

*Smilansky's alleged refutation of compatibilism*

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Saul Smilansky aims to refute the traditional compatibilist view that 'determinism does not really change anything, morally' (2007: 348). His argument runs as follows. Assume determinism plus complete predictability. Then the compatibilist does not have a strong principled objection' (ibid.) to prepunishing someone who we now know will commit a crime in a week, since they will commit the crime of their own free will, and hence will be morally responsible for it, and hence liable to blame and punishment. There is no need to wait in case they change their mind, since we already know that they will not. But the common-sense view is that prepunishment 'runs counter to the idea of respect for persons'. So compatibilism is not, in fact, compatible with our ordinary intuitions about punishment. And this means that compatibilism must be false, since it is false that 'determinism does not really change anything, morally': it makes a big difference, with respect to the permissibility of prepunishment, whether or not determinism is true.

Smilansky's argument fails on more than one front. Firstly, it is 'complete predictability' that is causing all the trouble, and not determinism itself. Imagine that we have libertarian free will, but that we also have access to affordable and reliable time travel. Then we could travel to the future, watch Smith commit a crime, and then come back to the present and prepunish the soon-to-be-guilty party. The mere

fact that Smith has not yet committed the crime, and *could* (in a libertarian sense of ‘could’), at the last moment, decide to desist, makes no difference. For of course we know that Smith will *not* desist. So there is no need to wait in case he changes his mind.

One might be tempted to object that the libertarian time-travel scenario is too far-fetched. But in fact it is not that much more far-fetched than Smilansky’s determinism-plus-perfect-predictability scenario. Perhaps time travel is physically impossible -- and it is certainly unlikely to be within the budget of any police force any time soon. But perfect predictability is also well-nigh impossible, even assuming determinism, at least if there are any chaotic systems in the vicinity -- and, again, it is certainly unlikely to be within the budget of any police force any time soon.

For Smilansky’s argument to succeed, he would thus have to show that foreknowledge is possible assuming determinism but impossible assuming indeterminism – and in some sense of ‘possible’ that is somehow relevant to the question about prepunishment. Since in both cases foreknowledge is arguably both logically and metaphysically possible but practically impossible, it is unlikely that this can be done.

The possibility of foreknowledge certainly does, as is well-known, present problems for free will. But that danger is not the special preserve of determinists; it’s a problem for libertarians (and theists) as well. In other words, it’s a problem for everyone. Smilansky’s argument rests directly on foreknowledge and not on any special features of determinism, and it therefore fails to present a problem for the compatibilist that is not faced by other positions on free will. And this undercuts the

final stage of Smilansky's argument: if prepunishment turns out -- contrary to our alleged ordinary intuitions -- to be permissible in principle whether determinism is true or not, then determinism does not, after all, really change anything, morally speaking.

The second objection is that Smilansky's claim that the impermissibility of prepunishment is 'the common-sense view' is open to dispute. The common-sense view, Smilansky says, is that 'prepunishment runs counter to the idea of respect for persons, according to which we must let the (still innocent) person decide, even at the last moment, to refrain from committing the crime, thus allowing him to maintain his moral goodness and not be punished' (348). But consider the fact that conspiracy to murder is a criminal offence, as is (in the UK) engaging in 'any conduct in preparation for giving effect to' an intention to commit an act of terrorism (Terrorism Act 2006). Of course, the law does not make any claim to represent the ordinary intuitions of the folk, but on the other hand it is certainly not all obvious that such laws run counter to the moral intuitions of at least a sizeable portion of the population.

There are two objections that might be raised here. First, one might object that 'prepunishment' that results in no crime being committed is not really prepunishment -- as opposed to mere prevention -- at all. But this is not Smilansky's conception of prepunishment. For Smilansky, it is perfectly possible that 'prepunishment prevents the crime' (347). Smilansky does say that preventative prepunishment 'is morally tempting in a different way' (ibid.) to non-preventative prepunishment in the case where postpunishment is for some reason impossible, and that the 'prevention of crime changes also the status of the punishment' (347, n.1).

But his overall claim is that prepunishment *in general* is, intuitively, impermissible – since in both the preventative and non-preventative cases, prepunishment affords the person no opportunity to change her mind.

Second, it might be objected that such laws do not result in prepunishment, since offenders are punished for their actual intentions, and for consequent activity in preparation for acts of murder or terrorism. But I would be surprised if the common-sense view here was that the purpose of the legislation is to punish people for their intentions. It seems much more plausible that the common-sense view -- or at least *a* common-sense view -- is that such legislation is legitimate *because* it prevents the relevant intentions being carried out: that is, because it prevents a crime (murder or a terrorist act) from being committed. If that is right, then these really are cases of prepunishment, as Smilansky defines it. The requirement that there be actual intentions and preparations can be seen merely as a reflection of the fact that these are the routes by which prosecutors come to have reasonable beliefs about what will happen if they do not intervene. (I do not say that they *should* be so seen; only that such a characterisation of this kind of legislation has a perfectly good claim to being a common-sense view.)

Smilansky's argument thus fails on two counts. It fails to show that the permissibility of foreknowledge runs counter to our ordinary intuitions; and even if it succeeded on this front, it would fail to demonstrate the falsity of compatibilism, because it would still fail to show that determinism makes a difference to anything, morally speaking.

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*Reference*

Smilansky, S. 2007. Determinism and prepunishment: the radical nature of compatibilism. *Analysis* 67: 347-9.