Skepticism and Sanction: The Benefits of Rejecting Moral Responsibility

**Neil Levy
Florey Neuroscience Institutes.**

nllevy@unimelb.edu.au

Abstract: It is sometimes objected that we cannot adopt skepticism about moral responsibility, because the criminal justice system plays an indispensable social function. In this paper, I examine the implications of moral responsibility skepticism for the punishment of those convicted of crime, with special attention to recent arguments by Saul Smilansky. Smilansky claims that the skeptic is committed to fully compensating the incarcerated for their detention, and that this compensation would both be too costly to be practical and would remove the deterrent function from incarceration. I argue that the skeptic is not committed to full compensation of the offender, and that the costs of such compensation would in any case be far smaller than Smilansky thinks. In fact, I claim, the costs of the criminal justice system to which the skeptic is committed might be very much lower than the costs – economic, social and moral – we currently pay as a consequence of our system of punishment.

If agents are never morally responsible for their actions, as some philosophers allege, what would the implications for the criminal justice system be? Skeptics about moral responsibility argue that though the system would have to be altered, to remove those elements – call them retributive punishment – that are justified only if agents are morally responsible for their actions, skepticism is consistent with attaining the other valuable ends of the criminal justice system. It is fair to say, however that the practical implications of moral responsibility skepticism remain one of the least well developed aspects of this family of theories. Given that central elements of criminal justice seem to rest on the supposition that agents are morally responsible for their actions, skeptics owe us a reasoned assurance that adopting their views, and altering our practices accordingly, will not precipitate moral or social catastrophe.

The need to provide such a reasoned assurance is all the more pressing in the light of recent work by Saul Smilansky. Smilansky (2011) argues that altering practice to reflect the skeptics' views would have terrible consequences. For Smilansky, skeptics are morally committed to actions that are inconsistent not only with the moral commitments that motivate them, but also inconsistent with *any* plausible moral theory.¹ For Smilansky, these entailments constitute a *reductio* of moral responsibility skepticism: since it is committed to policies that would quickly lead to moral disaster if implemented, we have good reason to reject the theory (though he also acknowledges the possibility that skepticism is correct and we confront a true moral dilemma: we can neither justify punishment nor avoid acting as though it were justified, and however we act we cause serious moral wrongs).

The proximate aim of this paper is to reply to Smilansky's arguments. In replying to Smilansky, however, I aim to contribute to the broader project sketched above: giving us reasons to think that moral responsibility skepticism is not committed to policies that would have effects that we cannot countenance. I shall suggest, *contra* Smilansky, that moral responsibility skepticism supports a range of policies that have moral benefits compared to those supported by compatibilist and libertarian accounts of moral

¹ More precisely, Smilansky argues that *hard determinists* – a view we shall shortly set out – are committed to practices that are inconsistent with their moral motivations. However, Smilansky's argument seems to generalize to all skepticisms about moral responsibility; it is this broader class of theories that I shall discuss here.

responsibility. The social and economic – not to mention moral – effects of these policies are likely to be positive, compared to the status quo, I shall claim.

I shall first set out the bare bones of theories that are skeptical about moral responsibility, concentrating on the hard determinism that is Smilansky's target. I will then set out his *reductio*, before showing how proponents of moral responsibility skepticism can avoid Smilansky's challenge. The first part of the response to Smilansky will concentrate on the normative commitments of moral responsibility scepticism – specifically, on the question whether moral responsibility skeptics are committed to the practice he calls *funishment* (the practice of making the conditions of incarceration as delightful as possible). In the second part of the response, I will turn to evidence that the moral costs to those people who would be incarcerated under policies justified by responsibility skepticism need not be as heavy as Smilansky thinks, and that therefore compensation for detention is likely to be far cheaper than he suggests. Taken together, the two parts of the paper sketch how skeptical policies can be implemented in ways that yield social and economic benefits, for society at large and – in many cases, at very least – for those who are detained as well. If the arguments advanced here are sound, we can make a case for the boot being on the other foot: far from these policies being too costly to implement, it is alternatives based on the rejection of skepticism that have unacceptable moral and social costs.

It should be admitted upfront that the arguments I shall present are of necessity somewhat speculative, inasmuch as they depend on empirical data that are contentious. The data is contestable for two reasons. First, because the number of uncontrolled variables involved in the study of social policies like different penological regimes is always huge, data like these are open to multiple interpretations, and the interpretations I shall offer, though reasonable and widely held, have been disputed (I will occasionally mention the nature of these disputes). Second and more fundamentally, it is possible to dispute the relevance of the data on the grounds that a society in which agents no longer held each other morally responsible would be so different to the societies in which the data were gathered as to make inferences from the data invalid. Some philosophers have argued that were we to accept hard determinism, for instance, we would, or should, no longer make normative claims at all (see Pereboom 2002 for discussion). I cannot hope to address the arguments for and against this claim. Rather, I shall simply assume that in

a world that rejected moral responsibility (a) normative claims would continue appropriately to be made and (b) enough background facts about human beings and human societies would remain stable to make evidence gathered today applicable to society as it would be. These assumptions may reasonably be disputed; however it is worth noting that thinkers like Smilansky, who argue that the adoption of practices predicated on responsibility skepticism would be disastrous, themselves assume that human nature and responses would remain sufficiently stable to enable predictions about likely consequences. In making this particular assumption, then, I do not assume anything that is controversial in the debate.

Moral responsibility skepticism

Most philosophers believe that agents are appropriately held morally responsible for some of their actions.² ‘Success’ views regarding moral responsibility (and free will: the debates closely parallel one another, especially given that many philosophers understand free will as the kind of freedom necessary for agents to be morally responsible) divide into two main classes. *Incompatibilists* (with regard to moral responsibility) hold that moral responsibility is incompatible with causal determinism, whereas *compatibilists* hold that it is compatible with causal determinism. Most incompatibilists are *libertarians*: they combine incompatibilism with the thesis that the universe is not causally deterministic and hold that (in part) because the universe is not causally deterministic, agents are sometimes morally responsible for their actions. Compatibilists typically hold that agents are sometimes morally responsible *whether or not* the universe is deterministic.

However, both compatibilism and libertarianism face serious objections, conceptual and empirical (see Levy and McKenna 2009 for a survey). In the light of these objections, some philosophers believe that there is no satisfactory account on which agents are morally responsible for their actions, and therefore advocate skepticism about moral responsibility. It is this family of views that is Smilansky’s target. He focuses, in particular, on *hard determinism*, which is the view that moral responsibility is incompatible with causal determinism *and* with indeterminism. There are other kinds of skeptical

² The authoritative website *Philpapers* conducted a survey of the profession in November 2009 (results available at <http://philpapers.org/surveys/results.pl>). 12.2% of professional philosophers advocate skepticism; a slightly larger percentage are libertarians. A majority are compatibilists or lean toward compatibilism.

views, but the differences between these views are irrelevant for our purposes, and I shall set them aside here.

Moral responsibility is not merely a theoretical matter. Central elements of the criminal justice system are, plausibly at any rate, justified only if agents are morally responsible for their actions. The sanctions this system imposes – especially the deprivation of liberty – are morally serious and require an equally weighty rationale for their imposition. Traditionally, incarceration is seen as justified, in part, by the *desert* of offenders: because they are *guilty* – morally, and not merely legally, guilty – we can impose significant sanctions on them; the more weighty the sanction, the more such a justification is required (thus strict liability offenses are usually limited to minor crimes). But if moral responsibility skeptics are right, agents are never deserving of the imposition of such sanctions. Thus moral responsibility skepticism has practical implications: it apparently entails that major elements of the criminal justice system are unjustified.

Of course, the imposition of sanctions serves purposes other than the punishment of the guilty: it is also justified by its role in incapacitating, rehabilitating and deterring offenders. Moral responsibility skeptics typically maintain that implementing their view would not require closing the prisons, because these justifications would remain valid. Smilansky's central aim is to show that this is false: if agents do not deserve punishment, they cannot justifiably be incarcerated without us inviting moral catastrophe.

An End to Punishment?

Smilansky (2011) starts from the plausible position that there are some wrongdoers who it will be necessary to incarcerate. Some criminals may be habitual wrongdoers, and it may be necessary to remove them from society for shorter or longer periods of time (depending on their prospects for rehabilitation). Moreover, the existence of a system of punishment is likely to have a deterrent effect, at least with regard to some kinds of crime (Kennedy 2008). These facts remain true whether or not agents deserve punishment. However, Smilansky claims, if agents do *not* deserve punishment then we may not justifiably treat them in ways that are compatible with the maintenance of deterrence or rehabilitation (indeed, practices inspired by skepticism are likely to encourage rather than deter crime); moreover, the incapacitation that is in principle

compatible with responsibility skepticism would come at an unacceptably high cost, economically and socially.

Smilansky argues that because the imposition of imprisonment on agents is such a significant burden, individuals who do not deserve such treatment must be compensated for the deprivation of their liberty. Since the burden is a heavy one, the compensation will need to be equally hefty: prisons will need to remain secure institutions, so that the general public is protected, but beyond that the conditions of their inmates should be made “as delightful as possible”, resembling five star hotels rather than today’s grim prisons (Smilansky 2011: 355). Punishment would have to be replaced by its distant cousin, *funishment*: the incapacitation of dangerous or otherwise anti-social individuals in conditions that are sufficiently good to compensate them for the loss of their freedom.

Funishment would be extremely costly. Firstly, it would be costly in economic terms. Ordinary imprisonment is already expensive; Smilansky gives a figure of U\$50,000 per annum for a typical prisoner in a high-security facility in California. Of course, Californian prisons are notoriously overcrowded; sufficiently so that the Supreme Court recently ruled that their conditions violated the constitutional ban on “cruel and unusual punishment” (Brown vs Plata 2011). It is likely that making Californian prisons adequate to meet *existing* standards would require spending significantly more per prisoner than is currently the case. But it will be necessary to spend very much more to raise the standards sufficiently so that inmates are funished rather than punished. The expenditure involved is, all by itself, a significant objection to funishment, and therefore to the moral responsibility skepticism that motivates it. At very least, it seems to undermine the motivation to be a responsibility skeptic by showing that it cannot guide practice.

If Smilansky is right, however, worse is to come. If prisoners are funished rather than punished, prison will become an attractive option to many. At very least, the threat of imprisonment will no longer deter wrongdoing. If the worst that befalls one, should one steal a purse or mug a passerby, is that one will be sent off for a holiday in a resort hotel, then the disincentive against crime is largely removed. Some people might find the restrictions on liberty involved in funishment a mild deterrent; others would probably find the experience a positive attraction. People might not merely fail to be deterred:

some might seek out funishment, and if that requires the commission of crime then some will gladly break the law.

This would have a multiplying effect on the economic costs: it would ensure a swelling prison population, all of whom must be maintained in a lifestyle sufficiently good to compensate them for the deprivation of liberty. Moreover, it would lead to a dramatic rise in crime levels. Law-abiding citizens would face much heavier tax bills, to funish an ever-more active class of lawbreakers. Prison would no longer deter. In the absence of deterrence, a significant motive for rehabilitation would be removed. And even as more and more individuals are removed from society by the system, crime would rise. Funishment would serve none of the social functions of punishment. The fact – if it is a fact – that moral responsibility skepticism entails funishment is, therefore, a powerful reason to reject such skepticism. At very least, one might think, a theory that has such dire implications must meet very demanding standards before we should accept it.

Is the skeptic committed to funishment?

There is an obvious rejoinder to Smilansky: if no one deserves to be punished, still a system of sanctions can be justified on consequentialist grounds. And it is clear that a consequentialist about punishment will not be dismayed by Smilansky's worries. However, Smilansky claims that accepting consequentialism "would betray the moral force of hard determinism" (2011: 362). Hard determinism is not simply a metaphysical thesis – the conjunction of incompatibilism and determinism – but a partly normative position as well; though a purely metaphysical hard determinism stripped of all normative commitments is conceptually possible, such a view would be unmotivated. In fact, the motivation for being concerned about free will and moral responsibility comes from a concern with desert, with whether agents who are punished deserve the burdens they bear. For this reason, Smilansky maintains, insofar as one is motivated to engage in debates about moral responsibility *at all*, one must hold (or perhaps be committed to, whether one knows it or not), a "broadly deontological paradigm notion of free will" (363).

In making this claim, Smilansky appears to have in mind varieties of consequentialism that seek to maximize welfare, or preference satisfaction or pleasure. As we shall see,

there are versions of consequentialism that are more complex than these simple maximizing views; some of these views give a weight to desert that is independent of its contribution to properties like welfare. Moreover, I shall argue, even simple maximizing views like those Smilansky has in mind may yield a motivation to care about whether or not agents can be morally responsible. It is therefore false that caring about moral responsibility commits one to a deontological normative framework.

Consider, first, a simple maximization view – say a simple hedonistic utilitarianism. Smilansky points out that on views like this, notoriously, there is nothing intrinsically wrong with the innocent bearing a burden. These theories are entirely forward-looking, holding that we ought to treat others in whatever way will maximize utility, and setting aside all questions of desert. However, it is a mistake to think, as Smilansky does, that this shows that consequentialists of this variety entirely ignore questions of desert. They certainly ignore them when they answer practical questions, but they feel entitled to ignore these questions because they have already answered them in ways that justify setting them aside. They have concluded that no one is morally responsible for anything, or that concerns about moral responsibility are trumped by concerns with maximizing utility.

Relatedly, proponents of the simple view have a motivation for addressing concerns about moral responsibility in order to convert others to their view. As Smilansky notes, the punishment of the innocent is widely held to be a paradigm of injustice: intuitions involving the imposition of heavy burdens on those who do not deserve them have seemed to many a powerful reason for rejecting utilitarianism. If the simple maximizer can establish that all burdens fall on those who do not deserve them, they thereby clear away an obstacle to the acceptance of their theory.

Further, even for simple maximizers there may be indirect reasons to continue to care whether agents can be morally responsible, for the simple reason that people's *beliefs* about moral responsibility mediate the consequences of actions. If people believe that some agents are deserving of punishment and some are not, they may worry unduly about policies that impose burdens on the innocent. This worry will of course lower their utility all by itself; it might also be a barrier to the establishment of policies that would maximize utility. Showing that no one can be morally responsible (for instance) might

assuage some worries about maximizing policies: worries that stem from concerns about how burdens and benefits are distributed. So the simple maximizer has a motivation for examining the plausibility of success accounts of moral responsibility. Of course, this is a reason to care about what people believe about moral responsibility, rather than to care about whether agents are morally responsible. However, convincing others that no one is morally responsible requires – *contra* Smilansky – engagement in the debates; moreover, we are more likely to succeed in convincing others of views that are plausible than those that are implausible, and that gives us special reason for taking the arguments seriously.

Even simple maximizers therefore have good reasons for engaging in, or for having engaged in, debates about moral responsibility. However, consequentialists need not be (and typically are not) simple maximizers. There is a range of more complex consequentialist views, and some of these views are concerned directly with desert. On some of these views, each of us deserves to be treated in accordance with the set of rules and practices that together promote utility (or welfare, or preference satisfaction). A consequentialism of this variety may object to the treatment of those convicted of wrongdoing when that treatment is not mandated by a system that promotes the best consequences.

It is epistemically possible, for all we now know, that judgments of blameworthiness will figure in the system that promotes the best consequences. But it is also possible that holding that no one is morally responsible will figure in a system that promotes the best consequences. If the latter possibility turns out to be correct, consequentialists of all stripes will have reasons to assess whether agents can be morally responsible, because it seems likely that building social and moral systems on truths contributes to their stability: establishing that no one is morally responsible will strengthen the system that promotes the best consequences.

Other consequentialist views might be concerned with moral responsibility even more directly. On the views I have in mind, desert is an independent consideration: not a consideration that is a function of the system that maximizes utility (or what have you) but a consideration that is responsive (*inter alia*) to whether agents are morally blameworthy or praiseworthy. Feldman (1997), for example, holds that desert is intrinsically valuable. Holding that desert is intrinsically valuable is not equivalent to

deserting consequentialism, though it greatly complicates the picture because we can no longer settle normative questions by measuring the consequences of actions or policies for a single property. For Feldman, desert interacts with other values, such that deserved pleasure counts for more than undeserved and deserved pain for less than undeserved. This view entails that, since undeserved suffering counts for more in the consequentialist calculus, the responsibility skeptic has even greater reasons to compensate the incarcerated. Equally, though, the view entails that we also have countervailing reasons that are sensitive to the consequences of compensating the innocent for *other* people (including those people who are not incarcerated: they, too, do not deserve to suffer). A consequentialist of this kind will regret undeserved suffering, but she is not committed to compensating fully for it; not if such compensation comes at an unacceptable price (whether she must compensate some or all of those punished will depend on both the costs of compensation for the values she seeks to maximize and the weight she gives to undeserved suffering).³ On a view like this, desert is a consideration that must be taken into account, but it is one among several (or many); the best set of practices will strike a balance among them. A consequentialist of this variety recognizes the hard truth that no moral system is cost free: getting the best results involves some hard decisions and some moral costs.

A consequentialist who is a moral responsibility skeptic will naturally hold that no one should be treated any worse than is needed to bring about the best consequences, with all agents' welfare – including the welfare of criminals – taken into account. But she need not, and almost certainly will not, think that those who are incarcerated for the good of society must be fully compensated for the burdens they bear, not even if she thinks desert is intrinsically valuable (giving desert independent weight in the consequentialist calculus does not commit her to giving it overriding weight). She will weigh the costs imposed on such people against the costs others must bear if funishment replaces punishment. If the consequences are as bad as Smilansky thinks, such a consequentialist will probably – regretfully – conclude that we ought to treat some people in ways that

³ A reviewer for *Law and Philosophy* points out an additional complication: on some views, because it is the state that is imposing the burden on the incarcerated there is an additional obligation on its behalf to compensate them. Even if the consequentialist were to accept such a view in combination with valuing desert for its own sake, she would not necessarily be committed to offering full compensation: the amount of compensation owed, if any, would depend on the weight she places on desert and on this additional factor, and on the weight she places on the burdens placed on society at large by compensation.

they do not deserve.⁴

So far, we have accepted Smilansky's assessment of the burdens imposed on the incarcerated; correlatively, we have accepted his assessment of how costly compensation would be (the cost of full compensation is a direct function of the burden of incarceration). In the next section, we will reject his assessment both of the number of people who must be incarcerated and of the costs of their incarceration. I shall argue that the *overall* costs of incarceration, economic and social, may be very much smaller than Smilansky thinks.

The costs of punishment

Smilansky's *reductio* depends on the skeptic being committed to expending an enormous amount of money to make incarceration as delightful as possible. Both these direct costs and the indirect costs they entail – such as a loss of deterrence – make acting on this commitment untenable, he holds. We have seen that the skeptic, if she is a consequentialist, can avoid paying these heavy costs, on the assumption that fully compensating the incarcerated would be as costly as Smilansky suggests. In this section, I shall suggest that we ought not to accept this assumption in any case. Rejecting the notion that some agents deserve punishment opens the way for us to adopt policies that respond to crime at much lower costs, economically, socially and morally.⁵

Smilansky claims that it is necessary to detain a large number of people who represent a danger to the rest of us:

Murderers, rapists, violent bullies, thieves and other miscreants need to be kept apart from lawful society; we have no real choice, for otherwise they will kill, rape, steal and make life miserable for the rest of us (355).

⁴ It might even be true that punishment is justified on a so-called 'consequentialism of rights' – a consequentialism that aims to minimize the number of rights violations. Since the victims of crime are victims of rights violations, we can trade off the rights of those incarcerated against the rights of their victims.

⁵ Notice that one does not need to be a moral responsibility skeptic in order to believe that no one deserves to suffer. A number of philosophers – Scanlon (2008) most prominently – distinguish between the conditions under which agents are blameworthy for actions and the conditions under which they might justifiably be sanctioned; it is open to such philosophers to reject the justifiability of punishment without embracing skepticism. The considerations outlined here would be relevant to anyone who took this view.

Obviously, the crimes listed here, as well as others hinted at, differ in the degree to which they can be tolerated, where a certain level of a kind of crime is tolerable inasmuch as that level of exposure to that kind of crime is compatible with being able to pursue one's central plans and projects (a tolerable level of exposure to crime can be, as it were, factored in as a cost of doing business in a particular society). Thus, a certain amount of theft can be tolerated; though it greatly inconveniences a person to have their TV or (worse) their car stolen, such events, if rare, are for most people neither sufficiently disruptive of everyday life nor producing of sufficient apprehension, to be unacceptably burdensome. Much less murder and rape is tolerable, both because being the victim of these crimes is obviously incompatible with pursuing one's central plans and projects and because these crimes produce a disruptive degree of apprehension in potential victims if their likelihood passes a certain threshold. But is it true that we need to detain a large number of people in order to ensure that there is a tolerably acceptable rate of murder and rape? In what follows, I shall argue that available evidence suggests that it is not true; moreover, I shall claim, the majority of those who must be detained are innocent, *regardless* of whether responsibility skepticism is true. It is therefore false that moral responsibility skepticism commits us to detaining many morally innocent people, in addition to those that we must detain on rival views. I should admit, however, that the evidence I shall cite is a tiny proportion of an enormous range of data, and that all of it is contentious. Nevertheless, I shall claim, there is reason to think that we can detain far fewer people (and in better conditions, and often for shorter times) and at the same time secure the benefits of crime reduction we rightly demand.

Recidivism rates for released murderers and rapists – that is, the rate at which murderers and rapists who are released from prison are rearrested for the same crimes – are the lowest for any category of crime (Langan and Levin 2002).⁶ The majority of perpetrators of intolerable crimes are unlikely to reoffend, and it is therefore false that they must be detained for our protection (though it may be necessary to detain such offenders for short periods for assessment and possible rehabilitation; nevertheless, the duration of incarceration may be dramatically cut). Smilansky is nevertheless correct in maintaining that there are individuals who are likely to reoffend and from whom we need protection.

⁶ As a reviewer points out, however, lower recidivism rates among violent offenders may be due in part to sentence length: longer sentences result in greater ages at time of release, and there is a significant inverse relation between age and crime. Further research is needed that controls for age, sentence length, and recidivism (available data, especially for violent offenders, seems to be scant).

Many of these offenders are psychopaths: recidivism for rape and murder – indeed recidivism more generally – are highly correlated with psychopathy (Serin 1996). Around 25% of the prison population meet diagnostic criteria for psychopathy (Coid 1998). However, there is a good case for excusing psychopaths from moral responsibility, regardless of whether global skepticism is true (Levy 2007; 2010).⁷ If we are required to compensate those whom we incarcerate if they are not morally responsible, then we are required to compensate psychopaths. They are therefore a problem for all theories, not just responsibility skepticism. Since psychopaths are responsible for more than 50% of violent crimes and far more likely to reoffend than other non-psychopathic criminals, non-psychopathic criminals represent a small fraction of recidivists for intolerable crimes (Hare et al. 1988). Non-psychopathic recidivists are far more likely to commit property crimes: a class of crime which it is far easier to tolerate than offenses against the person.

Most of those offenders who commit crimes that we cannot tolerate as a society are psychopaths who should not be held morally responsible in any case. Most of the remaining serious offenders do not need to be incarcerated for our protection – not, at any rate, for very long. The number of *additional* people who the moral skeptic is committed to detaining for significant periods despite their innocence – additional, that is, to those who must be detained on any view – is likely to be far lower than Smilansky thinks.

Further, it seems likely that we do not have to choose between ending harsh punishment and the non-retributive goals of the criminal justice system; we can actually better achieve these goals by making punishment less harsh. Abandoning those aspects of the criminal justice system that are justified only if agents deserve punishment might make deterrence and rehabilitation easier than it would otherwise be. In fact, available evidence suggests that excessive harshness actually increases recidivism (Pizarro, Stenius and Pratt 2006). Improving conditions seems likely to reduce crime. Of course, such improvements would have to be funded, but if such measures cause a decrease in crime, they are extremely likely to pay for themselves in direct and indirect savings (property crime is itself an economic cost; further savings might stem from reducing the prison population

⁷ Admittedly, the claim that psychopaths are not morally responsible is contentious; see Talbert (2008) for representative arguments for the claim that they are responsible and blameworthy. I have addressed these arguments elsewhere.

and making former criminals economically productive).⁸

We can further reduce the costs of incarceration – both the costs to the taxpayer and the costs to those who are incarcerated – by reducing the length of sentences. There is a relationship between sentence length and deterrence (Kennedy 2008) but swiftness and certainty of punishment correlate far better with deterrence than does sentence length (Kleiman 2009). Further, shorter sentences actually increase certainty and therefore have a multiplying effect on deterrence: prisoners do not tend to appeal short sentences and courts have little patience for them when they do. As Kleiman (2009: 3) notes, in criminal justice systems like those prevailing in most developed countries, “severity is incompatible with swiftness and certainty”.

Shortening sentences therefore tends to bring benefits in deterrence at the same time as reducing the moral and economic costs associated with punishing the innocent. It also makes it less likely that prisons serve as crime factories, by reducing the amount of time that first-time offenders are in contact with hardened criminals. Further, the recognition that offenders are not blameworthy clears the way for the provision of genuinely high-quality counselling and education in prisons (something which we might be reluctant to provide to the blameworthy, insofar as it might be seen as rewarding wrongdoing). To the extent to which we are successful in removing the stigma associated with prison sentences, moreover, we can provide opportunities for former offenders to take advantage of the skills they acquire.

Of course, none of this is to deny that incarceration of the innocent has a moral cost. It is to claim that the aggregated cost is likely to be far lower than Smilansky suggests: imposing a relatively small (though not insignificant) cost on offenders may be justified

⁸ A reviewer for this journal points out that some theorists hold that the drop in crime seen in the United States over the past two decades is attributable to an increase in incarceration; hence, a case can be made that decreasing prison populations would increase crime. However, it remains open to doubt whether this claim is true. First, the US has one of the highest rates of incarceration in the world, but rates of crime that are not especially low by the standards of developed countries (the US scores in the middle of the range on property crimes compared to OECD countries and remains spectacularly bad with regard to homicide despite recent improvements (Van Dijk et al. 2008)). This fact is evidence that higher rates of incarceration do not automatically entail lower rates of crime. Second, even within the United States, the evidence that rising incarceration rates have caused decreases in crime is, at best, equivocal. Randall and Brown (2004) show that altering the time scale used makes the effect entirely disappear and Zimring (2007) shows that for New York City, at any rate, rises in incarceration seem to play a negligible role in explaining a spectacular drop in crime.

from a consequentialist perspective by the benefits it brings to the community at large. Rather than being embarrassed by the practical implications of their view, skeptics about moral responsibility might reasonably claim these implications count in its favour.⁹

Conclusion

Smilansky suggests that the costs of moral responsibility skepticism count very significantly against its plausibility. I have suggested that this is false: moral responsibility skepticism does not have costs that we ought not to be willing to pay. When we become clear about the implications of moral responsibility skepticism, a project forced on us by Smilansky, we come to see that a case can be made for the boot being on the other foot. To the extent to which believing in moral responsibility is an obstacle to shortening sentences and equipping offenders with skills and opportunities for honest work (since doing so seems to reward offenders, making them better off in the longterm), we can point to the cost of *retaining* the concept of moral responsibility and ask whether we should be willing to pay it.

It remains true that providing education and a pleasant environment in prisons (for instance) might make them attractive to some people on the outside, who might therefore be tempted to commit crimes to receive these benefits. Indeed, this is a phenomenon that is already occurring: witness the recent case of a man who robbed a bank in order to get health care (Turbyfill 2011). The possibility of more people following his example if prison is made more attractive is a genuine one. What this shows

⁹ Some will find the defence of skepticism offered here unacceptable, since it assumes the truth of consequentialism. It is therefore worth noting that deontologists can embrace many of the claims made here. Deontologists might justify the imposition of burdens like incarceration on wrongdoers by pointing out that many offenders fall short of autonomy; given this fact, it might be justifiable by deontological lights to detain them temporarily, when doing so is required to give them the skills and capacities they need for autonomy. Many offenders have problems that significantly reduce their autonomy such as mental illness or addiction (and frequently enough both). Rates of mental illness and substance abuse disorders are extraordinarily high in the prison population: one representative study found that a large majority of prisoners in New South Wales had had a psychiatric disorder in the 12 months preceding (Butler & Allnutt, 2003), and the great majority of prisoners also meet DSM criteria for addiction or substance abuse (CASA 2010). These are people with serious problems, problems that significantly lower the quality of their lives and may undermine their capacity for autonomous choice sufficiently to warrant paternalistic interventions by deontological lights. It is worth noting that some philosophers believe that the core elements of deontology are compatible with skepticism with regard to moral responsibility (see Vilhauer forthcoming for discussion).

is that it is likely to be harder to implement the kind of policies I have advocated in a dysfunctional society. If decent healthcare, accommodation, steady employment and the like is out of reach of a large number of people, but prison is pleasant, some people will be tempted to commit crime. But in a society in which these goods are available to all, the temptation will be small. It may be that it would be disastrous to attempt to implement the kind of policies I have advocated without also making a serious effort to develop a better society in other ways at the same time. Insofar as these policies are likely to reduce recidivism and help to address the problems that bar people from employment, they may nevertheless be a crucial element in a package of measures that together would constitute a decisive step toward a better society.¹⁰

¹⁰ This paper has benefitted considerably from the comments of two anonymous reviewers for *Law and Philosophy*.

References

Brown v Plata. Supreme Court of the United States. 2011. No. 09-1233.

Tony Butler and Stephen Allnutt, *Mental Illness Among New South Wales Prisoners* (NSW Corrections Health Service, 2003).

<http://www.justicehealth.nsw.gov.au/publications/Mental_Illness_Among_NSW_Prisoners_2003.pdf>

CASA (The National Center on Addiction and Substance Abuse at Columbia University), *Behind Bars II: Substance Abuse and America's Prison Population*, 2010.

< <http://www.casacolumbia.org/download.aspx?path=/UploadedFiles/tw0t55j5.pdf> >

Jeremy W. Coid, "The management of dangerous psychopaths in prison", in T. Millon and M. Birket-Smith (eds.) *Psychopathy: antisocial, criminal, and violent behavior* (New York: Guilford Press, 1998), pp. 431-547.

Fred Feldman, *Utilitarianism, Hedonism, and Desert: Essays in Moral Philosophy* (Cambridge University Press, New York, 1997).

Robert D. Hare, Leslie M. McPherson and Adelle E. Forth, "Male psychopaths and their criminal careers", *Journal of Consulting and Clinical Psychology* 56 (5) (1988): 710-714.

David. M. Kennedy, *Deterrence and Crime Prevention: Reconsidering the prospect of sanction* (London: Routledge, 2008).

Patrick A. Langan and David J. Levin, *Recidivism Of Prisoners Released In 1994*. Bureau of Justice Statistics, 2002.

< <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf> >

Neil Levy, "The Responsibility of the Psychopath Revisited", *Philosophy, Psychiatry & Psychology* 14 (2) (2007): pp. 129-138.

Neil Levy, "Psychopathy, Responsibility and the Moral/Conventional Distinction", in L. Malatesti and J. McMillan (eds.) *Responsibility and Psychopathy* (Oxford: Oxford University Press, 2010), pp. 213-226.

Neil Levy, *Hard Luck* (Oxford: Oxford University Press, 2011).

Neil Levy and Michael McKenna, "Recent Work on Free Will and Moral Responsibility", *Philosophy Compass* 4 (1) (2009): 96-133.

Alfred, Mele, *Free Will and Luck* (New York: Oxford University Press, 2006).

Derk Pereboom, "Meaning in Life Without Free Will", *Philosophic Exchange* 33 (2002): 19-34.

T.M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge, MA: Harvard University Press, 2008).

Ralph C. Serin, "Violent recidivism in criminal psychopaths", *Law and Human Behavior* 20 (2) (1996): pp. 207-217.

Randall G. Shelden and William B. Brown, *Criminal Justice in America: A Critical View* (Boston: Allyn and Bacon, 2004).

Saul Smilansky, "Hard Determinism and Punishment: A Practical *Reductio*", *Law and Philosophy* 30 (3) (2011): pp. 353-367.

Matthew Talbert, "Blame And Responsiveness To Moral Reasons: Are Psychopaths Blameworthy?", *Pacific Philosophical Quarterly* 89 (4) (2008): 516-535.

Diane Turbyfill, "Bank Robber Planned Crime and Punishment", *Gaston Gazette* June 16 2011.

< <http://www.gastongazette.com/news/bank-58397-richard-hailed.html> >

Jan van Dijk, John van Kesteren and Paul Smit, *Criminal Victimisation in International Perspective, Key findings from the 2004-2005 ICVS and EU ICS* (The Hague, Boom Legal Publishers, 2008).

Benjamin Vilhauer, "Persons, Punishment, and Free Will Skepticism", *Philosophical Studies* forthcoming.

Franklin E. Zimring, *The Great American Crime Decline* (New York: Oxford University Press, 2007).

Minerva Access is the Institutional Repository of The University of Melbourne

Author/s:

Levy, N

Title:

Skepticism and Sanction: The Benefits of Rejecting Moral Responsibility

Date:

2012-09-01

Citation:

Levy, N. (2012). Skepticism and Sanction: The Benefits of Rejecting Moral Responsibility. LAW AND PHILOSOPHY, 31 (5), pp.477-493. <https://doi.org/10.1007/s10982-012-9128-3>.

Persistent Link:

<http://hdl.handle.net/11343/282705>