More prepunishment for compatibilists: a reply to Beebee

SAUL SMILANSKY

In Smilansky 2007 I argued that compatibilism has difficulties resisting prepunishment, and that it is thus a much more radical view than is typically presented and perceived. Helen Beebee (2008) presents two interesting counter-arguments, which I would like to examine.

Briefly summarized, my argument goes like this: the common-sense view is that prepunishment would be deeply problematic. Until a crime has been committed, people can decide, even at the last minute, not to commit it, hence maintaining their moral innocence and not coming to deserve to be punished (see Smilansky 1994; a reply to New 1992). In my recent paper, to which Beebee responds, I claimed that if we are compatibilists (and assuming predictability), we do not need to allow for a change of view,

since it is determined that such a change will not occur. Hence compatibilism is compatible with prepunishment.

Beebee's first argument is that 'it is complete predictability that is causing all the trouble, and not determinism itself'. She asks us to imagine that we have both libertarian free will and time travel. We can thus travel to the future, know who will commit a crime, and return to the past in order to prepunish him or her. My claim that libertarian free will (LFW) precludes prepunishment (because we need to allow for a last-minute change of mind), while compatibilist free will (CFW) does not (because it is determined that there will not be a change of mind) is thus countered. Under Beebee's scenario, we can find out, after the fact, whether the free libertarian choices will have unfolded into crimes, and then go back in time and prepunish for them.

It is not clear why we need to take time-travel seriously, as we do perfect predictability. I do not find plausible Beebee's attempt to argue that a time-travel scenario is no more incredible than determinism-based predictability. We are constantly approaching perfect predictability in many areas, while the idea of going back and forth in time (let alone altering the past after we have seen the future) is hardly on the table. And even if we do not quite have perfect predictability, predicting with virtual certainty is all around us. I can predict that, in the coming week, the neighbour's old dog will not run faster than 90 kilometres per hour (since the fastest greyhounds do not do this). We can predict that if a man known to be a police informer is put in the prison yard of the most violent prison, together with the people he has implicated, they know that he implicated them, and there are no other relevant factors, he will be harmed.

But even beyond the general dubiousness of time-travel, Beebee's argument does not succeed, because it does not address the central issue – the implications of determinism versus libertarian free will. Let t_0 be the proposed time of prepunishment, and t_1 the instance at which the crime is committed. The question is whether there is a difference between the implications of LFW and CFW, *in themselves*, for the possibility of prepunishment at t_0. Beebee's time-travel move is meant to deal with the question of predictability; but while predictability is important, it is not the only thing, or even the most important thing. The issue is not only what we may come to know, but under which conditions we are morally permitted to prepunish. On my account of a typical compatibilist situation, the reason why we may punish at t_0 is not predictability but that the crime, in a sense, is already there. If a person has formed an intention to commit a crime, and it is determined that this intention will later cause the crime (in a non-deviant way), then we seem to have, long before the crime is actually committed, a punishable desert and responsibility for the crime (and not only for the intention to cause the crime). The passage of time is still

required, but merely for the crime to unfold, as determined. For a determinist, even before the crime occurs, nothing morally substantial may be *missing*, in order for the punishment to be acceptable. Morally, determinism seems to extend the already formed intention into complete causal efficacy and culpable responsibility for the crime, even long before the crime takes place.

This would not be the case, with libertarian free will, under Beebee's story: the crime obviously cannot already be there, at t_0, because it is going to be caused, through the exercise of LFW, only later. Notice that under Beebee's conditions for prepunishment we might be permitted to punish someone when he is three years old (let us call this t_{-1}). For, it is not required that an intention to commit the crime exists at the time of prepunishment: we prepunish merely because we have come to know, much later, through time travel, that a crime has *already* occurred. This would apply at t_{-1} just as well as at t_0. In my way of thinking, by contrast, we may punish (at t_0) only because the crime already 'deterministically pre-exists', in the sense I explicated above; and we may *not* punish at t_{-1} because no intention to commit the crime has even been formed. Even if time-travel of the relevant sort were possible, it would not make it morally permissible to punish a person at t_0 (let alone a three year old at t_{-1}). For, with libertarian free will, even under Beebee's scenario, there is, at t_0, *no one who is causing a crime, and no moral culpability*. In contrast, with my scenario both determination of the crime and moral culpability for it already exist at t_0. The metaphysical and moral situations will be completely different under determinism or libertarian free will; and only compatibilist agents are prepunishable.

Beebee's second objection is of a very different nature. She asks us to consider the crime of conspiracy to commit murder, and quotes from the 2006 UK Terrorism Act, which speaks about 'any conduct for giving effect to' an intention to commit an act of terrorism. Beebee claims that these examples show that we are not opposed to prepunishment, and so there is nothing problematic about compatibilism even if it allows prepunishment. Beebee anticipates the major rejoinder here, which is that such laws do *not* call for *pre*punishment, since the intention and the active preparation towards murder or terrorism already exist. She counters this objection by saying that at least one major strand of the 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' (260).

But Beebee's reply to the objection that she anticipates does not do the work that it needs to do: from the fact that we punish for conspiracy because we care about what happens if conspiracies lead to crime, it does not follow that we punish for the crime; we still punish only for the

conspiracy. This is illustrated through the very laws in question, in the way they are formulated and in that the sentences for conspiracy and for its implementation will almost invariably differ. The law does not want people to engage in conspiracies to commit such serious crimes, but if they are caught at the conspiracy stage they are punished for the conspiracy, not for what they might have done, had they not changed their mind, and not been intercepted. In other words, they are punished and not prepunished. Take A to be the crime of conspiracy to commit a terrorist act and B the act of terrorism: they are punished after the relevant t_1 for A, rather than (as Beebee needs to show) prepunished at t_0 for B.

Beebee's attempt to show that common-sense opinion is sympathetic to prepunishment is unconvincing. The idea that someone will be severely punished now for a crime that she has not committed (and may never commit), as though she *has* committed it, would seem to be a paradigm of the morally unacceptable. Yet compatibilism, because of the special way in which determinism operates in extending culpability for the crime backwards in time, is pushed towards prepunishment, in stark opposition to our moral commonsense.

I conclude that neither of Beebee's arguments works. The first (based on time-travel) comes up short once we see that more than predictability is at issue; the second blurs the moral and legal distinction between punishment for intention and preparation (as in conspiracy) and prepunishment for a crime that has not occurred. Determinism establishes a connection between people and crimes, a connection that raises the possibility for acceptable prepunishment; hence, in contrast to the common way of understanding and presenting compatibilism, the issue of prepunishment shows compatibilism to be a radical, revisionist position.[1]

University of Haifa
Haifa 31905, Israel
Smilsaul@research.haifa.ac.il

References

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