

# *Should retributivists prefer pre-punishment?*

Article

Accepted Version

Tomlin, P. (2015) Should retributivists prefer pre-punishment? *Social Theory and Practice*, 41 (2). pp. 275-285. ISSN 0037-802X doi: <https://doi.org/10.5840/soctheorpract201541215>  
Available at <http://centaur.reading.ac.uk/38660/>

It is advisable to refer to the publisher's version if you intend to cite from the work. See [Guidance on citing](#).

Published version at: <http://stp.philosophy.fsu.edu/>

To link to this article DOI: <http://dx.doi.org/10.5840/soctheorpract201541215>

Publisher: Florida State University Department of Philosophy

All outputs in CentAUR are protected by Intellectual Property Rights law, including copyright law. Copyright and IPR is retained by the creators or other copyright holders. Terms and conditions for use of this material are defined in the [End User Agreement](#).

[www.reading.ac.uk/centaur](http://www.reading.ac.uk/centaur)

## **CentAUR**

Central Archive at the University of Reading

Reading's research outputs online

# Should Retributivists Prefer Pre-Punishment?\*

Patrick Tomlin

University of Reading

[p.r.tomlin@reading.ac.uk](mailto:p.r.tomlin@reading.ac.uk)

**Keywords:** *Time; Punishment; Pre-punishment; Retributivism; Desert; Pre-Desert.*

FORTHCOMING IN SOCIAL THEORY AND PRACTICE

## Abstract

Some philosophers believe that we can, in theory, justifiably pre-punish people – that is, punish them for a crime before they have committed that crime. In particular, it has been claimed that retributivists ought (in principle) to accept pre-punishment. The question of whether pre-punishment can be justified has sparked an interesting and growing philosophical debate. In this paper I look at a slightly different question: whether retributivists who accept that pre-punishment can be justified should prefer (ordinary) post-punishment or pre-punishment, or see them (in principle) as on a par. The answer is complex: asking this question brings to light unrecognised distinctions within both retributivism and pre-punishment, giving us four different answers to the question, depending on what kind of retributivism and what kind of pre-punishment are combined. Surprisingly, given that it is usually presented as a second best, to be pursued only when post-punishment is unavailable, some combinations will find pre-punishment preferable.

## I Introduction

Some philosophers have argued that we may (in theory<sup>1</sup>) justifiably *pre-punish* people – that is, we may punish them for a crime prior to them committing that crime. Christopher New, who

---

\* This paper shares a common ancestor with my ‘Time and Retribution’ so I am, again, grateful to all those who provided comments on that paper, in particular Saul Smilansky, as well as to two anonymous referees for this journal. I am also grateful to Joseph Adams for useful exchanges prompted by his own recent paper on this topic. I should, perhaps, note at the outset, that I am not a retributivist, or at least not a committed one. However, this paper forms part of a series of engagements with retributivist theory, in an attempt to deepen my own, and our collective, understanding of retributivist theory and its entailments.

<sup>1</sup> As with all discussions of pre-punishment, I am going to set aside our epistemic limitations concerning the future. Pre-punishment arguably requires that we have perfect (or at least excellent) foreknowledge of two possible worlds – the world in which we pre-punish, and the world in which we don’t. We should pre-punish only if the crime will be committed in both, since it seems wrong to pre-punish for a crime that will be committed only if we pre-punish (especially if the pre-punishment is causally involved in the commission of the crime – see Roy Sorensen, ‘Future Law: Prepunishment and the Theory of Casual Verdicts’ in *Nous* 40 (2006): 166-183; Stephen Kears, ‘Compatibalism can Resist Prepunishment: a reply to Smilansky’ in *Analysis* 68 (2008): 250-253, at p. 252.)

was the first philosopher to investigate the idea, motivated the concept of pre-punishment with this example:

Ben, a philosophical Alaskan traffic policeman, and Algy, an eccentric casuistical speedster, both know that Algy now intends, will continue to intend, and will eventually carry out his intention to exceed the speed limit on a remote, unpatrolled, but radar-surveyed stretch of Wilderness One at 10.31 tomorrow morning ... Algy, whilst remaining out of reach, radios Ben with the following offer: If Ben issues the fixed penalty summons for this violation before it occurs, he will pay the fine before he commits the offence. But if Ben does not issue the summons until after the offence, Algy will skip the country and avoid paying the fine.<sup>2</sup>

Should Ben accept Algy's offer and pre-punish him? New argues explicitly that retributivists in particular ought to endorse pre-punishment.<sup>3</sup> Joseph Q. Adams has recently further defended this idea, stating that retributivists are fundamentally committed to 'diachronic justice' – the idea that injuries at one time can be rectified by punishment at another. And, according to Adams, there is nothing in diachronic justice that prefers rectification after the fact:

The essential idea of rectification is a need to maintain justice over time through a justice-promoting, counter-action. Yet, a balanced equilibrium is achieved whether we punish before or after the offense; diachronic justice is secured just as well either way.<sup>4</sup>

In this paper I want to further investigate the relationship between pre-punishment and retributivism. In particular, I want to ask whether retributivists who accept the arguments of New and Adams, and therefore accept the permissibility of pre-punishment, should actually, in principle, *prefer* pre-punishment to ordinary punishment.<sup>5</sup> Discussions of pre-punishment

---

<sup>2</sup> Christopher New, 'Time and Punishment' in *Analysis* 52 (1992): 35-40 at pp. 35-36. New's example is complicated by introducing consent into Algy's pre-punishment. I will set that aspect aside in my discussion.

<sup>3</sup> *Ibid.*, p. 37-38. See also: Saul Smilansky, 'The Time to Punish' in *Analysis* 54 (1994): 50-53, at p. 50.

<sup>4</sup> Joseph Q. Adams, 'Retributive Prepunishment' in *Social Theory and Practice* 39 (2013): 213-222, at p. 216. Relatedly, Shelly Kagan endorses a view about desert which he calls the 'whole life approach', in which what matters is that people get what they deserve across their whole lives. If the retributivist belief that punishment promotes desert is coupled with this 'whole life approach', then we have a retributivist basis for pre-punishment. Shelly Kagan, *The Geometry of Desert* (New York: Oxford University Press, 2012), pp. 10-12.

<sup>5</sup> It is more interesting to explore the relationship between pre-punishment and theories which focus on the intrinsic justice of punishment, since those that focus exclusively on punishment's extrinsic benefits (e.g. deterrence), whilst accepting pre-punishment, will fairly obviously prefer whichever of pre- and post-punishment begets the best extrinsic benefits.

usually, at least implicitly, look at whether it can be justified as a *second best*. They do this by removing the possibility of ordinary, post-hoc punishment (hereafter, post-punishment) from the equation, as in New's original example. We are asked to consider whether *in such circumstances*, where we must choose between pre-punishment or no punishment at all, pre-punishment could be justified.<sup>6</sup> At the same time, however, we are told that endorsing pre-punishment rests on the claim that 'we should have no reason to prefer postpunishment to prepunishment'<sup>7</sup>, which suggests that if pre-punishment is justified, it will be, in principle, on a level footing with post-punishment.

Some are sceptical as to whether there is any point in thinking about pre-punishment, since we clearly lack the epistemic faculties required to justifiably pre-punish people (although, worryingly, some legal scholars have argued that some recent measures look a lot like pre-punishment<sup>8</sup>). I think it both important and interesting. In large part, this is because thinking about pre-punishment helps us to think about our ordinary post-punishment practices. Is our practice of only post-punishing simply contingent on our inability to see the future as well as we see the past? Advocates of the permissibility of pre-punishment say yes. But we can also ask whether which of pre-punishment and post-punishment we should *prefer*. I will show that if a certain kind of retributivist accepts the permissibility of pre-punishment in a certain way, then she will *always* view it as superior to post-punishment. Other retributivists will believe pre-punishment to be *at least sometimes* preferable. Therefore, they will believe not only that our practice of only post-punishing is contingent on our epistemic limitations, but also that

---

<sup>6</sup> Adams' 'Retributive Prepunishment' is the first attempt I have seen to compare pre- and post-punishment, although it offers only contingent reasons for retributivists to prefer either: all else equal, neither is intrinsically preferable.

<sup>7</sup> New, 'Time and Punishment', p. 38. See also: Adams, 'Retributive Prepunishment', p. 216: retributivists are 'indifferent to the timing of the justice-promoting action'.

<sup>8</sup> Lucia Zedner, 'Preventive Justice or Pre-punishment? The Case of Control Orders' in *Current Legal Problems* 60 (2007): 174-203.

those limitations are to be regretted, since pre-punishment is preferable but is made impossible by said limitations.<sup>9</sup>

For argument's sake, I will assume throughout this article that pre-punishment is (in principle) justifiable. This is obviously controversial, and the existing literature on pre-punishment is devoted to exploring what I am simply assuming here.<sup>10</sup> But I do so in order to focus on the question of whether those (and in particular those within the retributivist tradition) who accept that pre-punishment is justifiable should view it as inferior to, superior to, or on a par with post-punishment.

The answer is not simple. I will show that how the retributivist thinks about pre-punishment will depend both on exactly how she specifies her retributivism, and in particular its relationship to time, and how she understands justified pre-punishment. To this end, I will, in the next two sections, delineate two variants of retributivism (*Time-Sensitive Retributivism* and *In the End Retributivism*) and two variants of pre-punishment (*Pre-Desert* and *Debt*). This gives us a two-by-two matrix of positions combining retributivism and the justifiability of pre-punishment, with four combinations in total. Each combination answers our central question differently: two combinations consider it at least *possible* that pre-punishment is preferable to post-punishment, with one of those asserting that it is *always* preferable to pre-punish; one combination is fully neutral between pre- and post-punishment; and the final version (probably) prefers post-punishment (given other plausible claims). It is particularly interesting

---

<sup>9</sup> Of course, such limitations may still be all-things-considered celebrated even if they are regretted for this reason.

<sup>10</sup> As well as the articles already mentioned, see: Christopher New 'Punishing Times: Reply to Smilansky' in *Analysis* 55 (1995): 60-62; Daniel Statman, 'The Time to Punish and the Problem of Moral Luck' in *Journal of Applied Philosophy* 14 (1997): 129-135; Saul Smilansky, 'Determinism and Pre-punishment: the radical nature of compatibilism' in *Analysis* 67 (2007): 347-349; Helen Beebe, 'Smilansky's alleged Refutation of Compatibilism' in *Analysis* 68 (2008): 258-260; Saul Smilansky, 'More Prepunishment for Compatibilists: a reply to Beebe' in *Analysis* 68 (2008): 260-263; Michael Robinson, 'A Compatibilist-Friendly Rejection of Prepunishment' in *Philosophia* 38 (2010): 589-594.

that two combinations assert that pre-punishment could be preferable to post-punishment, since this reveals that pre-punishment is not automatically a second-best, *and* that supporters of pre-punishment are not necessarily committed to the claim that, at the level of principle, there is no moral distinction between pre- and post-punishment.

## II Two Versions of Retributivism

The general definition of retributivism I will use here starts with the concept of desert.<sup>11</sup> The basic retributivist claim, for our purposes, is that criminals deserve punishment. Deserved punishment brings about retributive justice, and this is something intrinsically valuable and/or to be pursued. Retributivists so-defined do not necessarily believe that retributive justice provides the whole truth about the justification of punishment, but rather that it plays, at least, some role. Everything I say hereafter concerns whether the retributivist should prefer pre- or post-punishment *qua* retributivist – other values or concerns may point in different directions.

For our purposes here, there are two different ways to understand retributivism which are importantly different.<sup>12</sup> They differ on whether the temporal distance between crime and punishment matters. To see the difference, consider the post-punishments of Anna and Mattie. They commit a crime together, and are equally deserving of punishment. Anna is punished immediately, while Mattie is initially left unpunished, eventually being punished ten years later.<sup>13</sup> Our two versions of retributivism differ on how they view these two punishments

---

<sup>11</sup> As is well-known, ‘retributivism’ is a broad church (John Cottingham, ‘Varieties of Retribution’ in *Philosophical Quarterly* 29 (1979): 238-246; Nigel Walker, ‘Even More Varieties of Retribution’ in *Philosophy* 74 (1999): 595-605) and so some stipulation is perhaps inevitable.

<sup>12</sup> I draw here on my ‘Time and Retribution’ in *Law and Philosophy* 33 (2014): 655-682. There, I distinguish between In the End, Brute Time, and Existing Bad Person views. For present purposes, the latter two are collapsed into Time-Sensitive Retributivism.

<sup>13</sup> An anonymous referee has pointed out to me that, in being made to wait/anticipate punishment, Mattie may have actually received *more* punishment than Anna. It is controversial whether experiences such as the anticipation of punishment can count *as punishment* – this is dependent upon what the

vis-à-vis one another. According to *In the End Retributivists*, what matters is that deserved punishment is delivered in the end, so the two cases are equally satisfactory at the bar of retributive justice – it doesn't matter how long it takes for justice to be done, so long as it is done, as it is in both cases here. According to *Time-Sensitive Retributivists*, Anna's punishment is better or preferable, since in the case of Mattie there is a period of ten years of a retributively unjust state of affairs, eventually rectified with his punishment, whilst in Anna's case there was hardly any period of retributive injustice.

Time-Sensitive Retributivism is motivated by the thought that there is something amiss with the world when a crime is committed. There is a distance between how the world is and how it ought to be – a morally bad state of affairs – and that punishment somehow closes or reduces this distance. Once punishment is enacted, justice is done. It seems plausible to endorse the following general principle: A morally bad state of affairs should be rectified sooner rather than later. Therefore, if there is a distance between the world as it is and as it ought to be, it should be closed or reduced as quickly as possible (when all else is equal). For example, if I have wronged you and owe you compensation, it seems all else equal preferable that I compensate you as soon as possible, and that a world in which you are compensated immediately is (all else equal) better than one in which you must wait. The Time-Sensitive Retributivist believes something similar is true for retributive punishment. Therefore, the Time-Sensitive Retributivist views Anna's punishment as preferable, as the retributive injustice does not exist for as long – justice is brought about, and the gap is closed, sooner rather than later.

### **III Two Versions of Pre-punishment**

---

correct 'metric' or 'currency' of punishment is, and whether punishment must be intentionally imposed. I intend to remain neutral on such issues here, and so stipulate that after ten years Mattie receives the *same* punishment as Anna, however that is to be calculated (i.e., if anticipation matters, he receives a suitably reduced sentence.)



As I have said, pre-punishment involves punishing someone for a crime before they commit that crime. There are two ways to understand pre-punishment, which have yet to be properly decoupled in the literature. One way to understand the justifiability of pre-punishment, from a retributive perspective, is to say that people can deserve punishment prior to committing a crime. Thus, if you will definitely murder someone tomorrow, then you already deserve punishment now. Let's call this the *Pre-Desert* version of pre-punishment. There are two different variants of the Pre-Desert view. One, proposed by Daniel Statman<sup>14</sup>, says that if we know that you will definitely murder someone in set of circumstances *A* tomorrow, then we know that you are the kind of person who will murder in circumstances *A*, and it is being *that kind of person* which is deserving of punishment. I am not convinced that this is really a species of pre-punishment.<sup>15</sup> Instead, it relegates the 'act requirement' of the criminal law to a merely evidentiary role, and admits future conduct as suitable evidence. But the punishment is *for* present characteristics – being the kind of person who will murder. Indeed, on this view, those who will never murder, but who *would* murder if they found themselves in circumstances *A*, deserve punishment, as it is simply moral luck that they will never find themselves in those circumstances. Therefore, having a wrongful or criminal act in your future is not a necessary condition of deserving punishment.

However, another way to understand the Pre-Desert version of pre-punishment is that being someone who has a murder in their future (and, possibly, having a certain kind of psychological connection to the person who will commit the murder<sup>16</sup>) makes you deserving of punishment *now*. Crucially, unlike the Statman view, it is actually having a murder in your

---

<sup>14</sup> Statman, 'The Time to Punish and the Problem of Moral Luck'.

<sup>15</sup> For example, Douglas Husak holds an almost exactly identical position regarding the punishment of would-be 'mega terrorists', without making any reference to pre-punishment. See his 'Preventive Detention as Punishment? Some Possible Obstacles' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin, *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013).

<sup>16</sup> Those who hold a Parfitian understanding of the persistence of personal identity would endorse this parenthetical clause (see Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984), part III).

future that makes you deserving, not merely being the type who will murder – you are still punished *for* the act.<sup>17</sup>

Another way to view justified pre-punishment can be called the *Debt* version.<sup>18</sup> On this understanding, the offender only becomes deserving of punishment *once* they've committed the crime. By pre-punishing we punish someone who does not *currently* deserve punishment, but whom we *know* will later deserve punishment. It therefore creates a retributive injustice to punish them before the crime, with retributive justice being (re)established once the crime is committed. How could creating such injustice be justified? Because if we fail to pre-punish, there will *also* be a retributive injustice. Either the offender won't be punished (as in New's example) *or*, if we punish *after* the crime, the period between the crime and the delivery of the punishment will also be a period of retributive injustice, as in Mattie's case. Think of it like a market transaction – things are out of kilter when goods have been provided and no payment received, *or* when payment is received and no goods have been provided. One party is in debt to the other. Parity is restored when the other party pays what they owe (payment or goods). When we post-punish, the offender is in 'debt' and we must extract 'payment' to restore justice. With pre-punishment, the offender 'pre-pays', creating an injustice, and justice is restored once they commit the crime.<sup>19</sup>

---

<sup>17</sup> Some of New's comments point in this direction – he argues against the claim that 'a person does not *become* guilty, and so deserve the penalty, until he actually commits (has committed?) an offence'. ('Time and Punishment', p. 37. Emphasis in original). Smilansky interprets pre-punishment in this way ('The Time to Punish', p. 51; 'More Prepunishment for Compatibilists', p. 261).

<sup>18</sup> Some of New's comments point in this direction, and he uses a debt analogy to explain pre-punishment. See 'Time and Punishment', p. 37. See also Adams' statement of a Herbert Morris-esque view of pre-punishment in 'Retributive Prepunishment', p. 219.

<sup>19</sup> A potential objection to this line of thinking is that it seems to entail that once his sentence is served the offender is 'owed' or 'deserves' his crime. Since it is not my aim to defend the justifiability of pre-punishment here, I will not try to defend it against this line of criticism. I will, however, offer three thoughts about how such a defence might go. The first is that similar objections can be levelled against payment analogies for retributive post-punishment and, indeed, compensation, in that since they seem to suggest that once the offender/tortfeasor has 'paid back' then all is well with the world. This could be taken to suggest that they were entitled to their crime/tort *provided they were willing to pay the price*. But we know that this is not the case – especially in the case of punishment, the whole point is that the offender *wasn't* entitled to act in that way. If post-punishment retributivism and compensation can

#### IV Should Retributivists Prefer Pre-punishment?

Whether the retributivist should view pre-punishment as superior, inferior, or on a par with post-punishment depends on which variant of retributivism and which variant of pre-punishment she endorses. With two versions of each position, we have a total of four combinations. I will now try to answer the question for each combination.

Recall that the discussion of pre-punishment tends to begin with seeing whether it can be justified when post-punishment is not available, whilst the theoretical arguments, resting as they do on not placing any important moral line between punishment occurring before or after the crime, tend to suggest that, all else equal, we should be indifferent between pre- and post-punishment. The most surprising finding then, is that the combination of *Time-Sensitive Retributivism* and *Pre-Desert* pre-punishment actually tells us that pre-punishment is *always* preferable to post-punishment. For the Time-Sensitive Retributivist there is a retributivist injustice when someone who deserves punishment is yet to be punished, and things get worse the longer this goes on. For those who reject the idea of Pre-Desert, the clock starts ticking the moment the crime is committed – the person deserves punishment from this point. For those who buy the idea of Pre-Desert, however, the clock starts ticking the moment the person *becomes deserving of punishment*, which occurs prior to the crime. I will not try to say here exactly when this moment is, but once the person deserves punishment, there is a retributive injustice in their not being punished, and the Time-Sensitive Retributivist will want to see justice done – i.e., punishment delivered – as quickly as possible.

---

escape this entailment, then perhaps Debt Pre-Punishment can too. Second, again, retributive post-punishment may have this entailment when it comes to the wrongly convicted. If I have suffered the punishment for a murder, am I entitled to a murder without punishment? (I am indebted to Kit Wellman's unpublished work here). Third, that 'the offender is pro tanto 'owed' his crime' does not entail he is all-things-considered entitled to it, or that we are not permitted to stop him, should that option become available (and, in such a case, we would surely want to say that he should be compensated for the pre-punishment he endured). So, the inference from Debt Pre-punishment to the offender being 'owed' his crime may not be as damaging as first appears.

What would the *Time-Sensitive Retributivist* say if we were to couple that view with the *Debt* version of pre-punishment? The Time-Sensitive Retributivist wants to minimize retributive injustice (whilst considering longer periods of injustice to be greater injustice), and so (all else equal) prefers injustice to last a shorter rather than a longer time. On the Debt version of pre-punishment, we must balance the injustice of punishing beforehand against the injustice of punishing afterwards. If we can punish only slightly early or very late, this is a consideration in favour of pre-punishment for this combination of views. If the two forms of injustice are equivalent, the Time-Sensitive Retributivist will prefer whichever of the available pre- and post-punishments is temporally closest to the commission of the crime.

However, the Time-Sensitive Retributivists who hold the Debt version will not necessarily view the two forms of injustice as equivalent, and therefore they will not necessarily simply look at the temporal distance (in either direction) between crime and punishment. The two forms of injustice may well be importantly different: if we pre-punish, there follows a period of *unjust punishment*, which will be rectified once the crime is committed; if we post-punish, there follows a period of *unjust non-punishment*, which will be rectified once the offender is punished.

We can plausibly see these two forms of injustice as morally distinct. When we endorse robust procedural protections, such as the presumption of innocence and a high criminal standard of proof, we try to ensure that we do not unjustly punish people, even when these robust protections make it likely that we will deliver less just punishment as well. These robust protections are often defended on the grounds that unjust non-punishment is heavily preferable to unjust punishment. For example, consider William Blackstone's famous (and widely endorsed) claim that 'it is better that ten guilty persons escape, than that one innocent

suffer'<sup>20</sup>, which implies that we balance unjust punishment against unjust non-punishment, but that the scales are tipped heavily in favour of avoiding the former.

If our defendant-friendly procedural principles are justified by appeal to the claim that (all else equal) unjust punishment is inherently *worse* than unjust non-punishment then that will tell us something important.<sup>21</sup> Time-Sensitive Retributivists who hold such a view should generally prefer post-punishment to pre-punishment, since the period of injustice involved in post-punishment is a period of unjust non-punishment. However, even in such a case, adherents of Time-Sensitive Retributivism and Debt pre-punishment could *in some cases* favour pre-punishment, where an available pre-punishment was *far* closer to the commission of the crime than the available post-punishments.

What of the In the End Retributivist? If the *In the End Retributivist* endorses the *Pre-Desert* view of pre-punishment, then she will be genuinely indifferent between pre- and post-punishment. Both are punishments that come after the offender becomes deserving and both give the offender what he deserves. The In the End Retributivist is equally satisfied either way.<sup>22</sup>

---

<sup>20</sup> William Blackstone, *Commentaries on the laws of England, volume 4, 19th ed.* (London: S. Sweet, 1836), p. 358.

<sup>21</sup> They could also be justified by the thought that we must never *knowingly* punish the innocent and that we must only punish when we are sure the accused is guilty. This is a deontological principle, rather than the product of balancing potential injustices. Elsewhere, I have referred to these two variants of the presumption of innocence as the overriding approach (the approach considered in this footnote) and the outweighing approach (the approach considered in the main text). If one adopts the overriding approach, and believes that we may never punish while knowing the offender is non-deserving, then one should reject the Debt variant of pre-punishment altogether. See: Patrick Tomlin, 'Extending the Golden Thread? Criminalisation and the Presumption of Innocence' in *Journal of Political Philosophy* 21 (2013): 44-66. See, in particular, pp. 49-52.

<sup>22</sup> There are *contingent* reasons, based on uncertainty about the future, for In the End Retributivists to prefer punishment sooner rather than later (see Tomlin, 'Time and Retribution', pp. 679-680) but since we stipulate away uncertainty about the future in thinking about pre-punishment, these reasons are not relevant here. Joseph Q. Adams' recent argument for retributivists (sometimes) preferring pre-punishment rests on assuming (near) perfect knowledge about the future commission of the crime, whilst assuming uncertainty about the availability of post-punishment. See Adams, 'Retributive Prepunishment.'

Deciding what the In the End Retributivist should say if she endorses the Debt Version of pre-punishment is more difficult. In stating her indifference to the time between crime and post-punishment, the In the End Retributivist appears to claim that punishments ‘cancel out’ crimes, and that it doesn’t matter when this happens. If we read this as denying either that the period between crime and punishment represents a period of injustice, or that the size of such injustice morally matters, then the In the End Retributivist should presumably view pre- and post-punishment on a par. If all that matters, retributively, is that people get the punishment they deserve at some point (including prior to actually deserving it) then the In the End Retributivist will not mind whether punishment precedes or follows crime.

If, however, the In the End Retributivist is prepared to acknowledge the period between crime and punishment as a period of injustice, whilst simply denying that the *duration* of this period contributes to the *size* of the injustice, then she will want to compare the injustice of punishing before with the injustice of punishing after. As before, if she prefers unjust non-punishment to unjust punishment, then she will *always* prefer post-punishment. For, unlike the Time-Sensitive Retributivist, the temporal proximity of the available pre-punishments will not matter – duration of injustice is irrelevant.

## **V Conclusions**

Discussions of pre-punishment seem to suggest that pre-punishment is, at best, a second-best to post-punishment, whilst also suggesting that neither pre- or post-punishment is inherently preferable. From the perspective of retributivism, however, neither of these is clearly the case. In order to show this, I have tried to make largely unrecognised delineations both within retributivism and within pre-punishment. Only if we are In the End Retributivists who accept the Debt version of pre-punishment should we view pre-punishment as inferior. And only if

we are In the End Retributivists who accept the Pre-Desert version of pre-punishment should we view pre- and post-punishment as on a par. Those who believe that time matters when it comes to delivering retributive justice (i.e., Time-Sensitive Retributivists) will at least sometimes, and perhaps always, prefer pre- to post-punishment. Those who accept such combinations of views ought to change the way they look at our ordinary post-punishment practices – they are (at least sometimes) second best forms of justice, forced on us by the disparity between our abilities in hindsight and foresight.

Some may find such combinations ruled out by the very entailments that I have drawn from them. Rather than a novel conclusion, these theorists will take some of the entailments noted above to be reductios of certain combinations. For example, if the combination of Time-Sensitive Retributivism and Pre-Desert pre-punishment leads us to the conclusion that pre-punishment is intrinsically and consistently preferable to post-punishment, then some may conclude ‘so much the worse for that combination.’ Therefore, they will insist that at least one of the two positions be rejected.

Is such a combination, and the entailment, unthinkable? Is it implausible to think that pre-punishment is preferable to post-punishment? The first thing to say here is that our entire discussion has been premised on the controversial assumption that pre-punishment can serve retributive justice and is permissible. Those who reject out of hand the idea that pre-punishment could be *preferable* to post-punishment may be motivated by the fact that they dismiss, or are at least sceptical of, the claim that pre-punishment can be (in theory) just and permissible. But once we have accepted that pre-punishment is permissible, it seems less of a stretch for the retributivist to concede that it may be (in principle) preferable. I am myself very doubtful of the position that pre-punishment is permissible, or that it serves justice, but if it is, I don’t think it is especially worrying if it turns out to be preferable. That second step

seems much smaller than the first (accepting pre-punishment as permissible). The second thing to say to this is that it must be remembered that the claim is that pre-punishment is preferable *in principle*, and *from the point of view of retributivism*. There are plenty of reasons remaining for the retributivist to prefer post-punishment, both because of our epistemic abilities, and because of other values or reasons.

In this essay I have not argued for retributivism or the permissibility of pre-punishment. However, as well as trying to see what retributivists might say about pre-punishment, I have tried to contribute to the scholarship of both positions. In terms of retributivism, the distinction (and choice) between the Time-Sensitive and In the End variants is not generally recognised and discussed, but it has serious ramifications both for how retributivists regard pre-punishment as well as how they view the timing and mode of ordinary punishment.<sup>23</sup> In terms of pre-punishment, it seems that, from a retributivist point of view at least, two completely different arguments can be offered in its favour, and traces of both can be found in the literature. Therefore, greater clarity can be achieved by focusing arguments both for and against pre-punishment on the Pre-Desert (or related positions like Pre-Liability, or Pre-Forfeiture) and Debt variants.

---

<sup>23</sup> Tomlin, 'Time and Retribution'.