

What's Wrong with Prepunishment?

Alex Kaiserman

Abstract: Punishing someone for a crime before they have committed it is widely considered morally abhorrent. But there is little agreement on what exactly is supposed to be wrong with it. In this paper, I critically evaluate several objections to the permissibility of prepunishment, making points along the way about the connections between time, knowledge, desert, deterrence and duty. I conclude that, although the conditions under which it could permissibly be administered are unlikely ever to arise in practice, nevertheless in principle, *nothing* is wrong with prepunishment after all.

1. Introduction

Consider the following case:

Speedster: Ben, a farsighted sheriff, and Algy, a casuistical speedster, both know that Algy will exceed the speed limit on a remote stretch of Wilderness One tomorrow morning. (They know this by some or other of the means one standardly has of learning about one's future actions or the future actions of others – testimony, introspection, mindreading, extrapolation from past behaviour, etc.) Ben additionally knows that it will be impossible for him to justifiably punish Algy after the speeding has occurred, either because it will be impossible to punish him at all (he'll have jumped town by then, he'll have acquired diplomatic immunity, etc.), or because Ben will no longer be in a position to know that Algy broke the speed limit (he suffers from short-term memory loss, etc.). Ben has Algy arrested and sentences him to one night in prison. The next morning Algy is released and, as predicted, breaks the speed limit on Wilderness One.

New (1992) provocatively argues that it might be permissible, perhaps even required, for Ben to punish Algy in *Speedster* before he has actually committed the crime. In this paper, I argue that for all that's yet been shown, New was right – although the conditions under which it could permissibly be administered are, for several reasons, unlikely ever to arise in practice, nevertheless in principle, *nothing* is wrong with prepunishment after all.

2. Preliminaries

Some clarificatory remarks are in order before we proceed.

First, it will be worth drawing attention to a couple of respects in which *Speedster* differs from New's original example. In New's version, Algy *offers* to submit to prepunishment; this feature is distracting, however, insofar as offering to submit to punishment is not something criminals typically do. In my example, Algy is arrested and incarcerated against his will, as in most cases of postpunishment (punishment after the crime). Moreover, the punishment in New's example is a fine, rather than incarceration; I choose the latter for my example, because as Lewis (1997) points out, the distinction between a fine and a *fee* is not always so clear-cut, and I want to avoid any suggestion that Algy is buying an *entitlement* to speed. Prepunishment doesn't make future wrongdoing permissible any more than postpunishment makes past wrongdoing permissible.¹

Second, it's important to note that Algy in *Speedster* is not being incarcerated in order to *prevent* him from speeding tomorrow. Ben, after all, *knows* that Algy will speed tomorrow; he knows, therefore, that any attempts to prevent him from doing so will fail. I labour this point because preventative detention is sometimes described in the literature as a kind of prepunishment.² I think this is a mistake – incarcerating someone to avert threats they may go on to pose might well be justified in some cases, but it cannot properly be described as *punishment*, since by assumption there is no crime that it could be punishment *for*. In any case, the morality of preventative detention is not my focus here. What I am interested in is

whether it might be permissible to punish someone for a crime they *will in fact commit* in the future.

Finally, a note on methodology. I will not attempt to provide a *direct* argument for the permissibility of prepunishment here; instead my strategy will be to consider a variety of objections to prepunishment I have encountered either in the literature or in conversation, and argue either that they fail or that they succeed only in a limited range of circumstances. I have two reasons for choosing this approach. First, any direct argument for the permissibility of prepunishment would presumably need to take a stand in the debate over what justifies punishment more generally. By contrast, where an objection I consider presupposes a background theory of punishment, I will mostly accept the theory in question for the sake of argument; my defence of prepunishment will thus be neutral with respect to which theory of punishment is correct. Second, the strategy of considering a broad range of objections has the advantage of revealing, with more precision than would otherwise be possible, the *range* of circumstances in which prepunishment might be permissible. Inevitably, some readers will feel that too much time is being spent on some objections and not enough time on others. I cannot claim to have knock-down responses to every objection, nor can I claim to have considered every objection that might be proposed. Nevertheless I hope to succeed at least in casting some doubt over the widely-held view that prepunishment is ‘morally abhorrent’ (Smilansky 2007: 347).

With these clarifications in place, let us turn to the objections. Here’s a quick preview:

§3: *Prepunishment is necessarily punishment of the innocent.*

§4: *Prepunishment opens up the absurd possibility of the punishment causing the very crime being punished.*

§5: *The threat of being prepunished for a crime cannot deter a rational person from committing it.*

§6: *Unlike postpunishment, the permissibility of prepunishment cannot be grounded in the individual's rectificatory duties.*

§7: *Prepunishment foreseeably will not succeed in reforming the individual.*

§8: *Prepunishment is never permissible because it is impossible to know what free agents will do before they do it.*

3. Desert

According to several authors, 'the problem with prepunishment derives, in the end, . . . from the unacceptability of the 'punishment' of the innocent' (Smilansky 1994: 50). Prepunishment is impermissible for the simple reason that someone who has not yet committed a crime is, as yet, innocent of that crime.

As New (1992: 37) emphasises, a lot depends on what one means by 'innocent' here. If 'innocent' means that one *never has and never will* commit a certain crime, then of course prepunishment is not punishment of the innocent. If on the other hand 'innocent' means that one's *present* psychological states are morally non-culpable, then not all prepunishment will be punishment of the innocent – in *Speedster*, for example, Algy intends to speed tomorrow, and he is culpable for having this intention. Moreover, many clear-cut cases of *postpunishment* will turn out to be punishment of the innocent, so-understood, since at least some of those who have committed crimes have perfectly non-culpable present psychological states.³ Presumably, then, we should take 'innocent' to mean that one *has not yet* committed a certain crime. So-interpreted, however, the objection begs the very question at issue. Why do those who *have* committed crimes deserve punishment any more than those who *will* commit crimes, if all else is equal?

It's commonly assumed that desert is essentially *backwards-looking*, in the following sense:⁴

Backwards-Looking: If at t S deserves x in virtue of the fact that S did or suffered something at t' , then t' cannot be later than t .

If *Backwards-Looking* is correct, then prepunishment is indeed always punishment of the undeserving. Yet as Feldman (2005) argues, there are reasons to doubt that desert must always be backwards-looking in this sense. A soldier who volunteers for a suicide mission might be thought of as deserving of great praise and reward, *before* they go off to perform the actions in virtue of which they deserve to be so treated. (It might be argued that what is really being rewarded here is the act of *volunteering* for the mission, not the mission itself. But this seems hard to defend. If the soldier backs out of the mission at the last minute, many would feel not just that he *no longer* deserves the benefits conferred to him, but that he never deserved them in the first place, even if his intentions at the time were worthy and sincere.) Similarly, a security guard might say, ‘I’m really sorry, but I’m going to have to search your bag’, the suggestion apparently being that the owner of the bag deserves an apology now in virtue of the guard’s future actions. (Again it might be suggested that what the guard is really apologising for is something else – the interruption, perhaps – but again this seems hard to defend. If the guard decides at the last minute not to search the bag, many would feel that his apology was unnecessary after all.) These examples suggest that *Backwards-Looking* is false – at least in some cases, what one deserves now can depend on what one will do, or what will happen to one, in the future.⁵

Moreover, the permissibility of prepunishment follows straightforwardly from several popular conceptions of the goal of retributive justice. Consider for example what Kagan (2005: 11) calls the *whole life view*, according to which *how* deserving a person is depends on how vicious or virtuous they are over the whole course of their lives, and whether they have ultimately *received* what they deserve depends on how well- or badly-off they are over the whole course of their lives. Time on this view drops out of the picture entirely: it does not matter when a particular act of punishment occurs, so long as the total balance of reward and punishment over the person’s life matches their total balance of virtue and vice. Or alternatively, consider a view described by Tomlin (2015) on which what matters for retributive justice is not (merely) that the balance of reward and punishment over the course of one’s life matches one’s total

balance of virtue and vice, but rather that the amount of time between the conferral of a reward or punishment and the event in virtue of which that reward or punishment is deserved is minimized (the thought being that during such periods there is ‘something amiss with the world . . . a distance between the world as it is and as it ought to be, [which] should be closed or reduced as quickly as possible’ (Tomlin 2015: 217)). Again, such a view is completely impartial as regards whether the punishment occurs before or after the crime – something is ‘amiss’ with the world in the intervening period either way. Tomlin considers the suggestion that the period of time between prepunishment and a crime is worse, all else equal, than the period between a crime and postpunishment, because the former is a period of *unjust punishment* while the latter is merely a period of *unjust non-punishment* (Tomlin 2015: 283). But even if this view was correct, it would be perfectly compatible with the permissibility of prepunishment in cases where all else is *not* equal, for example in cases, like *Speedster*, where postpunishment is impossible, so that the only available means of achieving any kind of retributive justice is to punish the criminal before they commit the crime (a small period of unjust punishment is better than an infinite period of unjust non-punishment).

Here is one final argument for the view that prepunishment is punishment of the innocent, due to Smilansky:

[I]n prepunishment we are not showing the respect due to the moral personality of the agent, who is, when ‘punished’, as yet [still] *capable of not committing the offence*. In prepunishment there is categorically still time, a ‘window of moral opportunity’ for the would-be offender . . . In postpunishment, by contrast, it is too late . . . The offence has been committed, and nothing in the relevant reality can change any more (Smilansky 1994: 52).

Smilansky’s complaint here is a bit difficult to pin down. He is not claiming, I think, that there are literally no facts of the matter about what free agents will do in the future.⁶ Nor is he saying that it isn’t possible to know that a future offence will be committed.⁷ Rather the idea seems to be that even if someone *will* in fact commit a crime tomorrow (and we know this), there is

nevertheless a sense in which they *can* choose not to commit it, and it is because of this that prepunishing them would be impermissible.

I don't deny that there is a sense in which someone who will commit a crime tomorrow nevertheless *can* still choose not to commit it. As Lewis (1976: 150) argues, "can' is equivocal . . . [t]o say that something can happen means that its happening is compossible with certain facts', themselves typically determined by the conversational context. *Holding fixed* that Algy will speed tomorrow, it's not true that he can stick to the speed limit; nevertheless, there's also a perfectly natural sense in which Algy can stick to the speed limit, one where only certain facts about the present situation are held fixed.⁸ What I fail to see, though, is why it should follow from this that prepunishment is punishment of the innocent. As New notes, in prepunishing someone we know will commit a crime, we aren't failing to respect her moral capacities so much as 'acknowledging how she [is] going to exercise them' (New 1995: 62). There may well be cases where it makes sense to 'give [the agent] a moral chance to *remain* innocent' (Smilansky 1994: 53), cases where *for all we know* the agent may change her mind. But if we know she won't change her mind, 'that would be no more than an empty gesture . . . it would be waiting for something to happen which we knew was not going to happen' (New 1995: 61).

Here's another way of making the same point. Suppose Algy has access to a time machine. As a matter of fact, he won't use it. But there's a natural sense in which he *can* use it – one where only certain facts about Algy's present state and his immediate environment are held fixed – and so there *is* something he can (in this sense) do which would cause his past speedings not to occur, such as going back in time and burning his car. Presumably, though, Smilansky wouldn't want to say that ordinary postpunishment is impermissible if it's done to people who can, in this sense, go back in time to prevent their past crimes. It's not a violation of an agent's moral autonomy to punish them for a crime we *know* they freely committed in the past just because there's some non-actual state of affairs the agent has the ability to bring about in which the crime doesn't occur; what Smilansky needs to explain is why the same isn't true when the crime being punished occurs in the future rather than the past.

In summary, I find the retributive arguments against the permissibility of prepunishment unconvincing (even granting the background theory of punishment they appeal to). Notwithstanding the widespread assumption that desert is essentially ‘backwards-looking’, there is in fact little reason to think that prepunishment must always be punishment of the innocent, or that future wrongdoers don’t deserve to suffer just as much as past wrongdoers do.

4. Causation

Another common objection to prepunishment is that it opens up the possibility of the punishment itself *causing* the very crime being punished.⁹ Suppose Jim incarcerates Rosie for a future assault. Rosie is so enraged by what she considers unjust treatment that, upon her release, she assaults Jim in retribution. Jim rules that, since Rosie has already been punished for her crime, she can be set free. Isn’t there something absurd, even incoherent, about this example?

I agree that there is something absurd about this example, but I don’t think it has anything directly to do with the fact that the punishment causes the crime. Generally speaking, for punishment to be justified, one must know (beyond reasonable doubt) that a crime has occurred or will occur. But in many versions of the case above, the only means Jim will have of knowing that Rosie will assault him is by already knowing, in advance of his decision, that he will punish her. And it’s a familiar fact that there is something incoherent about a process of deliberation the outcome of which one already knows in advance.¹⁰ Remove this element of the example and the sense of absurdity goes away. Suppose for example that Jim is told by an oracle that Rosie will assault him in the future, but isn’t told the cause of her action. He decides to prepunish her based on the oracle’s testimony. It later transpires that the punishment itself caused the assault. There is something tragic about this example, but not, I think, incoherent.¹¹ Or suppose that Jim knows that *if* he punishes Rosie, the punishment will cause her to assault him, but if he doesn’t she will assault him regardless (perhaps the punishment would only *pre-*

empt another would-be cause of the assault, such as an existing deep-seated hatred of Jim). Again, there doesn't seem to be anything incoherent about Jim deciding to prepunish Rosie in such a case.

It might be argued that causing someone to commit a crime by 'punishing' them for it in advance is really just *provocation* by another name.¹² Suppose Ant locks up Dec in his dressing room for a day, knowing that it will provoke Dec into punching Ant in retaliation. Clearly the fact that Dec punches Ant doesn't make Ant's original action permissible. How would Ant 'prepunishing' Dec for his future assault be any better?

I agree of course that it's wrong to provoke someone into committing a crime. But *provocation* is a thick moral concept – by causing someone to commit a crime, I only *provoke* them if what I did was wrong. So it's begging the question to say that prepunishment is wrong *because* it amounts to provocation – the question is precisely whether prepunishment, unlike provocation, is permissible. Two points are worth stressing in connection with this question. First, punishment generally involves more than just intentionally harming someone. There is a *communicative* component to punishment, for example, which isn't present in ordinary cases of provocation.¹³ And second, the fact that punishing someone would cause further crimes to be committed isn't normally considered an insurmountable barrier to just punishment. Suppose for example that I punish Eric for stealing, knowing that this will cause Ernie to steal (to offset lost income due to Eric's incarceration, perhaps), but also deter, say, ten others from stealing. Clearly punishing Eric would be permissible in this case. What the proponent of this objection needs to explain is why our judgements should be any different in the special case where the crime caused by the punishment is the very crime being punished.

In summary, although the causal dependency of future crimes on present decisions can make it difficult in some cases to properly deliberate over whether to prepunish someone (more on this in §8), it's not clear that there is anything inherently problematic about punishment which causes the crime being punished. Yet even if the objections considered in this section were

successful, they wouldn't explain what's supposedly wrong with prepunishment in those cases where it *doesn't* cause the crime being punished. Suppose that Algy simply wants to speed tomorrow, and whether or not we prepunish him will foreseeably have no effect on his motivations. If there's anything wrong with prepunishing Algy in such a case, it's not the fact that doing so would cause his speeding, since it won't.¹⁴

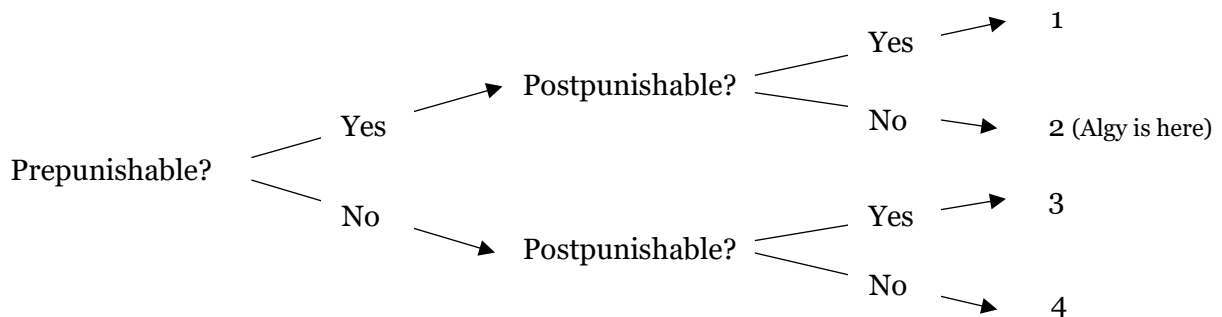
5. Deterrence

According to many people, punishment is justified at least in part by its deterrent effects on those who might otherwise commit similar crimes. A different way of objecting to prepunishment, then, is to allege that it cannot deter in the way that postpunishment does.

We should distinguish two versions of this objection. According to the first, punishing someone for a future crime removes any incentive they might have had not to commit it. 'After all,' such a person may reason to themselves, 'I've already been punished for stealing Tom's TV, so I might as well go ahead and take it now.' This objection can be easily answered. It's true of course that justified prepunishment foreseeably will not deter the crime being punished. But then it's equally true that justified *post*punishment foreseeably will not deter the crime being punished either.¹⁵ So there is no asymmetry here. Once we come to know that a crime has occurred or will occur, its occurrence becomes a fixed point in our deliberations – there is no point trying to prevent it, since we know in advance that we will fail. What justifies punishment, if anything, is its ability to prevent crimes *other* than the one being punished.

A better version of the objection goes like this. Unlike the threat of being postpunished, the threat of being prepunished for committing a crime would not deter a rational person from committing it. Suppose a would-be murderer is deliberating over whether to pull the trigger. They may reason as follows: 'If I was going to be prepunished for this crime, it would have happened already. Since it hasn't, I therefore know it won't. So there is nothing to fear!'

I think there is something importantly right about this objection, though seeing what that is will require some set-up. The first thing to note is that what really matters is not whether the *threat* of being prepunished deters, but whether prepunishment *itself* deters. In other words, we need to determine how deterred people would be from committing a crime in scenarios where prepunishment is allowed compared to those where it isn't. To get a handle on this problem, let's divide the set of people who commit a certain crime (say, murder) into four groups, according to (a) whether they are 'postpunishable', i.e. whether law enforcement agencies will at some point be in a position to charge, arrest and successfully convict them after they commit the crime, and (b) whether they are 'prepunishable', i.e. whether law enforcement agencies will be in a position to charge, arrest and successfully convict them *before* they commit the crime:



Let p_1, p_2, p_3 and p_4 be the prior probabilities I assign to the possibilities that I am in group 1, 2, 3 or 4, respectively. Now consider two scenarios. In Scenario A, only postpunishment is allowed; my credence that if I commit murder I will be punished afterwards is therefore simply $p_1 + p_3$. In Scenario B, prepunishment is *also* allowed, and routinely used, but only in cases (like *Speedster*) where postpunishment is impossible (i.e. for all and only those people in group 2). In this scenario, my *prior* credence that if I commit murder I will be punished at some point (whether before or after) is $p_1 + p_2 + p_3$, which of course is greater than $p_1 + p_3$. In this sense, then, rational agents are more deterred from committing murder in scenarios where prepunishment is allowed (assuming of course that rational agents are less likely to commit a crime the more confident they are that if they commit it they will be punished).

As the objection above points out, however, those who find themselves on the *verge* of committing a crime in Scenario B typically have more information than this. If I'm on the verge of committing murder – my finger is on the trigger, the moment of truth has arrived – I'm in a position to know that if I kill my intended victim, I won't be (or have been) punished for that crime before committing it;¹⁶ in other words, I learn that I am not in group 2 in the diagram above. Updating accordingly, my new credence that if I commit murder I will be punished is then $\frac{p_1 + p_3}{p_1 + p_3 + p_4}$. Notice that this again is larger than $p_1 + p_3$, the credence I would have had in that same proposition in Scenario A (where only postpunishment is allowed). It follows therefore that even those who are on the verge of committing a crime will be more deterred from doing so in scenarios where those in group 2 are prepunished.

Unfortunately, however, this isn't yet enough to show that prepunishment can be *justified* on deterrence grounds. To do that, we need to do more than just show that prepunishment has a deterrent effect; we also need to show that prepunishment is *necessary* for achieving this effect. And the problem is that, on reflection, the information on which I updated my credences in the case above could just as well have been supplied without actually prepunishing the people in group 2. Suppose instead that law enforcement agencies adopt a transparent policy of sending all such people a letter informing them that they have been identified as someone who will commit a crime in the future but won't be punishable after the fact. Now suppose I'm on the verge of committing murder in this scenario; I can then conditionalize on the fact that I haven't received such a letter, which increases my credence that if I commit murder I will be postpunished from $p_1 + p_3$ to $\frac{p_1 + p_3}{p_1 + p_3 + p_4}$, just as before.¹⁷

Here, then, is what is right about the objection above: prepunishment of future criminals who are not postpunishable cannot be *justified* on the grounds that it would make those who are on the verge of committing a crime less likely to commit it; it *would* make them less likely to commit the crime, assuming they are rational, but then so would many other, much less unpleasant things, like adopting a transparent policy of sending letters to those in group 2. But

this doesn't mean that prepunishment cannot be justified on deterrence grounds at all. The institution of punishment aspires to more than just deterring those on the *verge* of committing a crime; it also creates strong incentives not to engage in the types of behaviour and thinking that might lead one to commit crimes in the future – most obviously conspiring to commit a crime, but also associating with certain sorts of people, visiting certain websites, allowing resentments to fester, and so on. And in a jurisdiction where future murderers who wouldn't otherwise be punished are prepunished, these incentives are stronger than in a jurisdiction where only postpunishment is allowed, since one's prior credence that if one commits murder one will be punished at some point (either before or after the crime) would be higher in the former case than in the latter ($p_1 + p_2 + p_3$ rather than $p_1 + p_3$).

Moreover, providing incentives to those already disposed to criminal activity is not the only, or even necessarily the most important, means by which punishment can prevent future crime; it also plausibly does so by providing incentives to parents, carers, and teachers who care about the future welfare of their charges to engage them in productive activities that will make them less likely to offend in the future. And again, in a jurisdiction where those who wouldn't otherwise be punished are prepunished, these incentives are stronger than they would be if prepunishment weren't allowed. Thus, prepunishment might also be justified by its effects on those with the power to shape the moral psychologies of future adults.

In summary, then, although the relationship between prepunishment and deterrence is perhaps more complex than it might initially have appeared to be, there is ultimately good reason to think that prepunishment can be justified by its deterrent effects; if not on those who are on the verge of committing a crime, then at least on those who are yet to reach that point (either directly or via their parents and educators).

6. Rectificatory Duties

Here's a commonly voiced worry about the idea that punishment is justified by its deterrent effects. By harming someone in order to prevent future wrongdoing, one is using them as a means to an end; and generally, it is difficult to justify harmfully using someone as a means to an end. That's why, for example, it's not permissible to kill an innocent person in order to prevent two other innocent people from being killed. But as Tadros (2011) argues, there are limits to the prohibition on using people as means. In particular, harmfully using someone as a means to an end does not wrong them where that person has an enforceable *duty* to serve that end at the relevant cost. Suppose a trolley is headed towards five people and the only way I can save them is by pushing a man off a bridge and into the path of the trolley. Arguably, my act is impermissible if it would break the man's leg, but permissible if it would only cause him mild bruising. According to Tadros, this is because while the man has a duty to endure mild bruising to rescue five people, he does not have a duty to endure a broken leg to rescue them; so although breaking the man's leg as a means to saving the five would wrong him, causing him mild bruising would not.

Tadros builds on this idea to defend the following justification of punishment, which he calls the *duty view*. When one acts in ways that are seriously wrongful, one typically acquires stringent secondary duties to respond to that wrongdoing.¹⁸ Such duties will often involve duties to endure significant costs in order to protect one's victim, or others, from similar wrongdoing in the future. So for example, suppose the man on the bridge maliciously injured one of the five people on the tracks yesterday. Then plausibly, it *wouldn't* be impermissible anymore to break his leg by pushing him off the bridge to save the five. This is because the man now has a secondary duty, in virtue of his past wrongdoing, to endure greater costs than he would normally be required to endure in order to protect his victim from future harm. More generally, according to Tadros, it is permissible to punish someone to deter future wrongdoing, even though in doing so one is using them as a means to an end, so long as that person has an enforceable secondary duty to bear the costs we are imposing on them in order to protect those future would-be victims.

Suppose something like this view is correct. Then one might object to prepunishment as follows. Let's grant that after Algy exceeds the speed limit on Wilderness One tomorrow, he will acquire secondary duties to respond to that wrongdoing, which might include duties to bear increased costs in order to protect the public from future would-be speeders. Nevertheless Algy does not have such a duty *now*, since no wrongdoing has yet occurred. The duty Algy has *now* is, quite simply, to not commit the crime in the first place. That we know he will breach this duty is irrelevant – there cannot be any duties to respond to wrongdoing until that wrongdoing has actually occurred. Thus prepunishment cannot be permissible, since someone who has not yet committed a crime has not yet acquired the duties that would justify treating them in that way.

I think it's ultimately correct that one acquires secondary duties in virtue of some act of wrongdoing only after that act has occurred. Yet I don't think it follows from this that prepunishment cannot be justified. To explain, start by considering the following case:

Sally and Terry 1: Yesterday I (unjustifiably) broke one of Sally's arms and both of Terry's arms. Sally and Terry are now both facing independent threats of a broken leg. I can prevent one, and only one, of these threats, and doing so will cost me a black eye.

Plausibly, what I ought all-things-considered to do in *Sally and Terry 1* is prevent the threat to Terry, given that the harm I caused to Terry was more severe. But now consider this variant on *Sally and Terry 1*:

Sally and Terry 2: As in *Sally and Terry 1*, except that I have not yet harmed Terry. However, I know I *will* break both his arms tomorrow (maybe I'm a low-ranking mafia enforcer, and 'Terry arms x2' is next on my list).

Actualists and possibilists about moral obligation disagree about what I ought all-things-considered to do in *Sally and Terry 2*. Possibilists say that, since I *can* still choose not to break Terry's arms, what I ought to do is save Sally and not break Terry's arms. Actualists say that since I *will* break both of Terry's arms, I ought to save Terry. I prefer the possibilist view. The

problem with actualism is that it is implausible that I should lose my all-things-considered duty to save Sally merely because I will certainly act wrongly in the future. Suppose for example that I will certainly kill Betty with a rusty saw if I don't kill her with a sharp knife now. It would be better to kill Betty with a sharp knife than a rusty saw; but we cannot conclude from this that I ought to kill Betty with a sharp knife *simpliciter*! What I ought to do is not kill her in the first place, assuming this is something I am able to do, regardless of whether or not I will actually do it. Similarly, according to the possibilist, although it would be better to save Terry now and break Terry's arms later than it would be to save Sally now and break Terry's arms later, we cannot conclude from this that I ought to save Terry *simpliciter* – what I ought to do is not break Terry's arms in the first place, given that this is something I am still able to do, regardless of whether or not I will actually do it.¹⁹

Assuming possibilism is correct, it follows that I do not yet have the secondary duty that will be generated by my harming Terry tomorrow, and more generally, that secondary duties only arise after the wrongdoing which generates them. Fortunately, though, it doesn't yet follow from this that prepunishment is impermissible. The crucial question for our purposes is not what *I* ought to do in cases like *Sally and Terry 2*, but how a *third party* would be permitted to use me as a means. Consider then this third variant of the case:

Sally and Terry 3: As in *Sally and Terry 2*, except that Barry is able, at no cost to himself, to prevent either the threat to Sally or the threat to Terry (but not both) by pushing me into the path of their respective aggressors. Doing so, in both cases, would cause me a black eye.

Suppose the possibilist is right that what *I* ought to do in *Sally and Terry 3* is save Sally (and not break Terry's arms). Nevertheless, it seems to me that the right thing for *Barry* to do would be to use me to save Terry, rather than Sally. From Barry's point of view, it does not matter that I have already harmed Sally but haven't yet harmed Terry; given that I *will*, with certainty, harm Terry more severely than I have harmed Sally, it is better all-things-considered to use me to save Terry. More generally, if X knows that Y will commit some wrong in the future, I

think it would be permissible for X to harmfully use Y *now* as a means to protecting others from similar wrongdoing, *regardless* of when exactly Y acquires the secondary duty to bear the costs we'd be imposing on her. Effectively what I am proposing here is a further loosening of the prohibition on using as a means: harmfully using someone as a means to an end does not wrong that person where they have *or will foreseeably acquire* an enforceable duty to serve that end at the relevant cost.

Here's another case to further illustrate this point. Suppose A is threatening to punch V. The only way V can avert the threat posed by A is by pulling B in front of him so that A's punch lands on B instead. If B is a random bystander, it wouldn't be permissible for V to do this, let's suppose (even if B is hardier than V, so that the punch would harm her less). But now suppose that V knows that B will punch him tomorrow. Let's even stipulate B does not presently intend to do this – nevertheless, V knows it will happen (maybe because he has heard that B is a loyal and effective mafia enforcer, who will be ordered tomorrow to punch V). Now it seems to me that V *would* be permitted to use B as a shield to protect himself against A, even though B bears no responsibility for the threat posed by A and does not presently intend to harm V. This is because B's future assault will generate a secondary duty to bear significant costs to protect V from similar threats; and since V *knows* that B will acquire such a duty, it seems perfectly permissible for him to impose those costs on B *now* as a means to averting the threat posed by A. This seems especially true if the threat posed by A is the only threat V will ever face that B could possibly be used to avert (perhaps B is due to leave the country straight after her assault of V, which itself cannot be prevented). It would be absurd, I think, to insist in such a case that since B hasn't *yet* wronged V, V must simply sit tight and endure A's punch.

It's worth noting too that this reasoning seems consistent with what happens in other areas of the law. Consider the doctrine of anticipatory breach of contract. If it's clear that S will breach a contract with T at some point in the future – for example, because it's clear that S has no intention of delivering certain goods or services on time – then in many jurisdictions T would be permitted to sue S for damages now to compensate her for her anticipated losses, rather

than having to wait until after the breach occurs.²⁰ This seems like the right policy. Granted, if the possibilist is right, S doesn't yet have a duty to compensate T – what she ought to do, all-things-considered, is comply with the terms of her contract, assuming this is something she is still able to do, even though we know she won't. But seeing as S *will* acquire a secondary duty, after the breach, to pay T a certain sum in compensation, it seems perfectly permissible to compel S to pay that sum now. It would be perverse to insist on waiting until after the breach has actually occurred.

In summary, even though I agree that secondary duties do not arise until after the wrongdoing that generates them, nevertheless it doesn't follow from this that prepunishment cannot be justified on broadly deontological grounds. If punishment is justified because criminals acquire duties to bear significant costs to deter others from doing similar things in the future, it makes little difference whether the crime has already occurred or is yet to occur – as long as we *know* that someone will commit a crime in the future, it is permissible to harmfully use them now as a means to avert other similar crimes, even if those crimes would have happened before the crime that's being punished. And this seems especially true in cases, like *Speedster*, where it foreseeably won't be possible to punish the criminal after the crime has occurred.

7. Recognition and Reform

According to some people, the primary aim of punishment is to communicate a message to the offender, in the hope of getting them to recognise that what they did was wrong, to instil in them feelings of regret and remorse, and ultimately to reform the offender, to turn them into a co-operative and well-adjusted member of society. Another way of objecting to prepunishment, then, might be to argue that it cannot produce some or all of these desirable effects.

There are, once again, several versions of this objection. One version insists that regret and remorse are essentially *past-directed* emotions, so necessarily prepunishment cannot succeed

in getting future offenders to feel remorse or regret for what they have not yet done.²¹ I find this objection unconvincing. For one thing, it's not completely clear to me that one cannot feel regret or remorse for one's future actions – 'I regret what I'm about to do' sounds perfectly fine to my ear. But even if regret and remorse are essentially past-directed emotions, they presumably have future-directed analogues – a feeling of sadness about what one knows one will do, a wish that things could be otherwise, etc. – and insofar as there is value in making those who have committed crimes feel regret for what they have done, it's not clear why there wouldn't be equal value in making those who *will* commit crimes feel the analogous future-directed emotions towards what they will do.

A better version of the objection goes like this. If we know that someone will commit a crime in the future, then it's foreseeable in advance that any prepunishment would not succeed in reforming them. They might claim afterwards to feel remorse, to have learnt the errors of their (future) ways, and so on; but we know already such sentiments could not possibly be sincere, since we know they will go ahead and commit the crime regardless. So prepunishment cannot be justified, because by knowing that someone will commit a crime one thereby knows that any prepunishment would not succeed in reforming them.

One way of responding to this objection is to question the underlying assumption about how far punishment can be justified by its potential to reform offenders. Suppose I know that no amount of punishment would succeed in making a past wrongdoer come to see that what they did was wrong – perhaps they're a committed religious extremist, convinced that their terrorist activity was justified. Still, most people would agree that it is permissible to punish such a person, at least to deter others from emulating their actions. But let's grant, for the sake of argument, that punishment is justified only if it would succeed in making the wrongdoer feel sincere regret and remorse (or their future-directed analogues) for committing the crime. Still, I think there are cases where prepunishment could plausibly achieve this. Suppose Algy regularly exceeds the speed limit while driving. He thinks there's nothing wrong with this, and cannot understand why it's even illegal. One day he is arrested and prepunished for a future

speeding. The process of being made to think about his behaviour, of being formally censured by society, of being forced to confront victims of road accidents, etc., makes him realise that speeding is wrong. But he knows, despite this, that when he is released he will still speed at some point – he'll be running late, he'll convince himself it won't matter, he'll have a moment of weakness. He sincerely regrets this, and wishes he could be stronger-willed. Nothing about this example strikes me as particularly implausible. Of course, there is something akratic about regretting something one knows one will do. But such akratic states are perfectly familiar features of human psychology, and there is little reason to think that the regret in such cases couldn't be fully sincere. If postpunishment is justified by its ability to engender sincere feelings of regret and remorse for what one has done, then, it's not clear why prepunishment couldn't also be justified by its ability to engender such feelings for what one will do.

8. Foreknowledge

Throughout this paper, I have been assuming that it's possible to come to know, to the requisite standard of proof in criminal cases, that someone will commit a crime in the future. It is now finally time to revisit this assumption. According to the final objection I will consider, prepunishment can never be justified because it's impossible to know what any free agent will do before they do it – no matter how much evidence Ben has that Algy will decide to speed, for example, if Algy is genuinely free, there's always a chance he will choose otherwise (and if he is not genuinely free, then he is not a fitting target for punishment in the first place).

It's important to distinguish two different versions of this complaint. According to the first, knowledge of future free actions is impossible for the simple reason that there is literally no fact of the matter about what any free agent will do until they do it. Ben cannot know whether Algy will speed tomorrow in *Speedster*, for example, because it's not determinately the case yet either that he will or that he won't. This idea that the future is *metaphysically* 'open' is controversial, of course.²² For our purposes, though, it suffices to note that the question I am interested in simply doesn't arise if this view is correct. If it's not true now that Algy will speed

tomorrow, then there can be no question of prepunishing him, since there is no future speeding to punish him *for*.

Let's assume, then, that there are facts of the matter about what free agents will do in the future. A different source of scepticism about knowledge of such acts is the view that they aren't *determined* by the laws of nature and the present state of the universe. This might superficially seem equivalent to the view described above, but it isn't. Indeterminism is the view that there are counterfactual possibilities – call them *branching possibilities* – which match actuality in their laws of nature and histories up until some time *t* but diverge from actuality thereafter; and it doesn't follow from this that there aren't determinate facts of the matter about what will, in actuality, happen in the future. Nevertheless, it might be argued that even if it's true that Algy will speed tomorrow, Ben cannot know that he will if there are branching possibilities in which he doesn't; after all (the thought goes), Ben would still have believed that Algy will speed tomorrow had one of these branching possibilities obtained instead, given that those possibilities match actuality perfectly up to the present time.

One must be careful with this form of argument, however, since deploying it without restriction threatens much more than just our knowledge of the future. For example, it might similarly be argued that Ben cannot know that he has hands, given that he would still have believed that he does if he'd been a handless brain-in-a-vat. Only radical sceptics believe that knowledge is incompatible with any possibility of error. A popular anti-sceptical alternative is that knowledge need only be *safe* from error, in the following sense: S knows that *p* only if *p* is true in every *close* possibility in which S believes that *p*, where the close possibilities are the possibilities that, in some sense, *could easily* have obtained.²³ Thus the fact that I couldn't distinguish a fake barn from a real one might preclude me from knowing that there's a barn in front of me if I happen to be driving through fake barn country, but not in ordinary cases, where the possibilities in which I'm looking at a fake barn are far away from actuality.

On this view, indeterminism is incompatible with knowledge of future actions only if every branching possibility is also a close possibility. But there are good reasons to deny this principle. As Williamson (2009: 327) puts it, ‘the occurrence of an event in [some possible world] β that bucks a relevant trend in [another world] α may be a relevant lack of closeness between α and β , even though the trend falls well short of being a strict law’. For example, suppose that Algy has exceeded the speed limit on the same stretch of Wilderness One every day for the past 20 years. This small act of defiance is important to him – indeed, he considers it to be a central part of his identity. In such circumstances, even if there are branching possibilities in which Algy decides not to speed, they plausibly aren’t especially close to the actual world, since they are worlds in which Algy is a very different person to the person he actually is. Thus on a safety-based approach to knowledge, it’s perfectly compatible with indeterminism about free action that Ben is in a position to know that Algy will (freely) decide to speed tomorrow.²⁴

Of course, even if determinism is true, it cannot be denied that there are important differences in the nature of our epistemic access to the past and the future. Our beliefs about the future are typically formed by combining existing knowledge with laws or generalisations inferred by induction over previous observations; we believe that the sun will rise tomorrow because it has risen every day in the past, for example. At least some of our beliefs about the past are formed in this way – our beliefs about the positions of the planets thousands of years ago, for example – but the vast majority are not. Instead they are formed using *records* of the past that we encounter in the present; and a striking fact about our world is that while there are plenty of records of the past, there don’t seem to be any records of the future.²⁵ This means that the kinds of evidence we typically look for when investigating whether a crime occurred in the past – fingerprints, DNA samples, eyewitness testimony, and so on – simply aren’t available when it comes to crimes committed in the future. But while it’s surely right that the absence of records of future actions makes knowledge of future actions harder to come by than knowledge of past ones, I see little reason – beyond general scepticism about the possibility of inductive

knowledge – to think that knowing what someone will (freely) do in the future is impossible, or even particularly rare. I know it will be sunny tomorrow; so I know that Jaya, fair-weather cyclist that she is, will cycle to work tomorrow. I know that Chris will vote Liberal Democrat in the elections next week (he told me so). I know that Ellie will check her phone at some point today. Of course there are sceptical possibilities where these beliefs are false (there's a freak rainstorm, Ellie has lost her phone, Chris somehow becomes a Tory overnight); but once we accept that knowledge is compatible with distant possibilities of error, knowledge of future actions seems perfectly mundane (*even* granting indeterminism about free action).

Here's a slightly different epistemic objection to prepunishment, due to Sorensen (2006). Sorensen accepts that knowledge of future actions is possible; but he denies that knowledge of the commission of a crime is sufficient to justify a guilty verdict. Instead he defends a 'causal theory of verdicts' according to which 'a crime justifies a verdict only by being a cause of that verdict' (Sorensen 2006: 170). Since causes precede their effects, it follows that a guilty verdict cannot be justified if it precedes the commission of the crime. Sorensen motivates the causal theory of verdicts by showing how it explains the apparent impermissibility of convicting someone based on 'naked statistical evidence'. For example, it wouldn't be permissible to convict Alan of murder based merely on the fact that the murder could only have been committed by either Alan or Beatrice and 95% of past murders were committed by men. By contrast, it *would* be permissible to convict Alan of murder based on the testimony of an eyewitness whose judgements in such situations are 90% reliable. This is so despite the fact that it is more likely that Alan committed murder conditional on the statistical evidence than it is conditional on the eyewitness evidence. According to Sorensen, the reason for this is that while a verdict based on the eyewitness evidence would be caused by the crime itself, a verdict based on the statistical evidence would not be.

It's controversial what (if anything) is wrong with convicting someone based purely on naked statistical evidence.²⁶ But the idea that a guilty verdict must be caused by the criminal act itself to be justified is clearly much too strong. Suppose for example that we have some testimonial

evidence from a witness W to the effect that D told W of her intention to kill V a day before V was killed. This testimonial evidence wasn't caused by D's act of killing. Yet clearly it should be admissible, and a guilty verdict based on that evidence, in the right circumstances, would be justified. A natural explanation of this is that W's testimony and D's act share a *common* cause, namely D's intention to kill V.²⁷ And of course it's perfectly possible to have evidence of a future action which shares a common cause with that action. If for example Algy simply tells Ben of his intention to speed tomorrow, then Ben has testimonial evidence that the crime will be committed which shares a common cause with the speeding itself (namely, Algy's intention to speed). Convicting in such cases doesn't seem bad in anything like the way that convicting based on naked statistical evidence is bad.

There is one final epistemic objection to prepunishment I want to consider. Suppose again that Ben is deliberating over whether to prepunish Algy for a future speeding. If prepunishing Algy is an option available to Ben, then surely so is *preventing* the crime itself (if you're going to go to all the trouble of detaining Algy, why not simply hold him for one more day and stop him speeding in the first place?). But so long as preventing the crime remains a live option for Ben, he cannot know that the crime will occur (even if in fact it will). More generally, prepunishment cannot ever be justified, because any society that had the means of prepunishing people for future crimes would also have the means of preventing those crimes, and knowing that a crime will occur is incompatible with having among one's live options actions which would (or even might) prevent that crime.

I accept that in many cases where prepunishing someone is an option, preventing the crime instead is also an option. And it's also true, as noted in §4, that one cannot begin to properly deliberate over whether to prepunish someone for a future crime unless one knows that one cannot, or will not, prevent that crime instead. Nevertheless, it's not hard to imagine cases where such conditions could arise. Suppose for example that Algy has made it clear that he will speed on Wilderness One as soon as he has the opportunity – if he is imprisoned or detained, he will simply speed when he is released. Ben *could* prevent the speeding by

imprisoning Algy for the rest of his life, or putting him under 24/7 surveillance; but such actions would be grossly disproportionate to the risks Algy's speeding would pose. Knowing this, Ben decides not to try and prevent Algy's speeding, and thereby comes to know that the speeding will occur. He is now perfectly able to deliberate over whether and how to prepunish Algy for the future speeding. More generally, it's not hard to imagine cases where preventing a crime would require far more resources or impose far greater burdens on some would-be criminals than prepunishing them would, and in such cases law enforcement agencies might legitimately decide not to prevent the crime, from which they can conclude that the crime will therefore occur, and hence that the future criminal can justifiably be prepunished.

To sum up, in this section I have considered several arguments to the effect that prepunishment can never be justified because no-one who is in a position to prepunish a future criminal would also be in a position to know (to the requisite standard of proof) that the crime will occur. I have found all such arguments wanting. Admittedly, especially when taken together with the objections from previous sections, they suggest that the conditions under which prepunishment could permissibly be administered are unlikely ever to arise in practice. But even New was happy to grant that 'we cannot now satisfy, and may never be able to satisfy, the epistemic condition for practising prepunishment' (New 1992: 40). The more interesting question is whether there is anything about prepunishment that would make it impermissible *even in principle*. I have argued that there isn't – knowing that someone will commit a crime in the future is harder, for several reasons, than knowing that someone has committed a crime in the past, but not impossible.

9. Conclusion

The title of this paper was not originally intended as rhetorical. I really did set out to determine *what* was wrong with prepunishment, assuming along with most others that there must be *something* wrong with it. As should be clear by now, I failed. Perhaps others will be more imaginative. But for my part, I am ready to conclude that I was wrong to presuppose that my

question had an answer. Whatever the conditions on justified punishment more generally turn out to be, there seems to be little reason to think that they couldn't, at least in principle, be satisfied in cases where the punishment precedes the crime.

The practical consequences of this conclusion are, admittedly, limited. The arguments above only unequivocally support prepunishment in cases, like *Speedster*, in which (i) we know (beyond reasonable doubt) that the agent will commit a crime (and in particular that we cannot, or will not, prevent that crime), and (ii) we know that it will not be possible to justifiably punish the agent after the crime has occurred. Since such circumstances do not arise very often, we shouldn't expect routine prepunishment of future offenders to begin anytime soon. Yet I hope to have demonstrated that thinking carefully about the morality of prepunishment can reveal some important facts – and perhaps challenge some long-received wisdom – about the connections between time, knowledge, desert, deterrence, and duty.

Acknowledgements

My thanks to Victor Tadros, Simon-Pierre Chevarie-Cossette, Sandy Steel, Helen Beebee, Daniel Kodsi, Matthew Barclay, audiences in Oxford and Neuchâtel, and several referees and editors for valuable feedback on earlier drafts of this paper.

Balliol College, University of Oxford

References

Albert, David (2000). *Time and Chance*. Cambridge, MA: Harvard University Press.

Barnes, Elizabeth and Cameron, Ross (2008). 'The open future: bivalence, determinism and ontology'. *Philosophical Studies* 146(2), 291-309.

- Beebe, Helen (2008). 'Smilansky's alleged refutation of compatibilism'. *Analysis* 68(3), 258-260.
- Davies, Paul (2018). *JC Smith's The Law of Contract (2nd ed.)*. Oxford: Oxford University Press.
- Duff, R. A. (2001). *Punishment, Communication and Community*. Oxford: Oxford University Press.
- Feinberg, Joel (1970). *Doing and Deserving: Essay in the Theory of Responsibility*. Princeton: Princeton University Press.
- Feldman, Fred (1995). 'Desert: Reconsideration of some received wisdom'. *Mind* 104(413): 63-77.
- Gardiner, Georgi (2018). 'Legal burdens of proof and statistical evidence'. In James Chase and David Coady (eds.), *The Routledge Handbook of Applied Epistemology*, Routledge.
- Goldman, Alvin I. (1967). 'A causal theory of knowing'. *Journal of Philosophy* 64(12): 357-372.
- Greene, Preston (2021). 'The consequentialist problem with prepunishment'. *Thought* 10(3), 199-208.
- Hawthorne, John and Lasonen-Aarnio, Maria (2009). 'Knowledge and objective chance'. In Patrick Greenough and Duncan Pritchard (eds.), *Williamson on Knowledge*, Oxford: Oxford University Press.
- Kagan, Shelly (2005). *The Geometry of Desert*. Oxford: Oxford University Press.
- Kapitan, Tomis (1986). 'Deliberation and the presumption of open alternatives'. *The Philosophical Quarterly* 36(143): 230-251.

- Kearns, Stephen (2008). 'Compatibilism can resist prepunishment: A reply to Smilansky'. *Analysis* 68(3): 250-253.
- Lake, Ryan (2010). 'Compatibilist objections to prepunishment'. *Florida Philosophical Review* 10(1): 7-15.
- Lam, Vanessa (2016). 'On Smilansky's defense of prepunishment: A response to Robinson'. *Philosophia* 44(4): 1367-1374.
- Lemos, John (2012). 'Libertarianism and the wrongness of prepunishment'. *Public Affairs Quarterly* 26(3): 243-255.
- Levi, Isaac (1986). *Hard Choices*. Cambridge: Cambridge University Press.
- Lewis, David K. (1976). 'The paradoxes of time travel'. *American Philosophical Quarterly* 13(2): 145-152.
- Lewis, David K. (1997). 'Do we believe in penal substitution?'. *Philosophical Papers* 26(3), 203-209.
- Littlejohn, Clayton (2020). 'Truth, knowledge, and the standard of proof in criminal law'. *Synthese* 197, 5253-5286.
- Miller, David (1976). *Social Justice*. Oxford: Oxford University Press.
- Mustill, Michael (2008). 'The Golden Victory – Some reflections'. *Law Quarterly Review* 124, 569-585.
- Moss, Sarah (2022). 'Knowledge and legal proof'. In Tamar Szabó Gendler, John Hawthorne and Julianne Chung (eds.), *Oxford Studies in Epistemology (Vol. 7)*, Oxford: Oxford University Press.
- New, Christopher (1992). 'Time and punishment'. *Analysis* 52(1): 35-40.

- New, Christopher (1995). 'Punishing times: Reply to Smilansky'. *Analysis* 55(1), 60-62.
- Pritchard, Duncan (2009). 'Safety-based epistemology: Whither now?'. *Journal of Philosophical Research* 34, 33-45.
- Rachels, James (1997). 'What people deserve'. In *Can Ethics Provide Answers?: And Other Essays in Moral Philosophy*, Lanham, MD: Rowman and Littlefield.
- Robinson, Michael (2010). 'A compatibilist-friendly rejection of prepunishment'. *Philosophia* 38(3): 589-594.
- Smilansky, Saul (1994). 'The time to punish'. *Analysis* 54(1), 50-53.
- Smilansky, Saul (2007). 'Determinism and prepunishment: The radical nature of compatibilism'. *Analysis* 67(4): 347-349.
- Smilansky, Saul (2008a). 'More prepunishment for compatibilists: A reply to Beebe'. *Analysis* 68(3): 260-263.
- Smilansky, Saul (2008b). 'Prepunishment for compatibilists: A reply to Kearns'. *Analysis* 68(3): 254-257.
- Smith, Martin (2018). 'When does evidence suffice for conviction?'. *Mind* 127(508): 1193-1218.
- Sorensen, Roy (2006). 'Future law: Prepunishment and the causal theory of verdicts'. *Noûs* 40(1): 166-183.
- Tadros, Victor (2011). *The Ends of Harm: The Moral Foundations of Criminal Law*. Oxford: Oxford University Press.
- Tadros, Victor (2016). *Wrongs and Crimes*. Oxford: Oxford University Press.

Tadros, Victor (2020). 'Secondary duties'. In Paul B. Miller and John Oberdiek (eds.), *Civil Wrongs and Justice in Private Law*, Oxford: Oxford University Press.

Talbert, Matthew (2009). 'Compatibilism, common sense, and prepunishment'. *Public Affairs Quarterly* 23(4): 325-335.

Tomlin, Patrick (2015). 'Should retributivists prefer prepunishment?'. *Social Theory and Practice* 41(2): 275-285.

Williams, John N. (2012). 'Beyond Minority Report: Pre-crime, pre-punishment, and pre-desert'. Available at <URL: https://ink.library.smu.edu.sg/soas_research/1154>.

Williamson, Timothy (2009). 'Reply to Hawthorne and Lasonen-Aarnio'. In Greenough, P. and Pritchard, D. (eds.), *Williamson on Knowledge*, Oxford: Oxford University Press.

Wringe, Bill (2012). 'Pre-punishment, communicative theories of punishment, and compatibilism'. *Pacific Philosophical Quarterly* 93(2): 125-136.

¹ Thus I disagree with Feldman (1995: 76) that prepunishing someone for committing a crime is 'in effect to grant her permission to do so'.

² See Greene (2021), who also cites Smilansky (2007: 347), Beebee (2008: 259) and Wringe (2012: 135) as among those who have described as 'prepunishment' something which prevents a crime that would otherwise have occurred. This is also, of course, what the criminal justice agency Precrime aims to do in Philip K. Dick's *The Minority Report*, although the term 'prepunishment' notably does not appear in the book.

³ Williams (2012: 10) points out that it would be repugnant to punish a baby for its future crimes. But it seems to me that it would be just as repugnant to punish an elderly person with no memory of their past crimes and drastically impaired cognitive functioning, who lacks the capacity to experience regret or remorse or to make any conscious effort to repair their wrongs. So again, the fact that the punishment would occur before the crime does not seem to be what's morally problematic about punishing a baby.

⁴ For explicit endorsements of this view, see Rachels (1997: 176), Feinberg (1970: 72), Miller (1976: 93).

⁵ To be clear, I don't mean to suggest that our intuitions about these cases couldn't be accommodated without appealing to the concept of desert in the first place. As it happens, I am a sceptic about desert, or more precisely, about the idea that there are facts about what people deserve above and beyond facts about what rights and duties people have and how costs and benefits ought to be distributed. My point is merely that insofar as there *are* facts about desert, there is little reason to think that they cannot be grounded in facts about future actions, as well as past ones.

⁶ Some of what Smilansky says elsewhere is admittedly harder to reconcile with this assumption. For example, in a reply to Beebe (2008) he says that punishment is permissible only if 'the crime, in a sense, is already there', and 'the crime obviously cannot already be there' before it is committed (Smilansky 2008a: 261-2). On the other hand, Smilansky assumes the above claims follow from indeterminism about free action which, as I argue in §8, is not the same as the view that there are no facts of the matter about what free agents will do in the future.

⁷ 'The problem with prepunishment . . . does not arise simply because we could never be certain, before an offence is committed, that it will indeed be committed' (Smilansky 1994: 51).

⁸ Notice that this reasoning is perfectly compatible with the view that the laws of nature are deterministic. Relative to a context in which we hold fixed the laws of nature and the precise state of the universe at the present time, Algy can stick to the speed limit only if determinism is false. But there are many other legitimate interpretations of 'can', ones where more coarse-grained information about Algy and his environment is held fixed, on which he can stick to the speed limit tomorrow even if determinism is true; and for all that's been said, it is what Algy can do in one of *these* senses that matters morally. For this reason, the recent focus on the consequences of compatibilism and incompatibilism for the permissibility of prepunishment strikes me as something of a red herring (see Smilansky 2007, 2008a, 2008b; Kearns 2008; Beebe 2008; Talbert 2009; Robinson 2010; Lake 2010; Wringe 2012; Lemos 2012; Lam 2016).

⁹ See Sorensen (2006); Kearns (2008).

¹⁰ See Levi (1986: ch.4); Kapitan (1986).

¹¹ The tragedy here, of course, stems from the fact that if Jim hadn't punished Rosie, she wouldn't have assaulted him. Kearns (2008) appears to suggest that an act of punishment can't be justified if the

crime being punished wouldn't have occurred but for the punishment, since 'in such cases it is the so-called punishment that starts all the trouble in the first place' (Kearns 2008: 252). But again, I find this argument unconvincing. Consider the following variant of the case. Jim claims that Rosie assaulted him yesterday, and decides to incarcerate her for this past crime. Rosie, who has no memory of this assault, believes that she has been unjustly treated; so enraged is she by this that upon being released, she invents a time-machine, goes back in time and performs the very assault for which she was originally punished. Again, there is something tragic about this case, which stems no doubt from the fact that if Jim hadn't punished Rosie, she wouldn't have assaulted him. But otherwise, this is just a standard case of postpunishment – it would be a stretch to conclude that Jim's punishment of Rosie was unjustified in this case because it was him who 'started all the trouble in the first place'.

¹² See Kearns (2008: 252).

¹³ See Duff (2001).

¹⁴ Kearns grants this point, but insists that 'knowing that a person will commit a crime whether or not she is prepunished involves a lot more knowledge about the world than even a perfect predictor may possess' (Kearns 2008: 253). It's true of course that knowing that x will happen whether or not $I \phi$ literally involves more than just knowing that x will happen; but I reject the underlying suggestion that such knowledge is unattainable by ordinary people. I know the sun will rise tomorrow whether or not I eat a banana; and I know that Chris will cycle to work tomorrow whether or not I watch the football. The kind of knowledge Kearns is describing here is really perfectly mundane. See §8 for more on the epistemic objections to prepunishment.

¹⁵ See also New (1992: 38).

¹⁶ Assuming, of course, that I'm rationally certain that I won't be punished in the small period of time between my deciding to pull the trigger and the victim dying. I'll ignore this complication in what follows.

¹⁷ Of course, this would also have the effect of making those who receive the letter certain that if they commit the crime, they won't be punished. But remember, the authorities already *know* that these people will commit the crimes in question; there's no point trying to deter them.

¹⁸ Exactly why this is the case is a matter of dispute; see Tadros (2020).

¹⁹ For further discussion, see Tadros (2016: ch.16).

²⁰ See Davies (2018: ch.26). As Davies notes, the case law is unclear on what the justification for this doctrine is supposed to be. Some judges claim that declaring an intention not to comply with the

terms of one's contract, or knowingly impacting one's ability to comply with them, is *itself* an implicit breach of that same contract; others insist that '[t]he concept of anticipatory breach cannot be rationalised, but must be seen as a piece of positive law, firmly established but not anchored in or deducible from the ordinary course of the law of contract' (Mustill 2008: 584). But both of these explanations strike me as significantly less plausible than the view that it is generally permissible to force someone now to bear the costs we know they will acquire a secondary duty to bear, even before the wrongdoing which generates that secondary duty has occurred. So-understood, anticipatory breach is no departure from our ordinary principles of justice.

²¹ See Wringe (2012).

²² For discussion, see Barnes and Cameron (2009).

²³ For discussion, see Pritchard (2009).

²⁴ For more on the interaction between safety-based epistemology and knowledge of the future under indeterminism, see Hawthorne and Lasonen-Aarnio (2009).

²⁵ For one attempt to explain this asymmetry, see Albert (2000).

²⁶ For a selection of the recent philosophical literature on the topic, see Gardiner (2018), Moss (2022), and Smith (2018).

²⁷ c.f. Goldman (1967).