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Reply to Ferzan's Review of *Self-Defense, Necessity, and Punishment*

I thank Kimberly Kessler Ferzan for her review of my book *Self-Defense, Necessity, and Punishment* (hereafter *SNP*).[1] She has some complimentary things to say about me and the book, and some less complimentary ones. In my reply, as is to be expected from replies, I will focus on the latter. She attacks one claim of mine, and otherwise deals exclusively with structure and (*alas!*) tone. I take up these issues in this order.

Ferzan only addresses one "central claim" of mine by actual argument. This argument turns out to be incoherent. To wit, she first characterizes the claim quite correctly, but when she then moves on to criticize it, she suddenly *mis*represents it, contradicting her very own earlier correct description of it. Let me explain.

Ferzan – correctly – attributes the claim to me that culpable aggressors have no *right* against the use of unnecessary force; rather, unnecessary force would be prohibited by what I call a "precautionary principle." Ferzan – again correctly – paraphrases my position as follows:

> [I]f someone culpably tries to kill you, and you know you can stop him by pinching him, punching him, or even pummeling him, but you instead opt to kill him, you do not wrong him. Instead, your action is unjustified because you may be incorrect about the facts – it may be that your attacker is actually innocent (drugged, for example) and so would be wronged by unnecessary force. But you do not wrong culpable aggressors by using unnecessary force.[2]

Ferzan is "interested … in what lies beneath" this view and explains that I invoke "both the concepts of reciprocity and hypocrisy," and allegedly I run them together. In fact, however, I merely invoke arguments from hypocrisy to illustrate that the principle of reciprocity on which I rely is extremely plausible. She then focuses on this principle (she says "claim") and states:

> A reciprocity claim, as I take Steinhoff to be defining it, is the idea that rights exist because of a mutual agreement to respect each other's interests. [That is not my claim at all, and she did not need to "take me" to be defining anything, since I explicitly and prominently did define the reciprocity principle on p. 91. I will come back to that.]

She then argues that this claim is "too strong" and continues:

> Let's consider Steinhoff's reciprocity argument. Steinhoff thinks that a natural implication of a reciprocity account is that if you aim to kill me, then I do not wrong you by shooting you, even if I know that I could just step on your toe. By having tried to kill me, you are no longer entitled to my respecting your interests as rights.

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[1] Uwe Steinhoff, *Self-Defense, Necessity, and Punishment: A Philosophical Analysis* (London and New York: Routledge, 2020).

[2] Kimberly Kessler Ferzan, "'Self-Defense, Necessity, and Punishment: A Philosophical Analysis', by Uwe Steinhoff" (review), Notre Dame Philosophical Reviews, available at https://ndpr.nd.edu/news/self-defense-necessity-and-punishment-a-philosophical-analysis/, accessed on 12. January 2021. There are no page numbers. All quotes are from this review, unless otherwise indicated.

This last quoted passage is a correct interpretation of my position.[3] Almost everything she says after isn't. To wit, she claims, and let me quote at length:

> But Steinhoff takes this further. Once there is a loss of reciprocity, it is *in rem*. If you try to hit me, then not only may I hit you, but so too may Peter, Paul, and Mary (93). Let's be clear: Peter, Paul, Mary, and I may *all* hit you because you no longer have rights against being hit. Anyone may hit you. … Combining Steinhoff's conception of proportionality with his construal of necessity should yield the implication that if you are stealing an apple, and you have lawn signs that advocate, "Maim the apple thieves!" then not only the apple owner, but Peter, Paul, and Mary may maim you. Such a broad view of reciprocity, however, strikes me as potentially being a double-edged sword. If A is out of the social contract, not only with B, but also with C, D, and E, so that now C, D, and E are not bound against harming A proportionately to his initial transgression, then should we worry that A is also *out of the contract*? And if this is true, then won't A be free to hurt C, D, and E because he is no longer bound to respect their rights? … Now, it strikes me as implausible that there is a complete free-for-all against you in which Peter, Paul, and Mary may all permissibly hit you (and this is implausible not just because I take them to be folk singing pacifists). But it strikes me as even more implausible that after trying to hit me, you would not wrong any other random persons, say Larry, Moe, and Curly, by hitting them because the reciprocity has broken down. Maybe Steinhoff has something more limited in mind, but it is not clear how he plans to ground it and he does not address this potential implication of his view.

First of all, again, I fail to understand Ferzan's alleged need for speculating about how limited or unlimited my principle of reciprocity is. As already noted above in brackets, I explicitly state it on p. 91 of *SNP*:

> *Reciprocity*: If a culpable actor unjustifiably harms interests of others that are protected by their rights, then he or she has (all else being equal) no valid complaint against acts that harm equal or less important interests of the actor (but he does have a right against acts that harm his or her interests unnecessarily and disproportionately). Accordingly, the actor's own relevant interests are not protected by rights anymore due to his or her own culpable violation of the rights of others.

Clearly, this principle is formulated as a one-way street. (Moreover, in the footnote after "others," which I have omitted in the quote, I state: "Note that this principle is purely a principle of rights forfeiture, not rights possession.") It does not as much as suggest, let alone imply, the insane view Ferzan sees fit to associate my account of reciprocity with, namely that an aggressor can relieve himself of his duties by violating them.

Second, the term "social contract" appears exactly once in *SNP*, namely in passing and in a discussion of Hohfeld. However, I indeed use the term "contract" when discussing Kant with regard to his view (which I endorse) that culpable aggressors have no right against unnecessary force. I put "contract" in scare quotes there, though, which should have been some indication that I did not deem it to be a literal contract or agreement. Incidentally (and rather unsurprisingly), Kant also believed in a one-way street regarding the aggressor's rights-forfeiture.

The third point brings me back to my charge of incoherence against Ferzan's critique. Let me repeat parts of two quotes from above:

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[3] Or at least it is close enough for present purposes. To be precise, however: I do not claim that you have forfeited *all* your rights by a culpable attack on my life, but only rights of equivalent (or less than equivalent) strength. For example, you might retain the right not to be slowly tortured to death.

> Steinhoff thinks that a natural implication of a reciprocity account is that if you aim to kill me, then I do not wrong you by shooting you, even if I know that I could just step on your toe. By having tried to kill me, you are no longer entitled to my respecting your interests as rights.

As I already said, she is correct about this. But *then* she says:

> But Steinhoff takes this further. … If you try to hit me, then not only may I hit you, but so too may Peter, Paul, and Mary (93). Let's be clear: Peter, Paul, Mary, and I may *all* hit you because you no longer have rights against being hit.

The claims in this latter quote a) do not follow from the claims referred to in the former, b) misrepresent my actual position, c) contradict Ferzan's very own initial correct characterization of that position, which was this (which I also quote again here):

> [I]f someone culpably tries to kill you, and you know you can stop him by pinching him, punching him, or even pummeling him, but you instead opt to kill him, you do not wrong him. Instead, your action is unjustified because you may be incorrect about the facts – it may be that your attacker is actually innocent (drugged, for example) and so would be wronged by unnecessary force. But you do not wrong culpable aggressors by using unnecessary force.

Yes, indeed. So I say that *although* a culpable lethal aggressor has *no right* not to be unnecessarily killed, killing him would nonetheless *still* be *unjustified*. But if it is unjustified, then it is of course not true that you *may* kill him. So when Ferzan says that on my account "Peter, Paul, Mary, and I *may* all hit you *because* you no longer have *rights* against being hit" (emphases changed), she is thereby ascribing not only a view to me that I do not have and that does not follow from my account, but in fact the *opposite* view than the one I have and that does follow from my account.

This becomes even more ironic considering the fact that in a section informatively entitled "The Importance of the Distinction between Permissibility and Liability for the Limiting Conditions," I criticized her for having (apparently still not overcome) difficulties in making this distinction strictly and in recognizing its normative implications:

> Kimberly Ferzan, for example, explicitly distinguishes permissibility from liability but nevertheless argues "that liability is its own interesting conceptual and normative path to permissibility, and the reason it is permissible to kill culpable aggressors is because they are liable to defensive force." However, liability is no path to permissibility at all: that someone is liable to attack does not make it permissible to attack him (not even if one bars overriding necessity justifications, e.g.: if one knocked down the unjust attacker, terrorists will blow up a pre-school). (*SNP*, 69; compare also 204, note 106.)[4]

So let's summarize this: I criticize Ferzan for not realizing that someone's liability to be attacked does not make it permissible to attack him;[5] she then, when merely describing my view, does so correctly; but the moment she *criticizes* my view, she attributes *her* mistaken views on the connection between liability and permissibility to *me*, and then conveniently concludes that *my* account has implausible implications. If you meditate on this for a

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[4] She makes the explicit distinction in Kimberly Kessler Ferzan "Culpable Aggression: The Basis for Moral Liability to Defensive Killing," *Ohio State Journal of Criminal Law* 9 (2011-2012), pp. 669-697, at 671. The Ferzan quote is from Kimberly Kessler Ferzan, "Provocateurs," *Criminal Law and Philosophy* 7(2013), pp. 597-622, at 606.

[5] Quong makes the same mistake – which might explain the intuitions of his which Ferzan invokes. I spend quite some time explaining in *SNP*, namely in the section just mentioned, why these intuitions have no force given that they rest on precisely such mistakes. See in that context also my discussion of David Boonin on pp. 76-77.

moment, you might come to understand why I, as Ferzan notes, sometimes show an "evident frustration with other philosophers."

Ferzan also has problems with the structure of my book. She claims that the book fails to "present a clear and coherent vision" and that "the whole is less than the sum of its parts." Well, given that, as we just saw, she so egregiously distorts a central claim of mine that was explicitly formulated and there clear to see for all, her failure to recognize the whole constituted by the parts might not necessarily be indicative of shortcomings in my presentation. Moreover, she herself concedes that "the coverage and cohesiveness of the book's general topics is quite good," and then rather convincingly explains *why* it is good.

She is less convincing, though, when it comes to explaining where the book's structure leaves something to be desired. For example, she says that "[n]otably, the book is not about all types of necessity arguments – criminal law theorists looking for their standard prison escape cases, discussions of civil disobedience, or queries about torture will find that these are lacking." I do not know what she means by "types of necessity arguments." *SNP* is about basic moral and legal *justifications*, like the self-defense and indeed the lesser evil or necessity justification. There is no separate "standard prison case" justification. Rather, (certain) prison escapes are, yes, *cases* to which necessity justifications can be applied. And while it is of course good to discuss by way of illustration some cases to show how the general justification is to be applied – which I do – it is hardly the task of such a foundational study to go through all the possible applications to cases. Moreover, it is somewhat odd that she mentions torture. I have written an entire book *On the Ethics of Torture*.[6] If Ferzan is interested in how the self-defense justification or different types of emergency justifications are to be applied to the case of torture, maybe she should check there.

Likewise, when Ferzan states that the book is not "about all of punishment (rather it focuses almost exclusively on Kit Wellman's argument about why the state has the exclusive right to punish)," then I would like to point out that it need not be about "all of punishment." I define punishment, and then explain how it can be justified. I do so by relying on those earlier discussions of forfeiture, justification, necessity, proportionality, the subjective element, and so on that I had already offered in the context of the self-defense justification and indicating how and why (if at all) these elements differ in the context of punishment. Relying in the later part of a book on what one has already done in the earlier parts is hardly a revolutionary concept and might speak more for the cohesiveness of a work than against it. Furthermore, I discuss the question of exclusive state punishment because this question does not appear in the context of self-defense, and I discuss it with the example of Wellman because he is the one who has not rested content with giving vague hints but actually provided a sustained argument for the exclusive right of the state to punish (an argument with which I happen to disagree).

Ferzan also laments that I seem "to miss other arguments in the literature that contradict [my] views, including failing to engage the difficult questions of public authority that Heidi Hurd's *Moral Combat* raises for [my] view (341), or the intermediate position for justifications suggested by Antony Duff's concept of 'warranted behavior.'" In reply, let me note that it might tell us something that Duff's "intermediate position" and the terminological distinctions connected to it have not caught on. Furthermore, Duff constructs an analogy between practical (or legal) and epistemic justification, and then analogizes what he labels "straightforward" or "strong" justification to the epistemic concept of *truth* (*not* to the concept of epistemic justification). In other words, he construes

[6] Uwe Steinhoff, *On the Ethics of Torture* (Albany: State University of New York Press, 2013).

this kind of justification as *fact*-relative.[7] Given, however, that the part of *SNP* Ferzan likes most and praises quite a bit (and in fact seems to endorse) is exactly the part where I show that fact-relative justification cannot work, it would appear that my arguments undermine Duff's, not the other way around. I also criticize Hurd's account of objective justification explicitly. However, Ferzan mentions Hurd's account of "practical authority" here and refers to a page in *SNP* where I talk about public authority justifications. So, apparently, Ferzan thinks that Hurd's critique of practical authority applies to pubic authority justifications. Maybe Ferzan thinks that because the two sound quite similar. Yet they are not. Hurd's charge against practical authority amounts to the claim that "obedience to law of the sort required by the exercise of practical authority violates a central principle of rationality," namely that you should act "on the balance of reasons."[8] Yet the public authority justification is simply a justification police officers, for example, can avail themselves of when regulating the traffic while private citizens can't. So one concerns *obligations toward the law*, the other special *justifications given by the law* (or morality) to agents occupying certain roles. These things are clearly not the same, and I would really like to know which principle of rationality, in Ferzan's view, the public authority justification is supposed to violate.

Another problem for the structure of *SNP*, according to Ferzan, is my "constant injection of others' arguments." One would think that this is not such a bad thing. To be sure, the downside of developing and defending one's own views while meticulously dealing with objections and alternative approaches is indeed that it will make a book "dense." Yet on the other hand, the downside of achieving simplistic beauty and benign accessibility by ignoring objections (something quite a few recent contributions to especially the self-defense literature do) is that it will make a book *thin*. From a scholarly perspective, the former is to be preferred to the latter. But there might indeed be some disagreement between Ferzan and me on what is required for scholarly activity. For example, Ferzan grants that I have "novel insights and new connections." Yet that does not keep her from answering with a merely "tentative yes" when asking "whether those who are well versed in self-defense theory should read the book." At least if those "well versed" want to remain well versed, let alone advance the debate, one should think that they actually *must* read a book that offers novel insights and connections.

Let me finally come to Ferzan's complaints about my "tone," which preoccupies her quite a bit. Ferzan states that the book "is presented as ire at the work of others." That is absolutely true. And the one who presents it in this way is none other than Ferzan herself in her review. In fact, she appears to be extraordinarily committed to presenting it as such. Yet the examples – just two – she adduces for my "jarring … vitriol" are somewhat anticlimactic. To wit, Ferzan bemoans that I get "no farther than the second paragraph of [my] preface before attacking 'a group of just war theorists who like to call themselves, "revisionists"' (ix)." What does that have to do with tone? I do, indeed, state in the preface that I disagree with this group of philosophers on a number of points, which I list. And of course my formulation that they "like to call themselves 'revisionists'" suggests that I do not accept their self-description. But I am certainly entitled to reject other philosophers' self-image, am I not? So if Ferzan finds anything jarring here, then it is probably because she accepts the self-description of those scholars as well as some of their views. But then she should simply say so and explain where I go wrong instead of hiding her substantive disagreement behind complaints about tone.

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[7] Antony Duff, "Rethinking Justifications," *Tulsa Law Review* 39 (2004), pp. 829-850.
[8] Heidi M. Hurd, *Moral Combat* (Cambridge: Cambridge University Press, 2008), p. 69.

Her second example is that I "respond[] to an argument by one philosopher with a one-word sentence: 'Wrong'(314)." Not quite (that's two words: I'm adapting). Ferzan fails to mention that after this one-word sentence there comes a fifty-one-word sentence that explains *why* it is wrong and indeed merely summarizes a whole section where I had explained that in excruciating detail. In short, Ferzan's choice of these two examples as supposed evidence for my "vitriol" in fact unwittingly works as evidence that her implicit rules of academic civility are somewhat petty and pedantic. Less obsession about tone and more concern for substance might be good methodological advice for all philosophers. You find a lot of substance in *SNP*. And if you nonetheless dislike its tone, allow me to say what you can either interpret as one word or three: oops-a-daisy.