

# LEGAL PROBABILISM

MARCELLO DI BELLO – ASU - SEPTEMBER 12, 2024

## SUMMARY AND COMMENTS ON PUNDIK'S PREDICTIVE EVIDENCE AND UNPREDICTABLE FREEDOM

1. Pundik's paper examines the question whether, and under what circumstances, statistical generalizations can be admitted as evidence of guilt at trial. Consider statistics that people who have committed crimes before are likely to repeat them, more often than the general population. Should they be admitted as evidence of guilt at trial against someone tried for sexual abuse who has committed a similar act in the past?
2. When assessed with the tools of probability theory, these statistics can be very strongly probative of guilt because the associated likelihood ratio—a common probabilistic measure of the probative strength of evidence—can be very high. This point is developed in detail by Mike Redmayne in the paper 'The Relevance of Bad Character'.
3. Despite their probative value, a common intuition—though not unchallenged—is that many statistical generalizations should not be admitted as evidence of guilt in court. Pundik's paper aims to justify this intuition. The key idea is that admitting statistical generalizations as evidence of guilt is objectionable when it treats the defendant's conduct as unfree.
4. The paper begins with a few basic assumptions. The first is that a conviction of a defendant in a criminal trial is a judgment of culpability—that the defendant committed a criminal act of which they are culpable. The second assumption is that someone is culpable for an act only if they acted freely in committing the act. So, first, convicting requires culpability, and second, culpability requires freedom. I take these two assumptions to be uncontroversial.
5. In Section 2, the paper turns to what it means for an action to be free. Pundik claims that an action cannot be free if it is antecedently causally determined. This claim clashes with compatibilism, the dominant view about free will among philosophers. It is the view that even if an action is fully determined by antecedent causes, it can still be regarded as free.
6. Pundik also claims a predictable action cannot be regarded as free either. This holds even if the action is not antecedently causally determined. So free actions must be unpredictable. What Pundik means by predictable is this: if objective probabilities can be assigned to the occurrence of an action in the future, the action is predictable, even when the action isn't antecedently causally determined. So an action is predictable whenever we can tell, based on antecedent information, the probability of its occurrence. A succinct way of putting this requirement on free actions would be: a free action cannot be probabilistically predictable.
7. Pundik's theory of freedom clashes with compatibilism, but also with mainstream incompatibilism. The latter maintains that free actions cannot be antecedently causally determined, but they can be probabilistically predictable.
8. So what is a free action if it cannot be causally determined and it cannot be even probabilistically predicted? Imagine an agent torn between two options, for example, accepting a new job offer in another city or keeping the same job without having to relocate. The agent has equally good reasons for choosing one course of action or the other. Freedom comes into play when the agent picks one course action, even though the reasons are equally weighty on both sides. So, for Pundik, a free action is an action that has no explanation for why the agent picked one course of action rather than the other.

9. Pundik is clear that in the situation just described, there is no 50/50 chance that the agent would pick one course of action or the other. If the action truly is free, it makes no sense to make these probability assignments, not even 50/50 ones.
10. Let us put everything together. A conviction presupposes a culpable act. A culpable act must be a free act. Freedom to act requires lack of antecedent causal determination, and most importantly, lack of probabilistic predictability. Lack of probabilistic predictability requires lack of explanation for why the agent acted one way or the other.
11. Isn't this account of freedom to act a bit odd? Does it clash with intuitions about free will?
12. Consider an example. A lunatic points a gun at me and says: 'Either you accept to be kidnapped and tortured or your friend will; you have 30 seconds to decide'. I cannot escape this forced choice, so I must decide one way or the other. I am torn about what to do. I have good reasons on both sides: to protect my physical integrity and to protect my friend's. Suppose I sacrifice myself and spare suffering to my friend. The value of my friend's physical integrity ultimately prevailed as the stronger reason, if only so slightly. This action, on Pundik's theory, would count as unfree. This conclusion strikes me as odd.
13. Suppose, on the other hand, I decided to let my friend suffer and spare my body. I did that after much deliberating, but I have no good reason why I decided that. The reasons on both sides were equally weighty all the way through my deliberation process. This action, on Pundik's theory, would count as free. This conclusion, too, strikes me as odd. How is this different from merely tossing a coin of unknown bias to decide what to do when the reasons are evenly balanced on both sides?
14. Or consider this other example. I am in financial difficulties, cannot find a job, and need to feed my kids. I also want to be an upstanding citizen though. I am undecided about what to do, but because of financial distress, I cave in and decide to steal merchandise at local stores. I could have acted otherwise, but the reasons for stealing were, if only slightly, comparatively weightier than those against it. It was, say, 55% likely I would steel. So the balance of reasons explains why I decided to steal rather than not. This action, on Pundik's reading, would count as unfree and thus not criminally culpable. This outcome, again, strikes me as odd.
15. Moving now to [Section 3](#). The paper applies the idea of freedom-as-unpredictability to the question whether statistical generalizations should be admitted as evidence of guilt at trial.
16. A standard example: statistics show that people who have committed crimes before are likely to repeat them, more often than the general population. If a defendant is facing trial for sexual abuse, and committed abuse before, is the prosecutor allowed to introduce evidence against the defendant that they committed a similar offense in the past and this makes them more likely to having committed the offense for which they are currently facing trial?
17. The intuition is that this should not be allowed. Pundik justifies this intuition in two steps. First, if evidence of prior crimes were introduced as evidence of culpability, the defendant's act would be regarded as unfree. And, second, if the defendant's act is not regarded as free, the defendant should not be held culpable because culpability presupposes freedom. This is the basic argument. The second point is clear enough. The first is more involved.
18. To repeat the first point: if evidence of prior crimes were introduced as evidence of culpability, the defendant's act would be regarded as unfree. Pundik's argument is something like

this. If the prosecution introduced evidence of prior crimes as probative of the defendant's guilt, this evidence must be viewed as an indicator that the defendant possesses certain bad traits—perhaps habit, familiarity, need, etc.—that make the defendant likely to commit the criminal act in question, more so than the general population. An underlying causal mechanism must be presupposed which makes the defendant who has those bad traits more prone to commit the criminal act. The prosecution must view people with the bad traits in question as people whose balance of reasons more readily tilt towards committing the crime. And if that is how the defendant's decision-making is viewed, the defendant's action would not be viewed as free for Pundik's theory of freedom.

19. A way to object to Pundik's argument is to question his theory of freedom upfront. I have done that earlier. Most philosophers are compatibilists, and most incompatibilists still think free acts have objective probabilities and can be predicted. Pundik denies both positions about free action. So his view of free action is not mainstream.
20. What if we accept his view? The story above about what goes on in the defendant's mind while deliberating about whether or not to commit the crime is plausible, but still speculative. I wonder if we could tell other plausible stories that do not view the defendant's action as unfree, even under Pundik's theory of freedom, and still regard the statistical generalization about prior crimes as probative of the defendant's guilt.
21. Here is an alternative story. Presumably, most people have no inclination to commit criminal acts. So the balance of reasons for most of us is normally heavily skewed against committing crimes. But people who have committed crimes before are in a different motivational state. Every time they are given the opportunity to commit a crime, they are torn. The balance of reasons is even between reasons for and against committing the crime. Sometimes they happen to commit the crime and sometime they do not. We do not have a clear explanation why that happens. After all, they acted freely on Pundik's theory of freedom.
22. Another story. If I am thinking about stealing merchandise, I should bring myself to the store, enter the store and take the stuff. Perhaps people who have stolen merchandise contemplate stealing more often than the general population, especially if they are in need. But suppose that, in making the final decision to steal, they deliberate and are still torn between the choices. And sometimes they end up stealing and sometimes they do not. So they are still free in Pundik's sense. But this is consistent with their rate of stealing being higher than in the general population because they bring themselves to the last choice point more often, while most people don't even go to a store with the thought of stealing something.
23. Those who committed crimes in the past still end up committing crimes at higher rates than the general population, simply because the general population has no inclination to commit crimes at all. So the evidence about prior crimes should still be regarded as probative, but defendants who committed prior crimes can be regarded as free in their action.
24. Pundik will likely disagree. For him, either the evidence about prior crimes is probative of guilt, and if so, we must believe that individuals who committed prior crimes are not free to refrain from committing the crime (so we cannot hold them culpable); or the evidence about prior crime is not probative, and if so, we can believe that individuals who committed prior crimes are free (so we can hold them criminally culpable but we cannot use evidence about prior crimes to make that judgment).