Episode 23. Kim Ferzan on Preventive Justice

Released April 27, 2013

MATT PETERSON: This is Public Ethics Radio. I’m Matt Peterson.

Criminal justice is normally retrospective: You can only imprison someone for crimes they’ve already committed. But what should we do about individuals who clearly will pose threats in the future, even if they haven't done anything yet? To solve this problem, our guest today, Kim Ferzan of the Rutgers University School of Law, wants to create a new class of preventive justice, separate from normal criminal law. It would create rigorous legal standards for allowing preventive detention, among others, of individuals who have shown that they intend to cause unjustified harm.

Kim Ferzan spoke to our host, Christian Barry.

CHRISTIAN BARRY: Welcome to Public Ethics Radio. Today we’re going to be speaking with Kim Ferzan, Professor of Law at the Rutgers University, Camden, in the United States. And we’re going to be discussing the issue of preventive justice. Welcome to Public Ethics Radio.

KIM FERZAN: Thanks for having me.

CHRISTIAN BARRY: Kim, one of the interests that we often have in regulating the conduct of individuals within a society is not merely punishing people when they’ve committed crimes or detecting in advance certain types of risks that we want to curb, people that we think might be dangerous, but actually engaging in some kind of preventive action to prevent people from when they’re in a position where they could actually do harm. Are there norms that regulate this sort of intervention?

KIM FERZAN: I think there are. And I think that the norm that should regulate this intervention is the same norm that regulates self-defense. So, to the extent that somebody is liable to defensive force because by culpably choosing to attack a victim, that person has forfeited certain rights against defensive force, so, too, the person who’s trying to commit a criminal offense has forfeited rights against the state coming in to intervene and prevent that person from committing a criminal offense.

CHRISTIAN BARRY: Do you think it’s necessary that people have demonstrated some specific intention to do harm for them to be liable to preventive force? Or is a looser standard warranted?
KIM FERZAN: So I think that there is a requirement of an intention for liability. So let me back up, though, and say that there are going to be many reasons why we may want to prevent someone from harming us, and we may predict that one day that person may harm us. And so then there are very difficult questions about when it is that the state can intervene based on something like a statistical prediction of future harm. And we should be very concerned about statistical predictions, right, because it may be that because of someone’s race, gender, employment, et cetera, we might be able to predict that they’re in a class that’s more likely to commit an offense.

But any individual who is interfered with based on just falling within certain reference classes would say, “You’re not treating me as a responsible, autonomous agent. You’re just treating me as something like bad bacteria,” as Stephen Morris would say, “just something to be stopped. And that doesn’t respect me as a person.”

There might be reasons why the state would need to intervene against that sort of person. But we might ask, is that person entitled to something like compensation? Because that person hasn’t lost any rights. We are harming them, that person, for us and we should be concerned with that.

On the other hand, there are times when the person has actually forfeited a right, when they’ve actually given us grounds, based on that person’s own choices, to intervene and stop the person.

And, so, I think that culpability, something like an intention, is required in those cases because that’s what gives us grounds to say, “You have decided that other people don’t have rights, and it’s for that reason that we’re allowed to intervene against you and stop you from harming us.” And in those cases, there’s no reason to provide that sort of person with something like compensation.

CHRISTIAN BARRY: So, what kind of norms are there actually in place? So, for example, one of the issues that comes up is the question of preventive detention, or when people who, there is some belief, have some aim to carry out some type of serious misconduct, can be held—under what conditions they can be held, what evidentiary burdens are, that sort of thing? How should that work?

KIM FERZAN: So, in terms of what we do now, a lot of what we do now, I think, is unjustifiable, and I think most theorists think that some of the ways that we detain people, for example, in Guantanamo, are completely unjustifiable.

The sort of model that I have in mind, the thing that I think we should do, is actually have the sort of evidentiary hearings to make sure that someone actually has this criminal intention. And we would want to have a very high burden of proof, perhaps even beyond a reasonable doubt, before we would intervene against them.

CHRISTIAN BARRY: Yes, so one question about that is, the idea that there would be a really high burden of proof, something akin to sort of a criminal trial, is that, with respect to intentions, it’s very difficult often to meet that burden. There are good reasons for insisting on that burden with respect to incarceration, partly because of the sort of expressive content of what it means to incarcerate someone and all the things that follow from having been incarcerated or that follow from a criminal offense.
But I can imagine people saying that, well, that the types of risks that we’re talking about are so severe that a weaker evidentiary burden, either that we don’t really need to show specific intention or, that even insofar as we need to show specific intention, we’re justified in showing even that it’s just more likely than not, or something between it being more likely than not and being beyond a reasonable doubt that this person has some specific intention to carry something out.

**KIM FERZAN:** I certainly appreciate the concern, right, that this person could impose a huge risk on us. But the question we have to ask is, has this person forfeited rights? And how confident should we be before we lock someone up, or put a ankle bracelet on them or whatever we’re going to do, how confident should we be that they actually have this criminal intention?

And even though I will agree it’s not the same wrong to falsely convict an innocent person as to make a mistake as to whether somebody harbors a criminal intention, it still is highly problematic for the state to be substantially interfering with somebody’s liberty unless it’s incredibly confident about that.

Now, I have a paper where I come out just slightly on the side of beyond a reasonable doubt and not clear and convincing evidence. I think it’s a very tough call. And I think part of the reason it’s a tough call is because you have to take into account the sort of adversarial deficit, as people would say, between the potential offender and the state. The state just has tremendous resources that the person does not have, and if you want to compensate for that, you wind up with a higher burden of proof.

Again, if we’re concerned about our security and—we may have to go to sort of a pure preventive model. But then we’re no longer saying the person’s forfeited rights. This is about being a rights-respecting model.

**CHRISTIAN BARRY:** People think that there are different evidentiary burdens that apply to different things. So, when it comes to the question of how to regulate some particular type of chemical compound, the evidentiary burden is quite different than if we’re trying to evaluate whether or not someone likely was negligent and caused harm through their negligence. And that’s different from whether or not somebody is guilty of a criminal offense.

Preventive justice is kind of interesting in that the types of measures that we would take seem partly continuous, right? When does something stop being a regulation? That is, simply making it costly and difficult and time-consuming for someone to achieve some end. Right.

So I can imagine somebody saying that the types of security checks that we put particular people through partly on the basis of the idea that maybe certain people belong in certain classes might pose some risk.

It doesn’t look like a punishment, it’s not really detention, it sort of looks like regulation. And yet what kind of evidentiary burden should we be placing on it such that we’re justified in doing that without giving them compensation for the fact that we’re creating these costs for them?
KIM FERZAN: I agree that there’s a continuum, in terms of the sorts of deprivations of, of people’s liberties. And, in some ways, when there’s sort of a slight deprivation of liberties, something like having to take your shoes off at the airport and go through the security checks, we can say, “Why is the state getting to intervene in this way?” And the answer is because it’s for the good of us all. Right.

So there’s just a straight-up balance where the state is allowed to ask us to suffer some small harm for the benefit of everybody. And a benefit that we, of course, receive by being safer for that.

On the other hand, at some point you’re going to hit a threshold where you think, this is substantial enough that we’re going to need better reasons and greater confidence before we intervene against someone.

CHRISTIAN BARRY: Yeah, it’s interesting because in that case, with the taking your shoes off in the airport, the same people who are having this sort of burden imposed upon them, are the same who are benefiting from the fact of greater security, the fact that they have confidence that if they got on a flight, the likelihood that somebody will have gotten on the flight without a weapon is different.

But a lot of the measures which sort of look regulatory, for example, certain types of requirements for immigrants or difficulties for certain people who come from certain countries in getting visas or getting approved for certain types of security clearances, those sorts of things, they don’t seem quite like taking your shoes off at the airport, they don’t quite seem like detention, either. And yet you can’t really argue that the same people who are bearing a cost in those cases are sharing the equal set of the benefits that we have.

And I wondered if you could say something about whether or not you think those types of group specific regulatory burdens can be justified or whether or not these are sort of infringements of rights.

KIM FERZAN: I think those cases are hard. I think they’re hard for a number of different reasons. So, one is in the different cases, we have to look at what the sort of liberty restriction is. The second thing we have to ask is, is it appropriate to target the group? And targeting groups is tough.

In one respect, people can say, “Look, if you know that I’m not a risk, why are you subjecting me to this sort of targeting?” And, on the other hand, we may think that our equality is better served by being overinclusive, by not saying “We’re focusing on your neighbor but not on you,” because it makes us turn against each other in an inappropriate way.

So getting back to even the airport security measures, right, so now there are sort of some ways you can get approved by TSA to make it easier. And we could ask, do we really want to make it easier for some people and not others? Because there’s something to be served by saying everybody is subjected to exactly the same check at the same time because that actually furthers our equality, even if it turns out that my liberty interests aren't any better off for my having gone through security with my shoes off.
CHRISTIAN BARRY: We’re going to take a short break and be back with more on liability and preventive justice with Kim Ferzan.

MATT PETERSON: You’re listening to Public Ethics Radio. Christian Barry is talking to Kim Ferzan of the Rutgers School of Law.

CHRISTIAN BARRY: So I can imagine that it might be argued that preventive justice, these conditions under which we’re going to detain someone or create certain obstacles to their doing something based on some characteristic that they have, given that you think that what’s required for this is that there be some specific intent that’s demonstrated that they’re going to engage in some wrongdoing, that criminal justice, as it stands, is already adequate to give an account of when it’s permissible for us to intervene, to detain, to treat this person.

KIM FERZAN: So, I think that there is a real worry with how we are approaching the criminal law right now. Bill Stuntz, a legal theorist, talked about the pathological politics of criminal law, that basically, legislatures are rewarded for overcriminalization, for giving tremendous power to prosecutors, to charge virtually anything at this point. And what we do is we get nervous about any sort of risk and then we place it within the criminal law. And because no politician can look soft on crime, all of a sudden we have this ever-expanding criminal law. We have overcriminalization.

CHRISTIAN BARRY: Can you give an example of what you take to be sort of a case where some type of conduct is being treated as a criminal offense which doesn’t look like a criminal offense, or doesn’t seem plausibly a crime?

KIM FERZAN: So I really worry about a number of the preparatory offenses that we have. And this gets us back to preventive justice. So, assume that we are very worried, as we should be, about people having sex with minors. And so we have an entire continuum of behavior from when the defendant forms the criminal intention, to when the defendant meets with the victim to any further criminal act. And one question is at what point in time should the criminal law come in and actually say that there’s an attempt? Right, what should the act requirement be?

And in those sorts of cases, we see a push and pull between two sorts of concerns. One is we want to give defendants enough time to change their minds. We want to really have people have an opportunity to think the best of their decisions and say, “Forget it, I’m going to become law-abiding or stay law-abiding.” And on the other hand, we want the police to intervene as soon as possible. And so we want the act requirement to be really early.

But courts generally tend to like something close to dangerous proximity. In fact, even the Model Penal Code substantial-step test gets interpreted closer to dangerous proximity. Because courts are worried that people will change their minds.

CHRISTIAN BARRY: It’s sort of like an imminence requirement. You’re just about to engage in some conduct which seems clearly, paradigmatically criminal in this way.
KIM FERZAN: I think that’s right. It might be a little bit earlier than an imminence requirement but it’s still very close to the commission of the offense.

CHRISTIAN BARRY: So the sex offender has met with the prospective target, they’re making clear, substantial steps towards the commission of this act.

KIM FERZAN: That’s—that’s exactly right. So, then imagine that the legislator sees that that’s how the courts interpret it, the attempt statute, what starts to happen? Well, we’re still nervous about sex offenders, right, so what do we decide to do? They start creating offenses like enticing a minor over the internet.

So now, all of a sudden, something that wasn’t good enough for an attempt, and wasn’t good enough on a normative basis, becomes a crime itself. And so then there’s no question about whether or not there’s an attempt here, we actually have a committed offense.

Not only can you have that, of course, but you can actually have what we call a double inchoate crime. So you could actually attempt to entice a minor over the internet which would then even place the offender farther away from the actual commission of a crime.

I think those sorts of crimes, enticing children over the internet, many possession offenses, other sorts of preparatory offenses, like joining an organization, anything like that is going to be incredibly problematic because in so many cases, the defendant is likely not to commit the offense. And yet they have no way to show that, no way to, in fact, free themselves from the criminal law because the offense has already been completed very, very early on in the continuum.

CHRISTIAN BARRY: So you mention that in many cases what’s wrong with making these offenses criminalized is that it seems to disregard the fact that many people engage in one type of conduct, which seems problematic, but not necessarily something that we want to stigmatize as a crime, that they desist along the way from that initial part of the causal chain towards the end, where they would commit something and be clearly recognized as an offense.

Insofar as we don’t want to criminalize this conduct because we think that it doesn’t give sufficient space for the person either to desist or at least the opportunity for them to indicate that they are not a member of the class of people who are clearly going to go on to complete the, the crime, or at least the big crime, the kind of thing we all recognize as crime, what sorts of measures do you think could take the place of the criminal law that would serve the role both of allowing intervention at a point when it doesn’t require people to take on a tremendous amount of risk, with the rights of the defendant either to desist or at least have an opportunity to show that they, in fact, are not on their way towards completion of the big crime?

KIM FERZAN: So I think that’s where questions about preventive interference come in. So it’s one thing to say of this person, look, at the point that you formed an intention, and just done, perhaps, some sort of teeny, tiny act that indicates that you have that intention, you’re not worthy of blame or punishment. Or not a lot of blame and punishment, depending upon your view.
But we certainly have reason to be worried about you. And we have a reason to be worried about you based on your own choices, based on the fact that you as a responsible agent have decided at this point not to respect the rights of others.

And so, I think that at that point, the state should be able to stop you in the same way that somebody might be able to act in self-defense. Because at this point in time, you’ve shown yourself to be a potential threat. And until you’ve abandoned that intention, it’s permissible for the state to keep an eye on you in whatever way is necessary, but the base line, however low that might be or would be able to get to, whether it’s an electronic monitoring or something hopefully short of locking you up, but we get to keep an eye on you and restrain you to make sure that you won’t commit the act or that—until we’re confident that you’ve changed your mind.

CHRISTIAN BARRY: The way in which you’ve framed it is that someone engages in some conduct that makes them liable to a certain type of treatment, liable in the sense that their rights won’t be violated or infringed if we subject them to this sort of treatment.

But I can imagine a lot of cases where there would be a worry that people might think that, you know, once you sort of open the door to the idea of treating certain things as making people liable even for this preventive justice, there’ll be this sort of tendency to sort of assume that they’re liable to continued forms of preventive justice going into the future.

So, once somebody’s actually, through their conduct, made themselves liable to certain preventive measure, what sort of guarantees do you think could be put in place that would ensure that this doesn't become something which is just made indefinite?

KIM FERZAN: So I think this is a real worry. We don’t want it to be the case that we lock someone up and we throw away the key based on one intention.

The sort of measures I envision are something like repeated checks, perhaps every six months, where the state has to continue to prove that the person continues to harbor the intention. And where the person who has been detained or is otherwise being monitored, would then be able to show, I no longer have this intention.

Now, I think that any of these measures, we have to admit, are going to be difficult in the real world. Just as our criminal law is very difficult and nonideal in the real world.

But I think that you can put in place this continued check with, perhaps, something like a continued required step-down, such that somebody who’s detained after six months goes to electronic monitoring, after six months goes to curfews and, and check-ins, et cetera, so that you might actually be able to impose that these measures become less intrusive over time unless the state, perhaps, meets some incredibly high—beyond a reasonable doubt, again—showing that there’s reason we have to keep this person detained.

CHRISTIAN BARRY: So, as far as the idea of the initial step, when we’re… since you require that there’s actually proof of intention, naturally, intention is one of the
most difficult things that one can prove, so what kinds of evidence would you admit that would be real evidence of specific intention to actually do something?

**KIM FERZAN:** So proving mental states is very difficult even in the criminal law. Still, we have crimes such as possession of burglars’ tools with the intent to use them. And that would present, of course, the same problems or the same benefits that my system, the sort of system I propose, would.

I think the best examples are clearly going to be the ones where someone says something, says something to friends, writes something in a diary. And otherwise we have to read intentions from conduct. We do do it all the time and hopefully because we have proof… we require proof beyond a reasonable doubt, the alternative explanations actually furnish doubt.

So to give one real case and the case that actually started much of the sexual offender detention, Earl Shriner before he was released in 1987 was writing in his diaries about his desire to rape and murder children and was even talking to a cellmate about actually wanting to get the equipment to put cages in a van so he could pick up children to, to kill them.

When you have that kind of strong evidence of an intention—“The minute I get out this is what I’m going to do”—then I think we can be confident that we have someone that we need to intervene against.

**CHRISTIAN BARRY:** So one worry I can imagine someone having about preventive justice being introduced as a new category, is that people won’t consider it part of the criminal law.

I mean one of the interesting things about the criminal law is that it seems so ingrained in people that avoiding false positives, unjustly imprisoning someone is such a heinous thing to do, that it’s sort of almost deeply part of the public culture that we should insist on these strong evidentiary burdens when it comes to criminalization.

But since there’s no associations when it comes to detaining people in that way, isn’t there some risk that, if we sort of create this new category, there’s no guarantee that the types of protections that are in fact afforded to criminal defendants will actually carry over to prospective preventive justice defendants in this way.

**KIM FERZAN:** I think there’s absolutely that concern. Any time you’re taking something that’s at the level of ideal theory and worrying about what people will really do with it, there are going to be concerns that people will abuse the system.

But the point I want to make about that is this: we are kidding ourselves if we think we have real checks on the criminal law right now. Because what happens is, let’s say that you think that a crime should really be made of elements A, B and C. And I should admit I’m drawing from Bill Stuntz and Richard McAdams right now, this is not my original argument.

So you have an offense that has elements A, B and C. But it’s really hard to prove C. So what happens is that instead a crime gets enacted with just A and B that doesn’t have C that should be proven beyond a reasonable doubt. And the hope is that
prosecutors will only choose to pick cases that actually have A, B and C. That means that even when you have proof beyond a reasonable doubt of A and B, you don’t have proof beyond a reasonable doubt of what you really want to get at, which is A, B and C.

So all of these checks that we have, we have to be really worried about because we’re not imposing any checks on what we make a crime. The vast majority of crimes are subject to rational-basis review by the Supreme Court. That means it’s really easy to make something a criminal offense. And since it’s really easy to make something a criminal offense, it’s not the case that beyond a reasonable doubt is serving the check we think it does in keeping the innocent out of jail.

CHRISTIAN BARRY: Right. So that the overpopulating the class of crimes undermines the protections offered by the reasonable doubt standard because, effectively, things will be treated as crimes, which can be proved beyond a reasonable doubt that don’t bear any real clear, close relation to what we intuitively would regard as a serious crime.

KIM FERZAN: That’s exactly right.

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CHRISTIAN BARRY: So the emphasis that you place on culpability, that is, for someone to even be a subject of preventive justice they have to have shown some clear culpable intent. And, if we’re doing with a beyond reasonable doubt, you have to have a very justified belief that they’re up to no good.

Now one of the features that you mention about caution about preventive justice in the beginning was the idea that we don’t want to simply prevent people on the basis that we come to some nonspecific evidence about this particular person that they might be dangerous because they belong to a certain group or they’re at a certain church or they profess a certain religion and have shown an interest in their Amazon purchasing decisions or anything of that sort, right. So we want something that’s really specific about that person, whatever it is.

So to become even the object of preventive justice system, they have to have passed that test. Now once they’ve passed that test, you have a pretty good idea that they’re, they’re up to no good. And I can imagine someone saying that once you’ve established that threshold, once you’ve shown that such that you think you can actually detain them, it’s not clear that they should be afforded all the same protections they were beforehand when you’re considering whether or not you hold them in detention, whether or not you can continue to sort of exercise preventive justice against them. Because, of course, one of the features is that, whatever someone might have been saying, when you were determining whether or not you could lock them up in the first place, they’re probably not going to be saying it after you lock them up. So the idea that you would have continuing evidence of their intention seems a little bit hard to imagine that you would have.
Nevertheless, you might have evidence of a different sort, namely that people of the group from which they belong, which they’ve shown themselves to actually have these intentions, is very likely to commit certain types of crimes.

So how would you deal with that sort of case? Would you then immediately after you don’t sort of have further evidence of immediate intention to commit the crime, you simply give them all the protections they would have had before? Or is there a sense in which you would admit a bit more leeway in the way in which the justice system treats people once they’re in the system, as it were, by having shown some sort of culpable aggressive attitude?

KIM FERZAN: I think we have to walk a really fine line here. So one question is the question of forfeiture. What do you forfeit for how long? And I think we should be really careful about large, huge sort of conceptions of, of what you lose and can’t regain.

You can think about this even in the criminal law. Do you want to say felons can never vote again and can never count as citizens? That would be incredibly problematic. Right? So forfeiture shouldn’t be thought of as a complete abandonment of rights from here to eternity. It’s got to be fitting and appropriate to that culpable intention.

Do I think that the use of statistical evidence to continue to prove has the intention is something that’s appropriate to do? I think, yes, that’s OK, but I think we have to be careful that we’re always asking the same question. And that question is, does this person continue to harbor this intention in such a way that the person still has forfeited rights? Because in the self-defense case, if I’m pointing a gun at you, the minute I drop that gun, I regain all of my rights. And so we want to try to equally, you know, aim at narrowly tailoring our preventive justice practices to make sure that we are actually only interfering with someone for so long as they harbor that intention.

I do think, at the end of the day, we engage in lots of predictive empirical decisions, right. Even as I’m pointing my gun at you, you were, of course, relying on probabilities that, in fact, now I intend to kill you. And I don’t think that there’s all that much wrong with, at the point we’ve proven the intention, relying on psychiatric testimony that the person would continue to harbor the intention, given their behavior in the past, for example.

CHRISTIAN BARRY: So I can imagine that one case where different approaches to either punishment, on the one hand, detention would come apart, would be cases where someone clearly has culpable intent and yet the question is whether or not you really think their having of that culpable intent is increasing the risk of them actually doing any harm.

There may be people who harbor all sorts of culpable intentions but, ultimately, they’re—you just think they’re pretty hapless and they’re never going to get their act together to do anything.

I can sort of see different ways in which you could imagine preventive justice and criminal justice working in this idea. So, one, one tendency might be to say, well that shouldn’t matter, you know. They have the culpable and the mere lucky fact that
they’re too hapless to actually being able to execute their plan shouldn’t mean that they should be able to continue roaming free and doing what they want.

So, in a way, you could say that if you simply make that a crime, that you have that, then that’s all right. You don’t need to show anything further about their relevant capability. And once it’s you engaging in preventive justice, if you’re holding someone on the basis of a culpable intention, unless you think they actually have the requisite means and capabilities of following through on that intention and doing the real harm, so the thought might be that if you don’t make certain types of things crimes there are going to be certain types of pretty bad people out there that are going to fall outside of the, the justice system altogether, that, even on fairness grounds, you think maybe shouldn’t be allowed to fall out of the justice system.

KIM FERZAN: So, I like that question about culpability and risk. So let me start with this. Self-defense requires that the defender act with defensive intention. So, if you know so—someone is pointing a gun at you and that gun is completely unloaded and the person can’t possibly kill you, you’re not allowed to shoot the person because you know that shooting them is not necessary.

And so, in the same way, the person you know has evil plans but couldn’t possibly actually harm anyone, that is someone who, at that moment, falls outside the reach of any sort of preventive intervention system.

So, at some point early on, it’s certainly true that this person is outside the criminal law. So, at the point in time, I want to say that I’ve decided to kill you and I, you know, I have my unloaded gun and I have to fly across the world to come see you, at that point in time, I don’t think the criminal law should be interested in me. But at the point in time when I’m pointing my unloaded gun at you, or I pull the trigger, certainly the criminal law can say, “Kim, even though you didn’t cause any harm, you are incredibly culpable and you have made yourself blameworthy. You’re blameworthy and punishable and should go to jail for a very long time for attempted murder.”

And so, at some point in time, this person will probably wind up in one category or another. There’s actually a great impossible attempt case where this woman was trying to kill her husband and did all kinds of crazy things, like bake pies with tarantulas in them, kept failing and failing and failing then finally just went and sort of violently killed him. But it was one of those if at first you don’t succeed try, try again.

And, at some point in time, the person who keeps trying is going to fall within the reach of one or other system, although it’s true that, perhaps, early on the person won’t. I mean, the point where she bakes tarantulas in the pie, I’m perfectly happy putting her in jail for trying to kill her husband.

CHRISTIAN BARRY: Well, on that solemn note, I’ll thank Kim Ferzan for joining us on Public Ethics Radio.

KIM FERZAN: Thank you for having me.

MATT PETERSON: You’ve been listening to Public Ethics Radio. The show is produced by me, Matt Peterson, and Christian Barry is our host. The show is
supported by the Centre for Social, Moral, and Political Theory at the Australian National University and the Carnegie Council for Ethics in International Affairs.

Thanks for listening.