KIMBERLY KESSLER FERZAN fell in love with criminal law theory during her second semester of law school. That spring, she took both Criminal Law and an elective titled “Legal Personhood.” The latter was a course about what the law presupposes about people, raising questions including the free will–determinism debate (through the lenses of behaviorism, Freud, and neuroscience); personal identity over time; and the content and the role of intentions. The intersection of these classes ignited a spark for Ferzan. From her perspective, one cannot look at the criminal law without seeing the deeper philosophical presuppositions at its core. During her legal career, Ferzan has emerged as a leading figure for exploring these themes with her prolific work on culpability, attempts, self-defense, and many other foundational topics of criminal law. By weaving careful and contextual analysis with deep philosophical insight, she has, time and again, identified areas of criminal law that seem settled but actually require new layers of analysis. Her compelling theories have reoriented the way scholars and lawmakers think about crime, blame, and punishment.

Ferzan has never strayed from the pursuit of these topics. She began to unpack the relationship between law and underlying moral presuppositions with her student note, “The Role of Luck in the Criminal Law,” 142 U. Pa. L. Rev. 2183 (1994). In the article, Ferzan argues that attempts should be punished the same as completed crimes. Indeed, she insists that the only difference between those who try and those who succeed is luck, and the criminal law ought not to distinguish between such actors in terms of blameworthiness or punishability.

Writing that paper was fortuitous. Larry Alexander, a law profes-
sor at the University of San Diego, read it and called one of Ferzan’s professors, Heidi Hurd, to ask whether Ferzan might be interested in teaching. Prompted by that call, Hurd served as matchmaker by suggesting that the two co-author a paper Alexander had just begun on the question of whether it is appropriate to punish for attempts at early points when the defendant can still change his mind. The Model Penal Code, for example, only requires that the defendant take a “substantial step.” The defendant need not be near completing the crime to be guilty of an attempt. In “Mens Rea and Inchoate Crimes,” 87 J. Crim. L. & Criminology 1138 (1997), Alexander and Ferzan argue that punishment is not appropriate until defendants have unleashed a risk of harm that they can no longer completely control.

After graduating from law school, Ferzan clerked for two years in the Eastern District of Pennsylvania and was then accepted into the Department of Justice’s Honors Program, where she was placed in the Public Integrity Section of the Criminal Division. “Being a prosecutor was a wonderful experience,” Ferzan said. “I learned a tremendous amount about how to think systematically through the intersection of facts and law. When you are trying to figure out if someone has committed a crime, you hone in on the specific proofs that are necessary. It was also an incredible experience to be able to make judgment calls about what the just results should be: Should you charge? For what crime? What sentence should you pursue?”

Ferzan thrived as a prosecutor, but she was driven to become a scholar and write about the criminal law. She started her teaching career at Rutgers University, School of Law, Camden, and based on the quality of her scholarship in legal theory, she was later appointed as affiliated faculty to Rutgers’ world-class philosophy department. In 2014, Ferzan joined the law faculty at the University of Virginia.

Throughout her scholarly career, Ferzan has pursued a variety of topics, including a quest to understand the role and meaning of mental states in criminal law. Her article, “Beyond Intention,” 29 Cardozo L. Rev. 1147 (2008), directly examines the union of criminal law and philosophy of mind. What does it mean to say some result or circumstance falls within the scope of an intention? The standard answer is that a result or circumstance must be motivationally significant—it must explain why the actor performed the action. If a defendant shoots a victim in order to cause that victim’s death, then the death is intended. If a defendant steals a laptop because it belongs to the government, then stealing the government’s property is intended. But the conventional wisdom also states that a known circumstance or result that is not motivationally significant may not fall within the scope of an intention. For example, according to the laws of war, the killing of civilians (so-called collateral damage) may be justified by a good result when the civilian deaths are not intended.

In “Beyond Intention” Ferzan grapples with the problem of “closeness” in which individuals intend to perform one act and a side effect appears to be so inextricably intertwined so as to count as intended. “To see both sides of the puzzle,” Ferzan said, “imagine a defendant who intends to shoot Tom, an African-American man, who slept with the defendant’s wife. Let’s stipulate that the description ‘man who slept with my wife’ is what is motivationally significant to the defendant. Is this a hate crime? The answer appears to be no, as the victim’s race is not motivationally significant. This would place the victim’s race outside the scope of the intention. On the other hand, few would argue that the defendant did not intentionally kill a human being. But Tom’s status as a human being is not the motivationally significant description either. Does this mean that Tom did not intend to kill a human being?”

Ferzan draws on the philosophy of mind, and in particular an analysis of mental content, to argue that if the actor empirically and conceptually understands one act to entail the other, then the latter is also intended. The idea is that both concepts mean the same thing to the actor—they are different “senses” of the same intentional object. Ferzan maintains that by intending to kill “this person,” the defendant intends to kill “Tom,” “an African-American,” “the man who slept with his wife,” and “a human being.” The defendant intends to kill someone with all the descriptions he attributes to the victim. One implication of Ferzan’s analysis is that because intentions extend beyond what is motivationally significant, intentions cannot be used to delineate the relevance of motive, as in the case of hate crimes.

This analysis also has important implications for legal and moral prohibitions on the intentional killing of non-combatants in war, a topic that Ferzan recently addressed in “Intentional Content and Non-Combatant Immunity: When Has One Intentionally Killed a Non-Combatant?” (forthcoming Methode). In this article, she criticizes the recent works by philosopher Jeff McMahan and criminal law professor Adil Haque. Both theorists address the same question: If you
believe there is a risk that a person you are killing is a civilian, then are you intentionally killing a civilian? McMahan answers the question in the negative, whereas Haque argues that some instances should count as intentional. But Ferzan criticizes both theorists for offering too stipulative an account of intentions. Neither theorist undertakes an analysis of intentions to reach his conclusion. Ferzan shows that a proper understanding of the content of intentions reveals that these actions should not count as intentionally killing civilians. She adds, however, that other moral principles may dictate that it remains impermissible to kill under some conditions of uncertainty.

Ferzan’s work has extended beyond intentions to other mental states within the criminal law. For instance, what should we make of cases in which individuals understand they are imposing a “dangerous risk” but do not consciously unpack the meaning of “dangerous” into exact percentages of risks to persons and property? In “Opaque Recklessness,” 91 J. Crim. L. & Criminology 597 (2001) she argues that though the actor may only consciously think “dangerous,” he is still culpable for what “dangerous” means to him. Ferzan further dissects the culpability of intentional actors in “Plotting Premeditation’s Demise,” 75 L. & Contemp. Probs. 83 (2012). There, she theorizes that the law seeks to do too many things with just one concept and asserts that culpability requires looking at, among other things, the agent’s motives, the quantity of deliberation, the opportunity for deliberation, the quality of deliberation, and the other choices made before and after the act. Ferzan claims that premeditation alone is not up to the task; indeed, no single concept could cover the diverse array of factors relevant to an individual’s culpability.

As her premeditation piece reveals, Ferzan not only strives to understand underlying questions of content; she also pursues insights related to why and how our choices make us more or less blameworthy. In one criminal law case, a defendant, unaware of whether his shotgun had a live or dummy round in it, suggested playing Russian roulette with his friend, and immediately thereafter fired the gun at his friend, thereby killing him. A dissenting judge argued that the defendant was not depravedly indifferent to human life because the defendant was extremely distraught when he realized he had killed his friend.1 Ferzan disagrees, arguing that the appropriate question is not whether the defendant is upset but whether the defendant made a choice that shows he does not care as much about others as he should. Ferzan focuses on these connections between mechanics of choice and blameworthiness in a trio of articles: “Don’t Abandon the Model Penal Code Yet! Thinking Through Simons’ Rethinking,” 6 Buff. Crim. L. Rev. 185 (2002), “Holistic Culpability,” 28 Cardozo L. Rev. 2523 (2007), and “Act, Agency, and Indifference: The Foundations of Criminal Responsibility,” 10 New Crim. L. Rev. 441 (2007) (reviewing Victor Tadros’ Criminal Responsibility).

Ferzan ultimately offered a comprehensive assessment of the relationship between choice and blameworthiness when, fifteen years after Alexander’s call to Hurd, Alexander and Ferzan completed Crime and Culpability: A Theory of Criminal Law (Cambridge University Press, 2009). In their influential book, Alexander and Ferzan begin by discussing their moderate retributivist position. That is, Alexander and Ferzan believe that desert is necessary for punishment and desert is also an affirmative reason to punish. They then defend a view that culpability can be understood as an improper balance between the risks the agent understands she is imposing and her justifying reasons for imposing the risk. In other words, you may speed to get a sick child to the hospital, but not to show off for your friends. Alexander and Ferzan also defend the view that negligence is not culpable, as there is no principled way to define the reasonable person and because any “failures” that cause an agent not to notice a risk, or to misjudge a risk, are generally not culpable. A clumsy person can fall below the “reasonable person standard,” but an argument is needed for why clumsiness is blameworthy. Alexander and Ferzan return to their views that results do not matter and that individuals must unleash an ex-ante risk of harm. The book also advances thinking on what a “unit” of culpable action is, how one would draft a proposed code, and how to understand justifications and excuses.

Self-defense is among Ferzan’s favorite topics. One of her first pieces on self-defense was “Defending Imminence: From Battered Women to Iraq,” 46 Ariz. L. Rev. 213 (2004). “The Bush Doctrine that was used to justify the Iraq war stands in stark contrast to the criminal law’s understanding of imminence, and I wanted to push the contradictions,” Ferzan said. In the article, Ferzan claims that the Bush Doctrine’s assertion of an ever-present threat as “always imminent” did not amend imminence; it eliminated it. In contrast, battered women who killed their abusers in non-confrontational set-

---

tions—such as when the abuser was sleeping—were routinely prosecuted because their husbands’ threats were not deemed “imminent.” In the paper, Ferzan defends an imminence requirement to the extent that it serves as the act requirement for a threat—Ferzan argues that an aggressor must do something. But she also insists that most discussions of battered women stack the deck. “Theorists stipulate that the woman cannot leave. But if she cannot escape him, then the question should be whether that liberty restriction is sufficient, not whether he will ever kill her,” Ferzan said. Many cases, Ferzan concedes, are more complicated than the stylized cases employed by criminal law theorists. Women may lack the educational and financial means to leave, or they may have children, factors that complicate leaving but do not render it impossible.

Ferzan has also contributed to the theoretical underpinnings of self-defense doctrine. May you kill a culpable aggressor who will otherwise kill you? The answer seems to be obviously yes. But what if the aggressor is innocent, such as a child with a real gun that she believes to be a toy? Should we distinguish these cases? And what if you are mistaken and the culpable aggressor will not actually succeed? Ferzan claims that there is a distinction between culpable aggressors who forfeit rights and innocent aggressors who do not. She argues, for example, that these distinctions become apparent when we consider that it seems the innocent aggressor ought to be able to fight back, third parties may be entitled to aid the innocent aggressor, and the number of innocent aggressors matters. If we are entitled to harm an innocent aggressor, argues Ferzan, then it is because we are entitled to give our lives slightly more weight. This agent-relative preference, however, will have limits. Ferzan again developed her ideas in a collection of articles: “Justifying Self-Defense,” 24 L. & Phil. 711 (2005); “Self-Defense, Permissions, and the Means Principle: A Reply to Quong,” 8 Ohio St. J. Crim. L. 503 (2011); and “Culpable Aggression: The Basis for Moral Liability to Defensive Killing,” 9 Ohio St. J. Crim. L. 669 (2012) (symposium).

Ferzan also seeks to extend our understanding of self-defense beyond paradigmatic cases. She has argued that individuals who are culpably responsible for appearing to be threats also forfeit rights, thus rejecting the claim that individuals may only use defensive force when it is actually necessary to save themselves. She has distinguished aggressors from provocateurs—individuals who pick fights. According to Ferzan, aggressors forfeit rights such that defenders who harm aggressors do not wrong them. In contrast, although provocateurs pick fights, they do not, without more, forfeit their underlying rights against being harmed (though Ferzan also argues that, because they have “started it,” they are not entitled to defend themselves). In other words, if a culpable aggressor attacks you, you are entitled to harm him. If someone picks a fight, you are not entitled to harm him, although he has lost his right to defend against the harming. Ferzan worked through this under-examined type of actor in “Provocateurs,” 7 Crim. L. & Phil. 597 (2013).

“Although it seems theoretical,” Ferzan said, “The inability to distinguish provocateurs and initial aggressors can make a mess of jury instructions, including those given in the Trayvon Martin case.” Many jurisdictions have self-defense rules whereby an individual cannot fight back if he intentionally provokes the fight; however, in interpreting their statutes, jurisdictions conflate initial aggressors and provocateurs and incorrectly employ only initial aggressor formulations. Initial aggressors are those who attack with deadly force, but the sorts of behaviors that might be intended to start a deadly affray may be quite broader: stalking someone, pouring beer on someone’s head, perhaps even name-calling in extreme cases. The problem, then, is that jurisdictions eliminate a category of people who may not fight back—not because they aggressed—but because they picked the fight. “One question with George Zimmerman,” Ferzan said, “is whether his behavior provoked the fight. But because the Florida Supreme Court interpreted their provocation rules to require initial aggression, this question never got to the jury.”

Ferzan’s scholarship has recently broadened in a new direction, thanks to an opportunity to speak at an American Philosophical Association panel about what retributivists think about preventive detention. To address this question, Ferzan sought to map out the ways in which self-defense theory might assist in thinking through the problem. Specifically, if culpable aggressors forfeit rights, and thus may be preemptively stopped, might some instances of preventive interference likewise be justified by this same theory? Convinced that this was a normative and conceptual space worth exploring, Ferzan wrote “Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible,” 96 Minn. L. Rev. 141 (2011). This paper won the APA’s Berger Prize for the best paper.
in the philosophy of law written during the prior two years. Ferzan has continued to defend and extend the thesis in “Inchoate Crimes at the Prevention/Punishment Divide,” 48 San Diego L. Rev. 1273 (2011); “Moving Beyond Crime and Commitment,” 13 APA Newsletter in Phil. & L. 1 (2014); “Thinking through the ‘Third Way’: The Normative and Conceptual Space Beyond Crime and Commitment,” 13 APA Newsletter in Phil. & L. 16 (2014); and “Preventive Justice and the Presumption of Innocence,” 8 Crim. L. & Phil. 505 (2014). This topic of preventive detention brings her work full circle. Having argued that the criminal law ought not to punish incomplete attempts, her theories had left a gap where the state cannot do anything to stop dangerous actors. Now, this new work on preventive detention fills that void, though Ferzan intriguingly reaches the solution through her self-defense work and not by seeking to “fix” the puzzle her prior work on incomplete attempts created.

Going forward, Ferzan plans to continue her contributions to emerging and important questions of criminal law. Alexander and Ferzan are teaming up to write another book, building on their work in *Crime and Culpability*. Ferzan is also unifying her work on self-defense and preventive detention for a separate monograph. And Ferzan has recently started a new project on consent within the context of sexual assault. As an adviser to the American Law Institute’s Model Penal Code Sexual Assault project, Ferzan has taken a particular interest in how the law ought to understand consent. Ferzan hopes to reconcile the affirmative consent standard—requiring affirmative permission to initiate sexual contact by words or conduct—with the role of context and relationships. As affirmative consent assumes greater importance, not only in the criminal law but also in campus sexual assault provisions, codes and regulations will need to articulate how to take into account implicit factors that might matter. Although no law ought to endorse a marital rape exemption, all laws must distinguish between subway gropings and small, unsolicited displays of affection between intimates. Grasping the distinction is intuitive, but articulating it is much more vexing. Few topics, however, are likely to benefit more from Ferzan’s astute observations on intent, culpability, and context in the criminal law.

**EXEMPLARY**

**PLOTTING PREMEDITATION’S DEMISE**

*75 Law and Contemp. Probs. 83 (2012)*

Few legal concepts are as accessible to the layman as is premeditation. Popular culture is filled with images of premeditating actors, be they Professor Moriarty, Voldemort, or even the opaquely denominated Dr. Evil. What is striking about popular culture depictions is that these characters are typically one-dimensional: they do nothing but plan the demise of the hero. No doubt exists as to the antagonist’s culpability because all the actor does is plot the protagonist’s death.

Unfortunately, art sometimes does imitate life all too accurately. The events of September 11th reveal that there are human beings who truly spend significant effort deliberating over killing other people and planning those killings. Osama bin Laden, Adolf Hitler, and Saddam Hussein represent real-world embodiments of one-dimensional evildoers.

But the run-of-the-mill killing is not committed by Hitler or Voldemort. It is committed in strikingly different contexts—romantic rifts, bar fights, gang wars. One might think that, with such striking examples of premeditating actors, it would be easy to apply the common man’s view of premeditation. In fact, however, theorists are exceedingly skeptical as to whether premeditation actually exists in any discernible way and, even if it can be conceptually captured, whether premeditation is an appropriate means for distinguishing between first- and second-degree murder. Indeed, Dan Kahan and Martha Nussbaum proclaim, “Premeditation’ is in fact one of the great fictions of the law.”

Fiction or not, premeditation is a real problem. Despite the Model Penal Code’s rejection of premeditation, twenty-nine states, the District of Columbia, and the federal government all employ a premeditation or deliberation formula as a part of their murder statutes. In some of these jurisdictions, premeditation is the difference between life and death. In others, premeditation may make a significant difference in prison term.
In efforts to adjudicate the guilty mind, premeditation presents obstacles at numerous levels. First, as a normative matter, there is reason to doubt that premeditation truly distinguishes the most culpable killings. As Sir James Fitzjames Stephen imagined, a man “passing along the road [] sees a boy sitting on a bridge over a deep river and, out of mere wanton barbarity, pushes him into it and so drowns him.” Stephen noted that in this case there is no premeditation but that it represents “even more diabolical cruelty and ferocity” than premeditated killings. At the other end of the spectrum is State v. Forrest in which the defendant killed his suffering, terminally ill father; a first-degree murder conviction was upheld by the North Carolina Supreme Court. Premeditation thus appears to be both over- and under-inclusive in capturing the most culpable actors.

Second, at the conceptual level, articulating a clear distinction between premeditation and an intention to kill is difficult. In the average case, to form the intention to kill requires desiring something, believing that one will achieve what one desires by killing, and then forming the intention to kill. Is the deliberation inherent in choosing distinguishable from premeditation? Moreover, once the intention is formed, rational agents will often have to further deliberate as to how to kill, so intention execution may also involve deliberation. The problem is that, even if all that an intentional killing requires is the choice or intention itself, it is an extraordinarily rare individual who will not engage in some additional exercise of deliberation in intention formation or intention execution.

Third, even with viable normative and conceptual assumptions, translating this normatively charged concept into hard-edged legal rules will require that statutory drafters either opt for vague and overinclusive moralized standards (leaving “premeditation” to be filled in by juries) or underinclusive analytic styles (such as requiring specific time or ability to reflect). The latter will inevitably fail to capture some of the worst killers. Criminal law’s mental states consistently present this problem. Moreover, any attempt to take a continuum concept and give it hard edges will necessarily involve creating a rule, and rules themselves are by their nature over- and under-inclusive. Hence, any statutory formulation is bound to be imperfect.

Finally, even with the best test, things can go awry. Faced with heinous killings that fall outside the statutory definition, courts and juries might still begin to stretch the concept. That is, if bad facts make bad law, heinous facts make for expansive definitions of the law. In addition, the law may be changed for an entirely different political agenda. For instance, the desire to limit psychiatric testimony in the wake of the Twinkie defense led to restrictions in California’s test that cannot easily be reconciled with any coherent understanding of premeditation. Specifically, section 189 of the California Penal Code provides, “To prove the killing was ‘deliberate and premeditated,’ it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his act.”

A good understanding of philosophy of the mind may be able to solve the second problem, and the third and fourth concerns are more general problems for the criminal law. These are hurdles with which, given the topic of the symposium, legal theorists are rightly concerned. Nevertheless, they are surmountable. However, no progress can be made on any other level until premeditation’s normative dilemma is solved, and premeditation is rotten at its core. The problem is that premeditation captures only some aspects of what makes some killers the most culpable; and unfortunately, as formulated, its reach is woefully under- and overinclusive. The critical question is, if premeditation should be put to death, what should replace it? Answering this question requires the dissection of the various aspects of a choice that make choices particularly culpable. Unfortunately, culpability is complex and there is no one answer. Culpability may involve at least six factors: the analysis of risks imposed; the reasons why they were imposed; the defendant’s thoughts about the killing—either identifying with the wrong or displaying utter indifference to it; the quality of the defendant’s reasoning process; the number of choices the defendant made in killing; and the defendant’s responsibility for prior choices that may lead to degradation of his later reasoning. With all of these factors, it is simply no wonder that premeditation cannot capture the most culpable killers. No one test could. Moreover, because different aspects of choice yield different conceptions of why premeditation is culpable, abandoning premeditation will result in greater doctrinal clarity than simply suggesting supplements to it.

...
IV. UNPACKING CULPABLE CHOICE

To figure out what constitutes the most serious killings, it is necessary to unpack the content and quality of a defendant's choice to kill another. Culpability assessments derive the meaning of a defendant's choice—that it reveals insufficient concern—by looking at the content and the mechanics of that choice. For instance, it is not the defendant's cognitive state of knowing that his act will kill another that makes him culpable. Rather, it is our judgment that people who act despite this knowledge truly do not care about others. Hence, it is through looking at the content of the defendant's choices that we are able to ascertain whether he is acting culpably.

Consider the following aspects of choice that a premeditation formula might speak to: should the defendant kill, why will the defendant kill, and how will the defendant kill? The premeditation formula might also speak to the quality of the defendant's deliberation—was it cool blooded or hot tempered? Assessing the act of killing also requires looking at the defendant's choices before, during, and after the act. This section reviews each of these aspects of reason to determine when a decision appears to be particularly culpable.

A. Should?

Before killing another human being, a defendant may ask, “Should I kill?” The most important factor in asking this question is whether the defendant takes seriously that ending a human life is a reason against killing. Albert might be deliberating about whether to kill his father as an act of euthanasia, and he is tortured by the idea of ending his father’s life. Ben might be deliberating about whether to kill his father, but he does not value the fact that he will end another’s life. Carl might choose to kill his father, giving no thought at all to the fact that he is ending a life. Carl does not even stop to ask, “Should I?”

Notice that Carl does not appear to be less culpable than Ben. That is because giving no weight to ending human life may occur either with or without deliberation. It appears that Albert is less culpable. It is questionable, however, that Albert is less culpable because he gives his father’s life weight in his reasoning. After all, the bottom line is that Albert’s reason is ultimately defeated. He chooses to kill, even after acknowledging that there is reason not to do so. Indeed, imagine David, who kills his father because he desperately needs to inherit money from his father’s will. Is David less culpable if he deliberates over the fact that he should not kill his father if, ultimately, David decides to do so anyway?

When a defendant asks the “Should?” question and determines the answer is yes (as evidenced by the killing itself), the defendant determined that something was more valuable to the defendant than the life he ended. This is not insignificant. On the other hand, asking the “Should?” question is neither necessary nor sufficient for culpability. It is not necessary because giving the killing no thought can be extraordinarily culpable as in Carl’s case. It is also not sufficient because some killings may, in fact, be justified, and so, the “Should?” question, without seeing what is on the other side of the scale, does not tell us enough. Thus, it appears that if premeditation is meant to ask whether the defendant asked the question “Should I kill him?”, it is asking a question that is neither necessary nor sufficient for culpability.

B. Why?

Another aspect of reasoning that premeditation may reach is the question of why the actor is killing another person. This aspect is highly relevant to culpability. Individuals deserve punishment when they act culpably, and an actor is culpable when he exhibits insufficient concern for others. Actors demonstrate insufficient concern for others when they (irrevocably) decide to harm or risk harming other people (or their legally protected interests) for insufficient reasons—that is, when they act in a way that they believe will increase others’ risk of harm regardless of any further action on their part, and when their reasons for unleashing this risk fail to justify doing so. If Alex decides to drive one hundred miles per hour on the highway, whether society deems Alex culpable and deserving of blame and punishment will depend upon whether he has chosen to impose this risk to impress his friends with how fast his car can drive or, alternatively, to transport a critically injured friend to the hospital.

The relevance of the defendant’s reasons for acting is immediately apparent. Albert’s decision to kill his father is less culpable than David’s decision to kill his father because Albert’s reason nearly justifies his action whereas David’s killing for money is a poor reason.
(pardon the pun) to kill another person. Carl is culpable not because he acts for a bad reason, but because he acts for seemingly no reason at all. Now, this may be restructured such that one might want to say of Carl that he acted for his amusement or “to see someone die.” But it might simply be that Carl did not reason beyond the act of killing. When asked why he killed, Carl might simply ask, “Why not?” The most that could be said of Carl, then, is that he killed for the sake of killing, and this appears to be a rather evil reason for action. Notice that premeditation is not formulated to ask the “Why?” question and thus cannot distinguish the mercy killer from the cold-blooded killer. Therefore, premeditation cannot capture a critical aspect of culpability.

C. How?

A defendant begins by deliberating over whether to form the intention to kill. This is the “Should?” question. While weighing the reasons against killing, he also weighs the reasons for committing the act. This is the “Why?” question, and the ultimate “why” is determined when the defendant forms the intention to act for a particular reason. If he forms the intention to kill, he might then ask “How?”

After forming an intention, rational agents will typically engage in means–end reasoning about “how” to accomplish their intentions. Of course, this sort of reasoning is not required. An agent might form the intention “to kill him with a gun” during the first deliberation about whether to kill at all. Or the agent might engage in rather irrational thoughts as to how to execute his intention.

Still, the question is whether asking the “How?” question reflects any additional culpability. Now, one facet of the “How?” question is that, if one chooses a particularly gruesome means of killing another, this may reflect on one’s culpability because one is not just killing but is causing substantial pain during the killing. That aspect of “how,” however, is covered fully by looking at the risks the defendant is imposing and his reasons for acting. Rather, what the defendant’s asking of “How?” adds to the mix is that the defendant is taking time trying to figure out how to achieve his end.

The reason why the defendant’s expenditure of time and effort in deliberating about how to execute his intention poses concern is that the more effort he expends, the more he seems to identify with his end. A defendant who not only aims at evil, but takes time and consideration to achieve this evil, appears particularly culpable. He takes this end as central to his agency. This sort of view is most at home with the distinction that Antony Duff draws between attacks and endangerments. Duff claims that when the defendant intends harm, he attacks, thus revealing a practical attitude of hostility. When the harm is just a side effect, the defendant endangers, thus revealing his indifference. On this view, premeditating is particularly hostile to the victim. By the same reasoning, a theorist who believes that purpose is more culpable than knowledge because the defendant’s agency is identified with the wrong should hold that premeditated killings are more culpable. What premeditation seems to add is that, even amongst purposeful killings, some seem to be more culpable than others.

...
ference in identifying with one’s evil aim are both very culpable. That is, Anderson would have been very culpable if he had planned his brutal attack of Victoria Hammond. That he did not identify with his killing, however, but rather was completely indifferent to it, likewise manifests substantial culpability. It is hard to see why one killing would be worse than the other and, indeed, so much worse that only one is worthy of punishment as first-degree murder.

F. Summary

Culpability is complex. Premeditation is capable of covering two of the factors in culpability assessments. First, in those cases in which the defendant identifies with the act of killing, the defendant appears more culpable when he actually deliberates and spends time planning the killing. Understood in this way, premeditation should be quite concerned with the actual amount of time spent deliberating. The more deliberation, the more culpability. Second, premeditation also appears to be able to capture the qualitative assessment of the defendant’s reasoning. The question of whether the defendant was able to calmly deliberate about the killing is relevant, not only when more deliberation is indicative of more identity, but also when any failure to be able to deliberate would undermine the defendant’s ability to think through why he should not act.

Although premeditation can capture some aspects of culpability, it is woefully underinclusive in capturing others. It cannot reach the culpability of indifference in its entirety; it cannot look to whether the defendant’s prior responsibility led to the later impairment in reasoning skills; and it cannot capture the way in which choices made during and after the defendant’s action can also affect his culpability. Moreover, to the extent that premeditation fails to take into account the defendant’s reasons for action, it lacks a critical aspect of nuance—the reason for which a defendant acts is critically important to culpability assessments.

Although one possibility is to retain premeditation to capture some aspects of culpability, concerns remain about exactly what premeditation is doing and why. For instance, one might think that premeditation should remain as evidence of identity-type culpability. This conception would require that courts take seriously a requirement for substantial time and planning, something they have not done. Premeditation might also serve as the default rule, with first-degree being the norm, and rash and impulsive acts being the exceptions that warrant a departure to second-degree murder. This is more in line with what courts are doing. Because these two conceptions compete, one would need to be chosen. And then, it would still be necessary to figure out how to account for the other complex factors that enter culpability judgments. Whatever work premeditation will do, it will not do enough to serve as the sole criterion for first-degree murder liability.

BEYOND CRIME AND COMMITMENT: JUSTIFYING LIBERTY DEPRIVATIONS OF THE DANGEROUS AND RESPONSIBLE

96 Minn. L. Rev. 141 (2011)

INTRODUCTION

There is a range of dangerous persons who walk among us. The sexual predator who intends to molest a child. The terrorist who plans to bomb a public square. The psychopath who will inflict injury without remorse. The determined killer who aims to end the life of another.

We want the State to protect us from these dangerous people. Truth be told, we want the State to lock them up. The scholarly literature argues that the law approaches dangerousness from two distinct and irreducible vantage points. These are disease, where the State may prevent and confine, and desert, where it may punish and incarcerate. If the State denies the agent is a responsible agent, it can detain him. It can treat him as it treats other non-responsible agents, as a threat to be dealt with, without fear of infringing his liberty or autonomy interests. With respect to responsible actors, the State can use the criminal law. It can punish the deserving for the commission of a crime. For a responsible agent, the State should not intervene in any substantial liberty-depriving way prior to his commission of an offense for fear of denying his autonomy. The State must respect that a responsible agent may choose not to commit an offense. It cannot detain an actor for who he is. It must wait to see what he will do.
Thus, to the extent that we have preventive practices that do not fit either model, these mechanisms are typically condemned as unjust.

This choice between crime and commitment leaves a gap. We have no justification for substantial intervention against responsible agents prior to when they have committed a criminal offense. We have no theory of when or why we may engage in substantial liberty deprivations of dangerous and responsible actors. This Article bridges that gap. It offers an account of how, in one class of cases, the actor has made himself liable to preventive interference and thus cannot object that the liberty deprivation violates his rights.

How should we understand the relationship between prevention and punishment? At first blush, prevention and punishment seem to be conceptually distinct. Prevention looks forward. Punishment looks backwards. Prevention looks at what a person will do. Punishment looks at what a person has done. Prevention does not care about responsibility. Punishment requires the actor to be responsible.

Scholars warn against allowing punishment practices to focus on dangerousness, and conversely, of allowing commitment models to capture responsible actors. For instance, Paul H. Robinson argues that the current criminal law “cloaks” preventive practices as punishment. As Robinson rightly notes, three strikes laws and other habitual offender penalties increase the amount of punishment not based on what the agent deserves, but based upon how dangerous he is. This contorts the criminal law.

Simultaneously, the Supreme Court’s jurisprudence on the involuntary detention of sexual predators has drawn scholarly criticism. The test employed by the Court, which allows confinement of those with a mental disorder and an inability to control their conduct, fails to differentiate “the bad,” who deserve punishment, from “the mad,” who ought to be confined.... The message scholars are sending is clear: prevention and punishment are two distinct practices, but in both instances, the State is failing to maintain the clear boundaries between the two.

Although punishment and prevention are thus presented as non-overlapping practices, there is significant overlap that ought to be acknowledged. First, criminalization of conduct reduces that conduct. Second, theorists who subscribe to a mixed view as to the justification for punishment find desert to be a necessary but insufficient criterion for punishment. That is, mixed theorists believe we should punish if the offender deserves it and the punishment will prevent crimes, through deterrence or incapacitation. Moreover, in the real world, a world of limited resources where we cannot give everyone the punishment they deserve, one particularly good way to choose which criminals to focus upon is by looking to what other benefits accrue by punishing them.

A third way that desert can intersect with preventive goals is by way of the mode of punishment. When we are selecting how we punish—the mode of punishment—we may also decide that incarceration is a particularly important mode of punishment for the dangerous. (To put the point another way, we could simply cut off a criminal’s left hand as punishment, but that would mean that a mere few weeks after his sentencing, he would be standing behind you in the Starbucks line ordering a nonfat mocha Frappuccino). Hence, we could reserve imprisonment for dangerous offenders, thus getting the benefit of incapacitation, and use other punishment mechanisms for offenders who are not dangerous and do not need to be detained.

Notably, the amount of punishment would then be determined by desert, but the method of punishment would be dictated by other factors.

Finally, as a theoretical matter, prevention and punishment appear to play on the same normative and epistemic turf. Epistemically, both practices fear false positives, as both result in significant injustices—the punishment of the innocent or the detention of someone who would not harm others. Normatively, both practices ask when a State may interfere with an individual’s liberty. And both practices also may be constrained by other values. A retributivist might believe that the death penalty is what certain offenders deserve, but because it is applied in a racist manner, it should not be used. Prevention principles are likewise constrained by equality concerns. When prevention requires a focus on certain groups, this focused prevention threatens to undermine equality, stigmatize groups, and mask authoritarian state regimes.

Thus, the view that punishment and prevention are wholly independent sorts of inquiries grossly oversimplifies their relationship. However, the problem is not just that the literature has lacked the requisite degree of nuance. The problem is that this way of looking at the practices has blinded us to a familiar predictive practice that is grounded in responsible agency. We can have a model that
looks not only at what the agent has done but also at what he will do. Sometimes what actors do justifies acting on predictions of what they might do in the future. This is the framework of self-defense. What the aggressor has done grounds the defender’s right to act on the prediction of what he will do.

The false assumption that we must choose between prediction and responsibility has blinded theorists to how and why preventive interference is sometimes justified short of state punishment. This Article fills that chasm. The self-defense model demonstrates that there are grounds for substantially depriving responsible agents of their liberty to prevent their future crimes.

Part I argues that rather than having two concepts—desert and disease—we have three: desert, disease, and liability to preventive force. This Part first reviews the current state of the desert/disease analysis and then introduces the third perspective—liability to defense. The self-defense literature has recently spawned the concept of liability to defensive force. Liability explains why the defender does not wrong the aggressor—because the aggressor by his own culpable attack has forfeited his rights against the defender’s use of force against him.

Part II makes the case for a predictive practice grounded in responsible agency, and argues that the normative principles that underlie self-defense are directly applicable to preventive interference generally. Self-defense and liability to preventive interference have the same normative structure. Both are preventive principles grounded in responsible action. Part II begins by making conceptual space for this interference against criminal endeavors—a space currently occupied by preparatory offenses and attempts. Part II next sketches out the requirements for preventive interference, including both a culpable mind and an overt act, as well as how the State may intervene, using the United Kingdom’s civil preventive mechanism employed to prevent terrorist acts—the control order—as a possible model. Part II then addresses potential distinctions between the two practices, including that self-defensive actions are only authorized when a harm is imminent and that the nature of a self-defensive response is short lived. Part II argues that neither of these restrictions on individual self-defense has any normative traction when applied to State action. The Part concludes with an example of how this regime would work to prevent a criminal act by a sexual predator.

Part III addresses potential objections to the preventive interference approach. These objections include whether this model is sufficiently autonomy-respecting, whether it is properly a civil, as opposed to criminal, mechanism, whether it is affordable, and, finally, whether it will conceptually and normatively collapse into a pure preventive regime. Part III argues that this model does respect the actor’s autonomy and can provide the actor with sufficient constitutional protections, even outside the criminal law. It further argues that any government must make trade-offs in determining how to allocate resources, but this regime is unlikely to be more expensive than the resort to the criminal law. Finally, Part III claims that the principles that underlie this regime do not inevitably endorse a pure preventive-detention system, and that the regime can be practically implemented in a way that takes responsibility seriously.
BIBLIOGRAPHY

BOOKS


ARTICLES, BOOK CHAPTERS, AND REVIEW ESSAYS

“Intentional Content and Non-Combatant Immunity: When Has One Intentionally Killed a Non-Combatant?” Methode: Analytic Perspectives (forthcoming).

“Representational Content’s Relevance to War: A Reply to Husak,” Methode: Analytic Perspectives (forthcoming).


“Provocateurs,” 7 Crim. L. & Phil. 597 (2013).

“Rethinking The Ends of Harm,” 32 Law & Phil. 177 (2013).


“Ferzander’s Surrebuttal” (with Larry Alexander), 6 Crim. L. & Phil. 463 (2012).


“Intention,” in Dennis Patterson, ed., A Companion to Philosophy of Law and Legal Theory 632 (Blackwell, 2d ed. 2010).


“Response to Critics” (with Larry Alexander), 29 Law & Phil. 483 (2010).


“Results Don’t Matter” (with Larry Alexander), in Paul. H. Robinson et al. eds., Criminal Law Conversations 147 (Oxford University Press, 2009).


BOOK REVIEWS AND PODCASTS


“When to Punish,” Jotwell, Nov. 8, 2013 (commentary on Patrick Tomlin, “Time and Retribution,” 33 Law & Phil. 655 (2014)).


“Shining the Light on Negligence,” Jotwell, Oct. 8, 2010 (reviewing George Sher, Who Knew? Responsibility without Awareness (2009)).