

## In Defense of Reparations: A Reply to Estlund and Gaus

Geoffrey Sayre-McCord

### I. INTRODUCTION

In "Criminal Justice and Legal Reparations as an Alternative to Punishment" I argued that the many reasonable justifications for punishment, taken together, actually recommend a system of legal reparations that is, in important respects, very different from a system of punishment. The justifications in question range from those that appeal to justice or desert, to those that focus on deterrence and consequences, to those that give pride of place to the expressive role of punishment. To the extent these various considerations show we have reason to punish criminals, they show (I argue) that we have even better reason to respond to crime in a different way. Specifically, I maintain that in place of punishing criminals we should demand of them that, as a way of making amends for their offense, they contribute with their time and effort to a system of reparations.

The key difference between punishment and reparations is found in the latter's rejection of a central, defining, aim of the former. Unlike punishment, that aims essentially (even if not always solely) at the infliction of harm or pain, reparations fo-

cuses instead on efforts at repair. No doubt, a system of reparations, no less than one of punishment, will involve coercion and will impose costs and burdens on those convicted of a crime. Yet in a punitive system the point is to impose the costs and burdens on the criminal whereas in a reparative system the point is to require efforts at repair designed to make amends for the offense. The contrast can, of course, be overdrawn, especially in cases where the general justification for punishment—for intentionally inflicting costs and burdens—has a reparative or restorative focus. Nonetheless, the difference is real, I believe, and will properly make a difference to how one thinks about and justifies specific institutional responses to crime. Most immediately, in calling into question the relevance of making sure the criminal suffers and substituting an emphasis on his making efforts at repair in light of his offense, attention shifts naturally to addressing the situation productively.

In any case, my purpose in the original paper was to sketch this alternative and to show that all the good arguments people have offered for punishing criminals serve as at least as strong, and often stronger, arguments for abandoning punishment for reparations. Against this, one might argue (as David Estlund does) that the system I advance is actually a form of punishment, whatever its advantages.<sup>1</sup> Alternatively, one might argue (as Gerald Gaus does) that precisely because a system of reparations does not punish it does not give criminals what they deserve and thereby cannot lay claim to the important justification of punishment provided by retributivism.<sup>2</sup> Of course there are other worries one might have as well, but these two are enough for this occasion. I will take them in order.

1 See his "Comments on Geoffrey Sayre-McCord, 'Criminal Justice and Legal Reparations as an Alternative to Punishment'", pp. 365-371.

2 See his "Taking the Bad with the Good: Some Misplaced Worries about Pure Retribution", this volume, pp. 341-363.

#### A. *Do Enforced Reparations Require Punishment?*

Estlund is persuaded that the system of reparations I set out has significant advantages over more familiar responses to crime. He finds especially attractive the fact that a system of reparations concentrates on ensuring that criminals act "so as to warrant a reinstatement of the bond between the perpetrator and society generally" which is a bond that, he says, "is legitimately suspended as a result of a crime".<sup>3</sup> Yet — and he doesn't mean this as any objection to a system of reparations, just to my understanding of it — Estlund maintains that a system of the sort I describe is actually one of punishment and is, in fact "committed to a retributivist justification of punishment after all, though with an important new twist".<sup>4</sup>

To make his argument, Estlund distinguishes two phases in the system of reparations. The first phase comes with the demand for reparations and the second comes with the mechanisms of enforcement that are brought into play in the face of non compliance with the first phase. Estlund recognizes the first phase, with its demand for reparations, as offering an important and attractive alternative to punishment. In requiring efforts at repair, in place of intentionally inflicting pain or harm, he agrees that the system of legal reparations is not punitive. However, Estlund notes, in response to non-compliance a refusal on the part of criminals to make the required efforts at repair the system I describe would resort to force by withdrawing rights and privileges of various sorts. This second phase, Estlund maintains, is punitive in the way in a way the first is not. And obviously the system as a whole would not be viable without the second level response to noncompliance with the first. So while there is, perhaps, a central and appealing non punitive aspect to legal reparations, the demand for reparations gets off the

3 Estlund, pp. 365-366.

4 *Ibid.*, p. 366.

ground and can be sustained only by backing that aspect of the system with, what he takes to be, a credible threat of punishment. As a result, Estlund is inclined to describe me as proposing what is really "a scheme of punitively enforced non-punitive reparations".<sup>5</sup> Moreover, he thinks the punitive part of the scheme finds its support, at least implicitly, but nonetheless inevitably, in an appeal to retributivism. In discussing his argument, I will treat it as involving two separable claims that in responding to non-compliance a system of legal reparations would be resorting to punishment, and that when it does the justification for doing so would be retributive.

Estlund is surely right to distinguish between the system's first response to crime—a demand for reparations—and its response to non compliance. But I think he is mistaken to think that in enforcing the demand for reparations with incarceration for non compliance, one is thereby resorting to punishment. In thinking about the enforcement phase of the system, I believe it is important to draw a distinction between withdrawing conditional privileges, when relevant conditions are not satisfied, and inflicting punishment. Suppose, for instance, that I buy a car on loan and fail to pay my installments. When the bank takes the car away it is not punishing me, even though it is taking something of value away from me. No doubt knowing that a failure to pay will result in loss of the car would provide an incentive to pay my debt, but that prospective loss is not a threat of punishment even if the risk of losing the car is clearly part of an effective system of the enforcement of loan payments. Similarly, if those who commit a crime owe an effort at making amends and refuse a system of reparations might deny the unwilling certain privileges they would otherwise enjoy without thereby punishing them even though what they are denied is a real loss. And that prospective loss, in this case of freedom, is not necessarily a threat of punishment even if the risk of losing the freedom is

clearly part of an effective system of the enforcement of legal reparations. So what makes the difference between losing a privilege (and thereby suffering a loss) and being punished? One thing that seems central is that in withdrawing a privilege, as opposed to punishing, the fact that the loss of the privilege is a harm or genuine cost to the person who loses it is not properly at issue. Rather, what matters is whether the conditions that are appropriately imposed on the privilege are satisfied or not. No doubt sometimes what parades as the withdrawal of a privilege is really just a disguised punishment, but when this is true its either because the condition on the privilege is designed itself to be punitive or because the withdrawal of the privilege is grounded not genuinely in its conditions not being satisfied but in the hope of imposing a cost.

In general, it seems to me, there is a whole range of privileges, opportunities, and positions, that enjoyment of which is conditional upon satisfying certain conditions. These are such that when one fails to meet those conditions fails to maintain the required grades, or decent behavior, or responsible leadership, one rightly loses the privilege, opportunity or position. But the loss one thereby suffers is not an instance of one being punished unless the loss is imposed intentionally because it is a loss, rather than because the appropriate conditions were not satisfied. Withdrawing a privilege is not the same as intentionally inflicting a harm, even though it is often a harm and even though withdrawing a privilege is often used as a punishment.

My thought, in introducing incarceration as an appropriate response to non compliance, was that in refusing to work to make amends—to give others what is their due, given the offence—a criminal would be failing to satisfy a reasonable condition on enjoying freedom. While it could predictably provide an incentive to some to make efforts at repair, the point was not to threaten those who wouldn't with punishment. In thinking of things this way, I was assuming that freedom within society is a kind of privilege that comes with certain duties to treat others

<sup>5</sup> *Ibid.*, p. 367.

with a certain level of respect. Fail to meet that minimum, and one has no claim to the privilege. I was also assuming that not all crimes establish that one does not meet that minimum, though some do, and that sometimes incarceration becomes a reasonable only when in addition to having committed the crime the perpetrator refuses to comply with demands for reparation.

Against this background, then, I would hold that the second—enforcement—phase of the system I advocate does not (necessarily) introduce punishment although it does actively withdraw valuable privileges from those who show themselves unwilling to meet the minimum conditions on enjoying freedom. Moreover, because the aim is not punitive, it seems to me that it cannot be justified as a legitimate form of retributive punishment. Nonetheless, I do think that the grounds for setting conditions on freedom and for seeing the restriction of freedom via incarceration as sometimes justified harmonizes in various ways with some of what makes retributivism appealing. Specifically, the system I advocate does not shy away from holding people responsible for their actions and it sees some ways of acting as losing one rights that one would otherwise have. But to embrace these ideas is not yet to embrace a retributivist justification of punishment, nor even a retributivism justification of something shy of punishment, if retributivism is understood as intimately akin to revenge. Of course retributivism need not be understood as intimately akin to revenge. As is probably clear from my original paper, I do find various arguments that appeal to considerations of justice and desert compelling, despite my thinking that they recommend something other than punishment. In particular, I think that in committing an offense—non legal as well as legal—one thereby incurs a duty to make amends in some way or other. What I resist is thinking that the appropriate way of recognizing this duty involves punishment, either as a first response to the offense or as a secondary enforcement mechanism. It is worth noting too, I think, that one might en-

dorse the system of reparations I advocate, with incarceration as part of the enforcement mechanism, without appealing to the considerations of justice and desert that I find compelling. Even someone who thinks that utility is the final arbitrator, when it comes to the moral justification of various institutional structures, would (as I suggested in my original paper) have reason to support reparations rather than punishment.

### B. *Do Criminals Deserve Punishment?*

Yet, as Gaus points out, those who are convinced that criminals deserve punishment will find a non punitive system of reparations unacceptable precisely because it is non punitive and so fails to give criminals what they are due. As I have just noted, I believe considerations of justice and desert are of crucial importance when it comes to designing a morally defensible response to crime. It seems clear, for instance, that criminals have a right to be treated as responsible agents and deserve a fair trial and humane treatment. It seems clear, too, that victims, and society considered more generally, similarly have rights that a morally justified system should recognize including as a system of reparations would have it a right to a certain regard that calls for efforts at amends on the part of those who commit offenses. What is not so clear, I think, is why we should think criminals deserve punishment. Or, more accurately... I understand how it is that a criminal might deserve punishment in a context structured by a set of conventions and reasonable expectations that, in justifiable ways, have introduced punishments as the anticipatable result of committing an offense. What I find mysterious is the idea that criminals deserve punishment absent such conventions and expectations. And, when it comes to deciding between a system of punishment and one of reparations, the relevant claim has to be that criminals deserve punishment even when no such conventions and expectations are in place.

By way of defending what he calls Pure Retributivism, Gaus asks how one might go about rejecting the common idea that criminals deserve punishment. Two of the most direct ways are, he points out, not very attractive. One way would be to reject wholesale the notion of desert: “the quickest and easiest route” he observes, “is to simply reject the entire idea of desert”.<sup>6</sup> He gently suggests that I might be so inclined when he notes that I cite Protagoras’s claim that those who are rational with punish not for the sake of what cannot be undone but for the future. But I am not so inclined. I quoted Protagoras not because I endorse his pure consequentialism but because he so nicely captures that view. In any case, those who think talk of desert is appropriate and important, as I do, cannot resist Pure Retributivism by dismissing desert altogether. Still, as Gaus observes, one might be willing to countenance talk of desert and still resist the idea that criminals deserve punishment—and here is the second way—if one held that while people might deserve various good things, no one deserves anything bad (and so no one deserves punishment). Gaus quips that some of his colleagues appear to hold such a view when it comes to grading their students thinking that no one deserves a poor grade even as some deserve good grades. Were one to embrace an asymmetrical account of desert, according to which people might deserve benefits “but no one ever deserves the opposite of a benefit a harm”, one would still be in a position to reject the Pure Retributivist’s claim that criminals deserve punishment.<sup>7</sup> Yet an asymmetrical view, Gaus thinks, should be rejected as “certainly no part of commonsense morality”.<sup>8</sup> He seems clearly right about this, if the asymmetrical view in question is the strong one that “no one ever deserves the opposite of a benefit”. But one might grant that people sometimes deserve the opposite

6 Gaus, p. 347.

7 *Ibid.*, p. 349.

8 *Ibid.*, p. 350.

of a benefit without thinking that every time desert is in play, harms as well as benefits are at stake. Indeed, pretty clearly, sometimes people do deserve something positive—a prize for winning a race or a reward for finding something lost—in situations in which no one deserves anything negative. (And also, of course, sometimes people might deserve something negative in situations in which no one deserves anything positive.) Desert is not always symmetrical, even if it often is.

So one question to ask is whether, in the context of deciding on an institutional response to crime, the notions of desert in play (when we think about what the criminals, the victims, and others in society, respectively, deserve) are symmetrical. In holding that the criminals deserve fair treatment, the victims deserve concern, and others a modicum of respect are we mobilizing notions of desert that have deserved benefits matched by potentially deserved harms? I am dubious.

In any case, it is worth highlighting that even when the desert at issue is symmetrical, the benefits and harms that are deserved may not be rewards and punishments.<sup>9</sup> Gaus’s example of grades offers a good case in point. Rejecting his colleagues’ view that no one deserves a bad grade—as I think we should—is not at all the same as thinking that the bad grades are punishments and the good grades rewards. One can of course distribute grades as punishments and rewards (plenty of people do), but that is quite different from assigning the grades as an evaluation of the quality of work. And the difference remains in place even if the poorer grades assigned predictably deprive the students who deserve them of something valuable. Thus, thinking that considerations of desert are appropriate, and that the sort of desert in question is symmetrical (so that just as some deserve something good, others might deserve something bad), is not

9 Gaus notes that desert, and symmetry, do not together establish that either rewards or punishments are deserved when discussing what he calls the Compensation Theory. (p. 352).

yet to think that those who deserve something good deserve a *reward*, and those who deserve something bad deserve a *punishment*.

How and why do rewards and punishments get in to the picture as deserved? One answer comes with the *Reward Theory* Gaus sets out. According to that theory,

Under conditions C, a person who has X-ed, and so has contributed to the common good or a common project deserves treatment T as a reward she deserves a beneficial treatment. Under conditions C\*, a person who has Y-ed, and so has subtracted from the common good, or a common project, deserves a treatment T\*, a disreward (a punishment) she deserves a harmful treatment.<sup>10</sup>

But this theory doesn't really answer the question at all, since it simply asserts that rewards and punishments are, in fact, deserved. Why are rewards and punishments the right response to X-ing and Y-ing, respectively? Why not think those who have contributed deserve to enjoy the fruits of their labor (but not, in addition, a reward) and those who have subtracted owe efforts at repair (but do not, also, deserve a punishment)? True enough, as Gaus points out, the sort of backwards looking considerations that would justify a reward (assuming one is justified) would find a parallel in backwards looking considerations that would justify a punishment. Yet, so far, there is no account of why those considerations would justify rewards and punishments as opposed to benefits and costs that are non-punitive.

My own view is that talk of rewards and punishments, as deserved, begins to make sense only in a context of conventions, practices, and reasonable expectations that have set up the rewards and punishments. And precisely what rewards and punishments are deserved turns crucially on the specific conventions and practices that are in place. Someone counts as deserv-

ing a good grade not simply thanks to having done good work. The grade comes to be deserved only in a context in which grades are appropriately being given and then only when the standards governing the distribution of the grades are such that the work satisfies them. Move to a context in which work is ungraded, and it is wrong to claim that a person who does good work is being denied something they deserved. Or move to a context in which the standards for grading are sensitive to features other than those that make the work in question good, and again it is wrong to claim that the person deserves a good grade for the work she did.<sup>11</sup> In a similar way, I think, and for similar reasons, someone counts as deserving a reward not simply for having contributed to the common good. Indeed, I think commonsense morality rightly recognizes that people regularly contribute to the common good without thereby having a claim to some reward. A reward comes to be deserved only in a context in which rewards are appropriately being given out and then only when the standards governing the assigning of rewards are such that the contribution satisfies them.

I am not suggesting here that there are no moral constraints on the conventions and practices that might be put in place — that people might deserve anything for having done anything, if only certain conventions and practices are in place. Rather, my suggestion is that desert, in particular, secures a content robust enough to figure as part of a moral argument only in the context of specific conventions and practices.

Consider the person, imagined by the Reward Theory, who contributes to the common good under circumstances C, by X-ing. What does she deserve? Is she just doing her share? Is the contribution easy and such that failing to do it would be shameful? If either of these, why think she deserves a reward? If we suppose she deserves a reward, what reward, determined how?

<sup>11</sup> And this is true even though the work was admittedly good, as long as it was good in light of standards that are not in play.

<sup>10</sup> *Id.*

Should the reward reflect her effort, or the size of her contribution relative to what she has (or relative to what she helps to produce), or should it be fixed at whatever level would have provided an incentive sufficient to get her to make the contribution?

We get defensible answers to these questions, I believe, only against a background of assumed conventions and practices that would fix reasonable expectations. The circumstances, *C*, that figure in the theory's formula for desert must, if I am right, include such conventions and practices if there is to be any specific treatment *T* that is deserved as a reward. And, assuming symmetry, the same is true of the circumstances determining whether any specific treatment *T*\* is deserved as a punishment. If so, though, one cannot legitimately appeal to the Reward Theory, nor to any similar general theory of desert, to choose among the conventions and practices that the theory's application presupposes.

Of course, if the Reward Theory were true, the symmetrical structure it imposes would suggest that if there are circumstances under which a person might deserve some reward then there are likewise circumstances under which she might deserve some punishment. Yet, as Gaus points out, the circumstances that call for a reward may well be different from those that call for punishment. And if relevant circumstances include the presence of certain conventions and practices, accepting the Reward Theory is compatible with holding that there are good reasons to put into place the conventions and practices that would underwrite the rewards, but not similarly good reasons when it comes to the conventions and practices that would be needed to underwrite punishments.

Thought of in these terms, my argument for reparations comes to this: whatever reasons there are for the conventions and practices that make it true that some criminals deserve punishment, these reasons provide even stronger grounds for replacing those conventions and practices with alternatives that shift the

focus from what they deserve to what they owe.<sup>12</sup> The choice between the conventions and practices that constitute a system of punishment and those that would constitute a system of reparations should turn on the weight of these reasons and can not, in any case, be settled by an appeal to a notion of desert that assumes the conventions and practices in place will be punitive.<sup>13</sup>

## II. CONCLUSION

If I am right, a system of reparations is morally preferably to a system of punishment, for all the reasons there are for thinking that a system of punishment is morally justified. I do not doubt that under certain circumstances (maybe the ones we are in now) criminals deserve punishment. However, I think we have moral—as well as pragmatic—reason to change the circumstances by changing our conventions and practices so that in the future the right thing to say is not that criminals deserve punishment but rather that they have a responsibility to make amends for the offenses they have committed.

12 Perhaps it is worth noting that the shift is not complete. The system of reparations I advocate retains the idea that criminals deserve fair treatment as well as respect as responsible agents, and an opportunity to make amends, even if not punishment. Nonetheless, it is right to say that for the most part questions of what the criminal owes, rather than what he deserves, move front and center.

13 Of course, punitive conventions and practices are in fact now in place. And, assuming the laws are reasonably just and fairly enforced, I think it is true that criminals deserve punishment. What is not true is that the fact that they currently do deserve punishment means that changing our conventions so as to replace a system of punishment with one of reparations would involve failing to give criminals what they deserve. With the new system in place it would no longer be true that the criminals deserve punishment. Moreover, if there are good reasons to replace a system of punishment with one of reparations (as I argue in "Criminal Justice and Legal Reparations as an Alternative to Punishment"), claims to the effect that criminals deserve punishment would offer no reason against the change.