

Does Hard Determinism Require “Funishment” Instead of Punishment?

Author : Kimberly Ferzan

Date : October 28, 2011

Saul Smilansky, *Hard Determinism and Punishment: A Practical Reductio*, [30 Law and Philosophy 353](#) (2011).

The implications of determinism have long bedeviled our responsibility practices. If one starts with the premise that human beings are not “uncaused causers” but rather are comprised of beliefs, desires, values, and reasons that are themselves unchosen, then one begins to wonder how we can be responsible for our actions. Although compatibilists believe that responsibility is possible even if determinism is true, hard determinists believe that we are determined and that blame and punishment cannot be reconciled with that fact. Because individuals do not choose who and what they are, hard determinists maintain our current punishment practices are completely unjustified as criminals do not – indeed, cannot – *deserve* to be punished.

Enter Saul Smilansky. In his marvelously playful and thoroughly convincing article, Smilansky questions exactly what will happen in a hard deterministic world. The answer may surprise you – punishment will have to give way to “funishment.”

Smilansky challenges the reader to take seriously hard determinism’s claims on us as a society and what we would actually have to do if hard determinism were true. The problem begins with criminals. Even if free will is an illusion, criminals are real, and there will still be criminals. Society will have to do something with them, even if it is true that criminals do not deserve punishment. So, because there will be fewer criminals than law-abiding citizens, the criminals will have to be segregated. (Smilansky can be read as presupposing recidivism, though one could also argue that society would abandon criminal law *per se* and replace it with a purely preventive system of incapacitation. The latter possibility would still place the same demands on society and support Smilansky’s *reductio*.) Because the criminals do not deserve hard treatment, however, the conditions will need to be favorable. Moreover, because society is removing these individuals from society for society’s benefit, the criminals will need to be compensated (just as society can’t take your property for its benefit, etc.). And so, where and how criminals live will have to be pretty nice, pretty nice indeed. Specifically, Smilansky argues that although “fun-zones” would need to be as secure as prisons, they would otherwise need “to resemble five-star hotels, where the residents are given every opportunity to enjoy life.” (355). Smilansky argues that “no effort and no expense should be spared” and claims that “opulent entertainment” would be required. (355-56).

One can imagine how this story unravels. The nicer the fun-zones become, the more attractive they become. The more attractive they become, the more people find crime will pay (one way or the other). And soon, you have law abiding citizens who hate criminals all the more not only because crime is rampant and their safety undermined but also because criminals have a strong claim to tax dollars for their fun zones. Smilansky concludes, “Hard determinism is, in practice, self-defeating.” (361).

This is a tremendous piece of legal scholarship. As I read this piece, part of me was transported as I was when I read Ursula K. LeGuin’s “The Ones Who Walk Away from Omelas.” This article is not, however, a short story where the message is clear from the fiction. It is a rigorously argued piece of philosophical

work. At each and every stage at which the reader might balk – be it why there is such a demanding claim on citizens to turn prisons into fun zones, to why crime would be attractive, to the merits of a practical *reductio*, Smilansky painstakingly makes the case for each step in his argument. It is a wonderfully accessible piece for the novice and a must-read for expert. Criminal law theorists simply have to read it. And, among us compatibilists, we will blame you if you don't.

Cite as: Kimberly Ferzan, *Does Hard Determinism Require "Funishment" Instead of Punishment?*, JOTWELL (October 28, 2011) (reviewing Saul Smilansky, *Hard Determinism and Punishment: A Practical Reductio*, 30 **Law and Philosophy** 353 (2011)), <https://crim.jotwell.com/does-hard-determinism-require-funishment-instead-of-punishment/>.