

Prepunishment for compatibilists: a reply to Kearns

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I have argued recently that compatibilism cannot resist in a principled way the temptation to prepunish people, and that it thus emerges as a much more radical view than is typically presented and perceived; and is at odds with fundamental moral intuitions (Smilansky 2007a). Stephen Kearns (2008) has replied, arguing that ‘Smilansky has not shown that compatibilism cannot resist prepunishment. Prepunishment is so bizarre that it can be resisted by just about anybody’. I would like to examine his challenging arguments.

My claim that compatibilism cannot extricate itself from prepunishment is built on an ingenious argument made in this journal by Christopher New (1992). A person tells us that he is going to commit an offence (drive above the speed limit in Alaska) but that after he does so he will be beyond our reach. Since this person is highly reliable, we know beyond a reasonable doubt that he is going to commit the offence; and that we will be unable to punish him after he has committed it. He proposes that we go ahead and prepunish him now. New claims that we may prepunish this person for, after all, belief ‘beyond a reasonable doubt’ in the occurrence of an offence suffices for regular punishment, and such belief exists in this case. I replied (Smilansky 1994) that such 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. In my recent paper, to which Kearns replies, I argued that this commonsense view is not available to the compatibilist.¹ If we perfectly know *now* that it is completely determined that a person will commit a crime in (say) a week’s time, out of his own (compatibilist) free will, the compatibilist does not have a strong principled objection to prepunishing this person now, before he has actually committed the crime.

¹ Neil Levy has proposed a thought experiment, involving time-travel into the past, which raises some of the same worries about compatibilism and prepunishment as my own paper. See http://gfp.typepad.com/the_garden_of_forking_pat/2004/12/time_and_the_co.html. Helen Beebe (2008), by contrast, uses a time-travel scenario to help compatibilism. I think, however, that using time-travel in this context is problematic in ways that my own argument from determinism is not (see Smilansky 2008).

The commonsense objection, that we must allow him to change his mind, does not apply here; for according to compatibilism it is already determined that he will *not* change his mind. Thus, there seems to be no point, from a compatibilist perspective, for waiting. Compatibilism cannot resist prepunishment.²

Kearns presents two main arguments. The first challenges my claim that a deterministic compatibilism cannot make use of the commonsense ‘change of mind’ objection. According to compatibilism, Kearns says, until a person commits a crime he is still able to do otherwise, and remain innocent, and ‘we must allow her this opportunity out of respect for her’ (Kearns 2008: 251). But this is a very problematic argument for compatibilism. The compatibilist believes that the person is free and morally responsible for her choices and actions, and that this is compatible with the fact that it is determined that she will not change her mind. I do not need to dispute that. But if it is determined that the person will not change her mind, it seems completely pointless to wait. What are we waiting *for*? A compatibilist interpretation of respect for persons should not hinge on the pointless. We can agree that a person’s choices and actions are free but, given determinism (and bracketing epistemic difficulties), the compatibilist should not argue that there is any *doubt* about the occurrence of the crime. And if there is no doubt, then the crime is as good as present already, and (unless we are given some further argument) we may prepunish for it. Suggesting that compatibilism should be committed to allowing for doubt as to the outcome at the same time as holding that the absence of any change of mind is determined would not be good advice for compatibilists. The reason for not prepunishing was to allow for a change of mind, but if we know that there is not going to be a change of mind then there is no point in allowing for it, and a compatibilist insistence here would risk making this case a *reductio* of compatibilism. Compatibilism need not insist on the pointless; rather, it should resist Kearns’s suggestion.

Kearns does not pursue this move further but proceeds to what he considers a ‘more interesting objection’, which is purported to show that prepunishment is, in any case, unacceptable. This objection follows from the possibility that one will prepunish a person and thereby *cause* her to commit a crime. In such a case no crime would have been committed but for the preceding punishment that triggered it. Here, Kearns suggests,

² In the future this will become more important in practice, because forthcoming technological developments are likely to open up tempting options for prediction and prepunishment. See the Postscript to my recent book *10 Moral Paradoxes* (Smilansky 2007b).

the real criminals would be those who prepunish, for no one would come to deserve punishment if they had not been prepunished. Such a case is indeed problematic, but I do not see why Kearns thinks that it has much of a bearing on our issue. Surely such situations are unusual. In any case, a scenario such as New presents shares nothing with Kearns's worry. The person fully intends to commit the offence before any prepunishment, and will do so *whether he is prepunished or not*. We can only choose between prepunishing him and letting the offence go unpunished. My claim, that in such a case prepunishment cannot be resisted by the compatibilist, hence remains unaffected by Kearns's worry about generating crime through prepunishment, for clearly this worry does not apply here.

Kearns anticipates such a response, and has three replies. First, knowing that a person will commit a crime whether punished or not would require too much, epistemically, even from a perfect predictor. Second, even if the person commits the crime, her reasons may be modified by the prepunishment, and thus 'we may render her reasons to commit the crime innocuous'. Finally, if a person commits a crime, whether prepunished or not, then such a person 'may be in some sense *fated* to commit this crime', and a compatibilist may excuse her for that reason (since the compatibilist holds that 'determinism may be compatible with free will, but fate is not') (253).

However, while again there might be intriguing cases where such responses may be adequate, they do not address the challenge. For none of them applies to the sort of case that New presented: we know (beyond a reasonable doubt) that the offence is going to be committed because the person told us that he is going to do so and he is highly reliable. If we also assume determinism, it is difficult to see why the work of a perfect predictor would be so difficult. Likewise, there is no reason to think that the reasons for committing the offence would be affected by the prepunishment, let alone that the offence would be made innocuous through prepunishment: to recall, the person tells us that he is going to commit the offence, and then suggests that we prepunish him, if we wish. In this case prepunishment will play neither a causal role, nor an exculpating one. Finally, as to Kearns's third point, there is simply no reason to see the mysterious work of fate here: the person will commit the offence 'whether we punish him or not' of his own free will, because he wants to (perhaps he likes the thrill of speeding).

The role that determinism plays goes beyond that of precluding the need to allow for a change of mind. 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 before the crime.

I conclude that Kearns does not succeed in showing that the compatibilist has the resources to resist prepunishment, systematically and in a principled way. Insisting on allowing for a change of mind is unnecessary for the compatibilist view of freedom and moral responsibility, and would push compatibilism into the awkward corner of requiring a pointless gesture, which does not make sense if one believes that an action is determined. Kearns's major point, the fear that prepunishment would create the crime that the prepunishment is purported to punish for, is irrelevant to the class of cases I have been considering. The challenge I posed to compatibilism, to resist prepunishment in the sort of case presented by New, is not met. And we have learnt that determinism appears to push back in time criminal responsibility and desert, hence enabling prepunishment. What this implies about compatibilism remains to be seen, but it is clear that this position finds itself at a considerable distance from the judgments of commonsense.³

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References

- Beebe, H. 2008. Smilansky's alleged refutation of compatibilism. *Analysis* 68: 258–60.
- Kearns, S. 2008. Compatibilism can resist prepunishment: a reply to Smilansky. *Analysis* 68: 250–53.
- New, C. 1992. Time and punishment. *Analysis* 52: 35–40.
- Smilansky, S. 1994. The time to punish. *Analysis* 54: 50–53.
- Smilansky, S. 2007a. Determinism and prepunishment: the radical nature of compatibilism. *Analysis* 67: 347–49.
- Smilansky, S. 2007b. *10 Moral Paradoxes*. Malden, Mass.: Blackwell Publications.
- Smilansky, S. 2008. More prepunishment for compatibilists: a reply to Beebe. *Analysis* 68: 260–63.

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