



**JUST TORTURE AND AFTERCARE**

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A Thesis submitted to the University of Birmingham for the degree of  
MASTER OF RESEARCH

School of Philosophy, Theology and Religion

College of Arts and Law

University of Birmingham

December 2022

UNIVERSITY OF  
BIRMINGHAM

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## ABSTRACT

This thesis stakes the claim that some forms of coercive interrogation, also called interrogational torture, are morally justified under extreme circumstances for the defence of innocent persons and the institutions of liberal democracy. I go on to assert that persons harshly interrogated, and the interrogators, are rightfully offered compensatory care based on harm experienced as a result of defensive interrogation.

The thesis is divided in two chapters. The first addresses the moral justification for some forms of torture under limited circumstances, what limits should be placed on them, and who is liable to harsh interrogation. The second chapter outlines a theory of aftercare for those involved with torture.

My theoretical approach to just torture draws on the Just War Tradition and the works of Shunzo Majima and Uwe Steinhoff. To reach an ethics of just torture, or coercive interrogation, I consider objections from James Griffin, Henry Shue, Jeff McMahan, and David Sussman. I demonstrate how these objections can be overcome or set aside.

Examinations of two justifications of torture in the scenarios of the 'ticking bomb' and kidnappings show how both provide circumstances under which some forms of torture may be just. I draw on large evils like terrorist attacks and smaller ones like kidnappings. I demonstrate how the perpetrators of these serious wrongs forfeit the right not to be harmed we otherwise have. In addition to showing when torture may be just, I delineate which acts are morally permissible and those which are not. I call this 'line drawing'.

The second chapter is a unique focus on aftercare. This begins by looking at the emerging literature on justice after war, or *jus post bellum*. After examining some principles of 



war justice, I look at post-torture justice, or *jus post cruciamentum*. It is my position that those directly involved in coercive interrogation may experience harm and should be afforded aftercare. Just aftercare is first provided to innocent persons who were unjustly interrogated. I divide those justly interrogated into three groups: the first is the guilty person who will not be incarcerated; the second is the guilty person who will be incarcerated for a short period of time; the third is the guilty person who will serve a life sentence in prison. Within each category I argue for care related specifically to the possible trauma of torture the person faced. Lastly, I advocate aftercare for the interrogator. The interrogator, in the cases I endorse, is generally an agent of the liberal democratic state. Thus, the interrogator is owed aftercare by the society she acts on behalf of.

The thesis defends the rare use of harsh techniques to protect the innocent and defend the institutions of liberal democracy.

### ACKNOWLEDGEMENTS

This thesis was copy edited for conventions of language, British spelling, grammar, and formatting by Conrad Meinecke MA. Thanks to Ellen Feder, of American University, and at the University of Birmingham (UK), to Jeremy Williams and Merten Reglitz for intellectually challenging and supporting me as I undertook this controversial subject



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## INTRODUCTION

In this thesis I defend the rare use of some forms of torture, and the subsequent justice of providing care afterwards. Some of the forms of harmful interrogation that I will argue for are usually called 'torture'. This does not mean that I advocate torture as a general practice. I do not. Most of the methods and aims of torture are outside the bounds of morality and should be forbidden. However, I will also argue that *some* forms of torture *may* be justified in *rare* circumstances. While I am now using the generic term 'torture' for these practices, I will later refine the terms so that there is nuance between what may and may not be justified. Furthermore, I will articulate an expansive ethics of aftercare for those who have been directly involved with torture. This will embrace those who carried out, as well as those who received, torture. My reflections on torture began with Shunzo Majima's 2012 paper "Just Torture?".<sup>1</sup> Majima explored the possibility of just torture through the framework of Just War Theory (JWT). Uwe Steinhoff also offers a robust argument for just torture based on the right of self-defence.<sup>2</sup> This thesis is my attempt to carry these positions further, both theoretically and practically for security officers in the field, with an added concern for a robust aftercare.

Majima's original paper begins with a brief survey of the legal and moral restraints on torture and of six categories, taken from Michael Davis, where torture is applied.<sup>3</sup> He

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<sup>1</sup> Shunzo Majima, "Just Torture?", *Journal of Military Ethics* 11, no.2 (September 2012), pp.136-148, <https://doi.org/10.1080/15027570.2012.708180>.

<sup>2</sup> Uwe Steinhoff, *On the Ethics of Torture* (Albany: SUNY Press, 2013), pp.11-18.

<sup>3</sup> Ibid p. 138; His reference from Davis comes from Michael Davis, "The Moral Justifiability of Torture and Other Cruel, Inhuman and Degrading Treatment", *International Journal of Applied Philosophy* 19, no.2, p.161-178, <http://dx.doi.org/10.5840/ijap200519215>.



concludes, as do I in chapter one, that only interrogational torture may be morally defensible. He uses that term to apply to justifiable torture used to gain information in national defence, defining justified torture for national defence as defending a nation's civilians.<sup>4</sup> Working within the JWT framework, he discusses *jus ad bellum* (just causes for starting a war), *jus in bello* (rules of conduct during a war), and *jus post bellum* (conduct after a war) in terms of just torture as *jus ad cruciamentum* (just causes for torture), *jus in cruciamento* (just conduct during torture), and *jus post cruciamento* (just conduct after torture).<sup>5</sup>

In JWT, going to war follows a principle of 'last resort' and 'proportionality'. I take the position that torture should only be employed when a threat is impending, and other less harmful techniques have failed to elicit the desired results in an acceptable time frame. *Jus in cruciamento* points to restraint in torture, which I address in a section on line drawing; when the just goal "to extract the information necessary to prevent a national disaster – has been achieved, torture should immediately be terminated".<sup>6</sup> Just torture is not punishment- it is to prevent an evil. If morality ever allows for any form of torture, then averting a *national* catastrophe is not the only justified situation. In addition to disasters on a national scale, there are disasters on a smaller scale which remain injustices. I look at the kidnapping of innocent persons as examples.

*Jus post bellum* applies to torture as *jus post cruciamentum*. "The victim of torture, regardless of his culpability, is entitled to rehabilitation."<sup>7</sup> This rehabilitation includes "medical care and treatment, as well as other necessary means, [and] must be taken for

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<sup>4</sup> Majima, "Just Torture", p.139, p.143.

<sup>5</sup> Ibid, p.142

<sup>6</sup> Ibid p. 145

<sup>7</sup> Ibid p.146

recovering physical/mental health of the tortured regardless of his/her guilt or innocence".<sup>8</sup>

I include the perpetrator as a victim in need of care as well, extending care to recognise the "psychological burden of torturing for the torturer."<sup>9</sup>

This project is divided into two chapters. The first chapter addresses torture itself. I begin by reviewing the various ways in which torture is used, positing that barring the use of interrogation as a tool to gain information to save innocent lives, or protect institutions of liberal democracy from imminent threat, it is morally indefensible. I include the institutions of liberal democracy because they are the social and political structures which protect and enable the possibilities of flourishing.

After reviewing the uses of torture, I discuss five significant objections and I explain why I find these objections either unsubstantiated or to be overridden. Some views I disagree with are generally valid arguments against lethal harm. Others argue against torture except in circumstances so narrow as to be almost impossible. I may agree with an argument against lethal harm, but note that I am not building a case for killing; I build a case for torture to save innocent lives or liberal institutions. I am not arguing for justified killing but only for harm which can be compensated for in aftercare.

After looking at the objections, I look at two situations where torture has defenders. These are the famous 'ticking bomb' scenarios, and cases of kidnapping. Simplistic forms of the 'ticking bomb' are rightly challenged, but history shows that they are closer to reality than some critics allow. While there has not yet been a weapon of mass destruction (WMD) deployed in Paris, there have been mass casualty attacks on the subway systems in Tokyo

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<sup>8</sup> Ibid p.146

<sup>9</sup> Frances Myrna Kamm, *Ethics for Enemies: Terror, Torture and War* (Oxford: OUP, 2013), p.28.



(1995), Madrid (2004) and London (2005). All these complex attacks involved multiple perpetrators. With the right intelligence there is a reasonably good chance of apprehending conspirators and extracting the information necessary to thwart an attack. I state that a high degree of certainty that a suspect has information is required before a suspect is tortured, and I outline the elements of that certainty. These requirements protect the human and civil rights of innocent persons and stay the hand of overzealous, but poorly informed, security officials.

After reviewing the rare situations where torture may be called for, I discuss the moral basis of my position. Torture is justified in defence of self or others. I call this simply 'self-defence'. To this I add the defence of liberal institutions.

I also review the lesser evil argument used to support torture. For example, we can claim that it is a lesser evil to torture one terrorist than the evil of a bomb killing 200 people on a jet. I do not defend this as the strongest argument for my position because the ease of weighing the relative evils involved in a given situation can be difficult to impossible.

Liability is an important notion, and I look at liability for interrogational harm as a result of posing a threat to innocent people or the institutions of liberal democracy. The goal of Coercive interrogation (CI), or interrogational torture, is to obtain information to prevent wrongdoing. I consider theories of liability set forth by Jeff McMahan, Jonathan Quong and Victor Tadros as providing philosophical foundations for asserting who is liable to defensive harm.

I do not defend all forms of torture even when I do believe that torture could be justified. In a section on line drawing, I argue that some forms of torture must not be employed, even if they might work. One reason for this is that I want to protect the moral integrity of the



interrogator. Furthermore, in a section on institutionalisation and training, I point how training within pre-existing interrogation training programs offers safeguards against abuse. There is strong evidence that when the ill prepared are called upon to interrogate suspected wrongdoers, little, if any, useful information is gained, and the interrogator suffers moral and psychological harm in the process.<sup>10</sup> An important point I make is that the interrogator is an agent of the state. And the state here, the one whose agent I am speaking of, are democracies such as Taiwan, Japan, Germany, the US, and the UK. I say that this is an important point because training, or lack of it, is the responsibility of the employing and deploying state.

The second chapter covers aftercare, or *jus post cruciamentum*. Here I cover three broad groups of people: the first is the innocent person wrongly subjected to torture; the second is the person guilty of a harmful threat and thus liable to torture to prevent that threat coming to fruition; and lastly, I look at the torturer.

Each of these groups present us with victims of torture. By victims I mean those adversely affected by torture, and I include the torturer here as well. Even though torture may be justified in rare and urgent circumstances, it may nevertheless cause moral injury to state agents conducting it. I give more attention than is customary to the care of the torturer. I do this because I hold that citizens of liberal democracies must take responsibility for those who act in our defence.

Aftercare does not exclude punishment for wrongdoing. A person may be liable for torture to prevent a wrong and be a just recipient of aftercare following it. That same person may

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<sup>10</sup> One work investigating this is Joshua E.S. Phillips, *None of us were like this before: American Soldiers and Torture* (Verso: London, 2010).



be incarcerated for her role in the criminal event. Punishment for a crime does not rule out aftercare for the torture used to mitigate that crime. I focus on aftercare for all involved with torture.

This is the terrain before us. This thesis will make the case for the rare use of torture when a threat to innocent people or liberal institutions is pending, before unfolding proposals for the care of those intimately involved with these practices.

## CHAPTER I: TORTURE

### I.1 Introduction

This chapter begins by looking at torture, or coercive interrogation (CI), and then moves on to explore why it may be morally defensible in some circumstances and who might be liable for it. Torture is an act absolutely prohibited by international agreements and rejected by many with absolute conviction and without exception. Henry Shue holds to the positions of an absolute prohibition.<sup>11</sup> Having stated this position, he wonders if there may be circumstances in which torture, although morally wrong, may be justified; He concludes that there are none.<sup>12</sup> I will argue that while typically wrong, torture can be in certain circumstances and forms, morally justified, if not required. It is important to point out that I say *some* forms may be justified. Later I distinguish between harmful acts which I judge to be permissible and those that I do not. In addition to Shue, there are many who hold that torture is the one thing that we must never waiver in rejecting.<sup>13</sup> There may be times we say that freedom of speech is restricted, such as not having the right to yell “fire” in a crowded theatre. The right to life is curtailed on the battlefield or when an individual kills in self-defence. Freedom of religion is limited when we prohibit human sacrifice. Liberty is restricted through the lawful and just imprisonment of criminals. But torture is frequently

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<sup>11</sup> Henry Shue, “Making Exceptions”, *Journal of Applied Philosophy* 26, no.3, (2009), pp.307-322, p.310, <https://doi.org/10.1111/j.1468-5930.2009.00455.x>.

<sup>12</sup> Ibid. p.313.

<sup>13</sup> See for example, James Griffin, *On Human Rights* (Oxford: OUP, 2008), and Richard Matthews, *The Absolute Violation: Why Torture Must be Prohibited* (Montreal/Kingston: McGill-Queen’s University Press, 2008).



prohibited, even to a greater degree than killing, even though one can sometimes recover from the former and never the latter.

The following chapter begins by outlining various objectionable ways in which torture is frequently used. Next, I will look at the reasons why it may be justified in some circumstances, for specifically defensive purposes. For the sake of moral clarity, section I.9, on line drawing, provides demarcation between what harmful techniques may legitimately be used, and those that may not.

Line drawing serves two purposes. In the first instance, it will delineate forms of interrogation which may be justified to prevent wrongdoing while avoiding those that sink into barbarism. The second purpose is to reduce the physical, psychological, and moral injury suffered by all involved, including the interrogator. I use the term ‘moral injury’ here to refer to the violation of one’s deeply held moral standards.<sup>14</sup> Line drawing is the act of drawing a line between acceptable and unacceptable practices. For the purposes here, I will only indicate the upper level of what is unacceptable, which refers to the highest degree of pain that can be inflicted during interrogation. I will discuss training for interrogators in section I.9 under ‘institutionalisation’. While the idea of institutionalising harmful interrogations may raise alarms, I will demonstrate how it provides safeguards and limits what may be done to extract information. Institutionalised training provides the guard rails to keep interrogation within the acceptable bounds detailed in ‘line drawing’.

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<sup>14</sup> See “What is Moral Injury?”, The Moral Injury Project, Syracuse University (USA), accessed 6 December 2022, <https://moralinjuryproject.syr.edu/about-moral-injury/>, and Victoria Williams, Dominic Murphy, Andrea Phelps, David Forbes, “Moral Injury: The effect on Mental Health and implications for treatment.” *The Lancet* 8, no.6 (June 2021), pp.453-455, [https://doi.org/10.1016/S2215-0366\(21\)00113-9](https://doi.org/10.1016/S2215-0366(21)00113-9) for discussions on Moral Injury.



The last section concerns the determination of who is legitimately liable to interrogation and for what purposes. This will review two concepts: liability, and the lesser evil. Each of these concepts can be the basis of harsh interrogation. However, I will explain why, of these justifications, I focus on the former.

## I.2 The illegitimate Uses of Torture.

Different applications of torture are used for a number of reasons. Penal torture is used as a punishment for crime, such as the flogging of two Indonesian men for homosexuality, while also having potential for use as a deterrent.<sup>15</sup> Terroristic torture is torture used to terrorise a population. It is generally, but not exclusively, used by barbaric states such as Saddam Hussein's Iraq or Augusto Pinochet's Chile.<sup>16</sup> Demonological torture is the term I use for violent and painful forms of exorcism which seek to expel demons. While this is rare in industrial countries, it is unfortunately not so in parts of Sub-Saharan Africa.<sup>17</sup> Sadistic torture is torture carried out for the perpetrator's pleasure, reducing them to a mere means serving the perpetrator's pleasure.<sup>18</sup> Judicial torture is the painful extraction of a confession for a crime, generally indefensible when used *because* guilt has not been proved; torture used this way is more likely to produce a false confession and corrupts the legal system.

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<sup>15</sup> Kyle Knight, "77 Lashes for a Gay Couple in Indonesia", Human Rights Watch, 28 January 2021, accessed 06 December 2022, <https://www.hrw.org/news/2021/01/28/77-lashes-gay-couple-indonesia>.

<sup>16</sup> I take this term from Henry Shue, "Torture", *Philosophy and Public Affairs* 7, no.2 (Winter 1978), pp.124-143, p.132, <https://www.jstor.org/stable/2264988>.

<sup>17</sup> Chima Agazue, "Children as Mischievous Spirits: Legitimising Child Cruelty and Filicide in Contemporary Africa", *Dignity: A journal of Analysis of Exploitation and Violence*.6, no.3 (June 2021), <https://doi.org/10.23860/dignity.2021.06.03.03>. There is considerable literature on this subject- this is only one reference.

<sup>18</sup> J.I. Warren, R. R. Hazelwood, and P.E. Dietz, "The Sexually Sadistic Serial Killer", *Journal of Forensic Sciences* 41, vol.6 (November 1996), pp.970-974, <https://doi.org/10.1520/JFS14033J>.



I hold, but do not argue here, that the above listed forms of torture are morally inappropriate. Briefly, I say this because they are not directed to the higher goal of protecting the innocent or the institutions of liberal democracy from impending threats. My focus is on the remaining reason for which some forms of torture may be justifiable in rare circumstances. That is interrogational torture, or CI.

CI seeks information to mitigate an imminent threat to innocent persons and the institutions of liberal democracy. I am currently using these terms interchangeably, but Later I will distinguish between what forms of painful interrogation I believe to be justifiable under rare circumstances, and those that I do not. At that stage I will reserve the term ‘coercive interrogation’ to the allowable, and ‘torture’ to those practices which are impermissible. Torturing to extract information in the service of a tyrannical regime is, to my mind, *generally* indefensible. I admit a possibly legitimate use of CI by a tyrannical regime to protect its innocent citizens, rather than intimidate political opposition. Consider interrogation that would have prevented the 2021 attack on a Chinese construction crew in Pakistan, or that could have prevented the attack on a Moscow theatre in 2002.<sup>19</sup> These examples point out that illegitimate governments also have innocent citizens who deserve protection.<sup>20</sup> What I will argue for is the use of coercion to extract information to protect innocent lives or the institutions of liberal democracies from imminent threat. I include the

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<sup>19</sup> Ajit Kumar Singh, “Pakistan-China: Increasing Pressure”, South Asia Terrorism Portal (SATP), accessed 6 December 2022, <https://satp.org/south-asia-intelligence-review-Volume-20-No-4>; “Hostage crisis in Moscow theater”, “This Day In History”, History, last modified October 26 2020, <https://www.history.com/this-day-in-history/hostage-crisis-in-moscow-theater>.

<sup>20</sup> I use the term “illegitimate” government to describe those Rawls called “outlaw”. These states deprive citizens of basic human rights. Examples include Nazi Germany, China, and Russia. For more, see John Rawls, *The Law of Peoples with ‘The Idea of Public Reason’ Revisited* (Cambridge, Mass: Harvard University Press, 1999), p.90.



institutions of liberal democracies, along with individuals, because those institutions serve to protect and foster the possibilities of flourishing and moral equality among persons.

We are left with interrogational torture, or CI, whose purpose is the defence of persons and liberal institutions. I will soon review some of the orthodox positions that torture is always wrong. But before reviewing those positions, I will look at how torture is defined internationally.

### I.3 Torture is Prohibited Internationally.

The Declaration of Human Rights (UDHR) prohibits torture in Article 5. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1987 (UNCAT) further defines a global prohibition.<sup>21</sup> UNCAT defines torture as follows in Article 1: “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”<sup>22</sup>

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<sup>21</sup> “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, United Nations General Assembly, Resolution 39/46, accessed 06 December 2022, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>.

<sup>22</sup> Ibid.



UNCAT does not define the limits of “lawful sanctions”. Later I make provisional attempts at defining limits on torture. Article 2 rules out any possible derogation of this prohibition against torture.<sup>23</sup>

The European Convention on Human Rights simply states in Article 3:” No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>24</sup>

These are just two examples. It benefits the human community that nations agree upon norms that govern their interactions with one another as nations, and to the minimal goods to which persons are entitled. International conventions concerning torture are designed to protect persons against grievous wrongs. However, sometimes these conventions may prohibit states, when threatened, from acting in self-defence, such as in prohibiting CI to uncover and prevent an attack.

#### 1.4 Moral Arguments Against Torture.

More important are the moral arguments against torture which I list here and discuss below in more detail.

- Torture destroys human agency and thus personhood. It undermines our basic personhood as exhibited in our ability to act and to choose.
- Torture is wrong because it causes physical and or mental suffering when it is not necessary. Interrogation does not require violence.

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<sup>23</sup> Ibid.

<sup>24</sup> "European Convention on Human Rights", European Court of Human Rights, accessed 6 December 2022, [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf)

- It is wrong because it is violence against the defenceless. The person being interrogated is not an armed soldier but a restrained captive who is unable to harm his captors. As such, they should be treated as either an unarmed civilian or a Prisoner of War entitled to protections afforded by the Geneva Conventions of 1949. Article 17 forbids any form of “physical or mental torture” or other coercions to gain information.<sup>25</sup>
- It is wrong because it reduces a person to a means to an end.
- Torture is wrong because it does not work or is unreliable.

Below I review these objections in greater detail and point out objections to each as the basis for prohibiting the rare use of CI. Some of these objections I find to lack validity.

Others have a point, but one which is overridden when a grave threat is imminent.

Some of these objections are not absolutist positions in so far as they allow the slightest possible use of CI. But that use is so theoretically narrow to be nearly useless in practice. As a tool for saving innocent lives, the bar for implementing CI must not be so high as to be impossible to reach in actual practice. I will discuss where I judge that bar should be later.

#### I.4a: Agency and Suffering.

Returning to the argument that torture is wrong because it destroys agency, it seems to me that agency has acquired an almost sacrosanct status. Around it hang the values of liberty, and one’s ability to pursue a worthwhile human life. These are values that rightly deserve

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<sup>25</sup> “Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949”, Treaties, State Parties and Commentaries, International Committee of the Red Cross, accessed 7 December 2022, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=2D8538058860C1FCC12563CD0051ABBE>.



defending. Agency here means the ability of a mature adult to act in a rational way to achieve or pursue a goal. However, does one person's agency wipe away every other concern? I think not. Nor do I think that every person's agency is always deserving of equal protection. The suicide bomb maker, for instance, can lose his right to free agency by posing a threat. Agency is a vital component of personhood, but if it is directed toward evil, is it wrong to thwart it? I think not. Evil is the use of agency to violate the rights of others without just cause. It is through using agency for evil that one acquires liability for CI. Rights are not absolute, and we risk them when we act to harm others without great cause.

James Griffin states that torture is wrong for two reasons; it "involves excruciating pain" and is an attack on "normative agency".<sup>26</sup> Agency is central to his understanding of personhood. Griffin correctly asserts that painful interrogation is an attack on the captive's agency. David Sussman goes further, claiming that one of the elements that makes torture uniquely foul is that it "forces its victim into the position of colluding against himself".<sup>27</sup> But while these plausibly help to explain what makes torture wrong when it is wrong, there are not sufficiently strong objections to show that torture is invariably wrong. Again, if a person's agency is directed toward doing evil, it is wrong to turn it against itself to save innocent lives? As Nigel Biggar put it, "there are malicious commitments of the will that deserve to be broken or shattered"; the commitments he notes are those of Hitler, Pol Pot, and Islamic State agents.<sup>28</sup> Michael Adebolajo and Michael Adebowale butchered the unarmed Lee Rigby on a London Street.<sup>29</sup> Both were known to the British security services. If one of them

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<sup>26</sup> Griffin, *Human Rights*, p.52.

<sup>27</sup> David Sussman, "What's Wrong with Torture?" *Philosophy and Public Affairs* 33, no.1, (2005), pp.1-33, p. 3, <https://doi.org/10.1111/j.1088-4963.2005.00023.x>.

<sup>28</sup> Nigel Biggar, *What's Wrong with Rights?* (Oxford: OUP, 2008), p.172.

<sup>29</sup> Vikram Dodd and Josh Halliday, "Lee Rigby murder: Michael Adebolajo and Michael Adebowale found guilty", *The Guardian*, December 19, 2013, accessed 7 December 2022, <https://www.theguardian.com/uk-news/2013/dec/19/lee-rigby-murder-michael-adebolajo-adebowale-guilty>.



had been detained prior to the attack on May 22, 2013, and questioned about possible future plans, the attack may have been averted and a life saved. Some will say that the scenario just described would lead to an unwarranted violation of civil rights as citizens are picked up off the streets arbitrarily. This is not a justified worry if we are only applying this approach to persons known to the security agencies for prior signs of evil intentions, and not to random citizens based alone on politically unpopular views. The case I make is that the agency of a would-be attacker is liable to being thwarted if doing so saves lives.

Derailing the agency of an evil doer to do evil is a morally correct act.

Discussion of agency can lead to discussing the means used to diminish it. How strong an attack on agency is allowable in the attempt to thwart an unjust threat? This question is not pedantic as it is at the core of what we may, or may not, do to achieve the goal of protecting innocent persons and democratic institutions from assaults. I will return to them later in section I.9 discussing line drawing and the limits on what may and may not be used in CI.

#### I.4b: Unnecessary Suffering.

According to our second objection, torture is wrong because it causes suffering unnecessarily. This is partially true. For most of the uses discussed previously, causing pain is immoral because it is not necessary to a legitimate end. Causing pain alone is not what makes torture wrong. The objection that pain is not necessary is not applicable to the defensive cases of concern here, in so far as the use of pain *after* the prisoner has been offered a chance to cooperate demonstrates that physical or mental pressure was necessary, because the prisoner did not cooperate when given the chance. The application

of painful techniques is only allowable when the prisoner has been given ample opportunity to provide information that would thwart an evil act.

#### I.4c: The Prisoner is Defenceless.

On the next objection, torture is wrong because it is violence against a defenceless prisoner. On first glance, this is a very compelling objection. JWT, as well as the Geneva Conventions, prohibit violence against unarmed civilians and prisoners of war. Henry Shue makes this argument convincingly, and is correct that a defenceless and *innocent* person is not liable for harm. He argues that part of the justification for killing on the battlefield is that there is what he calls a 'fair fight', meaning that each party had a reasonable chance of surviving the encounter.<sup>30</sup> This idea of a fair fight means "protecting the utterly defenceless from assault" because the defenceless do not have a fair chance of survival.<sup>31</sup> Shue quickly points out that having a fair chance of survival alone does not make it morally acceptable to attack.<sup>32</sup> It is just an argument for fairness in fighting. He acknowledges that this notion of fairness in battles is partially rooted in our idea of the medieval joust.<sup>33</sup> In the case at hand now, the prisoner is no longer a danger, is defenceless and subject to the will of the torturer. And for this reason, torture "is more morally reprehensible" than killing on a battlefield in accordance with recognised laws of war.

Shue acknowledges that harmful interrogation is different from political torture in that it has a logical conclusion when the sought-out information is obtained.<sup>34</sup> However, he goes

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<sup>30</sup> Shue, "Torture", p.129

<sup>31</sup> Shue, "Torture", p.129

<sup>32</sup> Shue, "Torture", p.129.

<sup>33</sup> I do not endorse the idea that "fairness" is a justifying factor for self-defence. See Helen Frowe, *The Ethics of War and Peace: An Introduction*, 2<sup>nd</sup> ed, (London: Routledge, 2016), Chapter 11, "Remote Warfare", is particularly applicable.

<sup>34</sup> Henry Shue, "Torture", p.133; The term political torture as I use it here refers to torture used to silence political opposition and terrorise a population.



on to assert that “it is hardly necessary to point out that very few actual instances of torture are likely to fall entirely within the category of interrogational torture”.<sup>35</sup> I am only defending those instances of torture that fall within that category. Moreover, he says that once interrogation begins it is unlikely to stop, even if we think we have obtained the sought-after information.<sup>36</sup> Shue argues that this is because we may not be able to verify information, and thus keep torturing in order to get more or better information, something that is simply unlikely in today’s world.<sup>37</sup> Satellite and drone photography, telephone and internet intercepts, and on the ground human verification are just some of the tools available now to confirm information. What may have been true in 1978 is less true now. Finally, it is fundamentally not the case that a captured terrorist is necessarily harmless. A prisoner’s knowledge is a weapon in so far as she knows where a bomb is buried, when it will explode, or who is carrying it, information that can be used to prevent an attack. Withholding the information sustains the threat.

#### I.4d: Person Becomes Means to an End Only.

An especially prominent objection to torture is that it is wrong because it reduces a person to a means to an end, not an end in themselves. Kant said that a person must be treated “never simply as a means, but always at the same time as an end.”<sup>38</sup> This is a valid objection in so far as *for a limited time*, the captive is treated a means to another end. In CI this may be justified in order to save innocent lives. In other cases, as for the sadistic pleasure of the torturer, or to diminish political opposition, it is not. The deontological objection is valid but

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<sup>35</sup> Henry Shue, “Torture”, p.134.

<sup>36</sup> Henry Shue, “Torture”, p.134

<sup>37</sup> Henry Shue, “Torture”, p.135

<sup>38</sup> Emmanuel Kant, *Groundwork for the Metaphysics of Morals*, trans. H.J. Paton (New York: Harper Perennial Modern Thought, 2009), p. 96.



in some circumstances a person can make themselves liable to be treated as a means to an end.

#### I.4e: Torture Does Not Work, or is Insufficiently Reliable.

The final objection is that torture is wrong because it is insufficiently reliable. If this were true, it would be a sound objection- the fact that *no* form of interrogation has 100% reliability in extracting information disproves this. However, there *is* evidence that pain may produce lifesaving information. Carmi Gilon, the former head of Shin Beit (Israel's Security Agency), stated that coercive methods were used on "8% of the Hamas and Islamic Jihad detainees, and in 90% [of cases] they also led to results".<sup>39</sup> He goes on to cite specific examples; in 1994 Hamas planned a suicide bombing of the market in Petah Tikva, and on a bus on the Trans-Samaria Highway. Physical pain was brought to bear on prisoners, some talked, and a plan was foiled. The following year Shin Beit arrested Abdal Nasser. For two days he refused to cooperate. Applying "moderate physical pressure" was persuasive and four bombings were prevented as well as a plot to kidnap Israeli soldiers.<sup>40</sup> I will discuss other examples of this phenomenon when discussing 'ticking bomb' scenarios. For now, these are sufficient to challenge the assumption that torture never works; even if it only *sometimes* works, it is still worth trying to save innocent lives. Put differently, even if a given defence is not certain to work, the wrong doer has forfeited the right for it not to be used.

#### I.5: The "Ticking Bomb" and Other Scenarios.

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<sup>39</sup> Boaz Ganor, *The Counter-Terrorism Puzzle: A guide for Decision Makers* (New Brunswick: Transaction Publishers, 2005), p.165.

<sup>40</sup> Ibid p. 169

Before discussing the arguments for why torture or CI may be morally right, I will discuss *situations* which have been invoked to support it. The most well-known of these is the ‘ticking bomb’ scenario.<sup>41</sup>

### I.5a: “The Ticking Bomb”.

The scenario is that an evil person or persons have hidden a weapon of mass destruction (WMD) in a major city. The weapon is due to detonate soon, perhaps in a day or less. The authorities have captured a person who can avert the catastrophe, either by revealing where the WMD is or by pushing a hidden button that will disarm it. She is uncooperative and knowing that there is little time left, the authorities torture the prisoner. Under torture she reveals the bomb’s location and innocent lives are saved. These circumstances left the authorities with little choice but to employ harsh techniques. They would have been justified had it not worked because that attempt to save those lives was, under the circumstances, the best option available. This scenario has been used to defend the rare but urgent use of torture. Like most thought experiments, it is unrealistic, but it is more tethered to reality than many thought experiments. It is not impossible that a rogue state like the DPRK would attempt nuclear blackmail through smuggling a WMD into Chicago, or that a terrorist group would release anthrax in public transportation.<sup>42</sup> On March 20, 1995, terrorists attacked the Tokyo subway with gas.<sup>43</sup> What makes the ‘ticking bomb’ scenario

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<sup>41</sup> Michael Walzer, “Political Action: The Problem of Dirty Hands”, *Philosophy and Public Affairs* 2, no.2 (1973), pp.160-180, <http://www.jstor.org/stable/2265139?origin=JSTOR-pdf>. This is a classic formulation of the problem. Various versions have appeared since.

<sup>42</sup> The DPRK is the Democratic People’s Republic of Korea, often just called “North Korea”.

<sup>43</sup> “Tokyo subways are attacked with sarin gas”, “This Day In History”, History.com, Last Modified March 18, 2021, <https://www.history.com/this-day-in-history/tokyo-subways-are-attacked-with-sarin-gas>. Another example of a biological attack on civilians by non-state actors is the mass poisoning in Oregon in 1984- See Thomas J. Torok, Robert V. Tauxe, Robert P. Wise, John R. Livengood, Robert Sokolow, Steven Mauvais, Kristin A. Birkness, Michael R. Skeels, John M. Horan, Laurence R. Foster, “A Large Community Outbreak of Salmonellosis Caused by Intentional Contamination of Restaurant Salad Bars”, *Journal of the American Medical Association* 278, no.5 (August 1997), pp.389-96, <https://doi.org/10.1001/jama.1997.03550050051033>.



unrealistic to many is that it supposes that the authorities have been able to capture the *right* person, with the *right* information, at the *right* time, to stop an attack. This requires intelligence to be more perfect than it usually is. But the moral argument remains, and it is possible that a key person could be detained, and tragedy averted. I also claim that even in the absence of absolute certainty that we have the right person, we may proceed with CI if that person appears to be tied to the wrongful act. If authorities apprehend a highly probable suspect and harshly interrogate him, it is worth the risk if it would save 270 lives.<sup>44</sup> Of course, intelligence officers are not omniscient, and mistakes can be made. When a person was incorrectly suspected and interrogated, that person was wronged. I discuss this later in the section on aftercare. Critics of ‘ticking bomb’ scenarios rightly point out the challenges involved in it providing a justification for torture, but they generally fail to accept the possibility of successful outcome.<sup>45</sup>

### I.5b: Kidnapping.

Kidnapping is another example where urgency requires action. In 1976 three men kidnapped 26 children aged between 5 and 14 from a school bus in California and buried them in an underground bunker.<sup>46</sup> There they would have eventually died from dehydration or starvation, and it is thus an example of where CI could be appropriate. There was no WMD, but there was clear danger to children, and time mattered. Steinhoff gives two examples of child kidnappings in Germany where the police tortured the kidnapper to learn

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<sup>44</sup> 270 is the number of people killed by the terrorist bombing of Pan Am Flight 103 over Scotland in 1988. I use this case and number merely as an example of the threshold reached.

<sup>45</sup> For example, see Vittoria Bufacchi and Jean Maria Arrigo, “Torture, Terrorism and the State: A Refutation of the Ticking-Bomb Argument.” *Journal of Applied Philosophy* 23, No.3 (2006), pp.355-373, <https://doi.org/10.1111/j.1468-5930.2006.00355.x>.

<sup>46</sup> Robert Lindsey, “26 Children Found Safe After Being Kidnapped From Bus in California”, *New York Times*, July 17, 1976, accessed 7 December 2022, [https://www.nytimes.com/1976/07/17/archives/26-children-found-safe-after-being-kidnapped-from-bus-in-california.html?\\_r=0](https://www.nytimes.com/1976/07/17/archives/26-children-found-safe-after-being-kidnapped-from-bus-in-california.html?_r=0).



the whereabouts of their victims. In both cases the kidnapper relented. In one case it was too late, and the child was found dead, while in the second the child was rescued in time.<sup>47</sup>

The important point here is that the ‘ticking bomb’ thought experiment that critics attack is not the only situation in which gaining information quickly is important and justified.

Further, modified versions of the ‘ticking bomb’ scenario have appeared and will continue to do so.

### I.6: Interrogational Torture May be Morally Right.

Torture, or CI, can be morally justified on the basis of two arguments. The first is based on liability and the second on a lesser evil position. I believe that both stake out worthy claims for CI in defence of innocent people.

#### I.6a: Liability

Now the question is *who* is subject to be harmed, to what *degree*, and for *which* acts. I am going to discuss liability first, before moving on to discuss proportionality. Doing this allows us to separate and then relate the two concepts. It is worth remembering that the harm I am interested in here is liability to defensive harm that is not intended to lead to death. The goal of justified CI is to secure information that will prevent a wrong, and generally, killing the interrogatee is counterproductive and morally hard to defend. Killing her after she has provided information is not counterproductive since she has provided information, but the right thing to do is to turn her over to a legitimate authority for prosecution. So, my interest in the literature is to unpack liability to defensive harm that falls far short of killing. In fact,

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<sup>47</sup> Steinhoff, *Ethics of Torture*, pp.13-14.



not only do I want to avoid killing the subject of interrogation, but the next chapter will also show that I am concerned with healing the wounds caused by interrogation.

### I.6b: Jeff McMahan

Let me begin this discussion with the influential work of Jeff McMahan, who takes the position that one must have some responsibility in an unjust harmful act to acquire liability for defensive harm. McMahan defends what he calls the *Responsibility Account*; this is the argument that a person who plays a knowingly responsible role in the wronging event acquires liability to defensive harm (notice here that being responsible for the unjust harm need not involve intending it).<sup>48</sup> Note that, for McMahan, liability requires both moral responsibility for, and causal contribution to, an unjust threat; “Causal responsibility for an unjust threat is a necessary condition of liability to defensive killing.”<sup>49</sup> There is controversy over whether a causal contribution to the threat being averted is indeed necessary for liability. However, that issue is beyond my reach presently, because the cases that I am looking at do involve some causal connection.

### I.6c: Jonathan Quong

Quong takes a different approach. He sees liability to defensive harm as related to *Moral Status*. This says a person becomes liable to defensive harm when she treats another as if they lack the moral status they are normally recognised as having. Put another way, a person is liable to defensive harm when she treats another as if they lack the rights that they in fact do possess. Terrorists and paedophiles, for instance, treat their victims as if they lack the right to life and bodily integrity, and thus are liable to defensive harm. The terrorist

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<sup>48</sup> Jeff McMahan “The Basis of Moral Liability to defensive Killing” *Philosophical Issues* 15, no.1 (2005), pp.386-405, p.394, <https://doi.org/10.1111/j.1533-6077.2005.00073.x>.

<sup>49</sup> Ibid, p.404.



thrives by “slaughtering the innocent intentionally” and denying the victim’s moral status, by doing this, the attacker becomes liable to self-defensive harm.<sup>50</sup> For Quong, “To be liable to defensive force you must threaten to violate the rights of others.”<sup>51</sup> It is worth pointing out that he claims that *threatening* exposes one to justified defensive harm. I would build on this and claim that if threatening to harm exposes the threatener to the liability of being killed defensively, then it also exposes one to the lesser, and repairable, harm of CI. As many people contribute to the architecture of a terrorist plot, the degree to which each participant is liable to the defensive harm of painful interrogation needs to be determined.<sup>52</sup>

These are two significant views on liability to harm. I will set aside which I think is the stronger because in the cases I will focus on, they would both agree that there is liability. These are cases of unjustified threats of harm in which the wrong doer is responsible for an unjust threat and disregards the moral status of intended victims. One may be liable to interrogational harm because one is responsible for a causative role in a wrongful harm, or one may be liable to the same harm because one has disregarded the moral status of the intended victims.

#### I.6d: Variables Affecting Liability.

I will now discuss some variables that affect the degree of a person’s liability. Liability is acquired in what Tadros calls the “magnitude” of the person’s role in causing an evil.<sup>53</sup> Thus, the proportionality of defensive harm is similarly related to the magnitude of the actor’s contribution. On what Tadros calls the “scalar” view, which I am inclined to support, “the

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<sup>50</sup> Oliver O’Donovan, *The Just War Revisited*, (Cambridge: CUP, 2003), p.64.

<sup>51</sup> Jonathan Quong, *The Morality of Defensive Force*, (Oxford: OUP, 2020), p.152.

<sup>52</sup> Here I am setting aside the case of the ‘lone wolf’ who acts and plans alone.

<sup>53</sup> Victor Tadros, “Causal Contributions and Liability”, *Ethics* 128, no.2 (January 2018), pp.402-431, p. 402, <https://doi.org/10.1086/694275>.



magnitude of harm that a person is liable to suffer to avert a lethal threat depends on the magnitude of that person's causal contribution to the threat."<sup>54</sup> I agree with Quong that a person can only be liable in *principle*. This principle states that as the right under attack becomes stronger or more stringent, the defensive measures used to defend that right increase proportionally.<sup>55</sup> The right to life is a more stringent right than the right to own an automobile. Thus, it would be a proportionate defence to kill an attacker who would violate my right to life, but not to kill one who would steal my automobile. Likewise, I would say that it is a proportionate defence to harshly interrogate a suspect if lives are at risk, but not if the potential wrong is shoplifting.

I am going to introduce a hybrid approach to liability that integrates both a 'scalar' view and Quong's concern for the strength of the right under attack in relation to CI. An evil doer is liable to proportional CI based on the centrality (stringency) of the right under attack *and* their role in facilitating an impending evil act. The person carrying a bomb into an arena has a high degree of liability for defensive harm because he violates the victim's right to life and was the direct facilitator of the act. Justifiable CI is for gaining information to prevent an evil, not punishment, or frightening political opposition. A person acting alone is not subject to further CI once it is established that there is no further information to gain.<sup>56</sup> This section can be summarised briefly; *Persons are liable to CI if they have a causal relationship, enacted with responsible agency, to an unjust and imminent threat against the innocent or institutions of liberal democracy.* This said, the degree of interrogational pain the person could be justifiably subjected to is linked to the depth of information the person has

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<sup>54</sup> Ibid., p.406.

<sup>55</sup> Quong, *Defensive Force*, p.97.

<sup>56</sup> An example would be Ted Kaczynski, the so-called Unabomber who acted completely alone.



concerning the threat. Our estimation of how much information a person has would be based on a basket of indicators that I mention below.

In the last chapter I address justice for those who have been party to torture and interrogation, including those who were not liable, as well as those who were liable. Those who were liable to defensive CI do not have a claim against the interrogator because the interrogator acted correctly to thwart an unjust threat. Those who were not liable to CI do have a claim to make against the just interrogator who, in error, acted unjustly.

### I.7: Defence of Self and Others.

A self-defence argument is one based on the *right* to defend oneself. The argument extends to include others as well. Kant describes self-preservation in terms of a duty (“to preserve one’s life is a duty”), rather than a right, but for my purposes the significance is the same.<sup>57</sup> Similarly, Steinhoff says, “People have the right to defend themselves or others against wrongful aggression, in particular if the aggression is life-threatening.”<sup>58</sup> In this section, I am defending the right to defence of self and others, which for brevity I call self-defence. This argument takes the position that the evil act is in *process*. The bomb is actively ticking, a kidnapped person is still alive, the plane carrying armed hijackers is in the air and so on. This includes the planning of a threat which has not yet been initiated, but which is impending. A prisoner holds the key to the threat. All he needs to do is to surrender the information that can halt the evil act. The interrogator, in this situation, is acting as an agent of the innocent who are unable to act on their own behalf in the moment. These people are entitled to protection, and if the act of self-defence involves applying painful measures to someone

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<sup>57</sup> Kant, *Groundwork*, p.10.

<sup>58</sup> Steinhoff, *Ethics of Torture*, p.11.



likely to have the means to save these lives, then so be it. This is after, and only after, they have been provided the opportunity to freely provide the key to averting a wrong. I agree with Uwe Steinhoff that “Self-defensive torture is not only justified; it is *just*.”<sup>59</sup> The perpetrator of mass murder, beheadings, kidnappings and so on, through their own actions, relinquishes the claims that you and I have to the right not to be harmed. While the burden of evidence must be very high for a person’s liability in advance of painful interrogation, such evidence is obtainable.

### I.7a: Lesser Evil.

Let us now turn to ‘less evil’ arguments. This is the position that a particular act, in this case CI, is a substantially lesser evil than that which it seeks to prevent. This argument does not deny that a person’s rights are being attacked. It acknowledges that, but claims that those rights are justly overridden, or infringed upon, to prevent a substantially greater wrong.<sup>60</sup> For example, A had placed a bomb on a plane carrying 270 passengers. The authorities do not know which plane is carrying the bomb but only that it is one which departed Heathrow recently. Person A has been apprehended and is refusing to talk, and as they continue to refuse to cooperate, the decision is made to use CI. The authorities have limited options. They can immediately ground all flights that recently departed Heathrow, continue to interrogate A in normally acceptable painless ways, or apply CI in the hopes of discovering which flight carries the bomb. The first option is ruled out as being far too impractical, while the second option is deemed too slow; building rapport and establishing trust takes time, and time is limited. While agreeing that torture is an evil, the authorities believe that it is

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<sup>59</sup>Ibid., p.35 (emphasis in original).

<sup>60</sup> The distinction between wrongfully violating and permissibly infringing a right is standardly attributed to Judith Thomson, *Rights, Restitution and Risk: Essays in Moral Theory*, (Cambridge, Mass.: Harvard University Press, 1986).



the lesser evil to the greater evil of a commercial jet full of civilians blowing up.

Furthermore, not doing everything possible, within established guidelines, to save those innocent passengers is itself an evil.<sup>61</sup> One person will be directly harmed by interrogation compared to the 270 who will be murdered when the plane explodes. I should also point out now, that there is yet another category of person harmed in this scenario, and that is the interrogator, whom I discuss as a victim later. Suffice it to say that the lesser evil argument does not claim that torture is not an evil, but only that it is a substantially lesser evil than the evil which may result from not torturing someone. The problem with a lesser evil justification is that while a lesser evil justification can be used in extreme cases, it is not necessary where liability is present. For this reason, I believe a self-defence argument is a sounder basis for use of CI. Having summarised some views that justify the use of torture, I will now turn to discuss the word 'torture' and how the concepts of liability and proportionality are at work here.

#### I.7b: The Need for Clarity in Definitions.

In the opening paragraph of this chapter, I stated that 'some forms' of torture may be justifiable. Now I will explore what forms of painful interrogation may be justified, and which would not. The purpose of what follows is to define what it is that I believe is justifiable in terms of interrogation. When someone is accused of torture they become, rhetorically at least, guilty of a wrongdoing. Consider that the UNCAT defines torture as *any* act which causes severe physical or mental pain intentionally *and* is caused by a public official. While UNCAT is a treaty between states, definitions of torture could have included

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<sup>61</sup> If not an outright evil, then it would be a serious neglect of duty for security officials not to take extraordinary measures to save the lives of the passengers. Furthermore, the interrogating officers would most likely experience profound guilt for failing to do in their power to stave off the attack.



non-state actors as well, because the crimes in question take place within states. Indeed, sometimes the perpetrators of unjust torture are sheltered by states. The UNCAT was drafted in 1984, by which time non-state actors such as the Irish Republican Army (IRA), The Palestine Liberation Organization (PLO), and various drug cartels were active. Drug cartels, the PLO, and the IRA have tortured people, and thus need to be included as perpetrators of torture beyond state actors. Beyond limiting perpetrators to state actors, the UNCAT provides vague guidance on what it is that is not permitted beyond physical and mental suffering. These are somewhat vague terms, and we can disagree about their meaning and application. Referring to the earlier discussion, I do not think it is wrong to hurt a kidnapper who may have buried a child alive and whom we may yet rescue if we have the necessary information. We are left to seek better clarification on what is, and what is not, permitted. This I will discuss later in the section discussing line drawing.

#### I.8: The Acquisition of Liability and the Proportionality of Harm.

Having set out above the ideas of liability and proportionality in general terms, and some of the considerations that they depend on, I now return to the questions of how and when liability is acquired by individuals when they are emmeshed in terrorist plots in various ways. What role must one play in wrongdoing to be liable to the potential harm of CI, and to what degree can one be subjected to it? I am not focusing on liability to defensive harm leading to death. My question is the middle ground between killing and inaction. Imagine a terrorist plot; usually, many people are involved in a plot, some in essential ways, some who knowingly supported the plot, and others who may have been unknowing supporters. Take this example. A man gets in a taxi and is driven to a theatre, where he plans to explode his backpack in the audience. Does the taxi driver have liability? In this case, the driver is



subject to questioning and possibly interrogation. Not all interrogation is painful, and interrogating the driver is justified as it may provide information about other plots or co-conspirators. However, if the driver is innocent and just took a routine call, he is likely to be forthright with information. The conspiring driver who knew his passenger's intent is less likely to cooperate and thus would be liable to a harsher degree of interrogation. Like a line of dominoes, several people may play a role in a plot, and each may be essential for the eventual attack. They are liable for defensive harm because of their causal relationship to the wrong. As Seth Lazar states, "Liability does not require that one *pose* an unjustified threat, only responsibility for *contributing* to it."<sup>62</sup> In our case, the question is not if each person in the chain is liable to defensive harm, but whether they are liable to CI in order to prevent a *future* event which they have contributed to. In many cases a person may be liable to interrogation, but not to being killed, as rules of proportionality apply. For example, an accountant who transfers money to fund a terrorist attack would be subject to interrogation for the purpose of stopping future attacks and understanding the structure of the terrorist group. But that same person may not be liable to being killed for that role alone. However, she would be liable to imprisonment as punishment for her role in a terrorist organisation *if* she was a knowledgeable participant in the plot.

At this point, related to liability, it is appropriate to address concerns that CI will be abused and used beyond self-defence on persons who are not liable. The evidence for CI must be very high. The US intelligence community uses a set of terms in analytic products that should be applied to CI. The terms range from a possibility being "remote", meaning a 01-

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<sup>62</sup> Seth Lazar, "Method in the Morality of War", in *The Oxford Handbook of Ethics of War*, ed. Seth Lazar and Helen Frowe (Oxford: OUP, 2018), p.24 (emphasis in original).



05% probability, to “nearly certain” which is 95-99% probability.<sup>63</sup> I suggest suspicion that the interrogatee has information rises to the “very likely” (80-95%) level before the application of CI.<sup>64</sup> This is a high degree of certainty that can be achieved through a basket of tools. These tools include (but are not limited to) fingerprints, travel history, mobile phone and email records, hand swabs for gun powder and explosive residue, eyewitness reports, and content of social media accounts. Few of these alone raises the risk factor to the ‘most likely’ level, but as a bundle they are alarming. For example, if a young man posts direct threats on social media, his credit card shows the purchase of bomb building materials, he is a student, and a hand swab reveals contact with explosive residue, he is worth interrogating. A single factor is rarely enough for interrogation. A young man’s rants alone deserve notice, but not detention. But public threats, plus purchasing materials to carry out threats is alarming. We are looking for actions that have been taken to carry out a threat. Fertiliser is a common material in some bombs. Purchased by a farmer it is less alarming than by an urban young man who has also posted hate material on social media and recently returned from a country known to host terrorist training camps. When we are looking at a bundle of indicators which fit together, we are protecting innocent citizens from arbitrary interrogation. The “very likely” classification ensures that innocent citizens are not swept up arbitrarily, and that security services can attempt to provide safety within a liberal democracy. This said, I know mistakes can be made. Officers can misread information and wrong doers can slip through, but we must try for justice and safety. The next chapter on aftercare addresses this directly.

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<sup>63</sup> “Analytic Standards”, Intelligence Community Directive 203, Office of the Director of National Intelligence (USA), accessed 7 December 2022, <https://www.dni.gov/files/documents/ICD/ICD%20203%20Analytic%20Standards.pdf>.

<sup>64</sup> Ibid.

### I.9: Line Drawing: When *Some* Forms of Coercive Interrogation May be Justified.

Line drawing is drawing a line between those behaviours which we may use in interrogation to thwart an unjust threat, and those we may not. I rule out some forms of interrogation as simply too costly, even if they may yield results. They are too costly in terms of the moral damage done to those involved and in terms of long-term policy objectives. I will briefly define some terms as I use them going forward. I will use ‘questioning’ to describe a situation in which the authorities simply ask someone what they saw or participated in at a given time or place. ‘Questioning’ here does not imply any wrongdoing on the part of the person being questioned and should not arouse anxiety.<sup>65</sup> ‘Interrogation’ is the term I use to define a verbal examination that is pointed and directed to one who is suspected of being involved in, or having knowledge of, serious wrongdoing. So thus far, we might say that a *bystander* is questioned, and a *suspect* interrogated. An uncooperative suspect may be subjected to CI when a threat is impending and as an act of self-defence when additional evidence points to involvement in the impending evil. CI, as I will use it, applies to a range of techniques designed to elicit information from uncooperative sources. Some of these techniques are painful and may constitute what some would call ‘torture’. I admit this. ‘Torture’, as I will use it, is focused on techniques used for a variety of political, intelligence, and law enforcement purposes, which I judge to be illegitimate. I judge them to be so because they are not carried out in defence of the innocent or to protect liberal institutions, and they are powerfully debasing to all involved. They may cause emotional and moral damage to the recipient as well as to the perpetrator. I realise that my interlocutors may find my distinctions shady or disingenuous. I understand this criticism and only point out

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<sup>65</sup> I do acknowledge that questioning by the police or other authorities can arouse anxiety in members of groups historically oppressed by the legal system.



that the purpose of employing this terminology is for clarity in the discussion that follows- this nuancing is not intended to evade the fact that harm will occur.

I risk drawing a line between *some* behaviours that may on *some* occasions be justified to protect innocent people and liberal institutions, and those actions which must *never* be permitted. Not only is it possible to draw such lines, but it is necessary to prevent liberal democracies and their agents from sinking into barbarism while on the road to doing good. We must not allow ourselves to become like those whose plans we seek to thwart.

#### I.9a: Line Drawing Within CI.

Line drawing also provides the context for the consequences of CI. This is to say that if X method is permitted, the interrogator is not liable for punishment for having employed it. But if X method is not permitted and our interrogator uses it nevertheless, she is liable for judicial review and possible punishment. When I discuss aftercare in the next section, this will return as a significant factor in how we approach repair and healing in the *post cruciamentum* stage. To begin with, we must remain sensitive to the moral costs to interrogators of that which they do on our behalf.

We need to know what precisely is forbidden. There are a number of different conditions which need to be met. Let me begin by suggesting that *any means of inflicting pain greater than what an emotionally and intellectually healthy and basically moral adult, trained as an interrogator, would do to save lives crosses a line into the unacceptable*. Common sense morality tells us that rape is wrong, as is crucifying someone, chopping off fingers with a cleaver, putting out a lit cigarette in an eye socket, or pulverising feet in a vice. These are actions that a psychologically normal adult would be loath to do. It is true that this same adult would be loath to kill in normal circumstances, but that, as a soldier in war, she is



willing to do due in the urgency of battle. But it should be noted that even when a soldier is sent into battle with a willingness to kill, the traditions of just war have evolved to prohibit some behaviours. Even in war, a soldier is not to rape, kill an enemy combatant who has surrendered, or rob civilians of their last crumb of bread.

In the same way that war has guidelines and prohibitions, interrogation should have guardrails and prohibitions. The same adult, if trained to interrogate, may be willing to strip someone in an interview, deprive them of sleep, spray them with ice water, threaten to harm (but not actualise this threat) the captive's children, force them to hear classical music for hours on end, reduce food to bread and water, or cover their head with a hood. The same agent might be willing to use waterboarding for a limited number of times or frighten a person with a barking dog. These are things, I suggest, that a moral person might do to another person if they had very good reason to believe that many innocent lives could be saved by doing so, and that time was crucial. There *is* a moral difference between interrogating a naked and sleep deprived prisoner and raping him with broom handle. Not only is there a difference in the moral significance of the acts themselves, but there is also a difference in the impact the acts have on the recipient *and* perpetrator.<sup>66</sup> This difference rests on the degree of harm done to the participants. Generally speaking, it is less harmful to interrogate a person naked and cold than it is to beat him and break several ribs.

Those who take an absolutist position against torture need to define what they deem to be absolutely forbidden. Many people, quite sensibly, use the degree of pain inflicted as the place to draw a line. McMahan uses the example of painfully twisting a person's arm.<sup>67</sup> The

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<sup>66</sup> For a full study of rape as torture see: Michael Peel, *Rape as a Method of Torture*, (London: Medical Foundation for the Care of Victims of Torture, 2004), various chapters.

<sup>67</sup> Jeff McMahan, "Torture in Principle and Practice", *Public Affairs Quarterly* 22, No.2 (April 2008), pp.111-128, p.114, <https://www.jstor.org/stable/40441484>.



question is, does this painful act, carried out once or four times, constitute torture in such a way as to be forbidden, even if doing so would lead to information that could save lives? It is sensible, but not adequate, to use the amount of pain as the line drawing place. As I said above, I want to take into account the *actors* as well as the *acts*. Considering actors *as well as* acts, leads to an acknowledgement that the interrogator may be forced into a ‘tragic dilemma’, where all possible options are morally flawed. It is possible for there to be a situation in which all possible courses of action, including inaction, are morally undesirable. Waterboarding is undesirable, but then so too is allowing a plane to take off carrying a bomb if it could be prevented. It is tragic that there is no good option. Next, I am going to look at how training can mitigate the harm done while still striving to protect against unjust threats.

#### I.10: Training and Institutionalisation.

My proposal that training in the practices described above be institutionalised raises understandable alarms for some. I think that this is unnecessary. All that institutionalisation does is assure standards, or ‘best practices’, are mastered by those officers entrusted to interrogate potential wrongdoers. It means that they learn what may, and may not, be done to extract information under specific circumstances. That these techniques are learned does not mean they will be used. It is possible that a trained interrogator may never encounter a situation that meets the criteria for the use of CI. But if they do, they will be better prepared to act morally and legally than if they are not so trained. Who are we training, and where are we drawing a line?

Consider again my suggestion that one place to draw a line is under what a normal person would be willing to do. An objection to this is that many “normal” people have tortured and



that accordingly the “normal” person cannot be my reference point. I would argue that generally those people who carried out wrongful acts did so under circumstances of duress *and* other internal psychological factors. This duress was frequently caused by superiors making demands which the interrogator felt compelled to satisfy, or the pressure of needing information quickly. Well trained professionals tended not to be those involved in the most monstrous forms of interrogations and frequently the most abhorrent acts were not committed in interrogations. Prison guards at Abu Ghraib and Auschwitz committed cruelties but it is important to remember that they were not generally interrogators, which is what we are discussing. Nor are most interrogators from liberal democracies operating in environments like those at Auschwitz or Abu Ghraib. Returning to the ‘average person’ standard, I suggest one standard is to ask what a normal person would do to another to prevent a tragedy. We expect certain standards of well-trained soldiers in battle, so too we should have standards for well-trained interrogators. A well-trained interrogator should be able to accomplish the goal while inflicting a minimal amount of physical, mental, or moral harm. Skerker is right in saying that “More work needs to be done to specify what can be asked of state agents, given attention to mental, moral and emotional health.”<sup>68</sup> I am intending here to contribute to that work.

Moreover, I would also consider what this normal person would do to obtain information if they knew they were being watched by colleagues or filmed. So, the first element in drawing a line in what is acceptable and not acceptable CI is what an intellectually and emotionally normal person, trained in interrogation, would do to another to obtain information. The next element I suggest is that the interrogation should not be such that it would normally

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<sup>68</sup> Michael Skerker, “What can be asked of Interrogators?” in *Interrogation and Torture*, eds. Steven Barela, Mark Fallon, Gloria Gaggioli, and Jens Ohlin (Oxford: OUP, 2020), p.263



require a medical doctor to be on hand. Everyone taken into custody should have a basic physical exam which measures vital signs and other health indicators. Interrogators should be trained in measuring these throughout interrogation- this is not complex training. Interrogation should not include means that would cause a normally healthy adult to lose consciousness. If the detainee is not a healthy adult, extra attention needs to be given to the most effective safe means of extracting information. However, if the life of a kidnapped child is at imminent risk, and we are certain we have the kidnapper, interrogators may take risks in the interrogation that they would otherwise avoid. I am not suggesting that we cross the previously established boundaries, e.g., the rape of a kidnapper. Instead, I am saying we might waterboard someone with hypertension. This is a decision to make at the time taking all things into consideration.

Lastly, painful interrogation should be limited in duration to a few days. I aim to emphasise two points; information becomes stale if not retrieved quickly, and persons enduring 14 days of painful interrogation are unlikely to yield to that method. The U.S. made gross errors in interrogating suspected terrorists for months on end. Even if the prisoner had information, that information often becomes stale as time passes, and the justification for painful interrogation fades; the terrorist plot changes, or the target moves. This is the point at which crafty interrogators change methods and revert to those depending on rapport and trust rather than fear, pain, or intimidation. We must accept that there are times when interrogation fails to yield useful information.

#### I.11: Summary.

Now I will summarise my position. CI that can be used for the defence of self and others should be conducted in a way that would not damage a normally trained interrogator. The



interrogator should not be expected, or allowed, to perform acts that are debasing and psychologically and morally harmful to the extent that they can be avoided.

The next chapter will spell out my position that all of those directly involved in CI have a claim to care after the interrogation. Care and justice after torture, 'aftercare' for short, is a 'good' intended to modify the painful effects of justifiable torture. This aftercare will be extended to all the victims. These victims include the interrogator, as well as the perpetrators of evil acts.

## CHAPTER II: AFTERCARE.

### II.1: Introduction.

This final chapter addresses care for those involved after torture or CI. What I mean by care is compassionate treatment for those wounded physically, mentally, and morally by torture or CI. This care is intended to heal and restore the person, as much as possible, to a state in which flourishing is possible. I do not maintain that perpetrators of evil should not be punished, but my emphasis here is on repair and care after interrogation.<sup>69</sup> This is care for everyone directly involved, including the innocent and the liable, as appropriate recipients of aftercare.

Aftercare targets three groups of persons. First, those who were harmed but never liable for that harm; second, those who were liable to some degree of harm because of involvement with wrongdoing; third, the interrogators. I generally do not speak of the interrogator as the wrong doer, because those they are interrogating are judged to be liable to CI. It is possible, however, for the interrogator to cross the boundaries previously established, and become a wrong doer, even if motivated by the right intentions. Suffice here to say that I take the position that it is moral to help the hurting, including those who have in some way brought that pain upon themselves, though assuming liability as a result of wrongdoing. I aim to provide this care after harmful interrogation, because humans *qua* humans should be healed when wounded, if possible. I will demonstrate that it is sometimes the case that those who have been wronged and are justified in responding with defensive harm, may

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<sup>69</sup> The ethics of sentencing for criminal offence is important, but it is outside of my scope presently.



also commit wrongs and be liable for the consequences of that wrong. For example, the people of Spain were wronged in the train attacks of 2004. The security services justifiably respond by picking up and harshly interrogating persons on a terrorist watch list. The goal was to gain information to prevent an impending follow-on attack. Thus far the security officers are blameless and acting within the bounds of justified self-defence. However, if one of the officers also rapes a suspect in custody, that officer has committed a wrong for which there should be consequences. This is how one may be both the victim of one wrong, a terrorist attack, and the perpetrator of another wrong, unacceptable interrogation.

This chapter begins by reviewing some current thoughts on justice after war, *jus post bellum*. This provides structural ingredients for justice after torture, *jus post cruciamentum*. Here I consider all who are involved directly in interrogation.

## II.2: Jus Post Bellum

In JWT, aftercare falls under the category of *jus post bellum*, and in this context is *jus post cruciamentum*. Before care after CI, I will look at the place of *jus post bellum* in JWT thinking today. While *jus post bellum* is an underdeveloped area of theoretical and practical reflection it remains a useful area for contemplation because it affords us a venue to consider liability, harm, duty, and repair. *Jus post bellum* provides *mutatis mutandis*, a lens through which to consider the aforementioned topics. Liability for initiating an unjust war unjustly corresponds with the liability assumed in participating in a criminal or terrorist activity. Similarly, interrogation is comparable to defensive actions by a besieged state.



War unjustly harms the innocent in the same way as a terrorist attack, kidnapping, or trafficking in animals and humans.<sup>70</sup> Duty places a burden on the soldier entering a hostile village and it also places a burden on the interrogator. The interrogator feels a duty toward her nation in the abstract and to those immediately in harm's way. Furthermore, she most likely feels a duty toward her own conscience.

*Jus post bellum* shines a theoretical light on claims to justice for those wronged by war. Justice after war is a stage of political and, dare I say, moral activity which proposes principles for justice following the violence of war. The protest saying "no justice, no peace" rings true in that without a just settling of accounts after war, a sustainable peace is unlikely.

### II.2a: A State-led View of *Jus Post Bellum*

The first section will look at justice after conflict from a macroscopic position of states. The next section will take those principles, as appropriate, and apply them to the microscopic setting of repair after CI. In other words, we will move from the aftercare of war-torn nations to the aftercare of harmed individuals. There is controversy over what the victors in a just war owe the defeated. I am supposing that the defeated was the unjust aggressor, and defeat was the just outcome. The unjust aggressor is unlikely to conduct a just war in a just manner nor subsequently be concerned with treating the defeated justly. So, the concern here is with a just victor and its treatment of the justly defeated. In WW2, the German and Japanese governments were unjust aggressors who unleashed violent horrors on a massive scale. Their unjust aggression was a prelude to their unjust conduct during war

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<sup>70</sup> Human trafficking is both a form of kidnapping and slavery. I mention animals here because although animal rights are outside of my present paper, they do matter. Trafficking in animal parts, such as tusks and horns frequently funds terrorist organisations.



and their unjust conduct as victors. It is also worth stating that no flag remains unblemished in war. *A* may unjustly attack liberal democracy *B*, and thus *B* is justified in a vigorous defence. However, in the process of crushing *A*'s offensive military capacity, *B* may violate the rights of some of *A*'s citizens. And so, when the dust of war settles, we find that both *A* and *B* have acted wrongly to some degree at some point in the conflict. This insight has a parallel in the relationship of the terrorist or criminal to the interrogator. The terrorist is an unjust aggressor, and the interrogator a defensive actor attempting to thwart an intended evil. However, the interrogator may cross the lines established in the previous chapter and commit wrongs, even when those wrongs are committed against one liable to harm.

## II.2b: War or Interrogation?

There are differences between a full-scale war and standalone interrogation. I will only point out two of them. First, the number of participants- there is nothing comparable between the D-Day invasion of Normandy and interrogation. The size of battle also means a lack of intimacy; CI and torture are intimate, the bombing of Dresden was not. In the play *Death and the Maiden*, a female victim of political torture believes she has accidentally encountered her torturer from years past.<sup>71</sup> Throughout that torture, including rape, she was hooded and never saw her tormentor. Years later she has a chance encounter and believes she recognises him through his voice and smell. This is an intimacy that is rare on

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<sup>71</sup> Brook Wilensky-Lanford, "Ariel Dorfman", Britannica, accessed: 8 December 2022, <https://www.britannica.com/biography/Ariel-Dorfman#ref1199273>. An English text is available at: [https://www.vanderbilt.edu/olli/class-materials/Death\\_and\\_the\\_Maiden\\_script.pdf](https://www.vanderbilt.edu/olli/class-materials/Death_and_the_Maiden_script.pdf) (accessed 8 December 2022)



the modern battlefield. This intimacy plays a role in the latter section on repair and aftercare.

The second section will move from *post bellum* to *post cruciamentum*. While war is not the same as CI, there are some useful parallels with JWT. Fabre's question "What is owed to whom, by whom as a matter of right" can be applied both to war and harmful interrogation.<sup>72</sup> There are important differences as well. International law grants personhood status to states, reflected both in law and common language. However, states cannot be locked up and removed from society like an individual person. While individual states provide the structures for wrongdoing, it is ultimately individual actors who perpetrate the wrong. Without individual actors, wrongs cannot be committed, and thus it is the individual who is liable for the consequences of wrongdoing.<sup>73</sup> And it will be the individual who is the recipient of aftercare.

### II.3: Minimalist or Maximalist?

I begin by considering Alex Bellamy's rough division of *post bellum* theory into 'minimalist' and 'maximalist' positions.<sup>74</sup> Bellamy is useful here for two reasons. Firstly, he provides a succinct explanation of the two emerging traditions within JWT, and secondly, he provides an essential critique of *post bellum* claims today. The minimalist position generally focuses on what the victor should *not* do after a war.<sup>75</sup> This older position calls for the restoration of the rights of the victim, striving to *restrain* the victor's urges toward retribution and

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<sup>72</sup> Cecile Fabre, *Cosmopolitan Peace* (Oxford: OUP, 2016), p.145.

<sup>73</sup> This is not to say that states should not suffer consequences for actions. Nor am I suggesting that leaders be spared consequences. Here my focus is on the direct actors in wrongdoing or CI.

<sup>74</sup> Alex Bellamy "The Responsibilities of Victory: *Jus Post Bellum* and the Just War", *Review of International Studies* 34, no.4 (2008), pp.601-625, <https://doi.org/10.1017/S026021050800819X>, p.605.

<sup>75</sup> Bellamy, "Responsibilities of Victory", pp.602-611. This covers the entirety of what I have written regarding the minimalist position.



revenge. In many ways this position seeks a return to the state which existed *ante bellum*, or before the war, with some modifications. This means, for example, the restoration of territory taken by the aggressor, but it does not necessarily mean replacing the aggressor's government. It may allow for reparations, but they would be limited and not so crippling as to destroy in the vanquished the ability to restore a well-functioning society. This view held sway from Augustine, through Grotius, to the end of the 19<sup>th</sup> century. This was, and is, a conservative view that strives for restoration and rejects the right of a victor to annihilate the defeated as Rome did Carthage. In the minimalist view, the winning side is "entitled to protect themselves, recover that which was illicitly taken, punish the perpetrators... prevent, halt and/or punish those who gravely violate natural law...".<sup>76</sup> This argues for the restoration of what was before the outbreak of conflict and focuses on justice for the aggrieved party. The aggrieved party here is the victim of the aggressor with claims against the aggressor.

Both parties, aggressor and victim, may have claims to restitution for wrongs suffered during the conflict. For example, the civilian occupants of both London and Dresden may have claims due to aerial bombing in the second World War, while it is indisputable that the Third Reich caused the war. The problem is that the *status quo* before the conflict contained the seeds of the war whose damages must now be rectified. Simply returning to the pre-war status with a few consequences on behalf of justice for the victims of aggression, does not seem to build a structure for an enduring peace. Conditions before the war nurtured conflict, and thus discussions of justice after the war invite the recent theoretical directions discussed below because it is morally imperative that post war conditions be sufficiently stable and fair as to endorse a lasting and just peace.

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<sup>76</sup> Bellamy, "Responsibilities of Victory", p.605.



The more recent theoretical development is the maximalist position that focuses on what the victor *should* do. The position here is that the victor has acquired duties to aid the beaten.<sup>77</sup> This position manifested after WW2 when both Germany and Japan, as well as much of Europe, needed rebuilding and the United States took it upon itself to assist.<sup>78</sup> More recently, the wars in Afghanistan and Iraq have brought new urgency to discussions about what the victor *ought* to do. The theoretical boundaries are challenged further by the fact that very few wars are those envisioned by traditional JWT. In other words, fewer wars from the second half of the twentieth century to the present were large wars between nation states. Instead, we are seeing an increased frequency of civil wars, wars between the international community, neighbouring states and genocidal regimes, or aggressions waged against states harbouring international terrorists. Sadly, the recent Russian invasion of Ukraine clearly demonstrates that war between sovereign states is not entirely a thing of the past. But the generally changing nature of warfare has led to renewed interest in the concluding phases of conflict and how they are best managed. This position begins with the claim that “because war always produces bad consequences, victors have a moral and legal obligation to do more than satisfy their own rights afterwards.”<sup>79</sup> For examples, he lists war crimes trials and building legitimate institutions in the defeated country.<sup>80</sup> I do not think that stating war produces bad consequences is a strong enough claim for demands on the victor after a war. Winning in and of itself may not impose additional burdens. For example,

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<sup>77</sup> Bellamy, “Responsibilities of Victory”, pp.612-621. This covers the entirety of what I have written regarding the maximalist position.

<sup>78</sup> “Marshall Plan, 1948”, Milestones: 1945-1952, Office of the Historian, accessed 8 December 2022, <https://history.state.gov/milestones/1945-1952/marshall-plan>. A similar project is being contemplated for Ukraine in the future- see “Donors are already mulling a Marshall Plan for Ukraine”, *The Economist*, 8 November 2022, accessed 8 December 2022, <https://www.economist.com/international/2022/11/08/donors-are-already-mulling-a-marshall-plan-for-ukraine>.

<sup>79</sup> Bellamy, “Responsibilities of Victory”, p.618.

<sup>80</sup> Ibid.



after the 1967 Six Day War, Israel, the victor, did not assume any legal obligations toward the states it had defeated. In fact, Israel kept all the land it seized and only returned the Sinai to Egypt in 1982. But the nature and consequences of the victory may impose additional duties. The total and devastating allied victory over Germany in 1945 obligated the victors to more than just withdraw leaving pre-war boundaries in place with some plan for compensation to the winners. Justice suggests that the victor not simply abandon widows to hunger, children to homelessness, and the classroom to Nazi ideology. Justice also suggested that trials for war crimes be held. That there might be duties to aid is not a new ethical idea. What is significant here is the question of to what extent the duty falls on the perpetrator of the act creating the need to aid *following* an unjustified provocation on the part of another.

### II.3a: Cecile Fabre.

Cecile Fabre calls us to recognise the distinction between “procedural and substantive justice” in reaching post war settlements.<sup>81</sup> In this situation, substantive justice concerns the “content of a peace settlement and procedural justice to the extent the “belligerents are deemed competent to negotiate and endorse a peace settlement.”<sup>82</sup> In this paper, procedural justice is of no concern. But substantive justice is a concern. Fabre further states that “the postwar rights and duties of belligerents are partly determined both by those belligerents’ decisions *ad bellum* and their conduct *in bello*.”<sup>83</sup> Let me reinterpret this in terms of our interrogational narrative. The post interrogation rights and duties of both the victim and perpetrator of CI are “partly determined” by decisions made prior to, and during,

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<sup>81</sup> Cecile Fabre, “War’s Aftermath and the Ethics of War”, in *Oxford Handbook of Ethics of War*, eds. Seth Lazar and Helen Frowe (Oxford: OUP, 2018), p.510.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid., p. 513.



the acts which led to interrogation. I say “partly determined” because consequences for the future must also be considered. In this way, Jihadi John’s decision to join an evil organisation affects his subsequent claims. In the same way his conduct while so engaged determines, in part, his justified claims later. His decision to join the Islamic State (IS) reduced his claims to rights because the goals of IS are a threat to innocents. If in joining IS Jihadi John beheads unarmed prisoners, he further forfeits rights because he has demonstrated himself to be an unjustified threat. Now let us imagine that we have captured him. While in captivity he is unable to continue his homicidal behaviour, however, and this is important, he is likely to have information about IS plans, locations, armouries, and strategy. The use of CI on John is determined by John’s own behaviour in first joining IS (*ad bellum*) and subsequent behaviour (*in bello*) and the probability that he currently has actionable intelligence which could save lives. Having established John’s liability, I will later discuss John’s aftercare. At this point it is valuable to remember my earlier position that the *degree* of involvement in wrongdoing is complex and should rightly determine the extent of liability. I want to point out again the obvious fact that not all captives have the information useful to save lives. Lacking useful information reduces the argument for subjecting them to CI, but not incarnation or other forms of punishment for wrongdoing.

### II.3b: Brian Orend.

Now I want to consider the contributions of Brian Orend to *post bellum* discussion. Orend claims that the goal of a just war is “a more secure possession of our rights, both individual and collective.”<sup>84</sup> I argue that CI supports this goal when it is used to gain information to

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<sup>84</sup> Brian Orend “*Jus Post Bellum: The Perspective of a Just-War theorist*”, *Leiden Journal of International Law* 20, no.3 (2007), pp.571-591, <https://doi.org/10.1017/S0922156507004268>, p.578.



protect individual and collective rights, most obviously the right to life. Orend offers a list of principles for justice after the guns fall silent.<sup>85</sup> These include rights vindication, proportionality, and publicity. These do not completely translate from war to interrogation, but they are instructive to a point. For Orend, 'rights vindication' assures the restoration of the rights initially violated that led to war.<sup>86</sup> In terms of the cases discussed below, rights need to be restored for the person wrongly interrogated. The person interrogated and/or imprisoned who was a terrorist, or other criminal, did not have rights violated. Justice infringes and limits rights, but it does not violate them. Acts of terrorism, or kidnapping, are the rights violating acts which allow subsequent harm to the terrorist, kidnapper, or other criminal. The terrorist is analogous to the belligerent state which initiates war.

'Proportionality and publicity' are more complex. In a war between nations, it is good that the terms of peace be publicly stated. However, it may be damaging to a state's legitimate defence to publicly describe interrogational techniques and subsequent settlements.

Knowing which interrogation methods may be used allows potential captives to train in withstanding them. I discuss the use of proportionality below because it is at the heart of the aftercare issue. Distinction, for Orend, requires us to recognise the different degrees of liability involved in a war of aggression among the aggressor's citizens.<sup>87</sup> In other words, kings and presidents bear more responsibility than average civilians. In terms of interrogation, this principle requires us to acknowledge that some persons in a broad terrorist network bear less direct responsibility for wrongdoing than others. The principle of punishment is addressed below in detail and is based on an awareness of who fulfilled what role in a network. I also address compensation in the same terms. Compensation is due to

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<sup>85</sup> Ibid.

<sup>86</sup> Ibid. p.580.

<sup>87</sup> Ibid.



the innocent and in limited measure to the guilty. The last item on Orend's list of post war principles is rehabilitation. The German state after WWII obviously needed rehabilitation, and it was essential to build a more secure and peaceful future. In the very same way, rehabilitation is appropriate for violent extremists unless we execute them all, which does not strike me as a moral option. Otherwise, they remain potentially dangerous for the society into which they may return after interrogation, or to the society of the incarcerated.

#### II.4: *Jus Post Cruciamiento*.

In the preceding sections I discussed current debates in JWT on *post bellum* requirements. Now I want to return to *post cruciamiento*, with the previous discussion on *post bellum* in the background. Here I detail justice post-CI. What may stand out here is that I argue for aftercare for the harshly interrogated, even if that person was liable for that interrogation by their involvement in a grave wrongdoing. Additionally, I claim that the interrogator is entitled to aftercare as well.

I will claim, but not argue, that humans are inclined to repair the broken. Next, I discuss the three categories of people who are directly affected by CI. These are the innocent who are wrongly judged to be involved in wrongdoing, the liable who are involved to various degrees with wrongdoing, and the just interrogator. With each group I stake a moral claim that they should be recipients of aftercare.

CI aims to break us to the extent that we will reveal secrets which are a threat to others. In some cases, harsh interrogation only breaks the body, not the spirit. On other occasions it breaks both. Even when very harsh interrogation is justifiable, as I have argued it may be, it is damaging. Yet repair is possible, and we are morally obliged to attempt it. That people can recover from torture is illustrated by the life of John McCain. As a Naval pilot he was shot



down over Vietnam during the Vietnam war in 1967. He survived and was a prisoner of war until 1973. Through most of that time he was beaten, tortured, and held in solitary confinement for two years. Torture did not destroy him, nor leave him a shell of a person. After being released in he entered politics, serving in the US Senate from 1987 to 2018 and running against Barack Obama in the 2008 presidential election.<sup>88</sup> McCain had a family, and his second wife served in the Biden presidency with the rank of Ambassador.<sup>89</sup> McCain's public and private life after years of torture demonstrated that repair and flourishing are possible. I realise that McCain's life was exceptional, but it was a life played on a public stage demonstrating that torture does not necessarily ruin personhood. Even when torture is overcome and life regained, there is a cost. One African female survivor is telling. She was 9 when she was tortured and raped by agents of a government that saw her tribe as a threat. Six years later she noted that "At that time I did not know what I had lost. Now I realize that my future has been spoiled. They took away something that was special for me, not just replaceable, my virginity, my innocence."<sup>90</sup> The scars that she will carry for her life are reinforced by cultural views that she is defiled permanently. She was raped, as an act of political torture, just to terrorise her community. I made clear in the previous chapter that torture to terrorise is unacceptable. Rape is always wrong.

Elizabeth Spelman writes that "The Human being is a repairing animal. Repair is ubiquitous, something we engage in in almost every dimension of our lives. *Homo Sapien* is also *Homo reparans*."<sup>91</sup> I discuss repairing individuals damaged by torture and CI who are those

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<sup>88</sup> "The Story of John Sidney McCain III", Johnmccain.com, accessed 08 December 2022, <https://www.johnmccain.com/story/>.

<sup>89</sup> "Ambassador Cindy McCain", U.S. Mission to the UN Agencies in Rome, accessed 08 December 2022, <https://usunrome.usmission.gov/our-relationship/our-ambassador/>.

<sup>90</sup> Peel, *Rape*, p.81.

<sup>91</sup> Elizabeth V. Spelman, *Repair: The Impulse to Restore in a Fragile World* (Boston: The Beacon Press, 2002), p.1.



innocent of wrongdoing, those who are liable due to their own evil acts, and the perpetrator (interrogator). Concerning the interrogator, I consider 'moral repair' following the damage done by conducting CI. What I mean by 'moral repair' is repair to damage done to one's moral centre by harshly interrogating a suspect. It is important to point out that the roles involved may appear clearly delineated, but liability may rest with both parties depending on their roles in a given encounter. As Margaret Walker points out, "the same person may be a victim and a perpetrator ... but that person is a victim of some *particular* wrong and perpetrator of *another* distinct one."<sup>92</sup> With the exception of the completely innocent victim, the individuals under discussion here are both victim and perpetrator. One is a victim of CI and a perpetrator of a serious wrong, and the other is a perpetrator of CI and a victim of having harshly interrogated another. This is not to say that the interrogator committed a wrong- it simply acknowledges that she carried out acts, which although justified, may cause moral injury. I will return to this paradox later. 'Victim', as I use it here, is only to say that one has received an action, not that that action was a wrong. In the case of the interrogator, I am saying that she received the psychological impact of harshly interrogating another in ways that were, most likely, against her moral instincts even though it was morally justified under the circumstances of a serious impending threat. To protect the innocent, CI may "be repulsive even if it is morally permissible."<sup>93</sup>

## II.5: Categories of the Wrongly Harmed: Victims of Illiberal States.

Before I discuss the care and repair of people caught up in situations of harmful interrogation, I want to delineate the group of people I am *not* talking about. I am not speaking below of those countless victims of torture by illiberal states where torture is the

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<sup>92</sup> Margaret Urban Walker, *Moral Repair: Reconstructing Moral Relations After Wrongdoing* (Cambridge: CUP, 2006), p.7.

<sup>93</sup> Francis M. Kamm, *Ethics for Enemies: Terror, Torture and War* (Oxford: OUP, 2013), p.28.



widespread tool of an evil regime in the service of repression. Those innocent victims are entitled to psychological and physical care as victims. If they land on liberal shores, they should be cared for in the same way as an asylum seeker. Who is responsible for post interrogational care? There are two categories of providers here: one is a general provision of care that could be provided simply on humanitarian grounds by a liberal host- aid based on need alone; the other provider is the state who committed the interrogation, i.e., the interrogating state should provide repair. But in actuality, the Russian state is not going to offer repair to tortured Ukrainians. However, the UK *is* more likely to provide aftercare to interrogated suspects. The distinguishing characteristic here is that the person has endured the brutality of torture in addition to whatever political or physical hardship they endured in their native place prior to receiving sanctuary. Innocent victims of politically motivated torture by illiberal states deserve a full range of services on humanitarian grounds. These services are provided by ‘The National Consortium of Torture Treatment’ and the ‘Medical Foundation for the Care of Victims of Torture’ in the US and UK respectively. I say that these people are not the group I am speaking about because I take it as a given that these innocent victims are deserving of the compassionate care needed to build a flourishing life after the terrors of torture. The perpetrators of torture here are liable for punishment nationally, or internationally, because their acts were carried out for reasons I ruled out to be illegitimate in chapter one.

#### II.5a: Categories of the Wrongly Harmed: The ‘Wrong’ Victim.

Then there are those persons who were hurt in the belief, justifiably or not, that they were engaged in a criminal or terrorist activity when they were not. This activity would, most



likely, have fallen under the umbrella of National Security. But as noted earlier, there are other urgent reasons for coercive interrogation, such as in the case of kidnapping.

The least controversial position is to say that innocent victims who were tortured are entitled to reparative care. By 'innocent victim' I refer to a person with no connection to terrorism or other criminal activity whatsoever, who was tortured in the attempt to gain information they did not have. Sadly, in the global war on terror, persons have been detained who were innocent and their detention resulted from false accusation, misidentification, or the misreading of facts. For example, sometimes persons are falsely accused of terrorist associations by political, business, or social enemies. Sometimes a person is misidentified by poor quality documents produced in developing countries, which lead to identity confusion.

I hold that these innocent victims are entitled to aftercare because they were not liable for the harm they experienced. Given that they are entitled to aftercare, what form should this take? I have only a common sense understanding of what repair, or just compensation, would look like in detail. Experts in treating trauma and Tort law need to be invited to contribute to this conversation. While detailed discussion of the public face of compensation is outside of my remit presently, I can suggest some possibilities; a direct face to face apology from the interrogator, monetary compensation, depending on the extent of injuries, a pension of some sort, or even relocation away from a war zone to a third country. These victims are unfortunately a well-known group, whose plight has been publicised in the press. These are people who simply never should have been detained or interrogated, and aftercare should include a range of remedies appropriate to each individual case and respective of the specific context.



There is yet another category of wrongfully interrogated person. This person occupies a grey area. He does support terrorist organisation X, but lacks knowledge about specific plans. The principle stated in the previous chapter is that painful interrogation is reserved for persons who potentially have knowledge of future wrongful acts and information that could thwart such acts. This person could be questioned by authorities to gain knowledge of the operational and command structure of X. But he would not be liable to painful interrogation. The burden of knowing how much information this person may have rests with the intelligence agencies; it is their responsibility to carry out due diligence prior to embarking on acts that are harmful. However, it must be noted that the person's support for organisation X makes them a legitimate subject for surveillance and perhaps criminal prosecution. Aftercare for this person would be, all things considered, proportionate to the harm inflicted by interrogation.

#### II.6: Those Liable to Harmful Interrogation.

The next category is that of the liable subject of CI. This is a person who is liable to interrogation because he is probably withholding information that could save lives *and* is an active supporter of terrorism. This person is liable for harm because of her ongoing involvement within a network of violence against the innocent, or against states which secure (as a matter of course) fundamental rights for citizens. She falls into one of three categories. First, she may have provided sensitive information through CI to the authorities, but not be subject to further legal proceedings. Secondly, she may have been found guilty in a court of law and have been sentenced to a limited term in prison. Thirdly, she may have been found guilty and sentenced to life in prison. Each category represents a different offender in the web supporting a terrorist organisation or ideology. I will look at each category in more detail.



Liability is a matter of proportionality, as is the appropriate aftercare. The first offender is a person who had information concerning terrorist activity to some degree and only revealed it after being subjected to painful interrogation. The person may have only been interrogated for a brief time and the results could not be used in a way that would lead to lawful prosecution, and the best option was to release her. This happens in at least two circumstances; the first being that the information was not admissible in court, perhaps because of how it was obtained or because it was obtained without the person having been cautioned or offered legal representation. The second possibility is that the interrogation took place in a country where appropriate incarceration was not possible. An example is where the suspect is interrogated in Yemen, or another “failed state”, and released to a local authority or simply released to return to his home village.

There are two reasons, practical and moral, I believe that this person should benefit from aftercare. The first is pragmatic; this person is continuing to function in a wider society and that society benefits from the victim not walking around with a proverbial ‘chip on the shoulder’. If the person leaves custody angry, resentful, and hurt he may seek to reengage with a terrorist organisation. We must work to prevent that.

Another reason for providing aftercare is that attempting to repair a person is, I contend, a morally good act. Perhaps it is not a duty since the person *was* involved with a terrorist organisation. After all, the person was interrogated and *did* have information concerning terrorist activity that was not voluntarily surrendered. Aftercare here could be considered a supererogatory act, meaning one that is good but not required by duty. For both of these reasons, the pragmatic and the moral, the outcome is likely to be better than if no aftercare was provided.



This aftercare could take many forms. To begin with, the victim and perpetrator could meet, and the perpetrator could say something like “I’m sorry that what was done to you was done. But your membership in X group made you liable. Stay away from terrorist groups and we will never reveal that you gave us information. That should keep you and your family safe. If you reengage with terrorists, you will most likely be killed or imprisoned for life. Further, we have arranged for your children to have full scholarships at X school until they graduate. Is there anything you would like to say?” Allowing the victim to speak can be emotionally healing. Exactly how this would play out depends in large part on where we are in the world. Post interrogation aftercare would be different in Iraq than in the United Kingdom. This difference is due largely to what is possible, rather than what is necessarily right.

The next category is that of persons who are liable to harm due to terrorist involvement and who have been found guilty in a court of law and sentenced to a limited prison term. This is a person who was harshly interrogated prior to conviction to thwart a wrongful action. While this person was guilty of involvement in the wrongful event, she too should be given aftercare for the reasons outlined above. Sentencing guidelines in the UK allow for some convicted terrorists to be released in less than ten years.<sup>94</sup> It is to a society’s benefit and protection that the person released is not more dangerous coming out of prison than he was going in. One substantial difference from the above example is that this person is going to be incarcerated. Repair could take the form of in-prison therapy for emotional and physical harm done as a result of torture and enrolment in an appropriate anti-radicalisation

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<sup>94</sup> Sentencing Council, *Terrorism Offences Definitive Guidelines* (Crown Copyright, 2018), accessed 8 December 2022, <https://www.sentencingcouncil.org.uk/wp-content/uploads/Terrorism-offences-definitive-guideline-Web.pdf>.



program. HMP Frankland, which is a category A prison, has one to one counselling for inmates at risk of Islamic radicalisation.<sup>95</sup> This model could be expanded to include those who were harshly interrogated. Category A prisons contain those judged most dangerous, including, but not limited to terrorists. But in all other respects, this prisoner should be treated the same as any other prisoner sentenced for the same crime. Again, I want to emphasise that prison should not be a breeding ground for further radicalisation and care should be taken to ensure that it is not. The ethics here involve the following standards. First, for the defence of the community, every effort should be made for the rehabilitation of the prisoner. Secondly, respect for the person urges us toward attempting measures of healing and repair. This is respect for the person despite the fact that the person has done wrong. But the degree of wrong is not such that the period of incarceration is a life sentence. If A is thirty years old when convicted for ten years, she will only be forty when released, giving her potentially decades of life remaining in a community. It is prudent to consider a future past the punishment of crimes previously committed. This requires us to look to the wellbeing of the future.

Finally, there is the person who has been sentenced to life imprisonment. I do not claim that dangerous terrorists like Ramzi Ahmed Yousef in the US, or Michael Adebolajo in the UK *deserve* special aftercare related to CI. We, society, or the state acting on our behalf, may choose to lock them away and only provide them the minimal requirements. There are two reasons that providing aftercare is worth considering here. The first reason is simply pragmatic. A reasonably content prisoner is easier to manage, and this means that the lives

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<sup>95</sup> Currently HMP Frankland holds convicted terrorists Michael Adebolajo, Dhiren Barot and Osman Hussain. HM Chief Inspector of Prisons, *Report on an unannounced inspection of HMP Frankland* (Crown Copyright, 2018), accessed 8 December 2022, <https://www.justiceinspectorates.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2016/06/Frankland-Web-2016.pdf>.



of the prison staff, and their families, are improved. Repeated exposure to violent offenders has a negative effect on the wellbeing of prison guards.<sup>96</sup> This in turn can spill outside of the workplace and effect the guard's family and relationships outside of prison. So, in the first instance, a content prisoner can have an invisible, but real, impact on the broader community. Secondly, the prisoner remains a human being. In other words, this person remains entitled to considerations of human rights, albeit these rights are reduced due to the prisoner's previous behaviour and the risk they pose to some part of the larger human community. For this reason, post-interrogation specific care, and other humanising treatments are right for those incarcerated.

### II.7: Care of the Perpetrator.

I believe that care must also be provided to the interrogator. This will be, I suspect, a novel focus. Too often discussions about CI carried out by agents of Western democracies, focuses on to what extent we should punish perpetrators, and how to make our courts available to foreign citizens who were interrogated as venues for seeking redress. But as Saira Mohamed points out, "Understanding the perpetrator as a suffering person need not undermine the goal of respecting victims and giving voice to their experience."<sup>97</sup> Indeed not. And in addition to the rights of those discussed above, it behooves us to "consider the rights and interests of the interrogator, given the unique risks and stresses of their jobs."<sup>98</sup> It will be clear that my approach in caring for the perpetrator is a radically different approach from one focused on punishing the democratic state's agent as the sole wrong doer.

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<sup>96</sup> Dasha Lisitsina, "Prison Guards can never be weak: The hidden crisis in America's jails." *The Guardian*, 20 May 2015, accessed 8 December 2022, <https://www.theguardian.com/us-news/2015/may/20/corrections-officers-ptsd-american-prisons>; PTSDUK, "PTSD in Prison Employees", accessed 8 December 2022, <https://www.ptsduk.org/ptsd-in-prison-employees/5/>.

<sup>97</sup> Saira Mohamed, "Of Monsters and Men: Perpetrator Trauma and Mass Atrocity", *Columbia Law Review* 115, no.5 (June 2015), pp.1157-1216, <https://www.jstor.org/stable/43582425>, p.1212.

<sup>98</sup> Skerker, "What Can Be Asked of Interrogators?", p.253.



But first, I am going to discuss who the interrogators are, and how they are trained. This is important because it grounds us in the reality of who the interrogator is, how she was trained and what pressures she may suffer. These issues are pertinent to the interrogator's ability to carry out the task of gaining information justly and reducing moral injury. These raise the issue of aftercare. Next, I will discuss the terrain in which they act. Then I consider how the work affects them and what I believe we owe them in return for what they have done to protect us and our institutions. Finally, I will demonstrate why some limited degree of institutionalisation is beneficial if we accept that in rare circumstances, CI is called for.

First and foremost, I want to state the obvious. Interrogators in our context, are agents of the state. In other words, they represent us. We may, and often do, object to how our agents behave, but on the beaches of Normandy and over mountain passes in Afghanistan, they belong to us. We sent them there and they are there attempting to protect us- "State agents do things in service of their state that are superficially at odds with the behaviour expected of morally upright people."<sup>99</sup> This is said to remind us that the interrogator is not 'other'. She or he is a part of the same society that we are, and they come from us. Yet, they do things which are indeed "superficially" at odds with what we regard as moral. I will look at interrogators in three groups: the first being the military, the second the police, and the third the intelligence agencies.

Military interrogators are generally soldiers because the Army is a land-based branch and usually holds more prisoners than the Navy or Airforce.<sup>100</sup> Captive soldiers, or terrorists disguised as civilians, are frequently subjected to near immediate interrogation in the

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<sup>99</sup> Ibid p.270.

<sup>100</sup> Jean Maria Arrigo and Ray Bennett, "Organizational Supports for Abusive Interrogations in the War on Terror", *Journal of Peace Psychology* 13, vol.4 (2007), pp.411-421, <https://doi.org/10.1080/10781910701665592>, p.412.



attempt to save lives in a hostile environment. Interrogators in both the UK and US are part of the military hierarchy and thus are subject to demands from superior officers for intelligence. An interrogator is a warrant officer, which in the US is a specialist with advanced skills such as those of a helicopter pilot or tank commander. Army interrogators fall within the job category of military intelligence generalist, of which human intelligence (HUMINT) is a subspeciality career track.<sup>101</sup> In US military intelligence training, the average student is “a 19-year-old high school graduate with little military experience beyond basic training”.<sup>102</sup> In 2006 the training course for Human Intelligence Specialist was 16 weeks long. Only one week was devoted to interrogation, highlighting the necessity of supervision and mentoring in the field. Unfortunately, that did not happen in Afghanistan or Iraq. Events moved very quickly after the September 11 attacks on the U.S. The British faced the same problems with interrogators, but to a lesser degree. “Interrogation’s effectiveness was constrained, however, by a shortage of trained interrogators and interpreters, limitations in the interpreter’s skill levels, and the availability of written materials and analytic support, and weakness in written guidance.”<sup>103</sup>

The British problem was said by one British intelligence officer to “pale into insignificance compared to the Americans who have only interrogated a small fraction of the people they have detained.”<sup>104</sup> The US Department of Defense deemphasised HUMINT in the 1980s in favour of technological means for gathering intelligence.<sup>105</sup> At the same time the US

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<sup>101</sup> Ibid., p.412

<sup>102</sup> Ibid., p.415

<sup>103</sup> Samantha Newbery “The UK, interrogation and Iraq, 2003-2008”, *Small Wars and Insurgencies* 27, no.4 (June 2016), pp.659-680, <https://doi.org/10.1080/09592318.2016.1189519>, p.661.

<sup>104</sup> Ibid., p.670

<sup>105</sup> Arrigo & Bennett, “Organizational Support”, p.413.



diplomatic and intelligence agencies experienced reduced budgets and hiring.<sup>106</sup> When terrorism began to increase there were too few experienced interrogators and in Afghanistan and Iraq, we saw evidence that interrogators were too few, too inexperienced, and overwhelmed by both the number of captives to interrogate and the time pressures imposed by the conditions of war. The insurgency in Iraq posed lethal risks for coalition forces and the increasing use of Improvised Explosive Devices (IEDs) by insurgents meant that information was of increasing importance in a conflict where the enemy hit within the civilian population. Every routine patrol was life threatening. One British intelligence officer stated: “I have to make this clear: we were under a massive pressure from the whole Brigade to extract information or intelligence that potentially could be a secondary attack, there could be weapons out there that were about to be used on an attack tomorrow, next hour, next minute”.<sup>107</sup> The picture that emerges is one of relatively young men as relatively inexperienced interrogators in a hostile environment feeling pressure to provide information that could save the lives of friends and comrades, not in an abstract or theoretical way, but in an immediate and personal way. While there was no ‘ticking bomb’ here, there was a need for the rapid acquisition of intelligence for self and other defence. If one supposes that the second Iraq war was an unjust military action, the question follows how the use of torture to protect troops could be justified. There are two possible answers. One is that it cannot be. In other words, one cannot justify the use of harsh interrogation to prevent a roadside bombing of British troops. But even if that is the case, I contend that the interrogator who used it should still be given aftercare in her eventual return to civilian society. Providing this care is to her benefit as a person, and it is beneficial to society to

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<sup>106</sup> Personal correspondence with retired diplomatic and intelligence officers. Reduced diplomatic and CIA hiring was considered as part of the “peace dividend” with the end of the Cold War.

<sup>107</sup> Newbery, “Interrogation 2003-2008”, p.665.



diminish the effects of war, such as PTSD, within the population. The other position is to say that even though the war was unjustified, it was well intended. The goal was to replace a monstrous regime with a decent democracy. In this case the foreign troops were there to do good and thus their protection was just. I will set aside which of these two positions is right because in either case the interrogator is eligible for aftercare. If he crossed lines drawn in the previous chapter, he may also be subject to criminal charges, but even then, aftercare for the war's effects is right.

One additional aspect of the pressure felt by American interrogators is related to their location in the military hierarchy. In addition to the internalised demands to uncover actionable intelligence to save the lives of colleagues, there was the pressure exerted by superior officers. As noted above, interrogators are ranked as technical specialists, rather than as professionals like physicians or chaplains. They are generally not commissioned officers who would have graduated from academies like West Point or Sandhurst. This added to the stress the interrogator experienced as superior officers demanded additional information. There would be unspoken demands to use all means necessary to gain intelligence before the next patrol left the security of the base.

Recognising the stress of the battlefield conditions does not alone justify whatever harsh techniques may have been used during interrogation. But it does, I believe, point toward the strength of a claim that these military personnel deserve *post bellum* and *post cruciamentum* care.

Now I want to give attention to the remaining agencies that conduct interrogations. These are the domestic and foreign intelligence services; In the US these are the Federal Bureau of Investigation (FBI) and Central Intelligence Agency (CIA), while the UK has the Military



Intelligence, Section 5 (MI5), and the Secret Intelligence Service (SIS or MI6), for domestic and foreign operations respectively.

As noted above, the FBI is a domestic law enforcement and intelligence agency. Yet it still has a few agents stationed overseas who work with foreign governments on transnational issues such as international trafficking of persons, drugs, or animals. The FBI has very well-regulated protocols for interrogation and their methods have rarely been accused of crossing a line into what may be classified as coercive interrogation, or torture.<sup>108</sup>

Understanding who may be called upon to interrogate a detained suspect helps better understand the conditions under which institutionalisation and training may take place, and why I believe it is important to provide it. These agencies of government are described so that we have a picture of the environment in which it is suggested that training take place.

### II.8: Institutionalising Coercive Interrogation.

Supporting forms of institutionalising CI should be considered because it will assist in achieving two goals: the extraction of critical information to thwart an imminent threat, and to do so in a manner causing the least amount of harm. Almost universally, the cases of prisoner abuse in the context of interrogation post 9/11 were carried out by persons with little or no training. Glenn Carle was a CIA officer charged with interrogating an Al-Qaida prisoner. He says that on 9/11 the CIA had *no* trained interrogators. “I was not a trained interrogator” he wrote, “The CIA had none. We were case officers with various skills, but interrogating prisoners ... had nothing to do with our careers.”<sup>109</sup> The point here is that when poorly trained people are given a task for which they are poorly trained they are likely

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<sup>108</sup> This is not to suggest that the FBI’s history is free from wrongdoing. It is not, and attacks on civil rights leaders in the 1960s are well documented. However, torture is not one of their historic practices or wrongs.

<sup>109</sup> Glen Carle. *The Interrogator: An education* (New York: Nation Books, 2011), p.66.



to do it poorly. A poorly conducted interrogation is unlikely to secure the information sought and is more likely to slide into cruelty.

To support institutionalising the training and practice of CI is a step in the direction of morally increasing protection for innocent people. Steinhoff draws a distinction between “rudimentary” and “full-fledged” institutionalisation of torture, so that rudimentary refers to training limited to defensive CI.<sup>110</sup> There is no reason to believe that institutionalising CI would lead to a metastatic spread of abusive interrogation throughout society. Steinhoff admits that there are “different scales of institutionalization” and that points to the training that may be able to prevent the abuses we worry about.<sup>111</sup>

This matters because institutionalisation means training and professionalisation. Good training means that practitioners are less likely to cross the lines drawn in the previous chapter. Observing the boundaries means that the interrogator is less likely to suffer moral injury in the course of her work. The interrogator must “be trained to be able to conduct interrogations without suffering serious moral or psychological distress.”<sup>112</sup> And she must be so trained as to avoid inflicting such horrors that the prisoner would be irreparably broken. All of this must be accomplished with an eye on the prize of securing information to protect innocent lives and the institutions of liberal democracy.

### II.8a: What sort of Training?

This training should take place as a special track within training for interrogators. Note that I am not suggesting a school for torture. But rather a track within already established

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<sup>110</sup> Steinhoff, *Ethics of Torture*, p.67.

<sup>111</sup> Ibid.

<sup>112</sup> Skerker, “What can be asked of Interrogators?”, p.276.



interrogation training on the use of coercive techniques. Most intelligence officers would not need this training in the same way that most police officers in England and Wales do not carry firearms and are not trained to do so. Use of a firearm, like interrogation, is a specialised skill obtained through specialised training. Both the Authorised Firearms Officer and the Interrogations Officer are trained in skills that can hurt and are directed toward preventing a wrongful act. The Firearms Officer may kill a suspect to prevent a wrong and the interrogator may hurt a suspect to gain information to prevent a wrong. In both cases the goal is the prevention of a wrong and the protection of people or liberal institutions. As I acknowledged earlier, mistakes can occur. The wrong person may undergo coercive interrogation. The wrong person may be shot, as was the case of Jean Charles de Menezes who was fatally shot in the London underground in 2005. He was mistaken as a terrorist following the July terrorist attack which killed 52 in London.<sup>113</sup> Even though the wrong person may be killed, the authorities have not felt compelled to prohibit the use of guns in all circumstances. But it remains key that those who may use firearms are specifically trained to do so. Likewise, those who are charged with the burden of securing information must be trained to do so.

Institutionalising CI training does not mean *routinising* its use. It means that the institutions charged with protecting our lives and liberties have within their ranks persons trained to use it on rare occasions. In training interrogators, coercion should only be a small part of the overall curriculum. Training in building trust, rapport, and negotiation should all proceed training in coercive techniques.

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<sup>113</sup> “Police shot Brazilian eight times”, BBC News, 25 July 2005, accessed 8 December 2022, <http://news.bbc.co.uk/1/hi/uk/4713753.stm>.

## II.8b: Guardrails.

Training should provide the guardrails against the most grievous wrongs being conducted during interrogation. And in reducing the wrongs committed in interrogations, the interrogator's moral health should be impacted less than when guidance is lacking. Nevertheless, the very act of imposing pain on another, even if justified, is a disturbing experience. For this reason, the employing agency must be prepared to support the interrogating officer with a range of aftercare services. They must be prepared to mitigate against the "morally corrosive effect of the practice on those whose job it is to do the actual torturing."<sup>114</sup> I do think it is morally corrosive for most of us to hurt people even when it is done to save lives and people interrogated are suspected of being responsible for great evil. These mitigations can include, for example, psychotherapy, bonus holiday time, and a less stressful follow-on posting, all in addition to good training. Aftercare must include awareness that if the interrogation failed to provide information, and a successful terrorist attack occurred, the officer would most likely experience guilt. It is painful to live thinking that one could have prevented a tragedy. Thus, a bundle of provisions should be available to the interrogator who has suffered protecting innocent people and the fruits of democracy.

## II.9: Summary

Chapter I defended the position that harmful coercive interrogation was sometimes morally justified in order to protect innocent lives and the institutions of a liberal society. This chapter has laid out the basis of care after CI. I began by reviewing the status of justice after war as a framework. From this macro perspective, *jus post bellum*, I then looked at the

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<sup>114</sup> Jeff McMahan, "Torture, Morality and Law", *Case Western Reserve Journal of International Law* 37, vol.2, (2006), pp.241-248, <https://scholarlycommons.law.case.edu/jil/vol37/iss2/5>, p.243.



requirement of justice after harsh interrogation, *jus post cruciamentum*. I have pointed out how this aftercare is both good and just. I also claimed that aftercare does not eradicate the possibility of incarceration. Aftercare as employed here was not a substitute for legal penalties if crimes were committed- it is not a 'get out of jail free' card for terrorists of other criminals. Instead, it is a moral response to the unintentional harms brought about by justified interrogation. In many political situations, torture and coercive interrogation are used to further the political aims of the regime in power. That is not the case for CI, as I defend its very restricted use.



## CONCLUDING REMARKS

Torture is generally regarded as an unacceptable practice. Here I have argued for its rare use as a form of self-defence when the innocent or institutions designed to protect liberal democracy are under attack by malevolent forces. The examples I used were kidnappings and terrorist attacks; in both cases the innocent were unjustly harmed. Society has a range of tools to protect itself. CI is one of those tools, albeit to be used sparingly and to thwart an unjust threat.

In addition to arguing for CI as a justifiable form of self-defence, I acknowledge that its use involves injury and I propose aftercare. Aftercare is intended to repair this damage. I extend this care not only to the unjustly harmed through interrogation, but also to the liable and to the interrogator.

The basis for providing aftercare is that the human *qua* human should be afforded the possibility of flourishing. This includes the limited flourishing available to a convicted and imprisoned terrorist, as well as to the interrogator who experienced moral injury in the defence of the innocent.

Coercive interrogation can be fully justifiable, and aftercare is a compassionate response to its negative consequences.

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