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**On the Alleged Shallowness of Compatibilism:
A Critical Study of Saul Smilansky: *Free Will and Illusion*¹**

James Lenman

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1.

The millionaire's idle, talentless and self-centered daughter inherits a large sum of money that she does not really deserve. The victim of kidnapping rots in a cell in 1980s Beirut in a captivity that springs not from any wrong he has done but from his ill-fortune in being in the wrong place at the wrong time. The hard-working, brilliant and self-denying Nobel Prize-winning scientist receives a large cheque for his extraordinarily productive labours. The murderer spends decades in jail for the terrible crimes he has freely committed. The first two cases are cases where justice seems ill-served, where someone's good or ill-fortune reflects not what they deserve but mere luck. The second two are cases where justice seems to be honoured: what befalls Scientist and Murderer reflects not their good or bad luck but their merits and deserts.

¹ (Oxford: Clarendon Press, 2000)

As is notorious, closer examination may begin to undermine these judgements. Scientist may have worked hard for his results but not for his brains. Even if Millionaire's Daughter were to study as hard as he has, perhaps she lacks the native talent that take him to Stockholm. That, no less than her parents' great wealth, seems a matter of sheer luck.

Murderer's case seems less questionable but this appearance can be subverted. Consider a further case, that of Accident Victim. Accident Victim is a sweet-natured, very decent man who has never hurt a fly. Then one day, innocently involved in a road accident, he receives some serious head-injury that damages his brain. He survives but his personality is radically changed by what has happened. He is now extremely volatile, violent, ill-natured and is soon in trouble with the law. We condemn what he does but it is hard to blame him. For his misdeeds stem from his changed nature, a nature which he has not chosen but which itself stems from his sheer bad luck in falling victim to his accident. Neurophysiological damage has left him with the brain of a criminal. Admitting that this exculpates him may however have worrying consequences. For perhaps Murderer is ultimately no less excusable on similar grounds. He too perhaps has a neurophysiological constitution very different from that which sweet-natured Accident Victim enjoys before things go wrong for him. The only difference may be that for Murderer this constitution is innate. Constitutive luck has nonetheless made him the man he is and how can we blame him for that?

This is how the morally subverting dialectic of hard determinism gets off the ground, generalizing into the thought that, if determinism is true, constitutive luck

makes all of us all that we are. No less than Millionaire's Daughter, Scientist is the happy beneficiary of good luck; no less than Hostage, Murderer the unhappy victim of bad. The dialectic is traditionally resisted by libertarian insistences that we sometimes originate our own actions, not simply as a result of causal antecedents further down a long deterministic chain that reaches back long before our births, but in some contrasting way, that somehow makes possible an authorship of our deeds that frees us from the dominion of luck. However such resistance seems futile insofar as compromising determinism seems to lead nowhere but to indeterminism and indeterministic processes seem the very paradigm of processes governed by luck.

If libertarianism seem to offer little solace against the subversive dialectic, we may turn instead to the resources of compatibilism. Compatibilists allow for the possibility that all we do was determined long ago by events that lie outside our sphere of control, but insist that this leaves room for freedom and responsibility. The differences between Millionaire's Daughter and Scientist, or between Murderer and Hostage, do not - plausibly could not - go as metaphysically "deep" as the libertarian would like to believe. But differences remain: Scientist's self-denying hard work and Murderer's crimes involve actions they freely elected to do, actions reflective of the choices they have made where these in turn reflect their character and this in turn, at least up to a point, reflects their earlier choices. This is not true of Millionaire's Daughter's inherited windfall or Hostage's captivity. These differences, the compatibilist may grant, do not suffice to eliminate the ultimate contribution of luck. But there remain excellent reasons why we should design and sustain practices and institutions that give them weight.

Enter Saul Smilansky with this complex and subtle new work, an original and challenging book which anyone interested in the free will problem will wish to read. Smilansky rejects all three standard perspectives: hard determinism, libertarianism and compatibilism, at least in unqualified forms. Hard determinism - or at least an unqualified, "monistic" form of hard determinism - is rejected in the light of such compatibilist thoughts as I just now rehearsed. But compatibilism - at least an unqualified, monistic form of it - is itself rejected by appealing back again to the hard determinist dialectic: from what he calls the *ultimate perspective*, the differences in which compatibilism trades are ultimately a matter of luck and so are morally quite arbitrary. The Fortunate Criminal (pp. 51-52), the guy who turns out bad in spite of *not* having had a deprived childhood, *not* having been driven to his crimes by desperate economic circumstances, *not* being stupid or insane, has, in compatibilist terms, no excuse for what he does. But, ultimately, like Accident Victim, he has a compelling ground for exculpation: ultimately luck has made him this way. Ultimately he is a victim of injustice when he is punished. This ultimate perspective supplies real insights which compatibilism is charged with a complacent shallowness for disregarding.

Given his rejection of compatibilism and hard determinism, one might expect Smilansky to be a libertarian - there would seem nowhere else to go. But he is not. He rejects libertarianism no less strongly, agreeing with the Hobbesian tradition that convicts libertarianism of incoherence. The main originality of his book lies in his insistence that there is somewhere else to go, a somewhere else that is encapsulated in what he calls *the Fundamental Dualism* and what he sees as the pivotal role of illusion.

This talk of a Fundamental Dualism signals his recognition of the "partial validity" of both hard determinism and compatibilism. On this view, punishment, justified up to a point in compatibilist terms, is in differing ways, at once just and unjust. On the one hand, it is morally imperative for us to live in a *Community of Responsibility* (p. 83) in which people are held responsible - or not - for what they do in compatibilist terms. The differences compatibilists emphasize, differences in the extent to which our actions are, in a metaphysically unassuming, everyday, sense, *up to us*, are not only real but also normatively significant insofar as giving them weight in contexts of distributive and retributive justice is vitally important to people and a central aspect of what it is to respect them. We need, on the other hand, to recognize the ultimate injustice of treating people in terms of compatibilist distinctions. For, in an ultimate sense, nothing is up to us. So Fortunate Criminal is at once justly punished and a victim of ultimate level injustice.

To preempt a natural misunderstanding, this partial validity of compatibilism is *not*, according to Smilansky, at all illusory. A compatibilist understanding truly is valid, he thinks - if only up to a point and only in the context of the Fundamental Dualism. Compatibilists err only in imagining the distinctions they draw, and the normative significance attaching to them, to be the *whole story*, in supposing there to be nothing at all to be said for the hard determinist's perspective; just as the hard determinist's error was to give no weight at all to the compatibilist's distinctions. Smilansky's Fundamental Dualism is his attempt to recognize what he considers the truth in both perspectives.

The illusion whose role Smilansky places centre stage in the second part of the book is not illusion about the validity of compatibilism but an illusory belief in the truth of libertarianism. He thinks that such an illusory belief is widespread and, more controversially, that this is a broadly welcome state of affairs: illusion about free will plays a role in our lives and this role is an important and legitimate one. This legitimacy reflects two “problems” which Smilansky calls the *Dissonance Problem* and the *Insufficiency Problem*.

The Dissonance Problem stems from the Fundamental Dualism. The thought appears to be that the two perspectives, hard determinism and compatibilism, both of which the Fundamental Dualism aims somehow partially to endorse, pull us in opposite directions in morally threatening ways. Compatibilist distinctions are real and normatively significant but the partial correctness of the hard determinist dialectic is all too liable to undermine them. "The fragile compatibilist-level plants need to be defended from the chill of the ultimate perspective in the hothouse of illusion." (p. 173)

The Dissonance Problem reflects the tension set in place by the Fundamental Dualism. The Insufficiency Problem is in a way simpler, simply reflecting the absence of libertarian free will. Given this absence, we are never ultimately responsible for what we are or do and Smilansky argues that anything short of such ultimate responsibility fails to suffice for normatively central notions of justice and respect - including self-respect - to apply to our lives and actions in any but, as he puts it, "shallow" ways.

2.

Smilansky's argument begins with what he calls *the Core Conception*. This is the thought that an absolutely central role in our moral thinking, in particular our thinking about justice, responsibility and blame is played by notions of what is under our *control*, what is *up to us*. The centrality of this role is such that any way of conceiving of justice that is not sensitive to considerations of what is or is not up to the people to whom that conception is applied would be morally unacceptable to us. (This is why Smilansky assigns partial validity only to that form of compatibilism - *control compatibilism* - that preserves an intimate and essential connection between justice and "up to usness", rejecting as hopeless those consequentialist forms - *effect compatibilism* - that leave the connection more contingent and fragile.)

As Smilansky acknowledges (pp. 15, 21-22), the Core Conception is ambivalent. The notions of "up to usness" and "control" invite both a metaphysically modest compatibilist reading and a metaphysically less unassuming incompatibilist reading. The compatibilist might then accept the Core Conception but insist on a compatibilist interpretation of it. Here the debate threatens to stalemate in by now notorious ways. For such ambiguity infects almost all significant terms in the debate about free will and responsibility, starting with "free" and "responsible" themselves, and including "control", "up to us", "could have done otherwise" and so on. Each has an immodest incompatibilist reading that is favoured by those who insist on a kind of responsibility and control that is in some sense ultimate and a more modest compatibilist reading that is not. (Henceforth I will signal these contrasting senses by the subscripts "U" [for "ultimate"] and "C" [for "compatibilist"].) Robert Kane has

recently argued with impressive plausibility that the challenge for the incompatibilist is then to motivate his favoured interpretations of these concepts in some non-question-begging way.²

One way of understanding of Smilansky's approach is as acknowledging this systematic ambiguity of the Core Conception itself. Thus we might say, as well as there being responsibility_C and responsibility_U, control_C and control_U, we have also justice_C and justice_U, morality_C and morality_U. One could then claim that we can't have justice_U and morality_U without having desert_U and responsibility_U and control_U but that for justice_C we need only desert_C, responsibility_C and control_C. We could then reach a preliminary understanding of Smilansky's Fundamental Dualism as the view that both the "deep" but morally threatening justice_U and the "shallow" but "pragmatically prior" (see pp. 102-3) justice_C are important and desirable and that any position that insists that either is the whole story must be simplistic and incomplete.

However this way of understanding the matter raises a stark worry: it seems deeply problematic, given Smilansky's granting to the compatibilist of the incoherence of libertarian free will. If freedom_U is incoherent, how can it be worth wanting? And if it is a condition for justice_U, how can *that* be worth wanting? In chapter 3 (at pp. 48-50), Smilansky considers this worry that nothing incoherent can be worth wanting and dismisses it, to my mind, rather too fast.

² In *The Significance of Free Will* (New York: Oxford University Press, 1996), Part I. Kane himself makes an ingenious attempt to meet this challenge (see esp. chapters 5 and 6), discussion of which is outwith the scope of this critical study.

When wishes are more or less idle, perhaps we should not be much troubled by their incoherence. People may want all manner of odd things and so what? But the wishes that concern Smilansky being, as he constantly stresses, so very far from idle, we should plausibly take their incoherence as more problematic.

Still it might seem to make sense to regret the falsehood of incoherencies. Some things, writes Smilansky “remain worth wanting even if something that would be necessary in order to have them is not worth wanting because it cannot be coherently conceived. It is just this, the impossibility of the conditions for things that are so deeply worth wanting, which makes the realization of the absence of libertarian free will so significant.” (p. 50) There is some initial plausibility to these remarks. Take a less philosophically vexed example. A research project in mathematics might turn out to have an incoherent aim and it might make very natural sense for a mathematician who has devoted much of his life to the project to regret this fact. He might wish the project he had devoted his best years to had not been a waste of his time. It is a consequence of the incoherence of his project that he has spent his career on a wild goose chase; so it might seem that if he can coherently regret that he has wasted his years, he may also, in a sense, properly regret that his project is incoherent.

His thought would then begin from the perfectly sensible-seeming wish:

W1. Would that I had not wasted my career.

He knows, let us go on to suppose, that:

C1. I did not waste my career \rightarrow Project P is coherent.

Whence, by a kind of optative *modus ponens*, we might urge, it can intelligibly be said:

W2. Would that project P were coherent.

Here something coherently worth wanting - that our mathematician's career was not wasted on a wild goose chase - obtains only if P is coherent. Just as, for Smilansky, we can have justice_U only if we have libertarian free will.

C2. We can sometimes justly_U blame_U people \rightarrow we have libertarian free will..

Whence, again applying optative *modus ponens*, someone who wants justice_U may, in a sense, properly want libertarian free will, just in virtue of wanting something for which that is a condition.

However things are not so straightforward. Optative *modus ponens* is a rather dubious rule of inference. For it would seem to commit someone who desires that P to desire that Q whenever $P \rightarrow Q$. And, if we read " \rightarrow " as a material conditional, that looks disastrous. For that commits us, when we desire some *false* P to desire Q, where Q is *any proposition you like*, say the proposition that everyone dies tomorrow. Just one unsatisfied want now commits us to wanting everything!³

³ I am indebted at this point to Bob Hale.

This objection lapses if we read " \rightarrow " as something *stronger* than a material conditional. And it may seem to help Smilansky that, in the case of C2, this is very plausible. For, if I read Smilansky aright, there is nothing *contingent* about the link between libertarian free will and justice_U: the tie between them has rather the force of *necessity*. But if we understand the conditional this way, a different problem arises.

For

$$L(P \rightarrow Q) \models L\neg Q \rightarrow L\neg P$$

(unlike

$$P \rightarrow Q \models L\neg Q \rightarrow L\neg P)$$

is more or less uncontroversially a valid modal principle. So if we read the conditional in C2 as a *strict* conditional, the incoherence of libertarian free will is going to *infect* ultimate level justice itself. If something incoherent is a strictly necessary condition for X then X is incoherent too. So if libertarian free will is a strictly necessary condition for ultimate level justice and libertarian free will is incoherent, then ultimate level justice is itself incoherent. And if ultimate level justice is itself incoherent, Smilansky's position is in a very thoroughgoing sort of trouble. Perhaps it could be thought to make some sense to respect and promote a conception of morality one acknowledges itself makes no sense at all. Wittgenstein once expressed just such an attitude.⁴ But if a certain debate in philosophy comes down to a conflict over which of two rival interpretations of some fundamental value such as justice is the one we

⁴ See Ludwig Wittgenstein: "Lecture on Ethics" in *Philosophical Review* 64, 1975

should prefer, the conclusion that one - but only one - of the rivals is plain incoherent is surely as nasty a blow as can be delivered if moral philosophy is to have any chance of being itself a coherent research project.

It is puzzling then how something incoherent can be desirable. It is more puzzling still how something incoherent can be *deep*. Smilansky writes (p.52):

not to take the absence of libertarian free will seriously is not to take justice seriously. Positions that fail to do so and remain on the compatibilist level will inevitably be morally superficial.

"Justice" here means of course justice_U and Smilansky's central claims about illusion are premised on the thought that there is something strikingly deep about such justice. But if libertarian free will is a strict condition for justice_U and libertarian free will is an incoherent nonsense, then justice_U is an incoherent nonsense also and incoherent nonsense is never deep.

3

We are helped in making sense of the Fundamental Dualism if we view the problem for compatibilism, as Smilansky suggests, as a "Slippery-Slope" problem (p. 173; cf. p. 103). The worry then is that the rationale for insisting on ultimate control, ultimate responsibility, ultimate justice is not distinct from the rationale for control_C, responsibility_C and justice_C but a continuation (cf. p. 54) of it. On this reading we should see a certain dialectical intimacy holding between justice_U and justice_C such

that justice_U is something we are liable to find ourselves committed to if we think in a clearheaded way about the roots of our commitment to justice_C. This is close to Smilansky's intentions, as when, for example, he tells us (p. 77) that compatibilism is "faulty for not *following through* with the question of control".

The thought is then this. In order to avoid a morally nightmarish society we have to recognize a principle that people can't be justly held responsible and blamed for what is not up to them, not under their control. But once this principle is on the table, the compatibilist wants to limit its application. If he can't limit its application - and he cannot - the danger looms that it applies globally. For *ultimately* nothing is up to anybody. So once we recognize that control matters, as it would be morally unthinkable not to, we have to recognize that ultimate control matters, for ultimate control is what we become concerned about when we carry our concern for control through to its limit.

Imagine we begin with a nihilistic view of the moral world where we attach no significance to what a person freely does within the sphere of his control. We then recognize the importance of control and start to make the sort of distinctions that pull Millionaire's Daughter apart from Scientist, Hostage apart from Murderer. We are now in the business of creating an ethically satisfying Community of Responsibility. But we got into this business only by recognizing the importance of control. And, having recognized this we are off on a slippery slope that will lead us to insist on ultimate control. And this is a slippery slope back to something like our starting

point.⁵ For, in the absence of libertarian free will, we have ultimate control of nothing and the consequence of insisting on such control is that all the distinctions disappear again. At each extreme of this spectrum the moral landscape is brutally flattened, at one because we deny the significance of the crucial distinction, at the other because, while we grant its significance, we believe it nowhere to make a difference. We need a place to stop on the slippery slope and there is no principled stopping point. We cannot, as Smilansky puts it, "stop in the middle"(p. 47). All we can do is continue in the illusion that there *is* such a principled place and we do this by accepting libertarian free will. That is to involve ourselves in illusion but that is a price worth paying.

This is an interesting and genuinely worrying thought: that decent and civilized life demands that we go some distance in giving weight to considerations of up to usness and control but demands too that we not go the whole distance. For that would leave us with the ethically unacceptable perspective of a monistic hard determinism. We must stop somewhere but there is no even roughly determinate place where considerations of justice demand that we stop.

Addressing this worry is a central task for compatibilism, a task, it seems to me, which recent compatibilist writers, notably R. Jay Wallace and T. M. Scanlon⁶, have made more impressive progress than comes clearly across from Smilansky's

⁵ Not exactly like, on Smilansky's view. For his version of Hard Determinism is *not* morally nihilistic and respects the Core Conception. It doesn't allow that any two people *differ* in what they deserve but, just because of this, leaves open the possibility that all kinds of actions be demanded by way of rectificatory justice. Central here is Smilansky's highly interesting notion of an egalitarian "baseline" of desert which, in a longer study, would merit more discussion than I can give it here.

⁶ See R. Jay Wallace: *Responsibility and the Moral Sentiments* (Cambridge, MA, Harvard University Press, 1994) and T. M. Scanlon: *What We Owe to Each Other* (Cambridge, MA, Harvard University Press, 1998), chapter 6.

partial discussion of compatibilism. This study is not the place fully to address this task though I will close the final section with some brief remarks that may bear on it.

4

Smilansky's argument for the necessity of illusion rests, as I noted, on the Dissonance Problem and the Insufficiency Problem. Getting clear about the former may help us get clear about the Fundamental Dualism. Sometimes here Smilansky expresses the problem in rather unhappy ways, as e.g. when he says the problem with working with both compatibilist and ultimate-level truths is that these are "contrary" to each other (pp. 175, 287). Clearly insofar as both these things are true they cannot be contrary in the straightforward sense that implies inconsistency and elsewhere Smilansky makes it quite clear that this is not what he intends. Thus he concedes to W. D. Ross that "the truth cannot be inconsistent with itself"⁷ and stresses that that he does not claim otherwise. His claim is rather that the truth is complex (p. 37-38), "an admixture of elements" from compatibilism and hard determinism (p. 193).

However if we understand the Fundamental Dualism in this way, we see that the dissonance emphasized by the Dissonance Problem is not that deep. The central fear Smilansky airs in discussing the Dissonance Problem is that recognizing the truth in the ultimate perspective will sap our moral motivation. It will sap our motivation to be good by undermining our sense of the worth that accrues to us from goodness. And it will sap our motivation not to do wrong by offering us, in advance, a ready made excuse our awareness of which is liable to influence us for the worse. However the

⁷ He is quoting from *The Foundations of Ethics* (Oxford: Clarendon Press, 1939), p. 328

concern is not that the ultimate perspective, in the wider context of the complex dualistic truth, licenses these motivational deteriorations. For the norms of a Community of Responsibility rule them out and these norms, Smilansky thinks, are fully justified. Rather his worry is that, as a matter of empirical fact, these unhappy consequences are what we can, in practice, expect. (Just as someone might agree with Plato that we do not, speaking philosophically, need God to make conceptual sense of morality, while agreeing with Durkheim that it is nonetheless an empirical fact that, in practice, religious belief plays a crucial role in sustaining moral codes.)

Smilansky's talk of a single complex truth may seem, on the face of it, rather odd. As standardly understood, the issue of the truth of compatibilism is just the issue of the compatibility or otherwise of two claims - that we have freedom adequate to being held responsible and that determinism is true - and any two unequivocal claims are either compatible or they are not (putting issues of vagueness, which Smilansky does not emphasize, to one side). The point once again seems to be that the two claims are not unequivocal. This is what Smilansky suggests when he tell us that:

The Compatibility Question might be answered in a Yes-No fashion, for there is no conceptual reason why it should not be the case that certain forms of moral responsibility require libertarian free will, while other forms could be sustained without it. (p. 37)

A passage such as this again invites us to understand the Fundamental Dualism in terms of a claim that we need freedom_U to have responsibility_U and responsibility_U to have justice_U, but that we can have justice_C with merely

responsibility_C and freedom_C suffices for that. However a natural and especially alarming way of understanding the Dissonance Problem might be as suggesting that, without illusion, even the values implicated in *justice_C*, *respect_C* and *morality_C*, the compatibilistically justifiable values that constitute and inform a Community of Responsibility, would, as a matter of empirical fact, be threatened and undermined: that we would, without illusion, be worse off in their terms. So, if we cannot believe in the possibility of justice_U and respect_U, we will lack the motivation needed to sustain our commitments even to justice_C and respect_C. The claim would then be that, while, responsibility_C and control_C suffice philosophically to make justice_C possible, we need, in practice, to believe we have responsibility_U and control_U to keep even our commitment to justice_C alive. This is a key way the Dissonance problem might be taken to contrast with the Insufficiency Problem, the latter embodying the claim that justice_C itself is shallow and inadequate. If this is correct the Dissonance problem, even if less deep than the Insufficiency Problem is intended to be, could speak even to those, like myself, who view justice_U with some scepticism.

The claim implicated in the Dissonance Problem is an empirical but an interesting one. As with all empirical claims, what is claimed may well be true but its truth is largely beyond our competence as philosophers. Of course philosophers might do much to show that the claim somehow "stands to reason" by spelling out the patterns of thought by which we are supposedly threatened and showing how much *prima facie* sense they make, how seductive they can be - I guess this is what Smilansky is seeking to do in talking the Dissonance Problem up. But much of what he says does not have me convinced.

Thus, for example, at a central point in making his case for our need for illusion he invites us, very dramatically (p. 158), to consider two worlds, the Control Compatibilist's Dream World and the Control Compatibilist's Nightmare World. In the former people are blamed and punished only if and to the extent that they are guilty. In the latter those who are blamed and punished are all innocent. In other respects the two worlds are supposed the same. It is then stressed that, "from the ultimate perspective...there is *nothing* to choose between these worlds." This shows how deep the divide is between the ultimate and compatibilist perspectives such that, trying to live with both perspectives is apt to detract from our "moral seriousness of purpose".

I find it hard to see why this example is supposed to worry us. Given that the Fundamental Dualism is intended to respect the principle of noncontradiction, the thought cannot of course be that there both is and is not something to choose between the two worlds. Rather the thought must be that, in one, entirely valid, respect, there is nothing to choose while, in another, also entirely valid, respect, there is *plenty* to choose. In which case we surely have the straightforward upshot that, all things considered, there is plenty to choose. If I have tons of money in my Swiss bank account and no money at all in my Cayman Islands bank account, how much money do I have? Well, tons...

I suspect that, on close inspection, it turns out that the Dissonance Problem is resting on the Insufficiency Problem; that Smilansky's thought here is that it is because people are alive to what the Insufficiency Problem shows us to be the shallowness of justice_C, desert_C, respect_C etc. that they will find their motivation to

take these things seriously (even in their compatibilistic senses) undermined unless they can give credence to the applicability of these same concepts in their "deeper", ultimate senses. Certainly the metaphor of depth pervades Smilansky's characterization of the Dissonance Problem in ways that invite this reading, as e.g. when he writes (p. 153) that:

in a world without libertarian free-will there is only the significantly shallower compatibilist variety available. If one thinks that whatever one does will not be worthy or cherished as under libertarian assumptions, this may harm motivation.

If this diagnosis is correct, we will be apt to take the Dissonance Problem less seriously to the extent that we fail to be impressed by the Insufficiency Problem. I think, on the whole, we should so fail. One part of the story about why I think this was told in section 2 above: incoherence and depth make implausible bedfellows. I will conclude by briefly sketching another.

5

The Insufficiency Problem is intended to go deeper than the Dissonance Problem, to show the shallowness of a simplistic compatibilism. Here, as noted above, I take it that the aim is not to show that living without illusion would leave us worse off in terms even of justice_C and respect_C but to show how these, the kinds of justice and respect available to a compatibilist, are themselves inadequate and that we can make sense of a richer set of values only if we presuppose libertarian free will.

To argue this, one has to meet Kane's challenge by appealing to something that carries weight with us independently of the issue that divides the parties. For Smilansky it is the notion of depth that does this work. It is to this notion, above all that he appeals to urge that there is a set of values which find no application when we believe merely in up to usness_C, which are applicable only when we believe in libertarian free will, and that these values cannot be dispensed with without great loss. In particular, he argues, the pursuit of depth will lead us to give weight to the sort of ultimate level injustice that is violated when the Fortunate Criminal, or any other criminal, is punished for actions that were not, ultimately, up to him and to the sort of deep respect - and self-respect - that comes from seeing people - including ourselves - as the ultimate authors of their actions, values that are threatened when we see either the hero or the villain as "simply an unfolding of what he happens to be" (p. 163).

Here we may properly be sceptical. Take the case of respect first. Here Smilansky gives the example of a successful athlete, of whom he writes:

Having to subject his life to the ultimate hard determinist perspective could be truly tragic for such a person, for he may well have oriented years of his life around the thought of a medal, not for its own sake but as a token of his ultimate level superiority (p. 198)

Imagine then such a successful athlete, someone highly talented and motivated who has worked his butt off for his success and carried off all the prizes. For all kinds of good compatibilist reasons Smilansky will recognize, we will honour and reward this athlete's accomplishments. This is, thus far, a great life, great in ways most other lives

fall short of. In a sense, we might recognize that this is all luck. And surely the athlete might recognize this too without moral loss: he might surely recognize that for all that he has achieved he is ultimately just lucky, privileged, blessed. And he might simply rejoice in being so blessed, rejoice that fortune's favour has enabled him to fulfill the athlete's calling to excellence and competitive success. That he sees it as a case of, ultimately, privilege prevents him from running away with the thought of his superiority to others but surely that is all to the good: surely nobody should run away with *that* thought. A wise man should find nothing tragic in a becoming humility.⁸

Turning to questions of justice, I remain quite unclear about what is so terrible and shallow about recognizing, as Scanlon has urged we should, that

our attitude toward those who suffer or are blamed should not be “You asked for this” but rather “There but for the grace of God go I.”⁹

With respect to the fortunate criminal, there need be nothing subversive of justice in the thought that Scanlon recommends. Here there is certainly something *tragic*; but if we at least recognize, as Smilansky recommends, the pragmatic priority of the compatibilist perspective, what in our practice need this recognition threaten to subvert in such a way that we gain anything from kidding ourselves on about free

⁸ Smilansky has suggested (private correspondence) that this response does not touch the worry that the athlete's efforts are different, as a source of pride from something like his height, that a form of "quasi-moral appreciation" is involved in his pride in this. I don't think this reply effective. We do take pride in features like height but this is certainly very different from the sort of pride we take in effort. This is very plausibly primarily because effort differs from height in lying in the sphere of what we are properly (and with a straightforwardly compatibilistic rationale) held *accountable* for. For the athlete's coach, for his fans, for the National Sports Council who gave him a big grant, his effort will be the focus of normative expectations that would be quite inappropriately directed at his height. At least that's my story about why pride and respect directed at effort are "quasi-moral" in ways our admiration of tall people is not and you need have no illusions about libertarian free will to believe it. Cf. Scanlon, *op. cit.*, chapter 6, section 4.

will? Indeed our practices may *gain* from such recognition. Penology may well be civilized by the recognition that a certain deep egalitarianism is justified: an egalitarianism, to follow Smilansky himself (p. 125) in echoing Stephen Darwall's distinction¹⁰, of recognition respect, sitting alongside an honest and unavoidable inegalitarianism of appraisal respect. This egalitarianism may protect the successful athlete from a foolish arrogance and it may protect the fortunate criminal from barbarism that may result where our contempt for wrongdoers is not restrained as we all wish it to be. This sense of restraint may lie behind the opposition of many people and societies to the death penalty; and behind the way in which even where some think this sometimes to be tolerated, we may show, even with an Eichmann, a not inconsiderable restraint, an insistence on a swift and merciful mode of execution, a repudiation of humiliation and torture. The most monstrous of criminals show their victims no such restraint and, while we can readily imagine someone to say of them that they deserve to be done by as they do, it is precisely to such people that it may well be said: there but for the grace of God go you also. If there is that much truth in the ultimate perspective, then plausibly the very last thing we should do is to bury and suppress it.

For Smilansky, our punishment of Murderer, of Fortunate Criminal, even of Eichmann, is a case, as he puts it, of "unavoidable injustice" (or "structural injustice", see pp. 256-258, 291). But this seems questionable. Part of the problem is perhaps right at the start when, in characterizing the Core Conception, Smilansky insistently places desert right at the foundation of our notion of justice - his central objection to Scanlonian contractualism being that it fails, as Scanlon himself would happily

⁹ Scanlon, op. cit., p. 294

concede¹¹, to offer desert a fundamental role. But it is not so implausible to characterize justice broadly as the best set of principles we human beings can find and apply for the regulation of our lives together; nor indeed to think of the best such principles as principles to which reasonable people may most readily be expected freely to agree. In constructing such principles, we see the need for a punitive system of criminal law to protect us from harm and we constrain its operation to make our liability to its rigours sensitive to the choices we make. To say that is to follow Hart and others, in characterizing the general justifying aim of punishment without reference to desert but finding good reason to suppose that the distributive constraints on it on which reasonable citizens are most apt to wish to insist will make the principles of its distribution sensitive to choice and so reflecting of control_C and desert_C.¹²

In the context of such a conception of justice, we may well be tempted to speak of a form of "injustice" that is implicated in any punishment at all, given that all our actions may be just the unfolding of, ultimately, impersonal circumstances. But this is not injustice, properly speaking, at all. Injustice is prohibited by the best principles for the governance of human communities and not all punishment is so prohibited. Talk of "unavoidable injustice" is a somewhat paradoxical use of the term, a nonmoral deployment of an essentially moral concept. The point is strengthened by considering that Smilansky's unavoidable injustice is to be understood as injustice_U and that, as we saw above, there are compelling grounds to suppose that, if Smilansky's own claims about the incoherence of libertarian free will are correct, that

¹⁰ See Stephen L. Darwall: "Two Kinds of Respect" in Robin S. Dillon (ed.): *Dignity, Character and Self-Respect* (New York, Routledge, 1995).

¹¹ Op. cit., pp. 274-277.

incoherence is shared by his own talk of ultimate injustice. A concern for justice_U takes us down Smilansky's slippery slope but leads to paradox and incoherence. With justice_C, understood roughly as I have proposed, there is no paradox, no incoherence and plausibly no comparable slipperiness. These seem excellent reasons to believe that justice_C is justice.

Talk of unavoidable *tragedy* is less misleading. If we think at all, we may see it as tragic when good people come to harm. And, if we think deeply, we may see it is tragic when *anybody* comes to harm. But sometimes people do come to harm, sometimes they come to harm at each other's hands and sometimes they come to harm legitimately. Not all the ways we legitimately harm people are sensitive to their deserts_C.¹³ Some very properly are. They are just, in either case, when they respect the constraints on harming people the best principles for the governance of a decent human society lay down. But if they do this, though they may be tragic, they are not unjust. It would be idle to deny that life is, in many ways, tragic, mistaken to contest the thought that something tragic happens when Murderer, Accident Victim or even Fortunate Criminal is led away for punishment.¹⁴ With that much of what Smilansky claims we should all perhaps agree. But, while we would perhaps be happier if we let

¹² See especially H. L. A. Hart: *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968), pp. 8ff.

¹³ Think of warfare, of quarantine, or of the small but widespread risks, certain to result in harm to some few people, that are knowingly and often justifiably imposed by many large scale enterprises and activities.

¹⁴ Even in saying this is tragic am I not conceding that libertarian free will, however incoherent, is worth wanting after all? No. What is tragic is that horrible things happen to people, things like being killed in earthquakes, catching terrible diseases or being or having to be punished, quite justly, for committing crimes. Someone who thinks the world would be a nicer place if none of these things happened does not want anything incoherent.

ourselves be deluded about the prevalence of tragedy in human life, I seen no reason to believe we would thereby be morally either better off or less at risk.¹⁵

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