

Why Compatibilists cannot resist Prepunishment: A Defense of Smilansky

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2013 Montana State University International Undergraduate Philosophy Conference
Montana State University, Bozeman
September 6-7, 2013

I. Introduction

Prepunishment is to hold a person morally responsible for a crime she has yet to commit.

Punishing a person prior to committing a crime is considered wrong due to the fact that the crime has not yet in fact been committed. It is punishing the innocent. Prepunishment, therefore, is morally abhorrent. In a series of recent papers, Saul Smilansky (2007, 2008a, 2008b) argues that compatibilists cannot, in any principled way, reject the temptation to prepunish, which shows compatibilism to be a much more radical view, since it runs counter to our ordinary moral intuitions. Further, Smilansky argues that the common-sense objection—namely, that prepunishment is morally abhorrent—is unavailable to compatibilists because of the fact that one who has not yet committed a crime is a mere temporal matter bearing no moral significance (Robinson 2010, 590).

Smilansky's argument has sparked several objections. On the one hand, Stephen Kearns (2008) objected that prepunishment is a view that does not need to be accepted by anyone, let alone a compatibilist, due to its radical nature. On the other hand, Helen Beebee (2008) objected that prepunishment, which results in no crime being committed, is not really prepunishment, as there are many cases where it may seem as though we prepunish when really it is prevention of a crime.¹ Though both Kearns and Beebee force Smilansky to elaborate on the nature of his argument, their objections do not succeed. Another objection, by Michael Robinson (2010), states that even with Smilansky's elaboration on the nature of his argument, compatibilists should in fact resist the temptation to prepunish. Robinson's objection is motivated by appealing to the common-sense objection that Kearns and Beebee have overlooked. He argues that

¹ Beebee's objection is motivated by acts of terror, where we punish an agent for the actual intentions of her crime, and not the crime itself. Cf. page

compatibilists have two pairs of principles available to them, which necessarily entail that to prepunish someone for not yet having committed a crime is unjustified and inappropriate. I argue that the truth of these two pairs of principles is not as straightforward as Robinson makes them seem. Thus, if the truth of these two principles is debatable and since they are available to compatibilists, this does not say that compatibilism is false, but it does seem to show that these two principles are in fact *not* the way in which compatibilists can reject the temptation to prepunish.

II. Kearns's and Beebee's objection to Smilansky

Smilansky argues that compatibilists cannot, in any principled way, reject the temptation to prepunish. He argues that in cases where we know a person will commit a crime, she is determined to do so, and she acts out of her own compatibilist free will, there is no reason (according to compatibilism) not to prepunish this person prior to committing the crime (Smilansky 2007, 348). For example, if it is causally determined that the intention I form today of committing a crime (say) tomorrow and I am acting out of my own compatibilist free will, then (according to compatibilism) it is morally permissible to prepunish me today for the crime I am going to commit tomorrow. Kearns objects that not only is prepunishment absurd in these cases, but it is overall unacceptable.² His objection follows from the possibility that prepunishment will, instead of preventing a crime, cause a crime (Kearns 2008, 252). For instance, if we are to prepunish a person, the only actual crime would be our prepunishment of

² Kearns has two objections. I only discuss one here. For more on Kearns's objections see "Compatibilism can resist prepunishment: a reply to Smilansky" (*Analysis*, 2008) 250-253.

the still innocent person and this may cause that person to commit the crime for which she was prepunished at even a later date.

Smilansky grants that there are, in fact, a wide range of cases in which prepunishment would be impermissible, and the case Kearns has in mind is one of them. The cases Smilansky has in mind, however, are when “the person fully intends to commit the offense before any prepunishment, and will do so *whether he is prepunished or not*. We can only choose between prepunishing him and letting the offense go unpunished” (Smilansky 2008a, 256). Smilansky’s range of cases in which prepunishment is permissible, then, is where it is causally determined that this intention will cause the crime, and an agent is acting out of their own compatibilist free will.

On the other hand, Beebee’s objection is of a different nature.³ She argues that even in the range of cases Smilansky has in mind, prepunishment could not *really* be prepunishment (Beebee 2008, 259). Her objection is that there are a number of cases that meet all of the conditions that Smilansky requires, but there are analogous cases—namely, in legislation—where we punish for an agents actual intention. For instance, in preparation for acts of terror or murder, we punish for the actual intention to commit a crime. In these cases, then, it would not be prepunishment; it would be punishment for an actual intention. Examples of this nature show that we are in fact not opposed to prepunishment. Smilansky’s rejoinder is, again, that Beebee is correct in these types of cases: it is permissible to *punish* agents in acts of conspiracy, but this is not prepunishment *and* not the cases which Smilansky has in mind (Smilansky 2008b, 262).

Smilansky, then, qualifies the range of cases yet again: the intention for which we are prepunishing is what we are holding the person responsible for in just the same way we would if

³ Like Kearns, I only focus on one of Beebee’s objections. For more on Beebee’s objections see “Smilansky’s alleged refutation of compatibilism” (*Analysis*, 2008) 258-260.

the crime had already occurred. Therefore, to punish an agent for the conspiracy of a crime is to hold an agent morally responsible in a different way than we would if we were to *prepunish* them for a future crime. The latter (prepunishment for a future crime) is the kind of punishment Smilansky has in mind.

To clarify the confusion Beebee and Kearns have with the type of cases Smilansky has in mind, suppose the following example. Jones is an educator. One day after school, while grading his class's papers, Jones becomes infuriated with his students' atrocious grammar and style. He forms the intention that, instead of giving them a short lecture on grammar rules, he will kill every one of his students the following day for their atrocities. From an example of this nature, Smilansky says a few things must be true in order for prepunishment to be permissible. First, it must both be causally determined that an agent will commit a crime and that an agent freely decides to do so (compatibilism must be true). Second, prepunishment for the crime neither causes nor prevents the crime (Smilansky 2008, 255-257). Third, we must know perfectly well that an agent will commit a crime. And, lastly, the intention that the agent forms to commit the crime is what causally determines an agent to commit the crime. Accordingly, in order for prepunishment to be appropriate, compatibilists are committed to the following thesis:

- (E) If at t_0 a person S has formed an intention I to commit a crime C and it is causally determined that I will at some future time t_1 cause C (in a non-deviant way), then at t_0 S is morally culpable and deserving of punishment for C (Robinson 2010, 592).⁴

⁴ Robinson has another formulation of E that, if one is going to accept E, she should equally accept E*. E* is as follows:

- (E*) If at t_0 a person S exists and it is causally determined that S will at some future time t_1 intentionally commit a crime C , then at t_0 S is morally culpable and deserving of punishment for C .

The motivating question that E* raises is what does a crime deterministically pre-existing amount to, other than reiterating that its future occurrence is causally determined? Though this is a viable question, I foresee problems with the pairs of principles Robinson claims compatibilists have available to them. My area of interest, therefore, is not with E*.

III. Robinson's objection to Smilansky

Though the range of cases Smilansky has in mind remain unaffected by both Kearns's and Beebe's objections, the picture Smilansky argues that determinism is painting is too strong of a thesis, which compatibilists are not committed to. This is the nature of disagreement Robinson takes. Robinson's argument, however, is essentially twofold. First, he shows that compatibilists have two pairs of principles available to them, each of which necessarily entail that prepunishment is inappropriate. Second, he highlights the thesis Smilansky claims compatibilists are committed to and argues that this thesis is inconsistent with both pairs of principles, since they each necessarily entail that prepunishment is inappropriate and unjustified.

Robinson states that compatibilists have two pairs of principles available to them, each of which necessarily entail that prepunishment is inappropriate and unjustified. First:

- (R) Punishment of a person *S* for a crime *C* is justified only if *S* deserves to be punished for *C*.
- (D) A person *S* deserves punishment for a crime only if *S* committed *C*. (Robinson 2010, 590)

(R) is claiming that punishment for a crime is justified only when a person deserves to be punished for a crime. Further, (D) is giving an analysis of "deserving punishment", and *S* only deserves punishment when *S* committed *C*. The conjunction of (R) and (D) implies that punishment is justified only when one has committed a crime (Robinson 2010, 590). For example, if I'm going to steal a case of beer, justification for my punishment is only justified when I deserve it, which is if I actually stole the beer. Therefore, since (R) and (D) involve punishing a person for a crime after its occurrence, they are inconsistent with prepunishment. However, a second pair of principles is available to compatibilists:

- (T) To punish a person *S* for a crime *C* is (at least partly) to treat or regard *S* as having committed *C*.
(A) It is appropriate (or fitting) to treat or regard a thing as being *F* only if it is in fact *F*. (Robinson 2010, 591)

(T) is claiming that punishing a person for a crime is treating them as having committed the crime. Further, (A) is stating that it is only appropriate to regard a person as having committed a crime if they have in fact committed the crime. (A) is meant to highlight how it is inappropriate to punish person *S* for committing *C* *only once* *S* has committed *C*, *and not* before *S* has committed *C*. In short, both pairs of principles are intuitively available to compatibilism because they focus on the justification (R and D) and appropriateness (T and A) of punishment for a crime, which are uncontroversial theses, and they both are clearly inconsistent with prepunishment.

To illustrate both pairs of principles, Robinson uses two examples, which show that prepunishment would be both unjustified and inappropriate. The first example is along the following lines (Robinson 2010, 593). Imagine Jones is a homeowner. In a year from now, Jones intends to sell me his house and plans to continue living in it after he has sold it to me. Thus, Jones will be trespassing. According to Smilansky's claim of compatibilists and prepunishment, I would be justified in gathering my friends together and throwing him out of the house now. But, as Robinson states, this is absurd. In no way would my punishing of Jones be permissible *now*, since it is still Jones's house and he is not yet trespassing. Further, he claims "that it is causally determined that Jones will at some point in the future sell me his home in no way undermines his present status as rightful owner of the house" (Robinson 2010, 593). The second example is as follows:

Similarly, suppose Jones knows it is causally determined that his father will die of a heart attack in 5 years. Why would it not be

appropriate for Jones to stuff his father in a box, nail it shut, and bury him in the backyard tomorrow? (Robinson 2010, 593)

These two examples are either unclear or missing the point of Smilansky's argument. For the first example: if Jones forms the intention that causally determines his selling the house *and* living in it after he has sold it to me, and I have knowledge of his supposed crime, it is permissible that I punish him now. But how is this a case of the sort Smilansky has in mind? Strictly speaking, it would have to be acknowledged by both parties that Jones's trespassing is a crime. That is, I would have to consider it a crime and want to move in the day I buy it, and Jones's intention to continue living in the house would have to be an intention of committing a *crime*. I mention this because there are numerous cases—it is rather common—in which a person continues to live in the house she has already “officially” sold and it is *not* trespassing. But let's assume a case in which Jones's intention is in fact crime oriented. Then, according to E, Jones's crime of trespassing deterministically pre-exists and compatibilists have grounds for punishment.

For the second example: This case also does not apply for reasons akin to the first example. This example says that if it is causally determined Jones's father will die in five years due to a heart attack, why not kill him now? It is easier to see how this case falls outside the scope of Smilansky's cases than the first example. Simply, there is nothing morally significant about this case. Jones's father is not forming an intention to commit a crime, nor could he; dying from a heart attack is not a crime. The only crime would be Jones's killing his father. And, on this note, we should prepunish Jones if the intention to kill his father causally determines that he do so, since it would, then, deterministically pre-exist. In sum, while the first example of Jones's owning a house can be altered so that it fits the nature of Smilansky's cases, the second example is far from being one that Smilansky has in mind.

IV. Robinson and the truth of T and A (and R and D)

These two examples, however, seem to raise a slightly different concern. In light of the foregoing, compatibilists (according to Smilansky) are committed to E. But Robinson argues that E entails too strong of a thesis for compatibilism. Moreover, Robinson claims both pairs of principles, since they each necessarily entail that prepunishment is inappropriate, are inconsistent with E. The truth of R and D, and T and A, however, is open to dispute. Consider A: It is appropriate to treat or regard a thing as being F only if it is in fact F (Robinson 2010, 591). What does this amount to? The following seems to be an example of A:

- (1) It is appropriate to treat my friend as dying only if my friend is in fact dying.

Similarly,

- (2) It is appropriate to treat my friend as dead only if my friend is in fact dead.

In order to falsify A, one must show

- (A¹) It can be appropriate to treat a thing as being (or going to be) F even though it is not in fact F

is true. There seems to be something intrinsically similar to (1) and (2), such that they can be reworked to make up:

- (1*) It is appropriate to treat my friend as she is *going to die* even though she is *not in fact dead*.

This does not mean that I bury her body in the backyard today, but it does mean I can treat or regard her according to her ineluctable destiny. Thus, to treat or regard someone as holding a certain status—namely, going to die—does not mean that I treat them as being exactly that thing. There seems to be cases in which A¹ is true and A false. Moreover, since the conjunction of T

and A is what necessarily entails prepunishment to be inappropriate, only one of the conjuncts must be false to show that the conjunction overall (T and A) is false.

According to the first set of principles, specifically D, Robinson claims “that desert of punishment is (at least partly) conditioned on one’s having done the thing for which one is to be punished” (Robinson 2010, 591) Therefore, he seems committed to the claim that even if an intention causally determines an agent to commit a crime and our epistemic capacities are such that we know beyond reasonable doubt that a crime will be committed, we cannot prepunish a person because he has not yet committed the crime—the person is not yet desert for the crime. To this, as Smilansky claims, “compatibilists interpretation of respect for persons should not hinge on the pointless” (Smilansky 2008a, 255) What exactly are we waiting *for*? According to Robinson, we are patiently waiting for the crime to occur. But this is unreasonable—if we know perfectly well that a crime *will* be committed and a person’s intention to commit a crime causally determines the crime and that our intervening will prevent the crime from occurring, there is no reason why we are unjustified in saying that a person is desert for the crime *now*. As Jones as an educator alluded to, Robinson is committed to waiting until Jones has killed his students for Jones to be justifiably deserving and appropriate to punish. It is not so clear, therefore, that D is true in the sense Smilansky is thinking, which it must be in order to show that prepunishment is unjustified.

V. Conclusion

Robinson argues that the two pairs of principles compatibilists intuitively have available to them, each of which necessarily entail that prepunishment is inappropriate, are a way in which

compatibilists should reject the temptation to prepunish. The truth of these two pairs of principles, however, is open to dispute. I argue that there are cases in which they are in fact false, thus showing that compatibilists should not be so quick to claim commitment to them. But, if compatibilists do feel the urge to be committed to R and D *and* T and A, they cannot use them as a way to reject the temptation to prepunish.

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