

Deterrence and Self-Defence

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ABSTRACT

Measures aimed at general deterrence are often thought to be problematic on the basis that they violate the Kantian prohibition against sacrificing the interests of some as a means of securing a greater good. But even if this looks like a weak objection because deterrence can be justified as a form of societal self-defence, such measures may be regarded as problematic for another reason: Harming in self-defence is only justified when it's necessary, i.e., when there are no relatively harmless alternatives. While there are few harmless ways to remove the threat posed by dangerous individuals, there are many relatively harmless methods for preventing crime. We can bracket off our preventative failings when we think of present threats, but we cannot do so when contemplating alternative preventative measures.

1. INTRODUCTION

While many theorists remain sceptical about the viability of retributive, backward-looking justifications for punishment, some of our penal practices seem justifiable by appeal to forward-looking goals. Plausibly, the containment of dangerous individuals is justifiable by appeal to self-defence or defence of others, even if such treatment is not deserved. This seems analogous to the (widely endorsed) practice of quarantining individuals with infectious diseases.

Considerations of collective self-defence have seemed to many theorists to provide a strong moral justification for the detention of criminals purely in order to prevent them from harming others.

But we may wonder whether considerations of collective self-defence might also justify imposing penalties for purposes that go beyond containing individuals who pose an ongoing danger. We may also wish to *deter* crime. In the case of special deterrence, penalties may prevent a criminal who has offended from offending again. In the case of general deterrence, penalties may deter others from offending. These may similarly reduce our collective vulnerability to crime, so we might wonder whether penalties aimed at deterrence might also be justified as a sort of collective self-defence.

While the self-defence argument is widely thought to justify detention for the sake of containment, many remain sceptical about whether an analogous argument

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could justify punishment for the sake of deterrence, where general deterrence is often thought to be especially problematic. In the latter case, harms are inflicted purely to secure the public good of decreased crime rates. This is often thought to violate the Kantian prohibition against using someone merely as a means.

This stance is curious. Firstly, while detention for the sake of containment certainly makes others less vulnerable to crime, the same can plausibly be said about deterrent punishment. We may all be more vulnerable to crime if we are unable to deter criminals through credible threats. Secondly, while punishing for the sake of deterrence involves sacrificing some agents' interests as a means of protecting others, the same can plausibly be said about detention for the sake of containment. In this case too, costs are imposed on an individual in order to make others safer. If considerations of self-defence can outweigh the Kantian prohibition against using as a means for this measure, surely it ought to do so for both.

In what follows, I will explore a moral problem that arises even if we think that general deterrence can, in principle, be justified as a form of collective self-defence. The problem is not that our penalties violate the Kantian prohibition against using merely as a means; this prohibition may well be outweighed by considerations of self-defence. Rather, the problem is that the goal of self-defence provides a reasonable justification for causing harm *only* when we are unable to secure our safety without causing harm; any self-defence justification is weakened insofar as there are less harmful means of defending ourselves that we repeatedly fail to utilise.

This highlights a serious disanalogy between archetypal cases of self-defence, such as that of an individual using force to protect herself against an attacker, and the sort of collective self-defence that might be invoked in the context of public policymaking. Policymakers are unlike individuals responding to an attack, since they have a wide variety of alternative potential levers available. In present societies, this makes self-defence justifications of penalties aimed at general deterrence especially troubling.

While our failure to utilise relatively harmless methods of reducing the risk of crime weakens the self-defence argument *both* in the case of detention for containment and in the case of penalties aimed at general deterrence, there is a reason why deterrent punishment seems more vulnerable to this worry. When we think about deterrent punishment, we shift our focus from the question of what we can do once someone *has* become dangerous to the question of what we can do to prevent dangerous criminality arising in the first place. While deterrent measures involve inflicting harms on individuals in order to generally disincentivise crime, deterrent measures are not the only preventative measures that exist. Public policymakers typically also have relatively *harmless* preventative measures at their disposal.

It may be that our methods of protecting ourselves from those who are already dangerous are fairly limited, and hence that once an individual *has* become dangerous, containment is necessary. In contrast, there are a wide range of ways that we can reduce the chances of individuals turning to crime, so it seems doubtful that measures aimed at general deterrence constitute an unavoidable last resort.

2. RETRIBUTION, UTILITY, AND SELF-DEFENCE

Criminal sanctions are typically defended by appeal to both backward-looking and forward-looking considerations. Retributive justifications rest on the notion of desert and maintain that criminals ought to be punished in proportion to the severity of their wrongdoing. The suffering is an end in itself, even if no further good will be served by it. This is regarded as unconscionable by many free-will sceptics, and even nonsceptics may find it draconian.

However, appeals to forward-looking considerations also attract moral criticism. Penal measures can clearly serve various forward-looking goals, such as deterring individuals from crime, keeping the public safe from individuals known to present an ongoing danger, and reforming prior offenders (albeit with varying degrees of success). These may provide consequentialist grounds for penal measures. However, punishment is typically unpleasant. If the interests of criminals themselves are sacrificed for the public good, and if they themselves derive little benefit from this sacrifice, then the practice may seem to violate the Kantian prohibition against sacrificing the interests of some merely as a means to serving the interests of others (Kant 1997; 1785, 2017; 1785).

Sacrificing the interests of some for marginal gains in utility to others is certainly often regarded as morally problematic. Nonetheless, it's widely accepted that *some* considerations can outweigh this Kantian prohibition. It might be outweighed if the costs imposed are small enough and the benefits to others are significant and widespread enough (think of general taxation for the sake of funding essential public goods). And it may also plausibly be outweighed by the need to defend oneself or others from harm.

Perhaps elements of our criminal justice system can be justified even if they involve sacrificing the interests of some individuals to some degree, and even if these individuals do not *deserve* to incur this sacrifice, insofar as it serves to protect others.

3. CONTAINMENT, DETERRENCE, AND HARM

What harms or costs are we permitted to impose for the sake of public safety? At the most cautious end of the spectrum, we have philosophers who suppose that the only harm we are justified in imposing on criminals is detention for the sake of containment, and that we can only justify this if they are known to present an ongoing threat.

Nobody supposes that carriers of infectious diseases *deserve* to have their freedom curtailed when we forcibly quarantine them, but it may be justifiable when public safety is under threat. Analogously, it seems acceptable to detain dangerous offenders for public safety, especially if their lives are not made more miserable than they need to be, and if we attempt to reform them, making them safe for release, much as we try to cure quarantined patients (Shoeman 1979; Pereboom 2001, 2013, 2014, 2017; Pereboom and Caruso 2017; Caruso 2016, 2017). If we model our justifications for prison on quarantine, then we may have good reason to detain dangerous criminals purely to reform them and to prevent them from harming others. But there is a question about whether such a move can provide any parallel justifications for penalties aimed at general deterrence.

Pereboom and Caruso (2017) argue that considerations of collective self-defence may justify detaining criminals to protect others from any ongoing risk they pose. But they express moral doubts about punishment for the sake of general deterrence. The latter is thought to involve sacrificing the interests of some individuals for the sake of a public good, and hence to violate the Kantian prohibition against using as a means. However, Pereboom has since defended the view that some form of general deterrence may be justifiable (Pereboom 2020), and there is, I think, something curious about differentiating between detaining and deterring criminals on these grounds.

Since containment is *also* acknowledged to involve some sacrifice to the interests of the criminal, and since deterring others from crime is *also* acknowledged to serve the goal of reducing risk to the public, why not conclude that the considerations that count in favour of the former equally count in favour of the latter?

While some argue that harms inflicted against an aggressor (even an innocent one) in self-defence do not really constitute using as a means at all (Quinn 1993; Tadros 2017), it also seems that the goal of self-defence may be powerful enough to outweigh the Kantian prohibition against using as a means (Pereboom 2001, 2014). Insofar as deterrent penalties serve this goal, perhaps this consideration outweighs Kantian worries about using as a means.

Alternatively, Pereboom (2020) argues that if the penalties are mild enough not to damage one's ability to flourish and to develop as an autonomous rational being, then the sacrifice to one's interests may not constitute being used merely as a means at all.

However, even if penalties aimed at deterrence *do* involve sacrificing the interests of some as a means to securing public safety,¹ it seems far from clear that this consideration cannot be outweighed by other moral considerations. We readily accept that considerations of public protection ought to outweigh this factor in the case of quarantining and detaining those who present an ongoing threat to public safety, after all. So why shouldn't these considerations also justify deterrent measures? If one is attacked by an aggressor and both they and other would-be attackers see that there are no repercussions, this would plausibly leave one more vulnerable to further attack.

If safeguarding the credibility of our threats is also required for our safety, then perhaps, as many have suggested, some deterrent penalties can also be justified as a form of collective self-defence (Farrell 1985, 1990; Quinn 1993; Ellis 2003; Kelly 2009; Tadros 2017; Pereboom 2020). To resist this conclusion, and to maintain that general deterrence is harder to justify in light of the Kantian prohibition on using as a means than containing criminals who present an ongoing threat, we would need to establish that there is a morally significant difference between containment and general deterrence, which explains why the Kantian prohibition might be outweighed by considerations of self-defence in one case but not in the other.

I see three potential arguments for supposing that penalties aimed at general deterrence are more problematic, and hence may be less easily outweighed by considerations of collective self-defence, than measures aimed at detaining criminals to stop them harming others.

Firstly, perhaps the suffering of offenders when they are contained is not a *means* of securing public safety, but a foreseeable yet unintended side-effect of it. In contrast, suffering inflicted for the sake of general deterrence certainly appears to be directly intended as a means of producing the deterrent effect. So perhaps we can morally differentiate them by appeal to the Doctrine of Double Effect (DDE). In this case, we may argue that detaining criminals to stop them harming others is less morally problematic than imposing penalties for the sake of general deterrence, as the former harms them merely as a foreseeable but regrettable consequence of policies aimed directly at keeping others safe, while the latter involves directly intending to sacrifice their interests in order to secure public safety. If it is not morally wrong to bring about foreseeable but unintended harm while pursuing a greater good, then there will be no moral cost at all in policies of containment, while there will be a serious moral cost associated with penalties aimed at general deterrence.

Secondly, it might be claimed that deterrent punishment, as a matter of empirical fact (and in contrast to containment) is ineffective as a means of preventing further crime. In this case, the former will be harder to justify on the basis that the moral gains are unequal, and hence the costs may not be effectively outweighed by the gains in both cases.

Thirdly, it seems that if our goal is containment, we needn't make prisons especially miserable places. In contrast, if sentences are to be effective deterrents, they will have to involve misery; deterrents are only effective if they're severe enough to be off-putting. If so, then we may suppose that the harms required to secure public safety, and hence the moral costs of the measures, are much greater in the case of deterrent punishment than in the case of containment. If the moral costs are not equal, then those costs may not be similarly justifiable, even for the sake of similar gains.

Let's consider these points in turn.

3.1 DDE

The DDE forbids harming intentionally as a means of achieving a greater good, but permits one to cause harm as a foreseeable but unintended consequence of one's efforts to bring about a greater good.

Aquinas thought that one could injure in self-defence, so long as the harm was an unintended effect of one's efforts to defend oneself as opposed to the action being intentionally aimed at injuring one's assailant (1988, II-II, Q. 64, Art.7). The harms associated with containment may arguably be regarded as side-effects of protecting the public, whereas punishments inflicted to disincentivise crime seem to be inflicted intentionally in order to secure public safety.

The DDE is controversial, not least because what counts as directly intended vs. merely foreseeable seems troublingly dependent on how we choose to frame our goals (Foot 1967). Moreover, it's not obvious that directly intending harm is impermissible in situations of self-defence. Nor is it obvious that detaining a dangerous offender does not similarly harm them as a direct means of securing public safety. Pereboom notes that even if detaining dangerous individuals *does* involve harming their interests as a means of protecting the public, it is not obvious that this makes it morally impermissible (Pereboom 2001, 2014).

The goal of self-defence is widely regarded as a powerful moral consideration. It seems plausibly permissible to *intentionally* harm an aggressor in self-defence, even if the aggressor is innocent, e.g. a violent psychotic patient or sleepwalker. Some even suppose that it's acceptable to kill an innocent threat who is not an aggressor. Nozick famously asks us to imagine being at the bottom of a deep well when a person falls into the well (through no fault of his own) and his falling body will crush you to death unless you shoot him with your ray gun, disintegrating his body before it hits you. He suggests that the usual prohibition against harming an innocent person as a means may not apply in self-defence scenarios of this sort (1974, 24–25).

Some disagree with Nozick, and deny that killing innocent threats or aggressors is ever permissible, even in self-defence (Otsuka 1994, 2003; Rodin 2004), while others agree that our right to self-defence extends to the right to kill in cases of this sort (Thomson 1991; Kaufman 2010). But even those who are sceptical about whether self-defence justifies *killing* innocent aggressors or threats may concede that it justifies inflicting *lesser* harms than death, particularly if the threat to one's own safety is serious.

But even for the more extreme case of intentionally killing an innocent bystander (neither an aggressor nor a threat) as a means of protecting others, our judgements may be less clear than is often supposed. E.g., while most of us would judge it wrong to push the fat man off the bridge to stop the trolley from killing others on the track, our judgements may differ in situations that evoke a heightened sense of duty to act in a spirit of collective self-defence. For example, people seem intuitively more willing to accept the harm as justified when the thought experiment involves pushing a bystander into a suicide bomber, thereby causing the bystander's death, when this is our only means of stopping the suicide bomber from detonating a bomb on a crowded bus (Railton 2014).²

Even if we suppose that deterrent penalties involve intentionally harming the interests of some individuals for the sake of public safety (whereas detaining criminals who present an ongoing threat does not, since the harm is 'merely' foreseeable) it is far from obvious that this alone makes the former morally impermissible. This depends not only on whether there are moral costs, but on whether the moral considerations for the sake of which we incur those costs are serious enough to outweigh them.

We often suppose that the goal of self-defence provides a powerful enough justification for imposing *even directly intended* harms. In situations of self-defence, we are typically willing to suppose that the usual prohibition against directly intending harm is virtually voided. Contra Aquinas, it seems far from obvious that no harm is directly intended in many archetypal self-defence cases. E.g., if you defend yourself using violence—shooting your assailant in the head, say—it seems odd to suppose that the harm was unintended and 'merely foreseeable'. We could, as Foot notes, frame *any* intention this way, but in cases where the harm is fairly central to our means of achieving our goal, the claim that the harm is not directly intended will seem dubious (Foot 1967).

Even if we accept the basic stipulation of the DDE, that intentionally harming someone as a means is *harder* to justify than causing such harm as an unintended

consequence, it seems that the prohibition on intentional harm may plausibly be outweighed if it serves the goal of protecting others from serious danger.

3.2 Effectiveness and unpleasantness

Is deterrent punishment as effective for protecting others as containment? In fact, the empirical evidence strongly suggests that the level of *certainty* of punishment is significantly correlated with a deterrent effect, while the *severity* of punishment is not (Attunes and Hunt 1973; Dölling, et al. 2009). In fact, lengthier sentencing and harsher prison conditions seem to actually increase reoffending rates. Shorter prison sentences are, in contrast, far more effective (Kleiman 2009).

Suppose that some offenders do *not* themselves pose any ongoing danger to the public. It may be that ensuring such crimes always come with legal repercussions (albeit mild ones), even for those who present no ongoing threat, helps to reduce crime.

Moreover, while detaining dangerous individuals for the sake of containment certainly helps to protect *some* of us from crime, there is some evidence that such individuals are just as liable to commit crimes within incarceration as they are when free (DeLisi 2003). This seems especially worrying for free-will sceptics, as it appears that rather than protect the public at large from crime, we simply protect nonoffenders at the expense of making their fellow incarcerated offenders more vulnerable. Without appealing to retributive desert, it's not clear why shifting the risk to fellow offenders should be regarded as a moral improvement.

At present, however, there are surprisingly few studies directly addressing the question of how harms committed by dangerous individuals in incarceration compare to harms they commit when free. Moreover, it may be that reforming prisons can significantly reduce this risk. E.g. prisons in countries such as Norway have far lower rates of crime during incarceration than those in the UK or USA. Let's put this point to one side. Plausibly, it seems that containment and deterrence may both be somewhat effective (albeit imperfect) tools for reducing our collective vulnerability to crime, so both may plausibly bring gains to public safety.

We have already noted that the deterrent effectiveness of penalties is correlated with certainty as opposed to severity. It seems doubtful, then, that the unpleasantness of penal sanctions really *is* essential to securing their deterrent effect. Public safety is best served not by making our penalties more punitive, but by making them more likely. Hence it's not clear that the moral *costs* are necessarily greater either.

So far, then, it seems that the same sorts of consideration that justify containment of offenders who present an ongoing threat similarly justify imposing some penalties for the sake of deterrence, even where the offender presents no ongoing threat. They may both serve the goal of collective self-defence.

Nonetheless, I think that there is a genuine moral worry here. But the problem does not arise because of the Kantian prohibition against using as a means. The problem may arise due to a disparity between what we are justified in doing to defend ourselves against a pre-existing threat and what we are justified in doing to prevent a future threat from arising. This may make a difference with respect to the alternatives available, and hence with respect to whether the harm qualifies as a necessary last resort.

4. SELF-DEFENCE AND PREVENTATIVE MEASURES

Theorists have widely differing views about what sorts of harms can be justified for the sake of self-defence, and whether harms are equally justified in the case of responsible aggressors, innocent aggressors, innocent threats, etc. But there are some *minimal* commitments that are fairly ubiquitous. It's broadly agreed that the harms must be *proportional* (i.e., one must not cause greater harm than required in order to defend oneself) and that they must be *necessary* (i.e., there must be no *other* ways of protecting oneself that one has neglected to pursue, which would be relatively harmless yet similarly effective).

If we focus on individuals who have already become dangerous, it seems clear that containment may be necessary, at this stage, in order to remove the threat that they pose to others. If we are thinking about how to prevent individuals from *becoming* dangerous, in contrast, then we are forced to think more carefully about whether our proposed methods of securing public safety really *are* necessary. The problem is that this will depend on whether there are relatively harmless alternatives. This is important, because when it comes to thinking about potential methods for preventing crime, there may be a very broad range of less harmful alternatives to penal measures. In fact, this introduces a stark disanalogy between the position of lawmakers and the sorts of agents we think of when we reflect on archetypal self-defence cases.

When we think about self-defence, we typically focus on cases in which a threat has already arisen. In Nozick's well example, we imagine the agent's options are restricted to zapping the falling body with her ray-gun or being crushed. Once a person is falling towards her, the zapping certainly seems to be necessary for self-defence. Similarly, when one thinks about defending oneself from an aggressor, one typically imagines that the attack is underway, and that use of force is the only viable option.

It changes matters, however, if the threat is *not* an unforeseeable surprise. Let's grant that even in the relatively extreme case of an innocent threat (like Nozick's well example), one is permitted to kill if it is necessary in order to defend oneself. It may put pressure on the idea that such use of force is 'necessary' if there are relatively harmless preventative measures that have not been utilised.

Suppose that that our agent knows that she will be working at the bottom of the well on a daily basis. Suppose the well is located below a treacherous mountain path that's subject to high winds, and as a consequence, innocent people fall into it constantly. Suppose that she could put up warning signs, or fences around the well, or safety nets to catch those who fall, or could request the closure of the mountain path, etc., but consistently chooses not to. Now suppose that she has been working in this well every day for many years, and has to zap dozens of innocent threats every day in self-defence. Surely this somewhat weakens our well worker's argument for the necessity of using force!

Of course, Nozick's example is notorious for the comically unrealistic set of conditions it posits. But in many ways, this adaptation involving neglected preventative measures is not *that* unrealistic. In many respects it parallels the situation we are in, in present societies, with respect to penal measures, such as incarceration, and the broader goal of protecting ourselves from the threat of crime.

If a measure is to be necessary for the purposes of self-defence, there had better not be *other*, less harmful measures that we have had ample opportunities to implement, but which we have consistently failed to. The self-defence plea only looks convincing when the harm inflicted is a *last resort*.

5. PREVENTION AND NECESSITY

When we think about deterrence, we shift our attention from thinking about how to deal with threatening individuals once they crop up to thinking about the measures we might take in order to prevent crime from occurring. It soon becomes clear that there are many other (less unpleasant) ways to reduce crime, which we underutilise in present societies.

Many of these are explored by Caruso (2016, 2017), who gives compelling arguments for treating criminal justice as a public health problem and tackling the factors that put people at greater risk of offending in the first place. Not only does the evidence suggest that punitive methods are hardly our *only* option, but also that such measures may be less effective at preventing crime than other strategies open to us. Other strategies that we have evidence to suppose are effective at reducing crime rates include the following:

- Tackling poverty and deprivation, as the link between poverty and crime is well established (Hsieh and Pugh 1993; Pridemore 2002, 2008; Pratt and Cullen 2005; Nivette 2011).
- Intervening to provide additional engagement in learning and improve family support for preschool children, e.g., through preschool learning programmes, child-parent centres, etc. (Yoshikawa 1994; Reynolds and Ou 2011; Reynolds et al. 2017).
- Investing in child protection and care in order to prevent maltreatment and trauma, which are correlated with increased risk of criminal or antisocial behaviour (e.g., Maas et al. 2008; Fitton et al. 2018).
- Interventions involving CBT-based counselling and skills training, particularly when given to juveniles with previous convictions to prevent reoffending (Landenberger and Lipsey 2005; Lipsey 2009).
- Measures to prevent exposure to toxic pollutants, particularly lead exposure (Marcus et al. 2010; Nevin 2007)—a risk that can be further exacerbated by poverty and aging homes (Martin and Wolf 2020).
- Measures to encourage crime-preventative town planning (Cozens and Love 2015; Armitage 2017).
- Improving the perceived fairness and legitimacy of policing and courts (Tyler 2009). E.g., Making policing more community-based, more transparent and accountable, and more attuned to the shared moral values of the public, increases compliance with the law (Walters and Bolger 2019) and willingness to cooperate with police (Bolger and Walters 2019), hence interventions that can improve perceived fairness and legitimacy may be effective in crime reduction (Mazerolle et al. 2013).³

These are not the only measures by any stretch. There are a great number of methods of crime prevention available that are typically underutilised in many present societies. Moreover, many of the measures above are also shown to increase health, wellbeing, and other outcomes, and some of them are estimated to be more cost effective for crime prevention than penal measures.

This raises serious questions about how, if at all, our penal practices can ever be justified by analogy with typical cases of harming in self-defence. Typically, harming in self-defence is justified only where it is necessary, and this is typically understood to entail that the harm in question is a last resort. The fact that so many *other* methods of reducing crime are underutilised casts doubt on the applicability of self-defence arguments to contexts in which policy-makers are deciding between various measures aimed at public protection.

6. NECESSITY AND LAST RESORTS

A few things ought to be noted here. It's certainly not true that in typical cases of self-defence we would expect the agent to have exhausted *every possible* method of reducing their risk of exposure to violence before they are justified in harming in self-defence. E.g., we could all lower our risk of being fatally stabbed if we wore a suit of armour at all times. But we do not suppose that people's failure to wear armour on a daily basis undermines their right to injure knife-wielding assailants in self-defence.

Whether a measure counts as a 'last resort' will depend on which alternative measures are regarded as practical and reasonable, as opposed to which are merely conceivably possible.

Moreover, even if an agent has *not* done enough to avoid harming in self-defence, while this seems to weaken the case for regarding the harm as necessary, it is not clear that it ever *completely* diminishes one's right to harm in self-defence. E.g., suppose you live by a research facility that experiments with mind-altering drugs that can cause uncontrollable bouts of violence, and that those who run the facility consistently struggle to keep their (blameless but violent) research subjects under control, leading to frequent security lapses. If one of the research subjects enters your home and tries to kill you, it seems you are permitted to injure in self-defence. But suppose this happens constantly and repeatedly, that they always walk through your open front door, and you never bother locking or even closing the door.

After you've killed the first few dozen dangerous research facility escapees, your continued failure to bother closing the door certainly starts to look morally problematic. But should we ever say that you *lose* the right to injure in self-defence? If it's the hundredth time you've left the door open, and you've had to injure the previous ninety-nine escapees in self-defence, do you lose your right to defend yourself against the hundredth one? It seems to me implausible to suppose that you *ever* lose your right. But what does seem true is that your continued failure to take other measures becomes an increasingly morally serious wrong.

Here is a proposal: Ideally, one is justified in harming in self-defence when it is necessary to defend oneself, where this entails that in some *qualified* sense the harm is a last resort. The harm will not qualify as a 'last resort' to the extent that:

1. One has it easily within one's power to prevent the danger via relatively harmless methods.
2. One can be said to have a special responsibility for taking certain measures that would harmlessly stop the danger from arising in the first place.
3. One's failure to take alternative harmless measures to reduce the danger frequently or repeatedly gives rise to a need to injure in self-defence.

These factors introduce thresholds that are necessarily vague, but we might suppose that what is at issue here is not one's absolute right to injure in self-defence, but rather the *extent* to which one's harming measures are morally justified.

Finally, if one's vulnerability to harm *has* been increased by earlier preventative failures, this cannot completely remove one's right to harm in self-defence. This may be why detention for the sake of containment, while it *also* involves harming the interests of some in the name of self-defence, seems less problematic than deterrent measures. It's a measure implemented in light of the danger that some individuals *already* present (the equivalent of a person already falling towards you in Nozick's well). We are conceptually encouraged to bracket off our past failures and think about what we can do to deal with the danger now that it's present. Once we *have* a dangerous criminal, it is no longer open to us to improve their formative circumstances, say.

In contrast, thinking about deterrent measures involves thinking about how we might influence the chances of harmful behaviour arising beforehand. Other possible preventative measures therefore seem highly relevant to any self-defence claim. The situation seems somewhat analogous to deciding whether to put a fence around the well or to instead purchase a more effective ray gun. If we are not bracketing off the present facts, and we are instead thinking *in advance* about preventative measures, then the idea that the harm counts as a last resort seems indefensible in the face of numerous relatively harmless alternative preventative measures that are open to us.

Perhaps once a threat arises, we are permitted to harm in self-defence regardless, but a continued failure to utilise other preventative methods of self-defence ought to strike us as highly morally problematic. At the very least, our continued use of harmful penal measures, as a society, should introduce an urgent moral obligation to better utilise less harmful preventative methods.

It seems wrong to suppose that, as a society, we have no special duty to protect those at greater risk of criminality due to social inequality, impoverished educational opportunities, etc. Furthermore, many of the required measures are practically feasible to implement. And it seems that the situation we are in really does involve repeated and continuous harming, much of which is due to our repeated societal failure to effectively tackle the root causes of crime.

In this respect, measures aimed at containing individuals who present an ongoing threat look more like archetypal self-defence examples than measures aimed at deterring would-be criminals from crime. It is not that the former is our *only* means of public protection, but that our options for dealing with *ongoing* threats appear relatively limited. Even in this case, there is a clear disanalogy with archetypal self-defence cases, which we are liable to miss if we focus just on the present danger.

Once we start thinking in advance about how we might reduce the risk of criminality, however, the analogy with archetypal self-defence cases becomes very strained indeed.

This certainly casts doubt on our claim that such measures are a necessary last resort, and if that doesn't remove our right to use such measure entirely, it ought to at least make us regard our present policies as a serious and urgent moral failing.⁴

NOTES

1. And it seems to me that they might, even if they do not hinder an agent's ability to flourish and develop as a rational being: Consider the classic Kantian example of the lying promise. Even if there is no suggestion at all that the victim will be unable to flourish as an autonomous rational agent in consequence, we may suppose that he is used merely means simply because he does not *consent*.
2. It may seem as if our intuitions are so messy that they should be disregarded. However, [Railton \(2014\)](#) cites such cases in order to show that despite appearances to the contrary, there is a surprising degree of consistency in such intuitions across cases with certain similarities, suggesting there may well be discernable principles underpinning our intuitions.
3. A point that counts against the common stipulation that a good utilitarian ought to sometimes frame innocent citizens to prevent crime.
4. I am grateful to Dr. Anneli Jefferson, Dr. Philip Robichaud, and Professor Derk Pereboom for incredibly helpful comments on this paper, as well as to the attendees of the Forward-looking Responsibility Workshop at V. U. Amsterdam for valuable discussion and comments.

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