

Free Will and Reasonable Doubt

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Abstract

This paper explains and defends the following argument: (1) If it can be reasonably doubted that someone had free will with respect to some action, then it is a requirement of justice to refrain from doing serious retributive harm to him in response to that action. (2) Anyone who believes the free will debate to be philosophically valuable must accept that it can be reasonably doubted that anyone ever has free will. (3) Therefore, anyone who believes the free will debate to be philosophically valuable must accept that it is a requirement of justice to refrain from serious retributive harm.

Introduction

The purpose of this paper is to raise what the author takes to be an old and widely shared worry about free will in a new way. (In this paper, "free will", is used to mean whatever satisfies the control condition of moral responsibility.¹) The worry has to do with the connection between free will and retributive justifications of harm. Retributive justifications of harm claim that someone deserves to be harmed because of how he has acted. No one can deserve to be harmed because of how he has acted unless he was morally responsible for that action, and no one can be morally responsible for an action unless he had free will with respect to that action, or with respect to some earlier action that determined the later action.² But when one surveys the long history of unresolved conflict in the free will debate, one may wonder whether the grounds for believing that people have free will are strong enough to bear the weight of such justifications.

What is new in this paper is the particular argument defended in it, which implies that this worry is very important. It is as follows:

- (1) If it can be reasonably doubted that someone had free will with respect to some action, then it is a requirement of justice to refrain from doing serious retributive harm to him in response to that action.
- (2) Anyone who believes the free will debate to be philosophically valuable must accept that it can be reasonably doubted that anyone ever has free will.
- (3) Therefore, anyone who believes the free will debate to be philosophically valuable must accept that it is a requirement of justice to refrain from serious retributive harm.

The term "The free will debate" refers to the debate about whether anyone ever has free will. (There are of course other important debates about free will, but this term will be used to refer to this particular debate for the sake of conciseness.)

This argument has no prospects for persuading philosophers who do not think the free will debate is philosophically valuable. But it would not be a trivial result to convince philosophers who do think it is philosophically valuable that the grounds for believing that people have free will are not strong enough to support retributive justifications of serious harm, since this is typically taken to be among the most important roles played by the belief that people have free will.³

This argument will probably appeal more to free will skeptics than to free will believers. (Free will skepticism is understood here as the view that no one ever has free will.) But it is probably too weak to imply free will skepticism. This is because it may be possible to reasonably believe that something is true even if one accepts that it can be reasonably doubted. In other words, it may be possible to reasonably believe that human beings have free will even if one accepts that it can be reasonably doubted that they have free will.⁴

In recent years, a number of philosophers have advanced interesting arguments for free will skepticism, and some may wonder what the argument of this paper can contribute to the debate if it is too weak to imply skepticism.⁵ First, and perhaps most obviously, one might take the position that the reasons for believing in free will are strong enough to allow this belief to play some of its traditional roles (for example, in helping to explain praise and deliberation) but not to allow it to play a role in justifications of serious retributive harm. Someone who held this position could accept the argument of this paper despite rejecting arguments for free will skepticism. Libertarians and compatibilists could take this position. For example, a libertarian could hold that the reasons for believing that human beings have libertarian-style free will are adequate except in cases where serious retributive harm is at issue.

Second, even if one's sympathies ultimately lie with free will skepticism, one might employ this argument in an auxiliary role. Recent arguments for free will skepticism are based on metaphysical intuitions which are quite controversial, but the argument to be made here turns instead on an intuition about justice which should be less controversial. Further, its weakness makes it hard to block. It does not require that the *right* view of the metaphysics of free will is held by hard determinists, or by those who think that free will is incompatible with both determinism and indeterminism, or by anyone else who thinks human beings do not have free will. Neither does it require that the *wrong* view of the metaphysics of free will is held by compatibilists, by libertarians, or by anyone else who thinks human beings do have free will. It does not even require that arguments in favor of free will are *as strong as* arguments against free will. It requires only that doubts about free will are reasonable. The weakness of this claim implies that it must be more difficult to block the argument made here than it is to block skeptical arguments which make substantive metaphysical commitments. Compatibilists may

hold that skeptics fundamentally misconstrue the metaphysics of modality, and libertarians may hold that skeptics are too ontologically parsimonious, or that they do not take microphysical indeterminacy seriously enough, but these claims are quite distinct from the claim that doubts about compatibilism and libertarianism are unreasonable. An argument for the latter claim would be required to block the argument made here.

There are three sections in this paper. The first section defends premise 1 by way of a comparison to another "reasonable doubt" principle, that is, the requirement in criminal trials that the accused can only be convicted of the crime if it is proven beyond reasonable doubt that he committed the crime. The second section defends premise 2 by arguing that a debate can only be philosophically valuable if it is truth-conducive, and that a debate can only be truth-conducive if it involves reasonable objections which are directed against its central claim. The third section discusses some further issues about the justification of harm.

I. Justice and Reasonable Doubt

The purpose of this section is to defend premise 1, that is, "If it can be reasonably doubted that someone had free will with respect to some action, then it is a requirement of justice to refrain from doing serious retributive harm to him in response to that action." Retributive justification requires free will because of a chain of entailments which was sketched briefly at the outset of the paper. To retributively justify harming someone is to claim that he deserves to be harmed because of some action of his. (That he deserves to be harmed implies, among other things, that it is just to harm him because of his action.) For someone's action to ground the claim that he deserves to be harmed, he must be morally responsible for that action.⁶ If someone is morally responsible for an action, he must have had free will with respect to that action, or

with respect to some earlier action that determined his later action. The consequence of this chain of entailments is that if the reasons for believing that people have free will are too weak, then it is never justified to retributively harm anyone.

But how weak is too weak to justify retributive harm? The answer to this question may be complicated. It may depend on the severity of the retributive harm at issue. So this paper will focus on a narrower question: how weak is too weak to justify *serious* retributive harm? The answer implied by premise 1 is that the reasons for believing that people have free will are too weak to justify serious retributive harm if it can be reasonably doubted that they have free will.

Premise 1 should be accepted because of its close kinship to another "reasonable doubt" principle which is widely recognized to be a requirement of justice, that is, the requirement in Anglo-American criminal legal proceedings that the accused can only be convicted of a crime if it is proven beyond reasonable doubt that he acted criminally. The grounds for accepting the reasonable doubt criminal conviction standard are the same as the grounds for accepting premise 1, despite the fact that the conviction standard focuses on different facts about agents and their actions than premise 1.

The conviction standard and premise 1 are both grounded on the same basic requirement of justice, that is, the requirement that moral arguments for doing serious harm to people must be held to the "reasonable doubt" standard. Some moral arguments do not conclude that anyone is to be harmed. Other moral arguments do conclude that someone is to be harmed, and some of these conclude that someone is to be seriously harmed. Justice requires moral arguments for harming people to be held to a higher standard than moral arguments which are not for harming anyone, and it requires arguments for seriously harming people to be held to an especially high standard, that is, the "reasonable doubt" standard. No attempt will be made here to give a

detailed account of why justice requires this. It seems natural to think that the primary purpose of morality has to do with getting people to benefit one another, or at least getting them to refrain from harming one another. If this is right, then moral arguments which conclude that someone is to be harmed run against the primary purpose of morality, in at least a *prima facie* way. This might be a tentative first step toward explaining why justice requires these ascending standards. But even without a detailed explanation of why justice requires this, it seems clear enough that it does.

In the courtroom, an argument for the claim that someone has committed a crime is typically part of a larger argument that that person is to receive some punishment which will cause him serious harm such as imprisonment (or even death, in some countries). This is why, in Anglo-American law, it is taken to be a requirement of justice for arguments that someone has committed a crime to be held to the "reasonable doubt" standard. In civil trials, by contrast, the most common sort of penalty involves payment of monetary damages, which typically does not involve serious harm, and in that context, the burden of proof is the lower "preponderance of the evidence" standard, which is typically understood to require a demonstration that there is a greater than 50% probability that the defendant acted as accused. (It is probably the case that some civil penalties are more harmful than some criminal penalties—for example, civil courts sometimes deprive parents of visitation rights, and this can be a more serious harm than a few months in jail. Paying monetary damages can also be more harmful than jail time if they are high enough. But this can be chalked up as one of the many ways in which the current legal system fails to embody intuitions about justice.⁷)

When the claim that someone has free will plays a role in a retributive justification of serious harm, that claim must be held to the same standard, for the same reason. That is, in this

context, the claim that someone has free will plays a role in an argument for seriously harming someone, just as the claim that someone has committed a crime typically does. For this reason, it must be held to the "reasonable doubt" standard, just as the claim that someone has committed a crime must be. So premise 1 has the same justification as the criminal conviction standard.

Despite the sameness of their grounds, different questions are relevant for determining whether someone's actions meet the criminal conviction standard and the standard of premise 1. The question relevant for the criminal conviction standard is whether it can be reasonably doubted that his actions fit the definition of the crime of which he is accused. The question relevant for premise 1 is whether it can reasonably be doubted that the relation between him and his action is such that he had free will in acting as he did.

An objection might be raised against this distinction. It might be objected that a negative answer to the question relevant for the conviction standard implies a negative answer to the question relevant for premise 1. The criminal law typically does not allow an agent to be convicted of a crime unless it can be demonstrated that the agent acted with *mens rea* when he caused whatever event he is accused of causing. (The four ways of acting with *mens rea* recognized in the Model Penal Code are acting purposely, knowingly, recklessly, and negligently, and though this sort of issue is not typically discussed in jurisprudence, it seems safe enough to assume that these ways of acting can only be taken to constitute *mens rea* when there is nothing too unusual about them, e.g. when they are not caused by hidden Frankfurtian controllers.) Free will believers might think that one acts with free will whenever one acts with *mens rea*. (Compatibilists might think this because they might think that acting with *mens rea* is on its own sufficient for free will. Libertarians might think this because they might think that whenever human beings act with *mens rea*, they also act on an indeterminist mechanism or as an

agent-cause.) On this basis, free will believers might argue that demonstrating beyond reasonable doubt that an agent acted with *mens rea* is sufficient for demonstrating beyond reasonable doubt that the agent acted with free will. If this is right, then the question relevant for the criminal conviction standard is not entirely separable from the question relevant for premise 1.

This objection is not a reason for rejecting premise 1, however. If demonstrating beyond reasonable doubt that an agent acted with *mens rea* is sufficient for demonstrating beyond reasonable doubt that an agent had free will, then one is taking on no new burden of proof in the context of the criminal courtroom if one accepts premise 1 along with the conviction standard. So proponents of this objection should find premise 1 to be either an unobjectionable addition to the principles of justice observed in the criminal courtroom, or to be no addition at all. Premise 1 would of course be relevant not just in the criminal courtroom, but in any situation in which an attempt is made to justify serious retributive harm. But if it is unobjectionable inside the criminal courtroom, then it should also be unobjectionable outside it.

II. Reasonable Doubt about Free Will

The purpose of this section is to defend premise 2, that is, "Anyone who believes the free will debate to be philosophically valuable must accept that it can be reasonably doubted that anyone ever has free will." No attempt will be made to argue that one must acknowledge this if one does not believe the free will debate to be philosophically valuable.

To begin, a few terms for describing debates are needed. Some debates can be represented as focused on a *central claim*. The free will debate is such a debate: its central claim

is the claim that some people have free will some of the time.⁸ Debates which are focused on a central claim are made up of a *pro side* and a *con side*. As these terms will be used here, to be on the pro side of the debate is just to believe that the central claim of the debate is true, and to be on the con side is just to believe that the central claim is false. (Interested but non-partisan onlookers, who are neither willing to assert that the central claim is true, nor that it is false, may be ignored for present purposes.)

To believe a debate is *philosophically valuable* is to believe that it is *truth-conducive*. The sheer fact that one is on the pro or con side of a debate does not imply that one values the debate. For example, one might believe that the claim that some people have free will some of the time is true despite thinking the free will debate is a tragic waste of time. Believing that the central claim of the debate is true is sufficient for being on the pro side, just as believing that it is false is sufficient for being on the con side. Further, debates may be valued without supposing that they are truth-conducive. Some people value debates as opportunities for contradicting people or showing that they are clever. But to believe a debate to have *philosophical* value is to believe that it leads one closer to the truth. That is, if one is on the pro side of a debate that one thinks philosophically valuable, one thinks that working on at least some of the objections to the central claim posed by the con side has the function of prompting revisions to the theory one uses to support the central claim which make that theory more likely to be true, or at least has the function of clarifying *why* one's theory is true.

There is, however, reason to suppose that working on an objection has either of these functions only if that objection is reasonable, and a doubt about the central claim which is based on a reasonable objection to the central claim must be acknowledged to be a reasonable doubt.⁹ This shows that if one is on the pro side of a debate one believes to be philosophically valuable,

one must accept that philosophers on the con side can have reasonable doubts about the central claim. In the context of the free will debate, this means that philosophers on the pro side who philosophically value that debate must accept that philosophers on the con side can reasonably doubt that anyone ever has free will. If philosophers on the pro side must accept that philosophers on the con side can reasonably doubt this, then philosophers on the pro side must accept that it is possible to reasonably doubt this. This is all that is required to defend premise 2.

It is not claimed here that one *cannot* modify one's theory in ways that make it more likely to be true, or clarify why one's existing theory is true, when one is at work on unreasonable objections. One can of course be struck by a good idea at any time. All that is claimed here is that, since unreasonable objections from the con side do not direct the attention of the pro side to features of the pro side's theories which are reasonably thought of as implausible, there is nothing about these objections *as such* which would justify someone on the pro side in believing that modifications made to her theory in response to them would make her theory more likely to be true, or that work on them would lead to greater clarity about why her existing theory was true. They could haphazardly cause her to get closer to a true theory, or to clarity about why her existing theory was true, but they could not lead her there.

It is also not claimed here that philosophers on the pro side who think the debate is philosophically valuable must themselves be able to doubt that some people have free will some of the time. Philosophers on the pro side may have become so deeply committed to the central claim that it is no longer psychologically possible for them to doubt it. But this is not a problem for premise 2, because the fact that it is psychologically impossible for some people to doubt a claim does not imply that it cannot reasonably be doubted. The defense of premise 2 given here does not even claim that *if* the philosophers on the pro side were reasonable, *then* they would

doubt the central claim themselves. Philosophical disagreement is a complicated matter. As far as the defense of premise 2 is concerned, there may be what Richard Feldman calls "mutually recognized reasonable disagreement" between the pro and con sides, which is such that even when the pro side accepts that the con side reasonably doubts the central claim, the pro side can be reasonable *without* doubting the central claim.¹⁰ It would seem to be entirely adequate for the defense of premise 2 to claim that philosophers on the pro side would not be unreasonable if they came to doubt the central claim, and it is surely fair to claim this much. For philosophers on the pro side, doubting the central claim would of course mean doubting their allegiance to the pro side, but it is hard to see how this could be unreasonable if they understood that the con side had reasonable doubts.

It may be objected that the argument just used to support premise 2 has unacceptable implications. It implies, for example, that anyone who thinks that the debate over external world skepticism is philosophically valuable must accept that it is possible to reasonably doubt the existence of the external world. But (the objection might continue) it is clearly absurd to claim that just because someone thinks this debate is philosophically valuable, it is incumbent upon her to act as if the existence of the external world has been put in doubt in any sense that has practical significance.

This objection is easily rebutted, because it trades on a suppressed false premise. But the concern that motivates it is an important one. It is indeed true that the argument just used to defend premise 2 implies that anyone who thinks the debate over external world skepticism is philosophically valuable must accept that the existence of the external world can be reasonably doubted.¹¹ It is also true that believing this debate to be philosophically valuable does not imply that one should act as if the existence of the external world has been put in doubt in a practically

significant way. It would only imply this if the following premise is added: "if the existence of the external world can be reasonably doubted, then one should act as if the existence of the external world has been put in doubt in a practically significant way". The argument just made in defense of premise 2 certainly does not support this added premise. An additional argument which parallels the argument of section I in this paper would be needed, and it is hard to see how such an argument could be made regarding belief in the external world.

One virtue of the argument made in this paper is that it helps bring into focus an important difference between doubts about free will and doubts about the external world. If the argument of section I is correct, then it is a requirement of morality to treat reasonable doubt about free will as practically significant. But how could morality have similar requirements with respect to skepticism about the external world? It does not seem that morality could require us to take solipsism seriously under any circumstances. If the primary purpose of morality has something to do with getting people to benefit one another, or at least getting them to refrain from harming one another, then morality seems to require a commitment to the existence of at least some external things, that is, other people. If this is right, then there could not be a moral reason to hold belief in an external world to the reasonable doubt standard.

III. Further Issues

The argument of this paper does not undermine all justifications of serious harm. It only undermines retributive justifications of serious harm. As far as the argument made here is concerned, justice may sometimes permit seriously harming people on (e.g.) consequentialist grounds even though it is possible to reasonably doubt that they acted freely. According to the view of justice and moral argument advocated in this paper, justice requires moral arguments for

seriously harming people on non-retributive grounds to be held to the same high standard as moral arguments for harming people on retributive grounds, that is, the reasonable doubt standard. If it were argued that it was just to seriously harm someone who had committed a violent crime by imprisoning him because it would have the good consequence of preventing him from doing further violence, and the soundness of this argument could be reasonably doubted, then justice would require us to reject it. But this argument does not depend on the claim that the criminal was morally responsible for the crime in the way that retributive justifications do. This means that if this argument fails to meet the reasonable doubt standard, it fails to do so for different reasons than the reasons for which retributivist arguments for seriously harming people have been claimed to fail. That is, the argument that it is justified to imprison someone because it will prevent him from doing further violence does not depend upon the claim that he acted freely when he acted violently in the past, so reasonable doubt about free will does not imply reasonable doubt about this argument. One could reasonably doubt the soundness of this argument if one could reasonably doubt that imprisonment would prevent further violence (perhaps because there was no reason to believe that the person would do further violence), or if one could reasonably doubt that the good consequence of preventing further violence justifies inflicting the serious harm of imprisonment upon someone. But these issues cannot be addressed here.

It must also be emphasized that, according to the view taken here, the reasonable doubt criminal conviction standard is a requirement of justice *whenever* serious harm may follow upon conviction, whether the justification to be given for that harm is retributive, consequentialist, or of some other kind. According to the view taken here, the criminal conviction standard is justified solely by the fact that seriously harmful punishment often follows upon conviction. If

this is right, then the kind of justification to be given for that harm has no bearing on the criminal conviction standard. This means that giving up the retributive justification of serious harm would provide no reason to weaken the criminal conviction standard.

Conclusion

The purpose of this paper has been to argue that anyone who thinks the free will debate is philosophically valuable must accept that justice requires us to refrain from serious retributive harm. The significance of this argument for the retributive justification of serious harm is clear enough. But its significance for the free will debate is less clear. As mentioned earlier, free will skeptics could think of this as an auxiliary argument. But libertarians and compatibilists could accept this argument while preserving a significant part of their views. They might even try this as a strategic concession. Compatibilists and libertarians might concede that their theories are not strong enough to support retributive justifications of serious harm, but they might insist that this is only because of the very high standard which must be met here, not because their theories are inferior to the theories of free will skeptics. In other words, compatibilists and libertarians might take this argument to give them a good reason to stop defending the employment of the idea of free will in retributive justifications of serious harm, while continuing to defend its employment in other contexts. They might thereby try to give up the hardest-to-defend territory in a principled way that gave skeptics no inroads into other territory.

Notes

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¹ In this paper, "free will" is used in a broad sense meant to cover all the various accounts of what satisfies the control condition of moral responsibility. If the approach taken in this paper is correct, then it is possible to reasonably doubt that anyone ever has free will free will no matter what account one gives of free will, including strong libertarian accounts based on "dual control" as well as weaker compatibilist accounts based on "guidance control" (see e.g. Fischer and Ravizza 1998) or "hierarchical control" (see e.g. Frankfurt 1971).

² The specification regarding some earlier action is necessary to allow e.g. for a case where someone who thinks he may not have the stomach for a murder he intends to commit hypnotizes himself at time A to be irresistibly compelled to commit the murder later at time B. His irresistible compulsion to commit the murder may mean that he does not have free will when he commits the murder at time B. But if he has free will when he hypnotizes himself earlier at time

A, then his lack of free will at time B is no obstacle to holding him morally responsible for the murder.

³ Some might object that it only makes sense to question the justifiability of serious retributive harm if one assumes that one has free will, because if one does not have free will, one's questioning will make no difference to how one acts. But this is mistaken. Suppose, for the sake of argument, that hard determinism is true. That is, suppose that determinism is true, and suppose that this implies that human beings do not have free will. Now suppose that someone who thinks that serious retributive harm is justifiable begins to question its justifiability, and suppose that, after thinking it over, she comes to believe that it is not justifiable after all. Suppose that she acts on this new belief by voting for different politicians. Hard determinism implies that it was inevitable that she would change her voting behavior in this way. But it does not imply that her questioning of the justifiability of serious retributive harm had no effect on her voting behavior. It is natural to suppose that her questioning played a crucial role in the deterministic causal sequence that led to the change in her voting behavior. (Epiphenomenalism about mental events would be a reason to doubt that her questioning played a causal role in the change in her voting behavior. But hard determinism does not imply epiphenomenalism.)

⁴ This issue is discussed in more detail in section II.

⁵ See e.g. Double (1991), Honderich (1993), Pereboom (2001), Smilansky (2000), and G. Strawson (1986). Also of interest is the section on "Nonstandard Views: Successor Views to Hard Determinism and Others" in Kane (2001).

⁶ No claim is intended here that all desert is based on actions. Some desert-claims are based on the sheer fact of personhood. For further discussion of this issue, see Vilhauer (forthcoming).

⁷ For a helpful discussion of intuitions about standards of proof, see Laudan (2006).

⁸ As mentioned earlier, this is not the only important debate about free will. For example, compatibilists and libertarians, who agree that human beings have free will, have a debate about whether free will is compatible with determinism. It would be natural to identify the central claim of that debate as the claim that free will is compatible with determinism.

⁹ An example of such an objection in the recent free will literature is Derk Pereboom's Four-Case Manipulation Argument (Pereboom 2001, pp. 110-117), which is discussed further in Haji and Cuypers (2006), Mele (2005), and Pereboom (2005).

¹⁰ Feldman (2006). Feldman is a skeptic about mutually recognized reasonable disagreement. His argument suggests that, to be reasonable, philosophers on the pro side of the free will debate might have to suspend judgement about the central claim when they recognized that philosophers on the con side had reasonable doubts about the central claim.

¹¹ It does not come naturally, as a matter of human psychology, to doubt that the external world exists, or that human beings have free will. Some philosophers seem to suppose that the unnaturalness of these doubts provides an argument for their unreasonableness. (P.F. Strawson and some philosophers following him are examples of this. For P.F. Strawson on free will, see P.F. Strawson 1963.) But if one looks at philosophy more broadly, one can find doubts which are just as unnatural, but which no one would be likely to call unreasonable. Consider the utilitarian claim that morality requires one to give to the needy, and to continue giving until one arrives at the point where giving more would hurt one more than it helps the needy. Next consider the anti-utilitarian claim that this utilitarian claim is false. As a matter of human psychology, it seems quite unnatural to doubt this anti-utilitarian claim. But it seems unlikely that anyone who has thought seriously about ethics would claim that it is unreasonable to doubt

it. If the unnaturalness of doubts is no argument for their unreasonableness in ethics, then why should it be so elsewhere in philosophy?

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