
The Time to Punish

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The Time to Punish

SAUL SMILANSKY

On the assumption that we are able to justify the institution of punishment, *when* may people be punished? More specifically, may a person be punished for an offence only *after* she has committed the offence? Christopher New has recently argued that, despite our intuitions to the contrary, there is in principle nothing which forbids 'punishment' before the offence has been committed, i.e. 'prepunishment' [2]. He claims that 'there may be room in our moral thought for the notion of prepunishment, ... it may only be epistemic, rather than moral, constraints that prevent us from practising it' ([2], p. 35). New presents a detailed example, about a person bent on over-speeding, but willing to pay a fine for the offence. This person is however willing to pay the fine only before over-speeding ([2], pp. 35–36). If it is certain beyond any reasonable doubt that the person will indeed commit the offence, but that then he could not be caught, what objection could we have to prepunishment?

I explore the challenge presented by New, and argue that prepunishment is deeply ethically unacceptable. My argument, unlike New's intriguing suggestion, is not innovative: the problem with prepunishment derives, in the end, from the widely recognized need to respect persons and from the unacceptability of the 'punishment' of the innocent.

New defends his suggestion against both consequentialist and retributivist objections, but we need not concern ourselves here with the former. I allow that prepunishment may be useful. We could well imagine a significant reduction in crime if selective prepunishment were applied to e.g. dangerous criminals with many previous convictions. But then consequentialists, and in particular utilitarians, have notoriously had difficulties in escaping the need to 'punish' the innocent (see [3]). The crucial question is whether someone who believes in (non-consequentialist) constraints of justice has the resources to reject New's suggestion. It should be emphasized that the existence of such constraints need not commit us to any strongly retributivist position. H. L. A. Hart's dual-level position, whereby the institution of punishment is justified by its utility, but in which the 'distribution' of punishment is constrained by the categorical unacceptability of 'punishing' those who have not committed an offence, could also, I claim, allow us to reject New's suggestion ([1], pp. 9f.).

The crucial matter is clearly the deep value of taking care not to 'punish' the innocent. This value is not self-evident, but for our purposes putting it in doubt is not important. For New's strategy is to uphold this value but to

claim that, properly understood, prepunishment need not be taken as transgressing it. It is wrong to 'punish' a person for an offence he did not commit, but it is not wrong to punish someone for an offence he clearly '*intends to and will commit* after his punishment'. For 'the second is not in a morally significant way punishing the innocent at all' ([2], p. 37).

The problem with prepunishment in a case such as New describes does not arise simply because we could never be *certain*, before an offence is committed, that it will indeed be committed. For here New can reply that in real cases we cannot very often (if ever) be absolutely certain that the accused has committed the offence. But, in ordinary 'postpunishment', we are nevertheless willing to punish people if we think that it is certain beyond reasonable doubt that they have committed the offence ([2], p. 40). So if a similar epistemic level of certainty is established, what is wrong with prepunishment?

There is a simple difference between postpunishment and prepunishment, that in the former but not in the later an offence has been committed before the punishment. This is obvious and appears trivial, but it seems to me that stressing this difference is crucial for understanding the intrinsic unacceptability of prepunishment. While in postpunishment the offender cannot take back her actions, in prepunishment she still has time to choose. She can decide, even in the last minute, not to commit the offence.

But what is the significance of this? The problem with prepunishment may seem to be that, if the person in the end refrains from the offence, it was *wrong* to punish her. But this is not at all clear. She indeed would be 'punished' though innocent, but then so may be a person mistakenly punished after an offence has been committed. If we do not wish to beg the question against New, we must say that those punishing such a person were not wrong to punish her, only that they were mistaken. As we saw above, if the epistemic level of certainty is equal in a case of prepunishment and in a case of postpunishment, the fact that mistakes may be made does not distinguish between the two, and is, in itself, a risk we are willing to take.

Secondly, it might seem that the problem, if the person refrains from the offence after being punished for it, is that she would be punished but does not *deserve* to be punished. This is true as far as common usage goes, and of course reflects common intuitions, but is not in the end conclusive against New. If we have as good a reason to believe that a person is about to commit an offence, as we deem epistemically sufficient for conviction in postpunishment, New could argue that it would be reasonable to conclude that the person deserves punishment. It seems odd to claim so, but perhaps we can modify our notion of desert and say that, to the best of our knowledge, this person can be treated as deserving (or 'predeserving') punishment. We could stipulate that the notion of desert requires that an offence

had already been committed, but that sort of ‘victory by stipulation’ is not interesting. If we wish to reject prepunishment, we need to find a deep explanation.

This explanation, it seems to me, is that in prepunishment we are not showing the respect due to the moral personality of the agent, who is, when ‘punished’, as yet innocent, and who we must *respect as capable of not committing the offence*. In prepunishment there is categorically still time, a ‘window of moral opportunity’ for the would-be offender. This moral opportunity needs to be acknowledged. In postpunishment, by contrast, it is too late. We cannot – and thus cannot be under any obligation to – allow for the agent’s e.g. last-minute moral improvement. The offence has been committed, and nothing in the relevant reality can change any more. In postpunishment we are only required to ascertain, beyond reasonable doubt, whether we have proof that the offender indeed committed the offence.

Here New may reply that it is a very strange notion of respect that is not willing to take into account the agent’s declarations. If indeed we want to take the agent seriously, we should heed his claim that come what may, he is going to commit the offence, and would like to receive his (due?) punishment beforehand.

Now, the idea of respect for autonomous moral personality is perhaps difficult to explicate. But it is something like this idea which stands behind the intrinsic value of innocence, and behind the abhorrence for the ‘punishment’ of the innocent. We must respect people’s choices whether to be moral or not, choices which are constitutive of their moral worth and self-creation. Only if we must respect such choices, and create procedures which guarantee that our judgments and actions reflect this respect, do we have a deep non-instrumental basis for the need to take great care not to ‘punish’ the innocent. If our only concern would be the potential suffering of those innocents who may be ‘punished’, the fear which will exist if it is not made sure that the innocent are not ‘punished’, and the like, we would not have the deep feelings on this issue that we have. We would not look on the ‘punishment’ of the innocent with the particular ethical horror that we do. Perhaps it is best to accept a situation in which many of the guilty escape punishment, if the system insures that hardly anyone will be ‘punished’ when innocent. But perhaps not: this significantly depends on the probabilities, say, on the chance that the criminals set loose may scare, harm or kill people. (In utilitarian or indeed egoistic terms we could not defend even the level of safeguards against the ‘punishment’ of the innocent, prevailing in most Western countries – see [3].)

The intrinsic value of innocence makes sense, it seems, only due to the principled respect for the moral capacity and autonomy of people. Since

New takes the moral value of (real) innocence as axiomatic, he needs to disallow prepunishment. The crucial matter is not what the agent says about her intentions, or, indeed, what we think about the epistemic probability that she will commit the offence. To punish before an offence has been committed, in the light of such information and assessment, is to treat the person merely as an object. Respect for her moral personality and choice requires of us to give her a moral chance to *remain* innocent, and not treat her as guilty before she actually is. Whether she currently values this possibility or not is irrelevant.

If we believe that we lack libertarian free will, and certainly if we interpret the consequences of the lack of libertarian free will in a hard determinist manner, such respect for moral autonomy loses most of its point. But then, if we are hard determinists the intrinsic value of moral innocence is in itself undermined. For hard determinists cannot sustain the distinction between the guilty, who may really deserve punishment, and the innocent, who do not. If you like, according to hard determinism everyone, however they act, are equally morally innocent (see [4]). New cannot find assistance in that direction.

The unacceptability of prepunishment is not then a ‘mere prejudice, attaching improper moral significance to an insignificant temporal fact ...’ ([2, p. 37]). This unacceptability follows from our deepest ‘Kantian’ moral intuitions, about the necessity of respecting autonomous moral personality and choice. Such a picture of morality may be rejected, but it, or something like it, seems to lie behind the non-instrumental value of doing (almost) all we can to avoid the ‘punishment’ of the innocent. If we consider the ‘punishment’ of the innocent to be intrinsically wrong, as New seems to do, we cannot accept prepunishment.¹

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References

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- [2] Christopher New, ‘Time and Punishment’, *Analysis* 52 (1992) 35–40.
- [3] Saul Smilansky, ‘Utilitarianism and the “Punishment” of the Innocent: The General Problem’, *Analysis* 50 (1990) 256–261.
- [4] Saul Smilansky, ‘The Ethical Advantages of Hard Determinism’, *Philosophy and Phenomenological Research*, forthcoming.

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