7. Preventive detention of terrorists

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1. INTRODUCTION

In this chapter, our concern is with the preventive detention of terrorists and, specifically, whether preventive detention of terrorists might be morally justified.[1] Accordingly, we need to have serviceable accounts of preventive detention and of terrorism. Regarding terrorism, the following definition will be relied upon (see Chapter 2):

Terrorism is a political or military strategy that:

1. Consists of state or non-state actors deliberately perpetrating acts of violence aimed at (directly or indirectly) seriously physically harming, and typically killing, innocent civilians;
2. Is a means of terrorizing the members of some social, economic, political, ethnic or other group to achieve a political purpose;
3. Relies on the violence receiving a degree of publicity, at least to the extent necessary to engender widespread fear in the target group.

What of preventive detention? Preventive detention is a portmanteau notion used to refer to various forms of detention, including prisoner-of-war camps; quarantine during epidemics; detention of illegal immigrants; extensions of imprisonment terms beyond their initial sentences for 'dangerous' offenders, such as paedophiles; and short-term detention without charge of those suspected of intending to conduct an imminent terrorist attack. Here, we are primarily concerned with the imprisonment of members of terrorist organizations for the principal purpose of preventing future terrorist attacks by that organization (whether those future attacks be imminent or not) and, therefore, for the purpose of preventing harm by the persons imprisoned but also for the purpose (by means of interrogation) of collecting information from them regarding the organization's planned attacks, membership and so on. Accordingly, as with all categories of preventive detention, the purpose is forward-looking; the purpose is not, for instance, punitive and backward-looking, as in the case of punishing terrorists for past offences. Second, a fundamental purpose of pre-

ventive detention is to prevent harm to the community, including the murder of members of the community. Thirdly, preventive detention, as it is used here, does not refer to the related phenomenon of control orders. The latter do not involve imprisonment but rather the placing of various restrictions on the movements (for example, confinement to a certain address), communications (for example, prohibition on using a phone or email) and so on of known or suspected offenders, including, for instance, so-called returning foreign fighters, for example, citizens of the UK and elsewhere who were known or suspected of having travelled to Iraq or Syria to fight for the Islamic State but who have since returned home.[2]

2. TERRORISM AND PREVENTIVE DETENTION

According to our definition, terrorism is a violent means in the service of a political end. Moreover, the violence is typically directed at persons who are considered to be innocent, for example, civilians as opposed to combatants. Accordingly, terrorism is, or ought to be, a crime. In the case of state terrorism, in particular, it is sometimes not a crime, at least in the state perpetrating the acts of terror in question.

Combating the crime of terrorism involves particular difficulties not typically present in combating other crimes. One difficulty revolves around the status of terrorists. According to one view, they are simply criminals to be dealt with by police officers operating within a law-enforcement framework. But terrorists often insist that they are political actors fighting a war, that is, that they are military combatants. Indeed, in some instances, terrorists are clearly de facto (if not *de jure*) combatants (even if they are illegal combatants, as the United States declared members of al-Qaeda to be; see Blum 2008, Ch. 3), such as members of the Islamic State engaged in large part in conventional warfare in Syria and Iraq. However, during wartime, civilians are a separate category from combatants, and the rules of engagement with enemy combatants do not pertain to non-combatants. Moreover, terrorist-combatants are not simply combatants since, qua terrorists, they are criminals; terrorism is, after all, a crime in most jurisdictions and under international criminal law. Moreover, this is the case even if they are deemed to be unlawful combatants on some ground other than the fact that they engage in terrorism, for example, they do not wear uniforms and bear arms openly. Further, terrorists who are de facto combatants and who engage in, for instance, the murder of civilians in theatres of war are guilty of *war* crimes. Moreover, in all this there are complications arising from differences, firstly, between terrorists who are citizens or residents of the state under attack from the terrorist organization in question and terrorists who are foreigners and, secondly, between terrorist-combatants

captured on the battlefield and terrorists arrested in well-ordered jurisdictions outside areas of active hostilities.[3]

Terrorists pose problems greater than other dangerous criminals by virtue of the fact that they typically constitute an organized group that deliberately targets large numbers of people and does so indiscriminately – that is, members of the public at large are the targets. Given the danger to ordinary citizens posed by terrorists and, in particular, the need to prevent terrorist acts rather than merely react to them once they have been committed, the preventive detention of terrorists is an attractive option for governments. However, the preventive detention of suspects and the detention of suspects for prolonged periods without their being charged and tried are infringements, even if not violations, of the human right to freedom of action.[4]

Indeed, the cornerstone of liberal democracy is individual freedom and, aside from freedom of thought and speech, the most fundamental freedom, or set of freedoms, is freedom of action. Freedom of action includes freedom of bodily movement, freedom to associate and form relationships with others, freedom to buy and sell, freedom to plan and implement projects, including one's career, and so on. It is self-evident that detention, and especially long-term imprisonment, strike at the very heart of individual freedom. For this reason, imprisonment ought to be reserved only for serious crimes and in circumstances in which the suspect is guilty beyond reasonable doubt, or so it would seem. Thus, detention for prolonged periods without trial is morally unacceptable. Faced with these kinds of individual rights-based arguments, a tendency has developed on the part of governments to invoke the notion of trade-offs, and a balance between individual rights, on the one hand, and security considerations, on the other; this is especially the case in relation to anti-terrorist legislation.[5]

Here there are two crucial issues. The first regards whether or not there is in fact a need for a trade-off and, specifically, a trading down of particular individual rights. Arguably, privacy can be traded down to a significant degree, but freedom of action cannot (Kleinig et al. 2011). Or, perhaps we can increase security by spending more money (and time) on, for example, airport security, surveillance of at-risk installations and border controls without any significant diminution of existing privacy rights or existing rights to freedom. Secondly, in so far as there is a need for balancing and to trade off, what is to be put on the scales, and what is to be traded off against what?

With respect to one side of the scale, what proponents have in mind is perhaps clear enough; individual freedom is on the scales and is to be traded down. However, it is the other side of the scales that is unclear. Notions of national security or community safety are far too general and vague to be helpful here. There is a need for more precise and differentiated notions. Indeed, as far as the notion of community safety is concerned, this presumably

largely consists in the human rights to life and other aspects of personal security; so the other side of the scales consists in an individual right, after all, viz. the right to personal security. As is often the case, balancing rights to freedom and rights to personal security – if this is what has to be done – is a complex matter; sometimes the latter will trump the former – for example, searching luggage for bombs at airport security points – and there are contexts in which the former will trump the latter – for example, British soldiers going to war against Hitler's Nazi forces.

However, it is by no means clear that there is a need for a trade-off between fundamental rights to individual freedom and rights to personal security in well-ordered, liberal democratic states at peace. For one thing, security consists in large part in the provision of the conditions for the exercise of individual freedom. National security and law and order in liberal democratic states, as has been argued elsewhere (Miller and Blackler 2016, Ch. 1), largely consist in, or are heavily dependent on, respect for human and other moral rights, especially rights to personal security and property rights. Without respect for personal security and respect for property rights, there is no law and order in a liberal democracy and, therefore, the exercise of individual liberty is difficult, if not impossible. For another thing, the trade-off can be, and ought to be, a trade-off between the rights of offenders and suspected offenders on the one hand, and the rights of innocent people on the other. It is not as if what are to be traded down are the rights to, say, life and liberty of innocent civilians. The proposition is not that police and other security personnel ought to be empowered to shoot to kill, or indefinitely detain, *innocent* people in order to protect the rights of other innocent people.

While politicians in liberal democracies frequently frame the issue of preventive detention in terms of the trade-off between individual rights and national security, those who oppose preventive detention focus on the human rights of those preventively detained who are merely suspected, but not convicted, of terrorism and, therefore, might not in fact have perpetrated any act of terrorism (Blum 2008; Webber 2016). However, the existence of terrorist-combatants is problematic for this rights-based law-enforcement perspective. Let us now turn directly to these issues.

3. PREVENTIVE DETENTION, TERRORISTS AS CRIMINALS AND TERRORIST-COMBATANTS

Suspects are, by definition, not identical to those who have been tried and found guilty of a crime. Thus, unlike those who have been tried and found guilty, suspects continue to be presumed to be innocent and, as a consequence, cannot be, or ought not be, detained for lengthy periods, or otherwise subjected to restrictions or harms. Rather, suspects who are arrested must surely either be

charged and brought to trial expeditiously, or must be released (perhaps after a restricted period of interrogation). Moreover, suspects who are subjected to detention and interrogation ought to be afforded appropriate rights to protection, for example, the right to an attorney (Regan and White 2021, Ch. 1).

This is not to say that there might not be a need to calibrate, for example, periods of detention without trial in the context of changing circumstances, including the current threat of terrorism in the US, UK, France and elsewhere. Thus it may be that terrorist suspects ought to be able to be detained for weeks rather than days in the context of, for instance, the need to extract evidence from encrypted communications on seized computers. But such calibration must not be assimilated to a circumstance in which a terrorist suspect can be detained indefinitely without trial (including by the device of ongoing renewal of a detention order) as has been the case in some jurisdictions, for example, the United States' Guantanamo Bay prison camp (Blum 2008, Ch. 2).

Preventive detention is a controversial counter-terrorist measure that certainly infringes, and perhaps violates, the individual moral right to freedom. On the one hand, it is claimed by some (for example, human rights advocates and organizations, such as Human Rights Watch; see Fathi 2009) to be a human rights violation since it involves imprisonment of suspected terrorists who have not been tried for terrorism and found to be guilty beyond reasonable doubt in accordance with due process of law. On the other hand, others (for example, members of the former Bush administration in the US) have argued that at least some terrorist are combatants, although unlawful combatants, and can be subjected to preventive detention as combatants and perhaps (unlike ordinary prisoners of war) subjected to interrogation by virtue of not having the rights of lawful combatants undergoing detention (Blum 2008, Ch. 2).

Two conceptually separable moral justifications for preventive detention are embedded in the above-mentioned controversy. Firstly, there is the justification based on terrorism understood as a serious crime. Secondly, there is the justification based on terrorists as dangerous, irrespective of whether or not they are morally (or legally) culpable or even morally (or legally) responsible for their dangerousness. In relation to this second justification, consider enemy combatants or persons held in quarantine.

Regarding terrorists as criminals, the preventive detention of terrorists is morally problematic in that, at least in principle, it does not necessarily pertain to those suspected of a past or present crime – let alone tried and convicted of a crime – but to those suspected of being likely to commit a *future* crime; that is, persons are to be detained, notwithstanding the fact that the crime for which they are being detained has not been committed and is not in the process of being committed. Here it is important to distinguish between: (a) someone suspected of having already committed a crime – this first crime is in the present – as a precursor to committing a second crime in the future – for

example, conspiring in the present to commit a murder in the future; and (b) someone who is not suspected of any present (or past) crime, but only of being likely to commit a future crime – for example, someone who is not suspected of any past or present crime, such as the crime of conspiracy to murder, but who is, nevertheless, believed to be likely to commit a murder in the future. At least in principle, preventive detention might pertain only to a person in the situation described in (b), and not to a person in the situation described in (a). As such, preventive detention infringes the basic moral principle that a person should not be detained, or otherwise penalized, for a crime that they are known not to have committed or to be in the process of committing. Accordingly, so the argument runs, preventive detention cannot be morally justified.

What of the idea that terrorists are dangerous (irrespective of their moral or legal culpability for their dangerousness)? Thus understood, preventive detention might be morally justified by analogy with enemy combatants or those held in quarantine, depending on the quantum of innocent lives terrorists or terrorist organizations put at risk. Naturally, this justification has its limits. For instance, preventive detention might not be necessary if terrorist attacks are able to be thwarted utilizing less morally questionable means; and preventive detention might be disproportionate (and perhaps counter-productive) given (say) if the practice in the context in question required the detention of thousands of suspected terrorists over many decades, and yet only a small number of innocent lives would be put at risk if preventive detention was eschewed in favour of less morally questionable means.

Given that terrorists are both *criminals* guilty of past or present serious moral wrongdoing and *highly dangerous* persons likely to perpetrate future acts of murder – and, importantly, morally responsible for their dangerousness, unlike those held in quarantine, for instance – it seems that an adequate justification for preventive detention would need to help itself to both of these moral considerations. In doing so, it might not be relying on the disjunctive view that a terrorist is *either* a criminal *or* a combatant, but rather on the conjunctive view that, at least in the case of the members of terrorist organizations who can engage in armed conflict, such as al-Qaeda and the Islamic State, a terrorist is *both* a criminal *and* a combatant (albeit an unlawful combatant). Before addressing this issue in detail, two points should be made in passing.

Firstly, whether or not the preventive detention of terrorists in the form of long-term imprisonment is morally justified, the preventive detention for limited periods in some emergency situations is surely justified. For example, in the context of ongoing, large-scale, caste-based and communal violence of the sort experienced in Bihar and Gujarat in India in recent decades (Miller et al. 2008), preventive detention for limited periods of persons highly likely to incite mass crowds to violence might be morally justified. However, this is a moral justification for the preventive detention of select individuals for

a limited period and only in the context of a well-founded, and lawfully decreed, state of emergency.

The second point, in relation to the issue mentioned above of trading down of the rights of, especially, terrorist suspects, is this one. One illicit way in which the scales on one side (the security side) are being weighed down with a consequent trading down of the rights of suspects on the other side, is by the broadening of the scope of anti-terrorist legislation so as to embrace not simply actual specific acts of terrorism or actual membership in terrorist organizations, but also *threatened* acts of terrorism and the consequences of actual acts of terrorism in terms of the *fear* that they might produce. In some jurisdictions (Bottomley and Bronitt 2006, p. 402) terrorism includes the (possibly indirect and distant) *threat* of bombings and like actions, and therefore brings with it actions that have the potential to cause harm, for example, undertaking terrorist training; moreover, some anti-terrorism laws also focus on the motivation to intimidate and therefore bring into play the intentional causing of the *fear* of harm, as opposed to harm itself. There are other ways of widening laws against terrorism – for example, associating with a terrorist – and new crimes (or the resuscitation of ones in disuse) – for example, sedition. Here, as elsewhere, there is a need to analyse each of these elements on a piecemeal basis. Undergoing terrorist training, for example, manifests a high degree of culpability and, in the context of an increasing terrorist threat, warrants severe penalties. On the other hand, whether or not an action intentionally or otherwise caused fear is arguably so indeterminate a matter as to lead to abuse in the application of any laws enacted to eliminate or reduce such fear-causing actions.

4. PREVENTIVE DETENTION OF TERRORIST-COMBATANTS

Thus far we have seen that, at least some terrorists, such as members of al-Qaeda and the Islamic State, are both terrorists and combatants, that is, terrorist-combatants. Let us now consider preventive detention in relation to terrorist-combatants.

The preventive detention of terrorist-combatants is evidently justified by the moral principles, if not the laws, governing the conduct of war.[6] Since terrorist-combatants are combatants, and it is legally and morally justifiable to incarcerate captured combatants until the cessation of hostilities to prevent them from resuming the fight, by parity of reasoning, it is morally justifiable to preventively detain terrorist-combatants until the cessation of hostilities.

Moreover, since terrorist-combatants are combatants, it is legally and morally justifiable for combatants in an opposing force to kill them. One salient moral principle here is the one already mentioned, namely, that com-

batants are not only dangerous but also morally responsible for their dangerousness.[7] In this respect, combatants are unlike, for instance, infected persons in quarantine. A second salient moral principle is that of a *standing intention*. Combatants, by virtue of their occupancy of a role in an armed force engaged in armed conflict, are reasonably presumed to have a standing intention to kill combatants in the opposing force (and will do so unless the latter intervene to protect themselves by killing the former). Roughly speaking, standing intentions activate immediate intentions, which in turn cause actions. However, one can have a standing intention without having a relevant immediate intention – for example, a combatant who is eating lunch in a secure building – and one can have an immediate intention without having a standing intention – for example, a husband who intentionally kills his adulterous wife in a fit of anger but without any premeditation. The difference between combatants and terrorist-combatants is that the latter have a standing intention not only to kill enemy combatants but also to kill innocent civilians, should they be ordered to do so. Hence terrorist-combatants are unlawful combatants and, indeed, morally culpable combatants.

It is important to note that the dangerousness – understood as being comprised in large part of a standing intention and an ability to harm – of enemy combatants and, therefore, of terrorist-combatants involves the interdependence of standing intentions and a jointly held ability to harm. An individual combatant only has a standing intention to harm if they are a member of an organization in which their fellow members also have a standing intention to harm – and a standing intention to harm in the service of the same shared end, for example, to win a war. Accordingly, if all but one of the members of an army lay down their arms when the cessation of hostilities is declared, then the remaining one will typically do so. Moreover, the harm that an individual combatant can cause acting on their own is typically quite limited relative to what the armed force as a whole can cause. Further, the individual combatant does not act on their own as an individual but rather qua member of an organization. They act under orders from others in accordance with a strategy devised by others, and the tasks they are set are typically joint tasks, for example, take and hold a strategically important hill currently occupied by the enemy. This raises the issue of the *collective moral responsibility* – understood as joint moral responsibility (Miller 2006, pp. 176–93) – of combatants for harms resulting from their joint action as opposed to harm for which a single individual is solely morally responsible (see Chapter 3). Thus, a single combatant might be individually morally responsible for killing the enemy combatant they shot dead, but also morally responsible – jointly with others – for defeating the enemy platoon of which that enemy combatant was a member.

It is also important to note that the preventive detention of enemy combatants is *not* typically indefinite, even if it has lasted for an extended period

of time. Rather, prisoners are to be released at a definite end point, namely, the cessation of hostilities. By parity of reasoning, terrorist-combatants qua combatants ought to be released at the cessation of hostilities: presumably, a definite end point, for example, such as obtained in the case of the Irish Republican Army's (IRA) cessation of its terrorist campaign in the UK. It might be suggested that, unlike wars, terrorist activities go on indefinitely. As the IRA's terrorist campaign and numerous terrorist campaigns in anti-colonial struggles demonstrate, this is not necessarily or even typically the case. In any case, for our purposes here we need to distinguish terrorists engaged in armed conflict, that is, military-style campaigns, from sporadic bombings of civilian targets or armed 'marauders' in well-ordered jurisdictions (such as occurred in Paris in November 2015 at the Bataclan and other locations). It is the former and not the latter that is in question at this stage in the argument.

In the above discussion it has been argued that terrorist-combatants are combatants and, therefore, can be preventively detained until the cessation of hostilities. However, terrorists are unlike lawful combatants in two respects. Firstly, terrorist-combatants kill innocent civilians. Secondly, terrorist organizations defeated on the battlefield can continue to engage in acts of terrorism in well-ordered jurisdictions. Thus citizens of, say, the UK travel overseas and join a terrorist organization, such as the Islamic State; function as terrorist-combatants in a theatre of war, such as Iraq or Syria; and then return to the UK to carry out terrorist attacks in the UK as members of the Islamic State. These are the so-called foreign fighters that domestic security agencies worry so much about – home-grown terrorists with battlefield experience (Hoffman 2019). However, former terrorist-combatants who return to their country of origin to carry out sporadic terrorist attacks on ordinary civilians in their well-ordered home jurisdictions are not thereby engaging in armed conflict. Therefore, they are not terrorist-combatants by virtue of carrying out these terrorists attacks in their well-ordered home jurisdictions, as opposed to doing so on the battlefield.

Importantly, terrorists, including terrorists who are not combatants, are collectively, that is, jointly, morally responsible for the murders committed by the terrorist organization of which they are functionally integrated members, in addition to being individually morally responsible for whatever contributory actions they perform. Thus, the member of a terrorist organization who trains other members to, say, use explosives to murder people is doubly morally culpable. First, they are *fully individually* morally responsible for providing those they train with the means to murder. Second, qua functionally integrated member of the terrorist organization, they are, *jointly with the other members*, morally responsible for the murders performed by multiple members of the organization, albeit these murders are not actually performed by them, and their responsibility may only be partial (Miller 2010, Chs. 1 and 2).

This 'double' moral culpability has an important potential legal implication, namely, that the terrorist in question can reasonably be held criminally liable not only for the crime of training members of a terrorist organization, but also for the crime of murder or, at least, complicity in murder (Blum 2008) via their functionally integrated membership in a terrorist organization whose core business is murder.

There is a further important implication of being a functionally integrated member of a terrorist organization that is central to our concern with preventive detention. Being a functionally integrated member of a terrorist organization entails that the terrorist member in question has a standing intention – and a jointly held ability – to commit murder or to assist others to commit murder. Therefore, the presumption ought to be that such a person will commit murder or assist others to do so unless prevented from doing so.[8] Accordingly, there ought to be a presumption that a convicted terrorist who is imprisoned for their terrorist crimes will commit murder or assist others to do so, if they are released. Naturally, this presumption can be overridden and the detainee in question is entitled to periodic reviews to determine whether the presumption should be overridden. For instance, the presumption would be overridden if the terrorist organization in question abandoned its policy and practice of murder, or if the erstwhile terrorist demonstrates that they now reject terrorism. However, if this presumption is not overridden, then the terrorist in question can reasonably be preventively detained and for the same reason that enemy combatants are held as prisoners of war, namely, that by virtue of their functionally integrated organizational membership they have a standing intention to kill and will do so unless prevented from doing so by incarceration.

It has been argued that the members of terrorist organizations engaged in armed conflict, such as al-Qaeda and the Islamic State, can be presumed to have a standing joint intention to kill innocent civilians – whether in theatres or war or in well-ordered jurisdictions – and that this justifies their incarceration until the cessation of hostilities (irrespective of whether they were captured in a theatre of war or not). However, their individual moral culpability, taken in conjunction with the magnitude of the threat of the terrorist organization to which they belong, raises the question: Should some of the rights enjoyed by lawful combatants, on the one hand, and by ordinary criminals, on the other, be curtailed? For instance, lawful combatants do not have to provide intelligence to their captors (other than name, rank and serial number). Again, ordinary criminals typically have a right to silence.[9] Arguably, it should be permissible to interrogate members of such terrorist organizations, and their right to silence should be abrogated. However, interrogatory torture should not be permitted, nor should the right not to self-incriminate be abrogated; or, at least, terrorists should enjoy immunity from prosecution if they self-incriminate.

5. CONCLUSION

It was argued above, firstly, that since terrorist-combatants are de facto combatants, it is morally justifiable for them to be preventively detained in the manner of prisoners of war, that is, until the cessation of hostilities. Secondly, it was argued that even terrorists who are not terrorist-combatants can justifiably be preventively detained if it is established that they are functionally integrated members of a terrorist organization. This is most likely to be established by recourse to actions undertaken on behalf of the terrorist organization that are crimes in their own right. These might be lesser crimes than murder or even attempted murder – for example, the ongoing provision of training, recruitment or finance.

However, there is an important remaining question as to the standard of proof required to establish that a person is a functionally integrated member of a terrorist organization. Arguably, the standard of proof should be that of 'beyond reasonable doubt', at least for long-term detention. Presumably, the standard of 'beyond reasonable doubt' in relation to the conviction of a person for the crime of membership in a terrorist organization would be met if the person in question was convicted of, for instance, training terrorist members of that organization, and the standard of proof met in relation to this lesser crime was 'beyond reasonable doubt'. On the other hand, the standard of 'on the balance of probabilities' might be sufficient for short-term detention – for example, periods up to six months (assuming hostilities continue) – in order to avert the near-term harm of terrorist attacks currently being planned. Moreover, in such cases, the short period of detention might be followed by a period in which restrictions are placed on the movements, communications and so on of the person in question (that is, some form of control orders).

NOTES

1. For an argument justifying the preventive detention of terrorists that is somewhat different to the one presented here, see Scheid (2010). For discussion of Scheid, see Landesman (2011). For replies to Landesman and others, see Scheid (2011). For a more recent discussion of Scheid, see Miller (2018).
2. See Webber (2016), Chapters 5 and 6, for discussions of control orders.
3. There are also grey areas that are neither battlefields nor well-ordered jurisdictions, for example, the FATA in Pakistan. See Miller (2009), Chapters 4 and 5, for discussion of the significance of this threefold distinction.
4. See, for instance, Webber (2016) for a detailed treatment of the legal principles and issues from a human rights perspective.
5. See, for example, what Philip Ruddock, the former Australian Attorney General, had to say about this. He is quoted in Bottomley and Bronitt (2006, p. 412).
6. See Miller (2018, pp. 122–40).

7. Douglas Husak (2011) emphasizes that many dangerous criminals are responsible for their dangerousness.
8. Note that those who assist terrorists qua terrorists can be functionally integrated members of a terrorist organization. The notion of a functionally integrated member of an organization is essentially that of a role defined in terms of tasks and an occupant of that role; the occupant pursues the collective ends of the organization and does so by virtue of occupancy of the role. See Miller (2010), Chapters 1 and 2.
9. On interrogatory torture, see Skerker (2021), which is Chapter 6 in this volume.

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