FROM THE EDITORS
Steven Scalet and Christopher Griffin

ARTICLES
Kimberly Kessler Ferzan
Moving Beyond Crime and Commitment

Gideon Yaffe
On Ferzan’s “Beyond Crime and Commitment”

Douglas Husak
Do We Need a “Third Way”? Ferzan on Preventive Detention

Louis-Philippe Hodgson
Ferzan on Preventive Interference

Kimberly Kessler Ferzan
Thinking Through the “Third Way”: The Normative and Conceptual Space Beyond Crime and Commitment
FROM THE EDITORS

Edition on the Berger Prize Winner

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Every two years, the American Philosophical Association awards a prize for an outstanding published article in philosophy of law, in memory of Professor Fred Berger of the University of California at Davis. The winning entry is selected by the APA committee on philosophy and law, and a special symposium is held at the APA Pacific Division meeting for the winning author to discuss and defend his or her views in response to commentators’ reactions. In 2013, Professor Kimberly Ferzan was awarded the Berger Prize for her essay “Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible,” Minnesota Law Review 96 (2011): 141–93.

In this edition of the newsletter, we publish the symposium proceedings. We begin with Professor Ferzan’s summary of her article from the Minnesota Law Review. Next, we include three commentaries. The first is by Professor Yaffe, “On Ferzan’s ‘Beyond Crime and Commitment” (Professor Yaffe was also the recipient of the 2009 Berger Prize); the second is by Professor Husak, “Do We Need a ‘Third Way’? Ferzan on Preventive Detention”; the third is by Professor Hodgson, “Ferzan on Preventive Interference.” Finally, Professor Ferzan responds to her critics in “Thinking Through the “Third Way”: The Normative and Conceptual Space Beyond Crime and Commitment.”

Professor Ferzan joins a long list of esteemed Berger Prize winners, two of whom (Professors Joel Feinberg and Stephen Munzer) have since been profiled for their outstanding careers in tribute editions of these APA Newsletters.

ARTICLES

Moving Beyond Crime and Commitment

Kimberly Kessler Ferzan
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I am grateful to the Berger family for their support of this award, to the committee, and to my commentators. It is an honor to receive an award in the name of a respected scholar and beloved family member.

The general thesis of Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible is that some preventive measures are justified by the actor’s responsible choices. In the same way that a culpable aggressor can be liable to defensive force, so, too, someone who has initiated a criminal plan can be liable to preventive interference by the state. This justification covers terrorists, sexual predators, and the common criminal.

When originally asked to participate on an earlier APA panel on retributivism and preventive detention, my thinking was heavily influenced by the traditional “desert/disease” dichotomy, as Stephen Morse coined the distinction. Essentially, that approach holds as follows. There are two ways to treat people: as mechanisms and as practical reasoners. With respect to those individuals with severe mental illness, we can treat them mechanistically. We can predict what they will do and intervene to stop them. On the other hand, for rational agents, to take their autonomy and liberty seriously, we need to resort to the criminal law. Generally, the primary objection to prevention is that we decide that someone is “dangerous” based on facts about him and then predict that he will harm us. This does not appear to be autonomy respecting. In reading this literature, my first thought was that these two practices are irreconcilable. Desert looks backward; prevention looks forward. These are two conceptually distinct, non-overlapping practices.

As I continued to analyze the problem, however, I decided to challenge the assumption that we cannot have a predictive practice that is grounded in responsible agency. My model is self-defense, and specifically, the concept of “liability to defensive force.” What I aim to justify in Beyond Crime and Commitment is “liability to preventive interference.” This claim does not justify all preventive practices. Rather, I aim to open up new normative and conceptual space for some preventive interferences based upon choice and action.
This is a theory where action is not simply evidentiary of general dangerousness.\(^4\)

The self-defense literature distinguishes between permissible killing that is liability-based and permissible killing that is not.\(^5\) Take two cases. In the first case, a culpable aggressor points a gun at the defender and says, “I am going to kill you.” In the second case, the defender has fallen to the bottom of a well, and the defender’s mortal enemy then pushes a fat man (the “innocent threat”) down the well to kill him.\(^6\) If the innocent threat lands on him, the defender will die and the innocent threat will live. The defender has a ray gun with which he can disintegrate the innocent threat. Theorists struggle with whether self-defense is permissible in the innocent threat case, and many theorists believe that the culpability of the culpable aggressor is significant in distinguishing whether and how much defensive force may be used against him as opposed to the innocent threat.\(^7\)

Specifically, the rights of the culpable aggressor appear to be impacted in a way that the rights of the innocent threat are not. There are differences in proportionality, in whom third parties may aid, in whether numbers matter, and in whether the target can engage in counter defense against the defender. We can distinguish between the culpable aggressor and the innocent threat on the basis of liability. “Liability” in this context is best viewed as a limited forfeiture of rights.\(^8\) In the same way that we can change our rights and duties by exercising normative powers, liability to defense is about acting in a way that relinquishes one’s right and complaint against others acting to repel one’s attack.\(^9\)

The liability account holds the aggressor responsible, and maintains that by her conduct, she forfeits rights against the defender’s response. In fact, I have argued that even if the culpable aggressor would have missed, or changed her mind, this does not matter because the culpable aggressor forfeits rights by culpably causing the defender’s belief that force is necessary.\(^10\) Ultimately, however one frames liability conditions, the point remains. Self-defense is a preventive practice that is sometimes grounded in the aggressor’s responsible agency.

Although liability explains why one may kill the culpable aggressor, it cannot justify killing the innocent threat. The innocent threat is a mere projectile who did not even will the movement of his body. However, the fact that the innocent threat is not liable to be killed does not entail that it is impermissible to kill him. Note, however, that if there is a reason why you are allowed to kill the innocent threat, it is not because he has done anything to forfeit his right to life, but, rather, because it is unfair to ask you to privilege his life compared to yours.\(^11\) Thus, the structure of why it is we may permissibly kill an innocent threat can be easily distinguished from liability, where the aggressor forfeits his rights by his own conduct. The self-defense literature thus recognizes a distinction between those instances in which the aggressor as a responsible moral agent behaves in such a way that grounds a preventive response and those instances in which the aggressor’s own conduct does not justify the response but the defender cannot fairly be asked to assume the burden.

This structure has a natural application to preventive interference by the state. The aggressor is a responsible agent. He performs an act in furtherance of a culpable intention. And, based on that act, it becomes permissible to stop him. These cases can be contrasted to “pure prevention,” where along with innocent threats, the question is not what the aggressor has done, but whether it is fair to allow the defender to respond. Liability to defensive force provides a crucial framework that allows the state to intervene against responsible agents based on the exercise of their agency and not mere predictions that they will one day harm us.

Let me be clear about the nature of this claim. I am not stating that the government is acting in self-defense. Rather, I am arguing that the very principles by which a culpable aggressor renders himself liable to defensive force and therefore is not wronged by preventive interferences are equally applicable when the state aims to stop the aggressor from harming others. It is certainly the case that because the state has significant resources (and perhaps the luxury of time) the state will not operate in the same “stop ‘em in their tracks”\(^12\) way that an individual must in a case of self-defense. And, thus, although the differences between citizen and state may lead to different implications for the types of preventive interferences that are permissible in the context, the point—that the aggressor has forfeited his right against such actions—remains. Therefore, it is possible to have an autonomy-respecting preventive regime.

Currently, the state’s desire to prevent harms has been cloaked within the criminal law. As Stephen Morse and Paul Robinson have argued, the criminal law is currently in the prevention business and it ought to get out.\(^13\) Many actions are criminalized not because we think that the defendant deserves punishment for committing the act, but because we want the state to intervene to stop the harm. Consider the continuum involved in the course of a typical crime. A defendant might first possess burglar’s tools, then form an intention to steal something inside the victim’s house, then lie in wait outside the house, then break into the house, and so forth. In analyzing this continuum and selecting what to criminalize, we can look at both the law of attempts and the commission of preparatory acts. With respect to attempts, a critical question is where the line for the act requirement for attempt should be placed. We are pulled in two directions. We want the defendant to have time to change his mind and discover the error of his ways without police intervention, and we want the police to intervene early. However, if our goal is early police intervention, then perhaps we ought to do so through preventive mechanisms rather than by contorting the notion of crime. Indeed, the language of the cases, where courts struggle with what ought to constitute the act for the attempt, focuses squarely on preventive concerns when it ought to be analyzing at what point the act is deserving of punishment.\(^14\)

Attempt law’s almost purely preventive goals can also be seen in the abandonment defense. Attempt law somewhat uniquely allows the defendant to erase the crime simply by changing his mind.\(^15\) Once the defendant has abandoned his attempt, he is beyond the reach of the criminal law. But if we care about desert, we should still want to punish
someone who abandons the offense. In short, much of attempt liability could be placed within a preventive regime rather than within the criminal law.

The criminalization of preparatory acts is a further instance of prevention that ought not to be treated as punishment. Imagine the sexual predator who wants to have sex with a minor. We would like to intervene very early. Given that attempt laws will require more than mere preparation, legislators circumvent this requirement by creating a crime out of the earlier preparation, such as enticing a minor over the Internet. We might worry that a prosecutor could then charge attempted enticing of a minor over the internet. Legislatures create completed offenses early along the continuum, but the amount of blameworthiness in these cases is minimal or nonexistent. Note that if the rationale for placing the act requirement beyond mere preparation is that these individuals ought not to be within the reach of the criminal law at the very early stages, then this rationale is completely circumvented by the creation of a new completed offense at the preparatory stage. Retributivists find these offenses of particular concern because there is no argument that these actors are culpable or blameworthy. Indeed, even if we think early preparation (and intention formation) are culpable, how much punishment do you deserve just for intending a crime?

Instead of placing these cases, cases with minimal to nonexistent retributive desert, within the criminal law, we should have a straightforwardly preventive regime. With respect to state preventive interference, how would the liability conditions be formulated? First, like self-defense, the actor should be culpable—meaning that he either has an intention to cause harm or he is willing to unjustifiably risk it (and lacks a justification or excuse). Indeed, at this point, it appears that the state has good reason to intervene. The actor has decided to do something he ought not to do. For legality purposes, an act should also be required. Allowing the state unfettered police power to intervene in lives based on mere intentions could certainly lead to abuse.

Once the actor has performed an action in furtherance of his culpable mental state, what may the state do? We know what self-defense looks like—typically some sort of physical injury to an attacker that is aimed at stopping the attack. But once we think of prevention beyond the prospect of preventively detaining people, what sorts of measures are we talking about?

There are a range of other measures that may also substantially interfere with an individual's liberty short of incapacitation. Great Britain used a control order, a construct of the Prevention of Terrorism Act of 2005 (PTA 2005). Admittedly, these control orders were subject to significant scholarly criticisms, and this example is not intended as a proposal the United States should adopt whole cloth. Indeed, the British government announced in 2011 that it planned to abolish control orders and replace them with “terrorism prevention and investigation measures.” However, there is little difference between the two, and control orders remain useful to illustrate how to begin to conceptualize preventive action short of punishment.

The non-derogating control order allows the Home Secretary to impose numerous restrictions on those whom he has “reasonable grounds for suspecting” are involved in terrorism-related activity. The PTA 2005 provides for just about every preventive intervention one can imagine. Specifically, what the person possesses, what activities he engages in, where he works, with whom he associates in and outside of his home, where he can go, when he can be outside his home, whether he maintains his passport, when and how his property may be searched and retained, whether he is photographed, and whether he is electronically monitored are all possibilities under this provision.

Unlike control orders, it is clear that we would want to designate some fact finder to determine by a constitutionally set standard that an actor harbors a culpable mental state, has committed an action in furtherance of that mental state, and plans to complete the offense. Then, an agency would need to be tasked with supervising the actor in ways designed to prevent the commission of that particular crime. This supervision would be reconsidered at specific times, and supervision would cease once a showing was made that the defendant no longer harbors an illicit mental state.

This approach is preferable to the use of the criminal law. It is important to note first that we do not need the criminal law to respect autonomy. Although the argument against prevention has been that it is not autonomy respecting, here, what grounds prevention is not “naked statistical evidence” but the actor’s own choice and action. Moreover, the intervention is based on taking the actor’s plan seriously. We respect autonomy when we believe someone will follow through on promise or plan.

There are also huge advantages to being on civil side. First, it allows the state to act without cloaking its behavior as proper instances of the criminal law. That is, if as a practical matter we are going to intervene, then we ought to do it in the most defensible way. Second, this approach does not brand someone as a criminal. Third, because this approach asks the right question, it will give the right answer. When we criminalize, we often have overbroad rules that will ensnare individuals who wouldn’t have committed offense—say, someone who owns a burglar’s fool—because we are afraid the person will commit offense. But what if the defendant would have changed his mind? In the criminal law, there is no way to show this because you cannot directly rebut the background justification for the rule. But in a prevention regime, we can allow the actor to show that he has changed his mind and thus should be free of further state intervention.

Ultimately, autonomy-respecting prevention is conceptually possible and worthy of further inquiry.
On Ferzan’s “Beyond Crime and Commitment”

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INTRODUCTION

Let me start by congratulating Kim Ferzan on the Berger Prize. It’s a well-deserved honor. Her paper, “Beyond Crime and Commitment,” is thoughtful, interesting, and represents the way in which good work in moral philosophy can bear fruit in its application to questions of pressing importance to public policy. The philosophical literature on self-defense is guided by the observation that defensive force draws its justification in part from the bad behavior of the person who is its target, and so in that respect is like blame or punishment, but is also justified by its role in preventing future harm, and so in that respect it is, arguably anyway, different from blame or punishment. Ferzan suggests that sometimes the state can use power against its citizens in a way that is similarly justified, and so is subject to a different set of constraints than apply either when the state’s task is to mete out punishment or to administer civil commitment. Out of admiration for her paper, I will pay it the compliment customary in philosophy: I will show this important claim to be false.

To see the force of the criticisms I will be offering here, start by noticing that Ferzan’s advance is not in the observation that defensive force, when used by ordinary people, is justified for reasons that are importantly different from those that justify either purely preventive measures such as locking the front door—or backward-looking measures such as blame and punishment. That, it seems to me, is and ought to be a premise in all work on the nature of, and rationale for, self-defense. The advance, if Ferzan is right, is, rather, her claim that the state can act against its own citizens for purposes of prevention under conditions that are similar to those involved in self-defense and be justified in doing so without being properly understood to have imposed either a “criminal” or a “civil” harm or deprivation. In the international arena, states are clearly justified in acting in defense of the state, as when the army repels an invasion, for instance; but it is far from obvious that the state is engaged in anything like self-defense that Dr. Strangelove is acting in self-defense when his right arm fights with his left. If both the attacker and the attacked are citizens of the state, how could it be self-defense for the state to use its citizen-granted power to intervene? To see the force of the criticisms I will be offering here, start by noticing that Ferzan’s advance is not in the observation that defensive force, when used by ordinary people, is justified for reasons that are importantly different from those that justify either purely preventive measures such as locking the front door—or backward-looking measures such as blame and punishment. That, it seems to me, is and ought to be a premise in all work on the nature of, and rationale for, self-defense. The advance, if Ferzan is right, is, rather, her claim that the state can act against its own citizens for purposes of prevention under conditions that are similar to those involved in self-defense and be justified in doing so without being properly understood to have imposed either a “criminal” or a “civil” harm or deprivation. In the international arena, states are clearly justified in acting in defense of the state, as when the army repels an invasion, for instance; but it is far from obvious that the state is engaged in anything like self-defense that Dr. Strangelove is acting in self-defense when his right arm fights with his left. If both the attacker and the attacked are citizens of the state, how could it be self-defense for the state to use its citizen-granted power to intervene? The exciting claim in the paper, that is, is not that there are justifiable uses of force that are neither purely punitive nor purely preventive, but, instead, that some distinctive class of state imposed harms and deprivations, inflicted on citizens, falls into this third category. Ferzan, for instance, would place long-term detention of intending terrorists into this category, and post-incarceration detention of sexual predators. So, the discovery of the paper, if Ferzan is right, is a discovery about the source and nature of state authority. If Ferzan is right, we should assess practices like long-term detention of intending terrorists by neither the standards that apply when criminal punishment is at stake, nor by the standards that apply when civil commitment is at stake. We should be using, instead, standards closely analogous to those that apply to uses of defensive force.

NOTE


3. Ibid.


6. See Robert Nozick, Anarchy, State, and Utopia (Basic Books 1974), 34–35 (offering the original formulation of this problem). For ease of exposition, I have omitted innocent aggressors, whom I would group with innocent threats.


11. Morse, “Neither Desert Nor Disease.”


16. PTA §2.


20. PTA §2.

21. PTA §1(4).

22. See also Tadros, “Justice and Terrorism.”
state actor. The fact that it is a state actor who is applying the force plays no role whatsoever in the justification of the act. And in instances in which the state is acting in a way that ordinary citizens would not be justified in acting, such as in detention of intending terrorists, the state cannot justify its conduct on defensive grounds but must, instead, appeal either to its special roles in meting out punishment or in imposing civil commitment.

I think it is fair to say that part of what motivates Ferzan’s position are her particular, and I would say implausible, views about criminal liability for attempted crimes, and other inchoate crimes, views articulated in other work. Ferzan accepts the so-called “last act” test for criminal liability for attempt. According to the last act test, a person is not guilty of an attempted murder, say, until he has performed an act that he believes to be the last he will need to perform before an intended death is caused. As Ferzan is well aware, this view has various counter-intuitive implications. I will mention just one: The view has the implication that there cannot be criminal liability for attempts of some crimes, by their very nature, because they are not such that they ever involve a last act before completion. There are cases in which any agent who knows what he’s trying to do will lack a belief that he has performed the last act at any time prior to completion. There can be no attempts of criminal trespass, for instance. The reason is that people who enter other people’s property do not believe that they’ve done all they need to do to cause an entry until they actually enter. Even as the foot is about to cross the threshold, the agent believes that he needs to finish its movement. Entering is not the kind of act that is performed by an exercise of agency followed by a result; it, instead, involves agency all the way to completion, and so there is no time prior to completion at which the agent has the belief that Ferzan takes to be necessary for criminal liability for attempt. It also seems likely for similar reasons that there ought never to be criminal liability for attempted rape on this view, at least when rape is defined so as to include penetration. This is not just counter-intuitive but deeply so, as reflected in the fact that jurisdictions without exception allow for attempt liability even where the crime precludes the possibility of meeting the last act standard while falling short of completion. Criminal liability for attempted trespass, attempted rape, attempted breaking and entering, attempted burglary, etc. is common.

Ferzan does not deny the counter-intuitive implications of her position. Rather, she tries to show that the state would be justified in acting against people who fall far short of the last act; she tries to accommodate the intuitions. Since it would be just silly to suggest that using force to prevent the would-be rapist from succeeding—imagine that he’s stopped just before achieving the intended penetration—is a form of civil commitment (do we need a commitment hearing before we can stop him?), and since her acceptance of the “last act” test commits her to denying that such force is justified on the grounds that the actor has committed a crime, she seeks a characterization of the state’s right to inflict harm and deprivation of liberty on such agents that is not properly characterized without distortion as either criminal or civil. I do not mean to suggest that Ferzan accepts her position for tendentious reasons. We all have our theoretical commitments. But I do think it is important to understand that the theoretical quandary in which she finds herself is self-inflicted. She needs a special explanation for why it is justified for the state to intervene when someone is trying to commit a crime, but has not completed a “last act,” where those who think that such efforts can themselves be crimes do not.

Given this link between the views Ferzan offers in the paper and her independently developed views about the act element of attempt, it is useful to examine separately two kinds of case, and I divide my discussion here accordingly. In what I will call “incomplete attempt” cases, the defendant is trying to commit a particular token crime—a token of a prohibited type—but has not engaged in behavior that Ferzan takes to be necessary for criminal liability for attempt, and the question is why the state is justified in intervening—for prevention, for punishment, or, as Ferzan suggests, for a reason that does not fit into either category? In “future attempt” cases, the defendant has not tried to commit a particular token crime, but we can be very confident that he will engage in such an attempt in the future. Sometimes, this confidence derives from the fact that he has committed other tokens of the very same type in the past; think of the detention of pedophiles. But not always. We can, in principle—as it happens, we have in fact, in some domains—build a model predictive of future efforts to commit crime that is predicated on a combination of factors such as family history, socio-economic status, home location, peer and sibling criminal behavior, history of drug use, psychiatric diagnosis, gender, genetic-, neural- and other biological features, etc., and not on the basis of past criminal conduct at all, much less criminal conduct of the very same type that we can predict the person will try to engage in in the future. Ferzan claims that in at least some future attempt cases, if the state is justified in intervening, it is so on the same kinds of grounds that justify intervention in self-defense or defense of others.

I will offer arguments for two different claims, both of which run directly counter to those made by Ferzan. First, in connection with incomplete attempt cases, I will argue, in section 1, that when the state acts justifiably against a person to prevent him from completing an attempt in which he is engaged, one of two things is true: either the force in question is justified as self-defense or defense of another, but would be equally justified if inflicted by a non-state actor, or it is constrained in ways that are profoundly different from the way in which actors engaging in defensive conduct are constrained; it is constrained by the role that such force plays in administering punishment for crime. The result is that there is no meaningful sense in which state actors, as such, are justified in using defensive force in incomplete attempt cases; the force in question is either defensive and justifiably inflicted by any actor and not just a state actor, or else it is not defensive force but punitive.

Second, I will argue, in section 2, that future attempt cases are disanalogous to cases of defensive force in the most crucial respect: the actors in such cases have not forfeited their rights to be subject to preventive force; it follows that if the state is justified in acting against them, it is so for
reasons entirely different from those which justify self-defensive conduct. The state is not justified in such cases if it cannot justify violating the rights of some of its citizens.

1. INCOMPLETE ATTEMPTS

We virtually never stop people from committing crimes they are trying to commit in response to a finding of guilt for attempt, or any other crime. When the state gets involved, it is typically the police who stop people from committing crimes they are trying to commit, not the sentencing courts, or the prisons, or other supervisory agencies who are authorized to act against those who have been found guilty of some crime. Arrest is one mechanism of prevention in such cases, more about that shortly. There are also no shortage of cases in which the police use frank physical force, or coercively persuade, or cajole people to stop trying to commit a crime that will harm someone. These latter acts are not in need of any special justification. A policeman who kills an aggressor to prevent him from killing four other people is subject to the very same constraints that anyone else in such a position is subject to. There are things we can do, and things we can’t, to protect ourselves and others. The police are just much more likely to engage in such behavior than ordinary people because among their duties is seeking out circumstances in which such action is called for. So, the interesting claim that the state is sometimes justified in acting against citizens for reasons that are neither punitive nor purely preventive cannot be supported by noting that sometimes state actors act in defense of themselves or others and are justified in doing so. Non-state actors would be equally justified and for the same reasons in such cases, and so we do not learn anything about the justification of state power from the point. Rather, the interesting claim is that there are some exercises of force that state actors are justified in using but similarly-situated ordinary citizens would not be justified in using.

In cases of incomplete attempts of harmful crimes, the best example of such force is arrest and detention predicated on arrest. Putting aside the rather strange case of “citizen’s arrest,” ordinary citizens are not generally justified in kidnapping other citizens for lengthy periods of time when they are trying to commit crimes. Even when they are justified in restraining others to prevent them from committing crimes, standard constraints on the justifiable use of defensive force require releasing those we detain once the threatening conduct has been stopped. Not so with arrest and subsequent detention by the police. The police often justifiably detain people following arrest far past the point at which that would be necessary solely to prevent the commission of the crime. But it is not the case that post-arrest detention is justified on grounds analogous to those that justify uses of defensive force. Post-arrest detention is justified, if it is, because it is sometimes essential to the investigation of crime. Of course, such detention is justified only if the police have some reason to believe that there has been a crime. They have such reason if incomplete attempts of crimes are crimes. There is reason to interfere with a person who is wearing a ski-mask, carrying a gun, has a note that says “Put the money in the bag,” and is about to enter a bank. But there is reason to detain him beyond the time necessary to foil the plot only if you have good reason to believe that he has already engaged in criminal conduct. If incomplete attempts are crimes, there is a very good reason to think so. But since Ferzan thinks they should not be, she has to find some other explanation for why post-arrest detention of those stopped from completing their incomplete attempts at harmful conduct is justified. Since in such cases, by hypothesis, the attempt of the token act has been stopped—either by arrest itself, or by pre-arrest machinations, including frank physical force—and since she does not think that the attempt itself should be a crime, her only remaining possible explanation appeals to the need to prevent a future attempt. As we will see in the next section, I do not believe that uses of force to prevent future attempts can be justified on grounds analogous to those involved in self-defense. But at this point it is worth flagging only that the argument against Ferzan offered here uses the claim of the next section as a premise.

Another class of incomplete attempts where the police are justified in exercising force against the actor, but ordinary citizens would not be, are those in which the agent is trying to commit a harmless crime, or, if not entirely harmless, harmful in a way that does not directly affect any ordinary citizen enough to justify his acting to stop it. For instance, an ordinary citizen would not typically be authorized on defensive grounds in using force to prevent someone else from carrying drugs across the border. No individual stands to lose enough by this crime’s contribution to the distribution of illicit drugs (if any do) to justify acting against the perpetrator to prevent him from importing drugs. In addition, an ordinary citizen, even if he were justified in acting against the would-be drug importer, would not in such a case be justified in harming him to a degree that is proportional to but still in excess of the threatened harm, which is a mark of defensive force in contrast to that justified on the grounds that the greater good is thereby achieved. So one way to see whether police intervention in such a case is justified on defensive grounds is to ask the following question: Would the police be justified in acting to prevent a would-be drug smuggler from crossing the border by harming more severely than the harm that would be inflicted by his successful act of smuggling? Say that the smuggling would cause harm of level 5; would the police be justified in stopping it by inflicting harm of level 6, where, let’s assume, 6 is proportional to 5?

Any appearance that such police conduct would be justified on defensive grounds is misleading. Imagine that circumstances have conspired to give the police a choice: severely harm D in order to prevent him from crossing the border with drugs, something he is in the midst of trying to do, or else arrest him after the crossing and without harming him, despite the fact that the drugs would be imported and the attendant harm inflicted. The police are obligated in such a case to wait for the crime to be committed. If the police must choose between apprehending someone by inflicting a harm of level 6, and thereby preventing a harm of level 5, on the one hand, or, on the other, allowing the level 5 harm, they must take the latter route. But a mark of defensive force is that it is justified regardless of what one could do to ameliorate the damage after the intended harm is inflicted. An ordinary citizen can kill someone who is about to kill a third party even if he knows that were he
to allow the third party to be killed, the killer would be brought to justice. An ordinary citizen can harm another (proportionately) to prevent him from taking his property even if he knows that he would get his property back, and be well-compensated to boot, were he to allow the theft. But sometimes the police are obligated to allow crimes to take place rather than take harmful measures to stop attempts of them. Why?

The explanation for this is simple: police interventions to prevent completions of attempts, when they involve behavior that an ordinary citizen would not be justified in engaging in, are justified as part of an effort to punish criminal conduct, namely, the attempt. When the police harm a would-be criminal in excess of, but not out of proportion to, the harm he threatens, and are justified in doing so, the reason is that such conduct is essential to bringing the would-be criminal to justice for the crime he has committed, namely, the attempt. When justice can be achieved by allowing the crime to take place and then acting, and with less harm to the perpetrator, then that is what the police are required to do since justice is their justifying aim. If justice is equally achieved through two courses of conduct, the police have an obligation to undertake the one that involves the least harm. And we find this when the choice is between punishing for an attempt and punishing for the completed crime, where there is equal justice, but the latter course of conduct involves less harm. Ferzan cannot accept this, since she does not think that incomplete attempts should be crimes. But what follows is that she cannot explain why the police are constrained in their use of force against citizens in ways that ordinary defenders are not.

Here is the argument of this section in short: When state actors are justified in inflicting harm or deprivation of liberty to prevent crime, and are justified on defensive grounds, even non-state actors would be similarly justified. So there is no special form of justification of state power involved. When state actors are justified in the use of force against those trying to commit crimes, but non-state actors would not be similarly justified, state actors are not justified on defensive grounds, as we can see by noting that the state actors are in such cases obligated to allow the agent to complete his attempt if by doing so he can be brought to justice with less overall harm. The justifying aim in such cases is fundamentally punitive rather than preventive.

2. FUTURE ATTEMPTS
From the perspective of social policy, rather than from the philosophical perspective of understanding the nature and grounds of the justification of state power, Ferzan's most important claim is that the state is sometimes justified in harming and detaining intending criminals in order to prevent them from attempting to do as they intend in the future. Or, to put the point a bit more carefully, even those who are very uneasy with purely preventive policies would have reason to be more comfortable with preventive, non-punitive policies that are justified on grounds closely analogous to those involved in self-defense. Since we have policies of the kind Ferzan has in mind in place in the United States today—as noted, post-incarceration sexual predator detention, and detention of would-be terrorists are both examples—this is a conclusion of the first importance to those of us who take ourselves to be implicated in our government's actions, and so want to know whether and why it is justified in doing what it does to citizens like ourselves.

Ferzan accepts a right-forfeiture explanation for the justification of uses of defensive force. The idea is that we are justified in acting to prevent harm provided that we do not violate rights in so doing. Something—and as we are about to see what is the central question—can trigger a person's forfeiture of the right not to be harmed for the sake of prevention of harm. When there has been forfeiture, a person who harms in order to prevent harm is fully justified since he does not violate any right in order to prevent harm. For the sake of argument, I will assume a right-forfeiture position in what follows.

A first observation concerns the content of the right which is forfeited. In general, the aggressor forfeits the right not to be harmed for the prevention of X. The aggressor does not forfeit the right to be harmed for any old good purpose; rather, he forfeits the right not to be harmed for the sake of the prevention of some specific evil. But how should we characterize this evil? What is X? This much seems clear: X must bear some direct relation to that which triggers forfeiture. For instance, say that what triggers forfeiture is an attempt, by the aggressor, to inflict harm H. Then what is forfeited is, at least, the right not to be harmed for the prevention of the aggressor's infliction of H. I do not mean to be offering the conversationally implied account of that which triggers forfeiture here—namely, an intentional effort to inflict harm. Perhaps much less, or something quite different, is required to trigger forfeiture. My point is only the following: our characterization of the content of the forfeited right must fit with that which we take to trigger forfeiture. The content of the forfeited right, that is, is trigger-relative.

Add some further observations. Rights have value. Someone who has forfeited a right lacks something of value that others have. This is so even if he is not subjected to the harm or deprivation that he forfeited the right not to suffer. To lack a right not to be harmed is to lack something of value even if you are not harmed. Further, a right is forfeited, as opposed to being lost for some other reason, only if it is fitting or appropriate for the person not to have the relevant right. In cases of forfeiture, that is, it is fitting or appropriate for the person to lack something of value that others enjoy. And yet further, what explains the fittingness or appropriateness in such cases is that which triggers forfeiture. In light of the trigger, it is fitting or appropriate for the person to lack something of value that others enjoy, namely, the right not to be harmed for a particular preventive purpose. When we put these observations together, we get the following result: The content of the right forfeited must be normatively explicable by appeal to that which triggered forfeiture; the explanation must show why it is fitting or appropriate for the person to have lost such a right given the trigger.

Here is the claim for which I will now argue: justification of harm or deprivation of liberty in order to prevent future
attempts does not conform to this constraint. Therefore, it is not justified on defensive grounds but, if at all, on other grounds entirely. Or, to put the point more intuitively, and within the context of a salient example, intending terrorists who are not currently attempting acts of terrorism have not forfeited a right not to be harmed to prevent the attempt. If we are justified in acting against them, and we might be, it must be because there are more pressing rights than those we violate when we harm them to prevent their future attempts. Perhaps there are. But, even if so, the crucial point is conceded: we are not justified on defensive grounds in acting against them. We ought not kid ourselves into believing that we are not violating the rights of those we are detaining in Guantanamo. The remaining detainees may have forfeited rights. But they have not forfeited the right not to be harmed in order to prevent their future attempts to engage in terrorist acts. If we are justified in acting against them for this preventive purpose, then we are justified in violating their rights.

The argument for this claim depends on the following intuitive idea, for which, I confess, I have no real argument: an intention to cause harm must be guiding the agent towards the causation of harm to trigger the forfeiture of a right. What follows is that what the agent has forfeited the right to is not being harmed or deprived of liberty to prevent the harm that his intention was guiding him to produce. An agent intends to commit some terrorist act. So far, no forfeiture of a right has been triggered. Now his intention guides him towards blowing up a particular plane. Now he has forfeited the right not to be prevented from blowing up that plane. What his intention guided him to cause, and not merely the content of his intention, sets the boundary of the right forfeited. He has not forfeited more than is normatively explicable in light of the trigger, but part of the trigger is guidance by the intention towards a particular state of the world that would match the intention’s content. If he continues to harbor the intention but is not guided by it, then he has not forfeited any further rights. But in future attempt cases, where force is used to prevent an attempt that has not yet begun, the agent is not guided by an objectionable intention, even if he continues to harbor it. And so there is no forfeiture of the right not to have force used against him to prevent the intended harm. The result: the force in this case, if justified, is not justified on grounds even analogous to that which justified defensive force. Unlike in the case of defensive force, in this case, a right is being violated, since it was never forfeited.6

Now, it is important to note that while I have not offered an argument for the claim that intention itself, in the absence of guidance by it, is an insufficient trigger of forfeiture, Ferzan’s rationale for accepting the “last act” account of the act element of attempt would strongly suggest that she too is committed to this claim. In their book Crime and Culpability, Ferzan and her co-author offer several reasons why they believe that intentions, even if they are acts, are not culpable acts to which the criminal law ought to respond.7 I do not endorse the arguments that Ferzan offers there. But the validity of those arguments is not what matters here. What matters, instead, is that Ferzan seems to hold that intentions ought to have no greater legal significance, because they have no greater moral significance, than any other useful predictor of a future attempt, such as the kinds of factors listed earlier that we know to be useful predictors (past behavior, the past behavior of peers and associates, socio-economic status, perhaps even brain activity, etc.). According to Ferzan, that is, a person with an intention to cause harm has not, thereby, forfeited the rights that punishable criminals have forfeited thanks to their bad behavior; intention itself does not trigger forfeiture of the right not to be punished. But that strongly suggests that intention itself is, for her, an insufficient trigger of the forfeiture of the right not to be harmed to prevent one from performing the intended act. Or, to put the point in more charitable terms, if Ferzan thinks that intention suffices to trigger forfeiture of the right not to be prevented, she needs also to explain why the same argument does not extend to show that intention triggers forfeiture of the right not to be punished.

CONCLUSION

There is such a thing as justified defensive force that is not a special case of justified punitive force or justified purely preventive force. And state actors are often justified in engaging in such force; the police are fully justified in killing culpable aggressors to prevent them from killing innocents, for instance. But they are not justified in doing so because they are state actors; non-state actors are also justified in such cases. When we turn to those uses of force that state actors are justified in using because they are state actors, we find that they are performed in service either of the state’s role in punishing offenders, or in protecting the public through civil commitment. So there may be something beyond crime and commitment, namely, defense, and the state can pursue it, but, contra Ferzan, it is constrained in doing so in the same way as anyone else.

This leaves open the possibility, which seems plausible to me, that even though we are violating the rights of would-be terrorists, and of sexual predators, in detaining them without adequate punitive purpose, it is easier to justify this in light of their past objectionable behavior. But, if so, it is not because that past behavior bears on the justification of the present force that we exercise against them in the way that the trigger of right-forfeiture bears on uses of force in defense. It is not clear why such past bad behavior matters; it seems to ease the justificatory burden in comparison to, for instance, the civil commitment of the sick. And so what is left here is an intuition in wait of a theory. In this case, as in many in philosophy, progress is made by offering theories, defending them, and seeing why they fail. And so I believe that Ferzan’s paper has helped us to make significant philosophical progress.

NOTES

1. It has been suggested that criminal punishments are, themselves, instances of defensive force. See, for instance, Warren Quinn, “The Right to Threaten and the Right to Punish,” in Morality and Action (Cambridge: Cambridge University Press, 1993). But that is a different claim, compatible with, although in no sense entailed by, Ferzan’s.

3. The most commonly mentioned is the extraordinary lenience of the standard. For instance, say that D’s plan is to kill V with two shots—the first to disable, the second to kill. If he is stopped by the police after firing the first, and before firing the second, he is not guilty of attempted murder under Ferzan's view. This is true, for her, even if he is stopped while holding the gun to the head of his victim, who is bleeding on the ground from the first shot, but while believing that he still needs to pull the trigger to get the job done. As an intuitive matter, this is far too lenient a standard. It is in part because of recognition of this fact that there is not a single jurisdiction that accepts such a lenient standard; where-ever attempt liability is imposed, it is imposed even in the absence of a belief that the last act has been performed. While we cannot reach normative conclusions from positive law, positive law, especially where unanimous, provides powerful evidence of the entrenchment and universality of a moral intuition.


5. It is notoriously difficult to distinguish between a right being forfeited and it being, instead, either conditional—conditioned on the presence of certain conditions, or constructed to trigger forfeiture—or outweighed. There is also a question about what turns, as a matter of the proper characterization of the duties we have towards those who must be harmed to prevent harm to others, on these distinctions. I hope that the criticism that I will offer could be rephrased without loss of content within the language of conditional rights, or rights outweighed under certain conditions.

6. The argument offered in this section has fewer implications than it might appear for the debate over the conditions in which we are justified in using force against innocent aggressors. Nothing in the argument requires the general claim that the complex condition which triggers forfeiture must include a culpable mental state on the part of the aggressor. What is required is only a much narrower claim, Ferzan does not suggest that the state would be justified on defensive grounds in using force against those who pose a threat but have never even had a culpable mental state of relevance. If there are conditions in which we are justified in using defensive force against innocent aggressors, they are unlikely to be satisfied in cases like post-incarceration sexual predator detention or terrorist detention. There may be such conditions, and they may bear on some quarantine cases. I concede the possibility. What I insist is only that in the absence of special conditions that distinguish cases in which it is justified to act against innocent aggressors from those in which it is not, guidance by the agent’s culpable mental state, typically intention, is an essential part of the trigger of right forfeiture. This is compatible with the possibility that there are such conditions.


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Do We Need a “Third Way”? Ferzan on Preventive Detention

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I am absolutely delighted Kim Ferzan has won the prestigious Berger Prize. I join a large chorus to honor her. Although we have co-taught a class, co-edited a journal, and long been colleagues at Rutgers, I am most proud of her as a friend. I first read her “Beyond Crime and Commitment” in draft. At the time, I told her how much I admire it, and my opinion hasn’t changed. She can be confident that my flattery is sincere because it led to imitation. Her paper stimulated my own thoughts, which I subsequently published in a couple of places.1 Needless to say, however, I do not agree entirely with her position. I express my misgivings in what follows.

Ferzan thinks we need to find a third way to deal with a certain category of dangerous persons—a device that lies beyond crime and commitment, to quote from her title. That is, we need to devise a novel strategy for detaining a given category of dangerous persons (e.g., terrorists and child abusers) that is neither wholly punitive nor purely preventive. The criminal law, after all, is perfectly suited to punish culpable people. Civil commitment, on the other hand, is effective in incapacitating non-culpable but dangerous individuals. Between these two systems lies a supposed gap that Ferzan endeavors to close. How, she asks, might we use state coercion to protect ourselves from persons who are not subject to punitive sanctions but are culpable for being dangerous? To answer this question, Ferzan believes we must supplement our existing two models by constructing a new system to detain responsible but dangerous persons (hereafter RBDs) prior to the time they commit a criminal offense.

The best part of Ferzan’s article describes the conceptual and normative framework of the “third way” she believes is needed. I have little to say against her recommendations. New systems are required if she is correct that we cannot achieve adequate protection from dangerous persons through our familiar institutions of punishment and commitment. Ferzan has made enormous progress in describing how such a novel system might be structured and justified. The law of self-defense provides the normative blueprint for creating this system. As she recognizes, “self-defense is a preventive practice. The defender can never wait until the harm occurs. Rather, the defender must act on a series of predictions.”2 All of what Ferzan has to say about self-defense is original, important, and probably even true. She is, after all, one of the leading experts on the language of conditional rights, or rights outweighed under certain conditions.

It is here where Ferzan and I part company. I concur that the way we protect ourselves from non-responsible but dangerous persons can’t be easily adapted to the case of RBDs. But why not deal with the problem Ferzan describes via our existing criminal law? After all, the model on which Ferzan builds—self-defense—is an established part of the criminal law. It does not stand “beyond” or “outside” it. My own view is that Ferzan has an artificially narrow and restrictive conception of the criminal law, and this narrow and restrictive conception blinds her to the prospects of solving the problems that worry her by using the criminal law itself. Or so I will argue. If no third way is needed, Ferzan’s ingenious solution responds to a non-problem.

Before beginning, I should confess to skepticism about whether we should treat similarly each of the categories...
of offender Ferzan uses to illustrate the problem she believes we need to solve. I suspect that child molesters and terrorists are very different in important respects. A strong case can be made that the most worrisome kinds of child abusers are not responsible for their behavior. Our judgment about this matter may differ depending on the type of "child" these persons "molest." If we have in mind twenty-five-year-old males who act on their sexual attraction to seventeen-year-old young women, we are almost certainly inclined to conclude that these persons are responsible. The criminal law seems reasonably well designed to handle such individuals. But if we have in mind forty-year-old males who act on their sexual attraction to ten-year-old girls, our conclusions almost certainly differ. The latter type of offender is far more likely to be non-responsible and "sick." Civil commitment might be the preferred model to detain these individuals. But I put aside my armchair speculation about child molesters. In what follows, I will suppose we are talking mostly about terrorists bent on destabilizing communities by causing huge personal injury and property damage. These RBDs are the best candidates for preventive detention—the third way Ferzan describes.

What exactly is (or are) the problem(s) that lead Ferzan to believe the criminal law provides an inadequate response to prospective terrorists? Early in her paper she provides a number of abstract answers, none of which persuade me. She begins by citing theorists like Chris Slobogin and Paul Robinson about the alleged differences between prevention and punishment. According to Slobogin, punishment looks backwards and "is based solely upon a conviction for an offense" whereas prevention looks forward and is "based solely upon a conviction concerning future offenses." According to Robinson, subterfuge and deceit result when the criminal law "cloaks preventive practices as punishment." But I am unconvinced that either of these citations does much to advance Ferzan's case. I have an easier time understanding Robinson's concerns. But if the problem is subterfuge and deceit, the solution is to be open and honest about what we are doing. Surely we should lift any cloak that conceals our preventive practices.

Slobogin's position may seem more formidable and immune from any quick fix. But I have never been clear how to interpret the metaphors of "looks" and "based on" that are central to Slobogin's thesis. In my judgment, the use of these cryptic metaphors has done a great disservice to criminal law theory. It is more perspicuous, I submit, to substitute the for relation. If this terminology is employed, we could say that punishment is for a prior offense and prevention is for the reduction of future offenses. Fortunately, the ambiguity in this statement becomes more apparent when it is expressed in the way I prefer. In other words, it is easier to detect an ambiguity if we ask "what is punishment for?" In asking what punishment is for, we may want to know (a) what it is in virtue of which we punish; or (b) for what purpose or goal is punishment imposed? When disambiguated, it is plausible to say that the criminal law is for both. That is, it is imposed in virtue of past crime, but its purpose is (at least partly) preventive. The unanalyzed "looks" or "based on" relations disguise this ambiguity and should be resisted. Or so it seems to me.

In any event, soon after her initial presentation of punishment and prevention as "non-overlapping practices," Ferzan backtracks by admitting to a "significant overlap that ought to be acknowledged," even for theorists who (like Ferzan and me) take desert to be fundamental to the justification of punishment. She cites several factors that substantially undermine her case that a third way is needed. In the first place, the incidence of a type of conduct is reduced when it is criminalized. Moreover, the mode of punishment we select—fines or imprisonment, for example—should be chosen because of its impact on crime rates. Finally, desert might be only a necessary but not a sufficient condition for punishment. Thus she concludes that we "grossly oversimplify" when we conceptualize punishment and prevention as "wholly independent sorts of inquiries." I agree. However, she proceeds as though these institutions differ in enough respects to warrant her conclusion that an altogether novel mode of jurisprudence is needed to fill the chasm that is created by RBDs.

To my mind, the third of the foregoing factors is the most significant of those she lists. Despite identifying myself as a retributivist who believes desert to be crucial to the justification of punishment, I would express her final point somewhat differently. On my view, an adequate theory of punishment must contrast the question of (a) what persons deserve, from (b) why persons should be treated accordingly, that is, as they deserve. If the significance of distinguishing between these two questions is acknowledged, I think the answer to (b) must be sensitive to questions of prevention. In other words, I do not believe the state has sufficient reason to actually inflict the punishment offenders deserve unless some consequentialist goods—primarily, crime-reduction—is thereby achieved. It seems preposterous to me that any sensible effort to justify institutions of punishment in the real world would regard consequences to be wholly irrelevant. Thus I am even more inclined than Ferzan to think institutions of criminal justice have preventive purposes.

What does Ferzan believe to be the problem in using punishment to protect us from terrorists? Notice that the difficulty in employing the criminal law for preventive purposes cannot simply be legality: the principle that we should not punish persons unless they have committed a pre-existing crime. Of course, Ferzan is correct to note "the state cannot detain responsible agents. It must wait until a crime is committed." But her next sentence is a non sequitur. She continues: "And, this means that there are times that the dangerous may pose a threat but the State may not interfere." Why? If legality were the problem, the simple solution would be to enact whatever crimes we need. That is, if the absence of law were the problem, the legislature should respond by drafting new offenses that would be committed by the terrorists we want to detain. Thus I think there is a breathtakingly simple solution to the problem that leads Ferzan to mistakenly believe we need a new mode of jurisprudence to deal with terrorists. If I am correct, the criminal law can do just fine. Problem solved.

Notice Ferzan is clear that the category of RBDs (e.g., terrorists) she is worried about consists of persons who have two crucial features. First, they are dangerous. But
we don’t believe they are dangerous because we possess a crystal ball. Instead, we believe they are dangerous because they have done something in the past that makes us confident about how they will behave in the future. They have engaged in one or more acts that persuade us they are dangerous. Second, they are culpable for what they have done. The past behavior that makes us confident of their dangerousness cannot be construed as a symptom of a disease that would warrant their involuntary commitment. As Ferzan notes, these two characteristics are possessed by persons who become eligible for defensive harm in self-defense. But these two characteristics—a past act coupled with culpability—are also satisfied by persons we want to punish. So why not simply use the criminal justice system to punish terrorists and thus dispose of the problem?

In truth, new offenses will rarely be needed; existing law almost always will suffice. It would be helpful to provide illustrations of the actual offenses dangerous terrorists have committed, but details must await the production of actual examples. What exactly have particular persons done that makes us so confident they pose an ongoing danger that warrants their detention? Frequently these terrorists have conspired to murder or served as accessories to murder, but each case must be examined individually. In the case of Osama bin Laden, for example, several indictments prior to 9/11 charged him with a multitude of existing offenses. If we are nearly certain these RBDs are dangerous, they almost certainly will have committed existing crimes.

Obviously, Ferzan does not agree with my simple solution of using existing offenses (or enacting new offenses) to charge the dangerous, culpable persons we want to detain. In the remainder of this paper I will critically discuss her reasons for rejecting my proposed solution. The deeper problem, in her judgment, is that any of the new offenses I would mint would somehow pervert the criminal law, violating principles we philosophers of criminal law have good reason to preserve. Here is where I disagree most fundamentally. I disagree about the requirements that must be satisfied in order to be justified in enacting a criminal law. Remember, we agree that the terrorists we are eager to detain are culpable for having engaged in whatever bad conduct indicates dangerousness. So what precondition of criminal liability is missing? I’m not quite sure.

Of course, we may or may not have harm. But the criminal law has long had the authority to punish persons who are culpable and engage in dangerous conduct before harm occurs. It has a variety of ways of accomplishing this result. The most well-known offenses that perform this function are the so-called inchoate offenses of attempt, solicitation, and conspiracy. But the law also includes a number of additional crimes that proscribe conduct before harm occurs. Virtually all moving vehicle offenses, like drunk driving or speeding, are examples. So are virtually all possession offenses. Why can’t we simply enact new offenses of this kind to prohibit the culpable, dangerous conduct that worries Ferzan? I don’t much care what we call these offenses. But why wouldn’t they be justified?

At this point I should pause to say that I have defended a theory of criminalization, a theory I described as minimalist. At the time I developed my theory, I believed my label to be appropriate. But my theory turns out not to be nearly as minimalist as the criminal law Ferzan (and her co-author Larry Alexander) envision. I actually find it comforting to become aware that persons are more extreme than I. As we will see, Ferzan’s reservations about using the criminal law to achieve her preventive aims derive from her extraordinarily minimalist views about the conditions under which the state is justified in enacting an offense. She says: “Larry Alexander and I have argued that to deserve punishment one must unleash a risk of harm over which one believes one no longer has complete control.” Where Ferzan uses the word “argued,” I would substitute “asserted.” Among other difficulties, an analysis of control is needed to understand this alleged limitation on the scope of the criminal law. “Complete control” is a myth; for my act of shooting a bullet to cause harm, the sun could not become a supernova and vaporize the Earth at the instant the bullet speeds toward my intended victim. But once we start to construe Ferzan’s thesis by allowing lesser degrees of control, we have absolutely no idea where lines should be drawn. In any event, she is clear that her position is intended to rule out many of the kinds of offense I have in mind to punish terrorists. It is also designed to preclude a good deal of the criminal law as we know it.

We should be clear about the extraordinarily minimalist conception of the criminal law to which Ferzan subscribes—a conception that motivates her desire to invent a mode of jurisprudence “beyond” or “outside” it to detain terrorists. Examples are helpful. Suppose I am lying in wait for the president’s motorcade with a loaded rifle and a firm intention to kill him. Or suppose I raise a knife with the intention to stab him. In neither case does Ferzan believe the criminal law should punish me. Why not? According to Ferzan, until I have “unleashed” the risk of harm over which I believe I no longer have complete control, “I do not deserve to be punished. Thus there is no crime the state is justified in enacting that can be used to arrest, prosecute, and convict me.” We cannot punish these acts as attempts because they are not complete, which means the actor still believes there is something else he must do to “unleash” the harm—for example, the state “does not yet have a right to punish [me] for attempting to kill.” If I am to be prevented from assassination, some new body of jurisprudence must be invoked to accomplish this objective.

For present purposes, I don’t care much about the scope of liability for attempts. The point is that Ferzan’s position is far too minimalist, whatever we call the crime I believe should be used to punish me in the foregoing cases. If we wait until the last act is performed, and the trigger is pulled or the knife is plunged, we obviously have waited too long for the criminal law to prevent harm. Ferzan knows this, so she is driven to invent a third, noncriminal jurisprudence to deal with these kinds of case. But why is this needed? On the level of our intuitions—and I ask readers to report their own—her unbelievably narrow views about the scope of the criminal law are misguided. Let me also add two ad hominem arguments on top of my intuitions. First, no jurisdiction that has ever existed has placed such behavior outside the reach of the criminal law. So her ideas are
extraordinarily radical. Second, no criminal theorist—except for Alexander and Ferzan—would do so either. When no one else agrees with her position, she should begin to feel insecure. Of course, Ferzan does not budge here. We have gone around on this topic many times over the years. I have found myself in the familiar predicament of arguing against someone whose intuitions are so unlike mine—and, I am sure, unlike those of most everyone else—that further argument becomes futile. So our main difference is about the fundamental principles of criminalization that constrain the criminal sanction. She is far more restrictive than I, and I regard myself as pretty restrictive. Her problem would be solved if only she would give up her “last act” requirement for attempt liability. When one recognizes the enormous price she pays to retain this (highly counterintuitive) requirement—namely, the need to invent an entirely new mode of constitutional jurisprudence—one can only wonder why she regards that price as worth paying.

In my judgment, the greatest problem in supposing the criminal sanction is adequate for preventive purposes consists in sentencing rather than in the content of the substantive penal law itself. Most criminal theorists, including myself, agree that sentencing should be governed by a principle of proportionality, according to which the severity of the punishment should be a function of the seriousness of the offense. Thus our determinations of how long the offender should be confined are governed by his previous crime rather than by assessments of his future dangerousness. But this device to calibrate sentences, the objection continues, affords society too little protection from ongoing threats. In theory, a system of criminal justice that implements the proportionality principle I have described may be forced to release offenders even though they remain a grave threat to cause subsequent harms.15

Desert-based sentencing regimes that implement a principle of proportionality have long been attacked by consequentialists who contend that society merits greater levels of protection. As I have suggested, however, this attack is far more persuasive in theory than in practice. In fact, it is persuasive only in a realm of science-fiction we are unlikely to enter anytime soon. I remind those theorists who press this objection that both our track record and our current ability to forecast future dangerousness are unimpressive, to say the least.16 Our predictive tools may be tolerably accurate as applied to groups, but tell us woefully little about individual members of these groups.17 Needless to say, any system of preventive detention favored by Ferzan must succeed in making good predictions about individuals. It is a great merit of my alternative mode of dealing with terrorists within the criminal justice system that no predictions are required.

But even on the level of speculative theory, I contend that this general problem about proportionality is actually less acute in the present context than elsewhere. We will have little difficulty finding sound rationales for confining terrorists for a very long time. If we are so confident of their future dangerousness, the crimes perpetrated by these persons are almost certain to be very serious. If so, severe terms of confinement will be compatible with the principle of proportionality. Again, the charges brought against the most determined and notorious terrorists—like bin Laden, even prior to 9/11—would have made him eligible for several consecutive terms of life imprisonment. In short, we need not be overly concerned that responsible but dangerous persons will serve their sentences only to be released to resume their predatory lifestyle. This worry is insufficient to motivate Ferzan’s quest for an altogether new mode of constitutional jurisprudence.

Philosophers are accustomed to reasonable disagreement, but some of what Ferzan says scares me. She adds that “however one comes out on the punishment of inchoate crimes, the preventive intervention proposed here can be implemented without the cumbersome machinery of the criminal law.”18 In other words, the novel system of preventive detention she defends need not bother with niceties like the presumption of innocence or the requirement of proof beyond a reasonable doubt. In my judgment, this is a huge disadvantage rather than an advantage of her “third way.” To invent some body of law other than the criminal law to detain terrorists involves what Andrew Ashworth and Lucia Zedner usefully describe as undercriminalization.19 This label applies when the criminal law should be used, even though it is not. In my judgment, we should want and even demand the “cumbersome machinery” to which Ferzan refers, here as much or more than elsewhere. The wrongful actions performed by culpable offenders belong squarely within the criminal law, and should not be placed outside of it because so doing would allow us to circumvent the procedural protections many of us have worked so long and hard to preserve. We should not be tempted to water down these safeguards by assigning terrorists to a third category beyond crime and commitment unless we are certain that a “new constitutional jurisprudence” is needed.20 It is not. Or, to express my conclusion more precisely, Ferzan has not shown that a new constitutional jurisprudence is required, as her arguments in favor of this supposed need derive from an overly minimalist conception of the scope of the criminal law itself.

NOTES


3. For one of her many original contributions to the self-defense debate, see Kimberly Kessler Ferzan, “Provocateurs,” Criminal Law and Philosophy 7, no. 3 (2013): 597–622.


7. Ferzan, “Beyond Crime and Commitment,” 144.
Kim Ferzan’s “Beyond Crime and Commitment” is a rich and provocative contribution to legal theory. It touches on a broad range of difficult issues, and it calls for a deep reconsideration of our views about how the state can treat individuals who are deemed dangerous but who have yet to commit a crime. It is tempting to think that only those who are incompetent—who are not responsible for their actions—can legitimately be subject to substantial deprivations of liberty prior to having committed a criminal offense. The thought is tempting because this kind of preventive interference seems incompatible with the respect for personal autonomy that the state owes its citizens; hence it seems justifiable only when a person is not really meaningfully autonomous in the first place.

Ferzan disagrees. She argues that preventive interference by the state needn’t be incompatible with personal autonomy. The two ideas are reconciled, she maintains, when preventive interference is warranted by a person’s actions. More specifically, her thought is that, by carrying out actions “in furtherance of a culpable intention” (162) which indicate that he is likely to commit a crime in the future, a person can make himself liable to interference. In such a case, we have a justification for preventive interference that has the “same normative structure” (147) as a familiar justification for self-defense. It is a justification “grounded in responsible agency” (ibid.), as Ferzan puts it, and hence a justification that shows our practice to be compatible with respect for autonomy.

These terse statements hardly do justice to the complexity of Ferzan’s view, but they probably give a sense of why I called her contribution provocative. The idea that a competent adult could be subject to serious deprivations of liberty without having run afoul of the criminal law isn’t completely intuitive, to say the least. Yet Ferzan goes further. She insists that the regime of preventive interference she envisions properly belongs in the civil law. She maintains that preventive intervention through the civil law will be justified in cases where criminalization wouldn’t be. She even adds that the practice may not be subject to the same constitutional restrictions as criminal interventions (see, e.g., 171).

There is much that would be worthy of discussion in Ferzan’s paper, but here I’ll restrict myself to articulating some worries I have about these core ideas. My aim is not to refute any of Ferzan’s claims—the present discussion is too short and tentative for that, and Ferzan’s view has yet to receive its full statement (the paper at issue here is meant to be reworked into a book-length discussion). My hope is simply that, by putting pressure on some key aspects of her view, I can help her to identify some ideas that are particularly likely to encounter resistance from a broader philosophical audience, and also encourage her to formulate some aspects of her position more precisely—perhaps even to reconsider them.

**Ferzan on Preventive Interference**

**Louis-Philippe Hodgson**

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Let me begin with Ferzan’s claim that the kind of preventive interference she advocates is properly seen as a civil measure. Her main reason for thinking so seems to be that the justification she envisions for preventive interference is fundamentally at odds with the kind of justification that she sees as characteristic of the criminal law. On Ferzan’s view, criminal condemnation must be justified in terms of what a person’s actions deserve (143). By contrast, preventive interference is justified in terms of whether a person’s actions warrant us in viewing him as dangerous. The justification is still grounded in the person’s actions, as Ferzan stresses, but the fundamental concern is the threat evidenced by his behavior, not what he deserves for his actions.

As Doug Husak and Gideon Yaffe argue at some length in their respective contributions to this panel, Ferzan is relying on a highly contentious view of the criminal law here. She takes blameworthiness and desert to be the crucial elements in the justification of punishment; what is more, she defends an exceptionally narrow view of the criminal law. More specifically, her thought is that, by carrying out actions “in furtherance of a culpable intention” (162) which indicate that he is likely to commit a crime in the future, a person can make himself liable to interference. In such a case, we have a justification for preventive interference that has the “same normative structure” (147) as a familiar justification for self-defense. It is a justification “grounded in responsible agency” (ibid.), as Ferzan puts it, and hence a justification that shows our practice to be compatible with respect for autonomy.
between laws whose violation justifies a serious deprivation of liberty (such as the law against murder) and laws whose violation doesn’t (such as parking regulations). It seems to me that, insofar as the traditional division between the criminal and the civil law has any normative significance, it has to be because it tracks something like this distinction. But if that’s right, then there can be little doubt as to where Ferzan’s brand of preventive interference belongs. Measures such as electronic monitoring, curfews, and preventive detention (see, e.g., 192) are extremely serious deprivations of liberty. They can’t possibly belong with parking regulations and other such regulatory measures.

In a way, Ferzan takes account of this. She allows for preventive interference only when a person’s behavior is suitably related to the kind of rights violations that are the proper concern of the criminal law (see p. 180). This acknowledges the obvious: significant preventive interference could never be justified by a person’s being likely to park in the wrong place, or by her being accident-prone, or by her having a tendency to be negligent. Only being on the spectrum of intentionally violating the rights of others—whether at the very beginning of the spectrum, with the formation of an intention, or further along—provides remotely plausible grounds for such interference. But this just makes Ferzan’s claim that preventive interference doesn’t belong in the criminal law all the more baffling: both the kind of behavior that justifies it and the kind of deprivation of liberty it inflicts seem characteristic of that branch of the law.⁴

Ferzan briefly mentions a different motivation for wanting to keep preventive interference on the civil side of things, namely, that she doesn’t think it should involve the kind of stigmatization that is characteristic of the criminal law (see 183). How this is supposed to work is not entirely clear, however. Suppose that Ferzan is right to think that preventive detention can sometimes be justified. Could such a measure possibly fail to convey the same kind (if perhaps not the same degree)⁵ of stigmatization as criminal convictions do? After all, if society takes itself to be justified in locking you up just because of what you intend to do, it certainly does not view you as its friend. Imagine: you haven’t violated anyone’s rights yet, but we still think that we can justifiably detain you. Surely, that response has to carry an expression of severe disapproval; we’re not just saying that you’re the kind of person who parks in the wrong places.

In light of all this, I am especially puzzled by Ferzan’s suggestion that the kind of preventive interference she advocates is easier to justify than intervention through the criminal law, and by her willingness to leave open the possibility that the practice might be subject to less stringent constitutional restrictions. My doubts are particularly acute regarding the possibility of preventive detention. If such a practice is ever justifiable (and if Ferzan is right that we shouldn’t construe it simply as a punishment for an inchoate crime), then it may be true that it shouldn’t operate quite like punishment; perhaps it should take place in a different, somewhat less harsh environment. And it may be true that we should view those who come out of preventive detention differently than we do those who come out of prison for a corresponding offense. But these are at best subtle nuances. At bottom, the treatment Ferzan allows for remains much closer to incarceration than to anything that a failure to abide by civil regulatory measures could possibly justify. The idea that it might be inflicted “without the cumbersome machinery of the criminal law” (166), as Ferzan suggests in an enthusiastic moment, strikes me as downright chilling.⁶

- II -

A central theme of Ferzan’s paper—and an essential organizing idea of the broader project of which it is part—is that the theory of self-defense provides a useful template for thinking about preventive interference. To be clear, Ferzan doesn’t think that preventive interference by the state is analogous to self-defense (173). Something along those lines could perhaps be said of preventive war, but not of preventive interference visited on individuals by the state. Her claim is rather that preventive measures can be justified on the same grounds as paradigmatic cases of self-defense. In both cases, she maintains, the crucial idea is that the person has acted in a way that makes him liable to a certain kind of interference.

What does this mean exactly? As Ferzan describes it, a person makes himself liable to interference when he carries out an action that effectively forfeits his right against such interference (160–61). In the case of self-defense, her view is that I forfeit my right against you (proportionate) use of defensive force if I make it the case, through a culpable action, that you reasonably believe that I will imminently harm you unless you use defensive force against me. In the case of preventive interference, analogously, I forfeit my right against the state’s (proportionate) use of preventive interference if I make it the case, through a culpable action, that the state is warranted in inferring that I will commit a serious crime at some point in the future.

The comparison will be useful to the extent that the idea of liability operates similarly in the two contexts, but it’s not obvious that it does. As Ferzan acknowledges, we don’t think that a person has forfeited her right against defensive force unless a requirement of imminence has been met. This shouldn’t be contentious: so long as the threatened harm is not imminent, we think that the apparent aggressor would be wronged by the use of defensive force; hence her actions can’t entail a forfeiture of rights. Yet Ferzan stresses that no such requirement applies to the case of preventive interference. Indeed, an avowed motivation for her approach is to make room for intervening in the activities of pedophiles and terrorists long before any harm is imminent.

Why the difference? Ferzan isn’t as explicit about this as one might hope. In a surprisingly short section, she mentions some possible rationales for the imminence requirement and quickly concludes that none of them has any traction in the case of preventive interference by the state (see 173–76). I’m not so sure. Consider one of the rationales she mentions: that the imminence requirement aims “to ensure that defensive harm is truly necessary” (174). The general idea here, I take it, is that imminence is central to the justification of self-defense because it marks a tipping point.
point in what can reasonably be demanded of the potential victim. Allowing a potential victim to act in self-defense before the harm is imminent would fail to take seriously the perceived aggressor’s liberty interests. It would authorize the victim to cause serious harm to the perceived aggressor when there are likely to be other alternatives, and it would potentially allow her to act on a misconception that might be corrected by waiting longer. However, once the harm is imminent, the balance of interests tips the other way: at that point, the victim’s options have been exhausted, and asking her to wait any longer would fail to acknowledge her security interests.

That is merely the rough sketch of a story, of course, but if something along those lines is correct, then it’s not clear why the rationale wouldn’t also apply to the preventive measures that Ferzan advocates. If taking liberty seriously demands that defensive force only be used when all other options have been exhausted, why wouldn’t the same hold for preventive interference by the state? Of course, such a requirement of imminence would rule out the sort of early intervention that Ferzan is keen to justify; indeed, it may undermine much of Ferzan’s proposal. To avoid this kind of trouble, Ferzan would need to explain convincingly why the bar is so much lower for making oneself liable to serious deprivations of liberty by the state than it is for making oneself liable to defensive action by another citizen. Her main argument on this point seems to be that the harm visited upon the agent is smaller in the cases of preventive interference she envisions than in cases of self-defense (see 175). For the reasons I outlined in the previous section, I don’t find this reply convincing. There may be a significant difference between the two cases, but Ferzan underestimates how much it takes to justify serious deprivations of liberty.

- III -

I now turn to some more general concerns I have about the role that the idea of liability plays in Ferzan’s discussion. Arguably, the idea grounds her entire project. The claim that we can reconcile preventive intervention with autonomy draws its plausibility from the thought that an actor “cannot claim . . . that his liberty rights are being violated when he is the one who has effectively forfeited those rights.” (163; cf. 173) When we reason in this way, Ferzan insists, we don’t view the actor as a force to be contained, but rather as a responsible agent whose choices determine what can legitimately be done to him.

The idea of liability is familiar from discussions of self-defense, and it has recently gained currency in discussions of just war theory. 7 It’s worth noting, however, how different these two contexts are from the one that Ferzan considers. In cases of self-defense, we typically have a confrontation between two agents who share political institutions but who cannot, at the relevant time, call on these institutions to solve their problem (ideally, of course, that is what should be done: even in the direst cases, if there was a way to stop time and call on the state, then that would clearly be the right thing to do). The same holds a fortiori for countries at war, since in the current world order there are no higher institutions that can provide an authoritative solution to the problem they face. Both types of cases, then, involve agents of a certain kind—two individuals in one case, two states in the other—confronting each other in what we might call an extra-institutional situation.

The scenarios in which Ferzan claims that preventive interference would be justified are clearly not extra-institutional in this sense. Quite the opposite: they explicitly have to do with how political institutions should treat their members. In this kind of context, invoking the notion of liability risks obscuring the question being asked more than anything else. Let me explain. When two individuals confront each other in an extra-institutional setting, it seems natural to focus on what each has done, and on what that might entail for what the other has the right to do. This seems natural because one individual doesn’t normally have the right to use force against another; if he does, it must result from something the other did. And, of course, the same would seem to hold for one state’s right to use force against another.

If we consider the state’s right to detain one of its members, however, the individual’s actions may play a role in justifying the interference, but it will only be one small part of a much more complex story. Here the fundamental question concerns what political institutions can legitimately do to their members, and thinking in terms of liability seems an oddly roundabout way to get at the answer. Worse, it may be misleading. Talk of liability invites the thought that we can look at what a person has done more or less in isolation and draw conclusions about what rights he has thereby forfeited. I doubt that this is a fruitful way to approach the matter. If you tell me that a person has done X, Y, and Z, and you ask me whether that amounts to forfeiting the right not to be preventively detained, I must confess that I have no idea how to even begin answering that question. I would want to start instead with a much broader question, namely, whether it can be legitimate for a state to have the power to detain someone who has done X, Y, and Z (when doing X, Y, and Z doesn’t constitute a criminal offense, of course). If that question is answered in the positive, then perhaps we could go on to say that doing X, Y, and Z amounts to forfeiting the right not to be preventively detained. But that would be the result of a judgment about how political institutions can legitimately operate, not the grounds for that judgment. 8

To put it plainly, then, my suggestion is that, since Ferzan asks us to consider cases that take place in an institutional context, we should pose our questions in institutional terms. We should ask what shape our political institutions should take—what kinds of intervention they should engage in, what laws we should have to ground those interventions, and so on. In short, we should ask what way of setting up our institutions is acceptable to all concerned.

Focusing squarely on the justifiability of our political institutions has the advantage of bringing to the fore some considerations whose importance Ferzan’s approach tends to conceal. For instance, it seems essential that our institutions give individuals a fair opportunity to avoid serious deprivations of liberty. 9 But it’s unclear where such a consideration is supposed to fit in if the question we are asking is whether, by doing X, Y, and Z, an individual
has forfeited the right not to be detained preventively. By contrast, if the question is whether it would be justified to set up institutions that may preventively detain someone who has done X, Y, and Z, then it’s quite obvious that we need to ask whether such institutions would give people a sufficient opportunity to avoid serious deprivations of liberty.

A further advantage of this institutional outlook is that it brings out how crucial it is to consider what the alternatives to preventive detention are, and to ask whether we have done all that could reasonably be expected to preserve the person’s liberty. Once again, simply saying that a person has forfeited her rights stresses the wrong kind of consideration—whether the person has formed a culpable intention, and thus whether she is a “bad person,” rather than whether we are treating her fairly. After all, if a person has forfeited a certain right, then we don’t need to make sure that we have done everything we could to respect that right. We needn’t worry about whether we have exhausted our options since, as Ferzan puts it, the person has simply waived the right in question (see 193). This seems to me much too quick. If it is correct to say that a person is liable to interference, it has to be in part because we have done all that could reasonably be expected to respect his freedom, given the kind of institutions that we are able to put in place. Perhaps Ferzan can account for this line of thought within her theory of liability, but I find it hard to resist the conclusion that what kind of interference a person is liable to ultimately depends on what kind of institutions could be justified rather than the other way around.

NOTES

1. This is a slightly revised version of the comments I delivered as part of the Berger Prize Panel at the 2013 Pacific Division meeting. It was thought that, in order to document the exchange that took place during the session, the comments and Kim Ferzan’s response should be published roughly as they were delivered. It is very much in that spirit that the present text should be read.


4. Doug Husak and Gideon Yaffe both argue that the criminal law is already equipped to deal with the cases that Ferzan is worried about, which they see as falling under familiar categories of inchoate offense (attempt, preparation, conspiracy, and so on). My present point is that even if Ferzan were right that the criminal law cannot, as it currently stands, do the work that she thinks necessary, the measures she proposes couldn’t possibly be seen as part of the civil law. They are simply too intrusive.

5. To be precise, preventive detention probably wouldn’t involve the same degree of stigmatization as the corresponding full-fledged criminal conviction. But, despite Ferzan’s suggestion to the contrary (see pp. 183–84), it might very well convey a greater degree of stigmatization than some lesser criminal offenses (being preventively detained for planning a terrorist attack would presumably have to express a stronger disapproval than being briefly jailed for shoplifting).

6. To be fair, Ferzan means to leave open the question of what restrictions the practice she advocates should be subject to. Her considered view is that a new constitutional jurisprudence is needed to deal with the case (see pp. 183 and 193). So it may be that the new constitutional jurisprudence would have to include measures comparable to those that apply to the criminal law, although some of her remarks (such as the one quoted in the text) indicate that she doubts this.


8. Here I am echoing a point that T. M. Scanlon makes in his discussion of what he calls the “Forfeiture View” of the moral significance of choice. See T. M. Scanlon, What We Owe to Each Other (Cambridge, MA: Harvard University Press, 1998), 265.


Thinking Through the “Third Way”: The Normative and Conceptual Space Beyond Crime and Commitment

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It is a tremendous honor to have my friends and colleagues devote their time and attention to my work. I want to thank Gideon, Doug, and Louis-Philippe for their careful replies to my paper. Their comments were insightful, challenging, and fair. I am all the more delighted that my position withstands the arrows of these difficult critics.

I will proceed thematically.

THE PROJECT’S MOTIVATION—OR WHY THIS IS NOT A BANDAGE FOR A SELF-INFLICTED WOUND

As you can no doubt tell, Yaffe and Husak don’t like my position (a position I share with my frequent co-author Larry Alexander) that incomplete attempts are not deserving of blame and punishment. To them, my views are “particular,” “implausible,” and to quote Husak from another forum, downright “daffy.” They see this project as a solution to a problem of my own making. If I didn’t have such profoundly misguided views about the criminal law, well, we wouldn’t be here today.

They are wrong.

First, as an autobiographical account, it is simply not the case that this paper was aimed at filling the gap created by my own position in criminal law. Rather, a couple years back, I was asked to do an APA panel on what retributivists have to say about preventive detention. I thought, “Well, there really isn’t any discussion of this liability category within
the legal literature, so I should see what the implications are.” My goal at that time wasn’t to advocate for the application of the category, but as I worked on the paper, I became more convinced that this category was worthy of independent scrutiny. It happens to cohere nicely with my views about incomplete attempts, but it was not designed to do so.

Second, and more importantly, although I believe my view of incomplete attempts to be correct, nothing about this project turns on the correctness of that view. Indeed, Beyond Crime and Commitment assumes that incomplete attempts can be punished.3 And my claim, then, is that even if I am wrong about the punishability of incomplete attempts, I am correct that this approach is superior.

Indeed, the important battleground here is not the moment before last act attempts. Yaffe and Husak’s almost cartoonish caricature of my view distracts from the real issues at hand. My view is an outlier, no doubt. I won’t defend it here. But the question of exactly when conduct should be an attempt is hardly settled in law or in other scholars’ work. And, many scholars object to the punishment of early preparatory actions. If we are counting heads, I am hardly in the minority there. Those actions, the early actions, are truly the important ones for our purposes here. Engaging with this project, and with the prevention-punishment turf battle over early preparatory action, does not require readers to agree with my daffy, wacky, minimalist views about last act attempts. Don’t let the ad hominem attacks distract you.

**HOW TO THINK ABOUT SELF-DEFENSE**

Let us begin with liability in self-defense. Hodgson’s comment questions both imminence and liability. Let us examine the relationship between liability, proportionality, and necessity.4

I maintain that someone is liable if (1) he has a culpable intention and will be successful unless stopped or (2) he culpably causes the defender to believe that defensive force is necessary. In such instances, the aggressor forfeits his rights against force that is intended or believed to be defensive. This is a fact-relative judgment. It is about the change in rights and duties.

Now, consider proportionality. Proportionality is internal to forfeiture. An aggressor only forfeits rights against proportionate defensive force. If the aggressor threatens nondeadly force, the aggressor is not liable to deadly force.

The necessity requirement masks three different claims. First, sometimes necessity is a liability condition. That is, if the aggressor will fail, and the defender knows it, the aggressor is not liable to any force. This is a fact-relative judgment. Necessity also plays a second role in liability because the aggressor is only liable to force that is believed to be defensive. If the defender knows there is no chance that her action will stop the aggressor, then she may not employ force. Third, necessity masks proportionality questions. It may be necessary for me to use deadly force to preserve my good shoes, but killing someone is disproportionate to preserving that interest.5 Some of Hodgson’s concerns about alternatives, then, are built into one or another form of the necessity requirement.

Imminence, as I have argued elsewhere, covers three distinct concerns.6 First, it serves as a proxy for necessity under conditions of uncertainty. Second, it serves as the actus reus for aggression. Third, it patrols the boundary between citizen and state. I thus need to confront imminence in these three respects. I address the latter two infra. Let me discuss the role it plays for necessity here. Notably, the imminence requirement plays no role in a fact-relative determination of liability. Imminence is a question of what to do in the face of risk. It is therefore not internal to liability; it is an overlay that a legal (or perhaps moral) system will have to include when citizens do not know what they objectively ought to do. If you knew whether the aggressor was going to change her mind (or self-defense would otherwise be unnecessary), you wouldn’t need the imminence requirement.

Of course, once we aim to implement a preventive system, we certainly must look at what we owe the putative aggressor. Just as individuals may deserve punishment, but there is the separate question of the degree of confidence a state must have before imposing it; we will need to look at the tradeoffs between types of harm and ask about the degree of confidence we need. Hence, liability itself is fact-relative, and although the question of what the state or defender owes the putative aggressor is important, it simply does not bear on whether the defender is liable. These concerns are extrinsic to liability. This doesn’t mean that I can ignore the question of what can be reasonably demanded of the state, but rather that I need to more fully discuss the degree of confidence necessary as well as other procedural precautions. Elsewhere, I have begun to take a stab at this.7

**INTENTIONS AND FORFEITURE**

Let me now turn to my reliance on intention as the basis of forfeiture. Yaffe thinks that my theory cannot reach future attempters. He argues that “the content of the right forfeited must be normatively explicable by appeal to that which triggered forfeiture; the explanation must show why it is fitting or appropriate for the person to have lost such a right given the trigger.” This statement is absolutely right.

However, Yaffe then argues that to forfeit one must be “currently attempting.” He claims—admitting that he has no real argument—that “an intention to cause harm must be guiding the agent towards the causation of harm to trigger the forfeiture of the right.” So, in his example, D intends to commit a terrorist act. At this point, there is no forfeiture. Then, D is guided to blowing up a plane. Now, maintains Yaffe, there is forfeiture for that plane and only that plane.

I disagree. I don’t see why we need a “guiding causation” requirement nor am I sure what it entails. Consider Earl Shriner. Earl Shriner was released from prison in May 1987, after completing a ten-year sentence for kidnapping and assaulting two teenage girls. Officials weren’t worried about releasing him because he had been diagnosed
a "pedophile." They were worried about releasing him because during his last months in prison he wrote in his diary detailed plans to maim and kill children upon release, and he told his cellmate that he wanted a van customized with cages so he could pick up children, molest them, and kill them.7

Assume we are convinced this is in fact a firm intention. Taking the Bratmanian view,10 intentions are plans that lead to means-end reasoning and rule out alternatives. They are things that will guide us to specifics. Holding an intention requires that one not plan to go to the movies on the day one plans to blow up an airplane, and it will ultimately require one to figure out how to blow up the plane.

Why isn’t the general plan sufficient for the moral asymmetry? At the moment the aggressor forms the broad intention, he has shown that he does not respect his future victim’s rights, even if he may not have pinpointed the precise victim. What independent work does action do? I have debated this before with Yaffe in the context of incomplete attempts. Consider the Balanced Rock hypothetical, imagined by my co-author Larry Alexander.11 A moves the rock to hit the victim below and just needs to use a jackhammer to jostle it. But A decides, after having set things up, to take a nap. B sees everything and forms the intention to use the jackhammer. Both have the same current stance, so what work does the action do besides corroborate the intention? For this project, I do endorse action for corroboration, but action is not required because of liability; it is required to constrain the state.

Back to self-defense. Shriner does not have a particular child in mind. However, from an omniscient point of view, the child that Shriner would later rape and strangle, sever his penis, and leave in the woods to die, must be entitled to act at some point to stop Shriner. I submit that at the moment that Shriner forms his intention to rape and murder kids, he is liable to defensive force from the child and third-party defenders.

To be clear, liability is about both the intention and the necessity or the culpable creation of the appearance of necessity. That is, for liability, we couple Shriner’s intention with the fact that it is actually necessary to engage in defense. Or, alternatively, we couple his intention with the fact that he causes others to believe he is a threat. It is intention and actual need or appearance of need. You forfeit rights either (1) because you will culpably harm someone and thus the intention shifts entitlements or (2) because you are culpably responsible for causing the belief that you will harm him and thus lose rights against preventing defensive force, the belief in the necessity of which is your responsibility. But Shriner doesn’t need to do more than form the intention to forfeit his rights. We are allowed to lock him up before he buys a cage in which to put a specific child.

Now, admittedly, this account puts tremendous pressure on the moment of choice—of forming the culpable intention. After all, I think culpability matters. So it is not enough that as a child Shriner would grow into the adult who later forms the intention. This isn’t Minority Report. I do think that an autonomy-respecting regime requires choice.

The forfeiture of the claim right against defensive force is fitting and appropriate when the actor makes the decision not to respect the rights of another.12 It is at this moment that he views himself as above the baseline of claim rights of others, and he forfeits his claim right against being harmed by defenders.

Of course, ultimately, there may be other restrictions on the use of permissible defensive force. So, for instance, I think that the defender must subjectively believe that the force is necessary. We may want an action before we intervene. But the specificity that Yaffe seeks is unwarranted and ungrounded. Our baseline moral entitlements give way when we choose not to respect others. I fail to see what additional work the “guiding causation” requirement does.

Yaffe also presses a potential tension in my work that arises from wedding my views on incomplete attempts with my views of preventive detention. My argument against punishing incomplete attempts is that intentions are fleeting, conditional, revocable things, and I find it difficult to justify punishing someone who hasn’t chosen to do something that actually unleashes a risk of harm to someone else.13 And, in fact, I struggled with whether I could reconcile that view with the claim that intentions are sufficient for prevention. Here is how I see it.14 If Alex decides to kill Betty, the fact that he can change his mind gives him reason to complain about being punished for something he may ultimately choose not to do.

With self-defense, though, we have to ask a different question. What is the moment of forfeiture at which the aggressor has lost standing vis-à-vis the defender? The moment that strikes me as most plausible is the moment of choice. The fact that someone acts on the intention may be evidence of its resilience, but it isn’t the root of that forfeiture. I once defended a much stronger requirement, arguing that imminence was an overinclusive requirement for aggression.15 But I have since failed to see what any act does beyond meet some further epistemic warrant. Why is acting on the intention what changes his entitlements?

Because these practices are grounded differently, the role that intention needs to play differs. Assume that my nine-year-old son likes to play video games on his Nintendo DS and that he gets thirty minutes a day to do so. (This is true.) Imagine, then, that when I pick him up from school, his friend informs me (out of my son’s earshot) that my son told him that my son plans to sneak his DS out of the kitchen and play an extra thirty minutes. What is a mom to do? Well, I think it would be wrong to punish him for forming the intention. He’s a pretty good kid with a conscience, and he might think the better of his plan. On the other hand, I think given that intention, and until he convinces me otherwise, I would be permitted to restrict his liberty by, say, telling him to do his homework in the room in which I am sitting, so I can keep an eye on him. He has simply lost some moral standing—he has lost some trust—by forming the intention. I get to stop him. And the moment I am convinced the intention is gone, he regains his freedom.
Still, even if I am wrong about this and we need an act for forfeiture, we can still have a preventive regime. But say that Shriner upon release had gone to buy the stuff to make cages. I think that for so long as he plans to molest children, Shriner may be held. It is not the case that he hasn’t forfeited anything or gets to wipe the slate clean just because the particular specific way the broad plan was to be executed has been foiled. He forfeits for so long as the broad plan remains in place. My claim is similar to the Model Penal Code’s (MPC) approach to the abandonment defense for attempts. The MPC does not provide an abandonment defense when the defendant does not execute her plan because of fear of cops or because she decides to find an easier target. The overarching plan remains in place, even with a shift in the particulars, and it is that overarching plan that is sufficient for liability to prevent interference.

**LOST IN TRANSLATION FROM CITIZENS TO STATE?**

Of course, even beyond the question of whether I have the right theory of self-defense, there is the question of how this applies to the state. To my mind, Yaffe and Hodgson take opposite tacks on the imminence divide. Yaffe claims that anything the state can do, a citizen can do, so my theory doesn’t add anything. Hodgson claims that everything citizens can’t do, the state can’t do. To Yaffe, self-defense is ordinary; to Hodgson, it is exceptional and rare.

Neither commentator is quite right. When an aggressor decides to harm a defender, the reason the defender may not just shoot the aggressor is because typically there are a number of things the defender can do short of that. And one of the most important things to do is to call the cops. Assume that A, an estranged husband, threatens to harm B, his wife, next week. B can’t shoot A now. But it is certainly true that the state may impose a stay away order on A. Why? Well, A’s threat has given grounds for restricting his liberty. And, because the state has a number of resources, B is not entitled to engage in self-help. So, when Yaffe says, “When state actors are justified in inflicting harm or deprivation of liberty to prevent crime, and are justified on defensive grounds, even non-state actors would be similarly justified. So there is no special form of justification of state power involved,” I concede. If we hadn’t allocated this power to the state, then yes, citizens would be justified.

However, when we think about what the state may do, even if we concede that it isn’t something over and above what citizens may do in the state of nature, then if our scholarship is not drawing on the work of self-defense and seeing how liability sheds light on why individuals, and thus the state, are entitled to act in these ways, then it is missing something important. I viewed this paper not as introducing self-defense to the state, but as reinvigorating our understanding of self-defense’s application and introducing the liability category, something that scholars in criminal law theory were not drawing on, even when they were taking passing glances at self-defense. Moreover, the power of the state makes it uniquely situated to play this preventive role.

Now Yaffe thinks that what the state may do over and above what the average Joe may do is grounded in its punishment power, not its preventive interference abilities. But his example shows quite the opposite. Here is Yaffe’s hypothetical case. The cops see a man with a ski mask and a gun about to enter a bank. They arrest him for an attempt. So, one line of attack is that I have to let this guy go because I don’t believe in incomplete attempts.

It is certainly true that by my lights, if you stop him and there is no future crime, then there is no reason to hold him. End of attack is end of story. So only a future crime would justify holding him.

But consider the law we currently have. After the cops stop him, and detain him for a few minutes to ask some questions (something that could be done in my regime too), what is it that justifies holding him beyond the time necessary to process him in the system? Yaffe is simply wrong to assert that we can hold defendants while we investigate their crimes. You cannot throw someone in jail while you figure out if and how he committed a crime. Nevertheless, we often hold people between arrest and trial. Why do we get to do that even for completed crimes?

The Bail Reform Act allows a judge to justify holding the person based on future dangerousness and evidence of the commission of the offense itself. My view, and the view of many people working in this area, is that a reliance on the crime charged is profoundly misguided and at odds with the presumption of innocence.

If you want to hold someone, there are only a couple potentially good reasons. He won’t show up at trial or he will kill witnesses. Moreover, what should ground that detention is not just a prediction, nor the fact that the person committed the other crime (which runs contrary to the presumption of innocence), but some showing of a positive intention to skip town or kill a witness. That is, the liability theory’s handling of post-arrest detention best justifies what is justifiable about the practice. The desert basis of the criminal law provides no additional grounds beyond the reason to have the trial and thus a reason why we need to detain to protect the interest of just institutions. Arrestees should only give up liberty rights for preventive reasons, and it is my theory that provides those.

Both Yaffe and Hodgson raise concerns about the sort of justification the state needs, an analysis that seems to extend beyond the way we think about self-defense. Hodgson believes that thinking about rights is not the best way to analyze the question. Here, I disagree. Indeed, I think the punishment literature could use a little more rights talk. While criminal law theorists think about deterrence and retribution, they don’t give an account of why the defendant has lost rights. They need something like Mitch Berman’s claim-rights specification approach, the rights forfeiture approach taken by theorists such as Kit Wellman, John Simmons, and Christopher Morris, or Victor Tadros’s duty view. The loss of rights is exactly where our analysis should start, even if that is not where it ends.

What about fair opportunity? I do think that if we get the criteria for forfeiture right, we will necessarily take into account some questions of fair opportunity. I don’t think you forfeit when you are justified or excused. Moreover,
I agree that there are deep questions about when the state is justified in acting, even when someone deserves punishment or has forfeited rights. But the current literature on prevention denies the possibility of even exploring this category. I am opening up this normative and conceptual space. I haven’t filled in all the details yet. I no more think that desert is the final word on state punishment than that liability is the final word on preventive interference.

It is also the case that when thinking about any institution, you have to think all things considered, and forfeiture is not an all-things-considered judgment. Neither is desert. So, of course our institutions have to think more broadly. I am willing to concede this. For self-defense, liability is going to be defeasibly sufficient, whereas for preventive detention, it may not be. But any government action is going to require more sophisticated trade-offs than individual cases. However, that does not undermine my central claim that the state does not wrong someone with a criminal plan when it prevents that person from committing a crime.

The breadth of all-things-considered permissibility also answers Yaffe’s objection that I can’t justify when and how a state may intervene against defendants attempting to commit harmless crimes. Tentatively, yes, the state has to sometimes let the person commit the offense. I actually got so far as to title a paper "The Time Before Crime" to consider when the state has to let a crime occur. Now, I wish I had gotten beyond the title. Still, for Yaffe’s example, I am confused. I don’t know what the offense is or why we have it. What justifies this crime, a crime that no citizen would be willing to concede this.

In addition, handing this over to the criminal law does have some advantages. It is an area where there has been sustained and systematic analysis. Why start fresh?

There are two questions here. First, can criminal law capture what we want it to capture? Second, even if both regimes could work, which should we pick?

Responding, then, to the first question, I am skeptical that we should criminalize everything that we wish to prevent. Husak enumerates inchoate crimes, possession offenses, and motor vehicle offenses as demonstrating the criminal law’s ability to intervene early. However, many of these offenses have been criticized for their unjustified expansiveness, not just by wacky last-act proponents like me, but by myriad theorists.

Moreover, you can’t look at attempt law on the books and say, “Well, see. We’ve got this covered.” Looking at attempt law yields three important conclusions. First, when courts directly attend to the normative justification for attempt law, they require significant acts; they don’t make retributivists arguments; they focus on prevention. But in determining what someone deserves, we can’t yet move to the additional preventive bang we might get for the punishment buck. We have to determine what the person deserves first. Second, oftentimes, courts applying the lower standard of the Model Penal Code’s substantial step actus reus will interpret that requirement stringently, requiring something closer to dangerous proximity. Thus, when courts directly attend to the normative justification for attempt law, they require significant acts. That would leave a preventive gap. But here is the rub: when courts get it right (or closer to right by my lights), legislators simply circumvent the normative conclusions. If contacting a fifteen-year-old girl over the Internet isn’t attempt to have sex with a minor, legislators create the new crime of enticement. This crime prohibits the very preparatory conduct that ought not to be an attempt, and ought not to be an attempt not because of something about “attempts” but because of what we take to be normatively justified as a crime. In other words, we haven’t got this covered.

CRIMINAL LAW CAN DO THIS BETTER

Husak claims that we can accomplish prevention within the criminal law. Hodgson goes further and claims that what I am proposing is properly deemed part of the criminal law.

Can criminal law do what needs to be done? Let’s start with some points of agreement between Husak and me. Husak and I agree that criminalization is about prevention. Our denunciation of certain acts is intended, among other things, to reduce the incidence of such wrongs. Husak and I also agree that in a world of limited resources, the state may consider which deserving actors to punish, and one reason to punish some instead of others might be for preventive purposes. Husak and I also agree that the mode of punishment (incarceration versus chopping off hands, for example) might be determined by preventive concerns. So, it isn’t that the criminal law has a dash of prevention in it. Rather, the criminal law is shot full of prevention. I am willing to concede this.

Moreover, when making the decision whether to intervene, the goal of pursuing justice is more complex than Yaffe makes it out to be. Even if retributivist desert is intrinsically good, it is an odd good. You don’t get to create crime to have that good. But if Yaffe’s lesson from his drug case is that given my view of incomplete attempts, the state can’t do anything because there isn’t a crime and there is nothing to defend against, I haven’t heard anything that makes me uncomfortable with that result.
Creating new crimes won’t solve the problem. Husak simply misunderstands my argument at one point. After noting the state must wait for a crime to be committed, I say that this means there may be a threat where the state may not interfere. This, Husak says, is a non sequitur. Husak reads me as making a legality point, and he solves it. If you need a crime, make a crime! My point, though, was normative; not every act should be a crime.

Now, perhaps you disagree and think that anything that I would prevent would also be punishable. (Again, we are talking about possession and other early preparatory offenses.) At this point, then, we must confront proportionality. Husak and I have a significant disagreement about proportionality. Now, of course, my “daffy” view is that there is no desert when someone simply forms an intention, or joins a terrorist organization. But let’s put that to the side. The standard view is that there is a deep discount for early acts. I take this stipulation from the work of theorists like Andrew Ashworth, who argues that possession offenses should have steep discounts, and from empirical research by Paul Robinson and John Darley, who find that the average Joe on the street deeply discounts liability until an offender reaches something close to dangerous proximity.26 This would mean, though, that the punishment that is applicable may very well fall short of our preventive needs. Desert will be exhausted before our preventive needs are met. Husak simply cheats when he uses Osama bin Laden. Of course, that man committed myriad offenses. But take someone else, who engaged in more minimal actions much farther removed from the offense, and your intuitions may differ. These offenses aren’t hypothetical; the criminal law is doing quite a bit of prevention.27 Then, a criminal law that punished according to desert would need to let defendants go even if they are still dangerous. Not every criminal is Osama bin Laden.

This question brings to focus the broader issue about which regime is better. Consider two actors who both plan to commit a terrorist act. They are both caught, and one abandons his plan at that moment but the other continues to harbor criminal intentions. As between two actors, one who continues to harbor a culpable intention and one who has abandoned it, the backward-looking desert story, as set forth by Husak, should not distinguish between the two. Moreover, although Husak might want to keep one in jail over the other for preventive purposes, even the actor who abandoned his intention might be kept in jail for a long period for deterrence reasons. We would have to calculate the consequences. But as a matter of desert, there is no distinction.

Now, consider the fact that someone may continue to harbor the criminal intention. Elsewhere Husak advances a rather ingenious solution to this puzzle. He makes it a continuing offense.28 But here are a few concerns. First, it is at least debatable that continuing to harbor an intention is like continuing to possess stolen goods. If I take Gideon’s painting, one can see that the harm continues for so long as I possess it. But intentions aren’t really like that. If Alex decides to kill Betty a year from now, it is harder to say that he warrants additional punishment for each and every day that he has that intention, irrespective of whether he acts on it.29

Second, criminal law tracks the wrong thing. When I have Gideon’s painting for five years, then I deserve punishment now, going into the future for that time. But prevention is not about looking back. The detention is justified only for as long as the intention is held. A criminal model will be insufficiently sensitive to this concern. It is insufficiently nimble at relating detention to intention.

Perhaps Husak can meet these objections. We would still need to decide which regime to choose. A culpable attacker might both be liable to defensive force and be deserving of punishment. That is certainly true in the case of individuals. Then, we would have some choices to make. My worry remains that we currently use many preparatory offenses, not to give people what they deserve, but to prevent crimes. After criminalizing such conduct, we punish individuals for longer than they deserve. If we want to do prevention, why not analyze how such a system should be justified?

THIS IS CRIMINAL LAW

Hodgson challenges me from the other angle. He claims I am already doing criminal law.30 Part of his objection derives from his desert skepticism, but part of it may also derive from the different systems of which we are currently a part. Hodgson is Canadian. I am not an expert on Canadian constitutional law, but my little exposure to it is this: anything that involves substantial deprivations of liberty triggers what Americans think of as criminal procedural rights. In a recent paper, Vincent Chiao in fact argues that the category of criminal is not co-extensive with the category of punishment.31 So, this objection is quite different from Husak’s. Husak says, let’s do punishment. Hodgson says, even if this isn’t punishment, it is criminal law.

Hodgson then argues that I am wrong to assume that the burden of proof is lighter in prevention cases. He’s right; I was wrong. I have a forthcoming paper in which I struggle with the meaning of the presumption of innocence and tentatively conclude that beyond a reasonable doubt is the correct burden of proof for this regime.32 (Husak, then, need not be “scared” of my regime, nor should Hodgson find it “downright chilling.”) In my presumption of innocence paper, I specifically confront the meaning of the presumption of innocence and address how it would apply. I am not using this mechanism to circumvent the protections to which individuals are entitled.

Still, I am going to stubbornly insist that this regime is civil. One approach I want to resist is that we use the label to determine the allocation of procedural rights, and once we do that, we need to label this criminal. We could just as well think that there are civil remedies that so profoundly impact rights that certain procedural protections are required. That is, when Ashworth and Zedner complain about undercriminalization because of a civil regime’s ability to evade criminal procedural protections, I worry that we will soon let the procedural tail wag the substantive dog.33 What follows from the determination that this regime isn’t
criminal is that “criminal” is reserved for punishment, which requires desert and inflicts stigma and hard treatment. Nothing about procedural requirements follows.

Hodgson does press a more damning objection, though. He points out that I require culpable intention. It is one thing to allow civil remedies to hang on non-criminal acts or mental states, but quite another to say, “The state may intervene because you have evil intentions, but when the state locks you up for your evil intentions, it isn’t saying anything stigmatizing about them.”

Yet, is there anything really wrong with this? We have civil fraud trials. They are based on culpable intent. So are intentional torts. I take it there is nothing problematic about thinking that when a cop shoots a robber, he isn’t saying, “I hereby stigmatize you,” though culpability does give him a reason to prefer the robber to the victim. Even when we move the proverbial cookie jar, we do so out of suspicion or lack of trust, even though we don’t move the jar to convey this fact. Ultimately, then, I don’t think we should deny the conceptual possibility that the state could premise its action on culpability but act without intending to convey stigma. And, again, nothing about this delineation determines the procedural guarantees of the system.

I am not blind to the force of this objection. There is a sense in which if it looks like a duck and quacks like a duck, it is a duck, and no amount of foot stomping on my part is going to convince you otherwise. My suspicion is, though, that the very fact that my proposal looks so much like a duck (that is, like criminal law) is because something has gone awry with our use of the criminal law.

I would rather confront the chilling, scary world we live in head on than hide it beneath the blanket of criminal law. I do maintain that as a matter of ideal theory, this preventive regime ought to be civil. Only a liability-based preventive regime has the state directly respond to risk and not desert, as I replied earlier to Husak. But let’s be clear. We don’t live in a perfect world. We live in a world where prevention is masked as punishment, and “tough on crime” rhetoric leads to the incarceration of defendants far beyond their criminal desert. This is a criminal law that has been labeled “pathological.” It is a criminal law that Husak himself has misdiagnosed it. Ultimately, I am centrally guided by core commitments that I have to the criminal law. Commitments that Yaffe and Husak share, but Hodgson rejects. I am a proud card carrying retributivist and I think that desert is necessary for punishment. I simply refuse to distort and defile the criminal law by recasting prevention as crime. I am not sharing the criminal law with purely preventive aspirations. Not when there exists an entirely different premise for state action in the form of liability to preventive force.

NOTES

3. Okay, here is a little defense. First, let’s be fair to my prior writings. My view isn’t entirely minimalist. After all, I would punish attempts the same as completed offenses (when I would punish attempts). Second, I think we ought to take into account all the risks the defendant foresees when he does unleash a risk, so the person in Yaffe’s footnote who shoots to disable and plans to shoot again to kill is risking quite a bit with that first shot. For a more complete defense of the view, see Alexander and Ferzan, “Danger.”
8. Husak advances the worry that child molesters may be non-responsible and thus should not be grouped with terrorists. As I argue in “Beyond Crime and Commitment,” if the person is non-responsible, the appropriate remedy is civil commitment but not punishment. However, I do not think we should assume that all child molesters are non-responsible.
12. For further defense, see Ferzan, “Forfeiture and Self-Defense,” (manuscript on file with author).
13. See Alexander and Ferzan, “Danger.”
19. See Duff, “Pre-Trial Detention and the Presumption of Innocence.”
21. There are some difficult questions here for self-defense theorists as to whether one aggregates harms in determining proportionality. I can’t address those questions here, but here is one observation: because of the state’s assigned role in protecting its citizens, it currently has different proportionality rules than individual citizens even in the exercise of what might otherwise be ordinary self-defense. Individual citizens sometimes must retreat; the police need not. We can’t have the police running away from bad guys, but this is clearly grounded in principles underlying self-defense, and the state’s role in protecting its citizens. This is not a question of punishment.
23. Ferzan, “Inchoate Crimes.”
24. Ibid.
25. Ibid.
29. For further exploration of how harboring intentions can affect desert, see Kimberly Kessler Ferzan, “Plotting Premeditation’s Demise,” Law and Contemporary Problems 75 (2012): 83–108.
30. Husak seems to imply this as well, but for a different reason. He notes that “the model on which Ferzan builds—self-defense—is an established part of the criminal law.” But simply because criminal law recognizes the moral justifications for self-defense does not mean that I am building on the criminal law. I am building on the underlying moral principles, and whereas the criminal law focuses on desert, self-defense does not. No one thinks that when I shoot the burglar in my home that I am punishing him.