arguing against the justification of punishment in general, and against retributivism in particular.