

# Torture and Moral Integrity

*A Philosophical Enquiry*

By

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*To Norman Geras*

### 3.1.5.3. Some transitional ruminations on Sussman's theory

Sussman's account of torture's wrongness serves as a fine point of transition to my own account, for there is much in his theory on which I shall profitably draw. His 2005 article is a major contribution to the contemporary philosophical literature on torture. Nevertheless, my own diagnosis of the wrongness of torture will seek to avoid the shortcomings that detract from his article. Perhaps most prominent among those shortcomings is his allegiance to Kantianism (albeit not to the orthodox Kantianism which he pertinently criticizes, of course). That allegiance manifests itself in his excessive emphasis on deliberative agency throughout his article. When Sussman expounds the subtle way in which every victim of torture is forced into self-betrayal, he characterizes the process as a perversion of the dignity with which a victim is endowed by dint of her capacities as a rationally self-governing agent. That characterization recurs, in one form or another, at many junctures in his article. Having come up with an insight that illuminates the nature of the travails undergone by *every* victim of torture, Sussman regrettably treats that insight as if it were confined to the travails undergone by *reflective agents* who are subjected to torture. By contrast, this chapter will endeavour to re-elaborate Sussman's insight without any Kantian limitations.

Another shortcoming in the 2005 article by Sussman is that he does not sufficiently disentangle the different senses in which a victim of torture can be forced into self-betrayal. In the most familiar sense, whereby somebody betrays herself if she acts in a way (for example, by providing information) that is detrimental to long-standing comrades or inimical to the promotion of values which she has staunchly endorsed, only some victims of torture are forced into self-betrayal. Not all instances of interrogational or act-impelling or intimidatory torture induce self-betrayal in that familiar sense, and most instances of other kinds of torture do not result in any such self-betrayal and are not aimed at inducing it. Though the principal type of self-betrayal which Sussman broaches is significantly subtler, the more familiar type continues to surface in his exposition of his theory (chiefly in passages that I have not quoted). He brings in further aspects of self-betrayal through his discussion of certain techniques of torture. All of these types of self-betrayal are very important, but they are distinct. Only the subtlest kind of self-betrayal delineated by Sussman—whereby the bodily sensations and vulnerabilities of a victim are turned against her through her subjection to severe pain—is realized in every instance of torture that is not quickly aborted or foiled. Given that my own account of torture's wrongness will advert solely to that always-occurrent kind of self-betrayal, I shall have to be more careful than Sussman to avoid running it together with any of the other kinds of self-betrayal that he depicts.

Related to the weakness just outlined is Sussman's disinclination to ponder modes of torture other than interrogational torture (and punitive torture, in an ancillary discussion toward the end of his article). As Sussman acknowledges forthrightly: 'My discussion focuses on interrogational torture, i.e., torture that involves a protracted process of inflicting or threatening pain in a context of helplessness and dependence, so as to make its victim provide information, confessions, denunciations,

and the like' (2005, 4). Now, as my second chapter has remarked, interrogational torture—especially calamity-averting interrogational torture—is far more frequently debated in contemporary Western societies than is any other type of torture. Hence, although Sussman's article is entitled 'What's Wrong with Torture' rather than 'What's Wrong with Interrogational Torture', the circumscription of his investigation of the topic is quite understandable. Nonetheless, it skews his analyses toward some conclusions that are peculiar to interrogational torture (though some of his other conclusions are more wide-ranging in their applicability). Moreover, it leads him away from exploring whether and why any non-interrogational modes of torture can ever be instantiated legitimately. My own account of torture's wrongness proceeds quite differently. Having submitted in Chapter 2 that some possible instances of ephemerally incapacitative torture and edifying torture are morally legitimate, I shall have to explain in this chapter why those kinds of torture differ morally from other kinds.

In § 3.1.5.2, we have seen another misstep in Sussman's reflections on torture: the overstatedness of his distinction between the anguish induced by torture and the anguish induced by natural illnesses or accidental injuries. Albeit the experiential difference to which Sussman's distinction draws our attention is important, it does not always obtain. Hence, one should be wary of treating it as an integral aspect of torture's wrongness. More generally, one should be wary of following Sussman in his excessively victim-focused perspective on the wrongness of torture. Crucial though such a perspective is, it has to be supplemented with a perpetrator-focused perspective. Without that latter viewpoint, we cannot fathom the wrongness of certain instances of calamity-averting interrogational torture and act-impelling torture. Similarly, without that latter viewpoint we cannot fully fathom the moral legitimacy of certain instances of ephemerally incapacitative torture and edifying torture.

## 3.2. Why Torture is Wrong

An account of torture's wrongness should draw on two of Sussman's insights that are presented separately from each other in his 2005 article. Central to his article is one of those insights, pertaining to the distinctive form of self-betrayal that is forced upon any victim of torture. Through the affliction of such a victim with severe pain, her own bodily feelings and susceptibilities are turned against her as instruments and expressions of the torturer's dominance. We have just been mulling over that first main insight, of course.

### 3.2.1. The consumingness of severe pain

In addition to that first point, which Sussman articulates so prominently in his article, is an equally important point which he articulates less conspicuously and sustainedly. My summary of his critique of orthodox Kantian approaches

to torture, in § 3.1.4.2, has quoted a passage in which he remarks upon the radically consuming power of intense pain. Although the passage as a whole is itself redolent of Kantianism in its overweening concentration on the destruction of agency, its general theme is dis severable from Kantian preoccupations. Of particular significance are the following two sentences: 'It is almost impossible to reflect, deliberate, or even think straight when one is in agony. When sufficiently intense, pain becomes a person's entire universe and his entire self, crowding out every other aspect of his mental life' (Sussman 2005, 14). The gist of these statements is applicable even to situations of torture in which the victims are animals or mentally infirm human beings whose abilities to reflect and deliberate are extremely limited—far too limited for them to be correctly classifiable as reflective agents.

With the quoted statements, Sussman highlights the power of severe pain to fixate upon itself anyone who suffers from it. Whereas somebody can largely disregard minor aches and pains while attending to daily affairs, excruciating pain does not similarly lend itself to being subordinated to other concerns. Instead, as is suggested by Sussman's analogy between the insistent demands of such pain and the shrieking of children—an analogy which I have quoted in § 3.1.5—one's excruciating pain thrusts aside one's other concerns as it clamorously absorbs attention to itself. At its most severe, such pain crowds out everything else in someone's psyche as its own horrible pulsing stymies her awareness of anything else. Améry memorably recounted the oblitative power of the agony of brutal torture. Among the many relevant statements in his essay are the following: 'Whoever is overcome by pain through torture experiences his body as never before. In self-negation, his flesh becomes a total reality.... [O]nly in torture does the transformation of the person into flesh become complete' (1980, 33). Writing specifically about the strappado-induced dislocation of his arms and shoulders, Améry recalled that the interrogator's voice faded into a dim hum as '[a]ll your life is gathered in a single, limited area of the body, the shoulder joints' (1980, 32).

Of course, the torture to which the Nazis subjected Améry was notably dreadful, and the pain which they elicited in him was correspondingly terrible (though, as he himself remarked near the beginning of his essay, the torturous measures which he underwent—the strappado and horse-whipping—were not the worst such measures that were employed by the Nazis). Still, even when the pain induced by torture is somewhat less severe and is thus not oblitative of everything else in a victim's consciousness, it dominates everything else by relentlessly fixating the victim on itself. Until it abates, it takes control of the victim as it thwarts him or her from attending sustainedly to other matters.

### 3.2.1.1. *The consumingness of euphoria*

To be sure, intense pleasure can also crowd out everything else in a person's mind. Though Sussman in his rejoinders to the traditional Kantians has made this point with a focus on the disruption of rational self-governance, the point

can be generalized to animals and human beings who lack the capacities for self-governance. Two remarks in response to that generalized observation are appropriate here.

First, as is vividly conveyed by the tale of the lotus-eaters in Book IX of the *Odyssey*—and by the tale of the Sirens in Book XII of the *Odyssey*<sup>11</sup>—the inducement of overwhelming pleasure in someone for a prolonged period can be as sinister and destructive as the inducement of severe pain. As Sussman comments: 'Certain drugs might induce intense euphoria in someone regardless of what he wants and in a way that, like pain, makes it impossible to think or care about anything else' (2005, 15). Such a state of euphoria in a normal human adult over a lengthy period would preclude any rational deliberation, and in an animal or a mentally infirm human being it would undermine any sense of self. The non-consensual imposition of such a state on someone for a protracted span of time would be seriously wrong (except in some very unusual circumstances where the inducement of such a state is the only palliative that can spare someone from agonizing pain). Accordingly, the fact that intense pain resembles intense pleasure in its tendency to overwhelm all the other components of one's consciousness is not a consideration that militates against the ascription of wrongness to the infliction of intense pain.

Even more pertinent in the current context is a second remark. Whereas the radical absorbingness of intense pleasure is due to the delight which it elicits, the radical absorbingness of severe pain is due to the misery and aversion which it elicits. Though the grip on anyone's consciousness exerted by the overpoweringness of ecstasy can in principle be as smothering as the grip exerted by the overpoweringness of anguish and dismay, the inducement of the latter feelings is morally far more problematic than the inducement of the former feeling. Sussman makes this point in a statement which I have quoted in § 3.1.4.2, where he asserts that '[t]he Kantian seems unable to do justice to what we would normally take to be a clearly nonaccidental truth: the fact that torture *hurts*' (2005, 15, emphasis in original). Sussman's point is that, whereas the orthodox Kantians will focus only on the *extent* to which a given way of treating someone has subverted his or her autonomy, the *means* by which the autonomy has been subverted is equally of great moral importance.

Admittedly, there can be aberrantly masochistic people in whom the eliciting of severe pain will also evoke intense pleasure, and there can be aberrantly ascetic people in whom the eliciting of intense pleasure will also evoke deep distress. Indeed, somewhat fancifully, a torturer who knows of the strongly ascetic disposition of a victim could even educe sensations of pleasure in her for the purpose of afflicting her with misery. Still, the possibility of extreme masochists and extreme ascetics does not tell at all against the proposition that the deliberate infliction of severe pain is morally worse than the deliberate arousal of intense pleasure. If a torturer were to treat an extremely ascetic victim in the manner just suggested, his conduct would be reprehensible precisely because he would be seeking to rack her with anguish. Conversely, if somebody who knows of the

<sup>11</sup> Also of relevance here is the scenario of the experience machine in Nozick 1974, 42–5.

strongly masochistic disposition of someone else were to afflict her with severe pain in order to arouse keen pleasure in her, the gravity of his conduct would be attenuated precisely because he would be seeking to gratify her with delight. His conduct is morally wrong, but it is less seriously wrong than it would be if he were afflicting her with severe pain in order to make her desolate. (I have not yet expounded the basis for my judgement that the deliberate infliction of severe pain by one sado-masochist upon another is wrong. The basis for that judgement will become clear later, when this chapter introduces a perpetrator-focused perspective on these matters.)

Of course, a torturer in an interrogational context might inflict grievous pain on a masochistic victim without knowing of her masochistic propensities. In that event, the torturer has committed a very serious wrong even though he has unwittingly provided his victim with abundant enjoyment. After all, as Sussman has rightly said in his critique of utilitarian approaches to the wrongness of torture, we should not be concentrating solely on the usually dire effects suffered by the victims: 'There seems to be something about the distinctive structure of the relationship of torturer to victim that is intrinsically objectionable and that goes beyond the badness of its usual effects' (2005, 13). If Angela subjects Markus to torturous methods of interrogation without knowing that he is a masochist who will derive pleasure from the experience, she will have adopted the outlook of an interrogational torturer in so doing. Unable to foresee the decidedly atypical results of her application of torturous interrogational methods to Markus, she has proceeded on the assumption that those methods will engulf him with searing pain and will thereby reduce him to a state of such desperate misery that he will divulge the information which she is seeking to obtain. Her having proceeded on that assumption is what makes her conduct even worse—considerably worse—than the conduct of a sado-masochist who knowingly subjects Markus to searing pain in order to elicit pleasure in him. (As should be evident, these reflections on a torturer's unwitting evocation of pleasure in a masochistic victim are relevant to my reasons for prescinding from the Experience of Pain Inquiry in § 2.3.1.1 of Chapter 2. Because the outlook of a torturer who does not succeed in his endeavours to afflict his victim with agony is fundamentally the same as the outlook of a torturer who succeeds in such endeavours, the moral character of each torturer's conduct is fundamentally the same. Though the actual inducement of agony in a victim intensifies the gravity of the second torturer's conduct, the fundamental wrongness of the conduct is independent of that actual inducement. Much the same is true here. Although the interrogational torture inflicted on Markus would have been even worse if the sensations of searing pain had educed desolation rather than ecstasy in him, the fundamental wrongness of Angela's conduct is independent of such an upshot. Given that Angela sets out with the intention of reducing Markus to misery and despair by causing him to experience intense pain, the actual occurrence of the misery and despair would merely be an intensifier of the gravity of her conduct. It would not be indispensable as a wrong-making property thereof.)

### 3.2.1.2. *Some observations by philosophers and other theorists*

The consumingness of severe pain as a central wrong-making or gravity-intensifying feature of the administration of torture has not gone unnoticed by philosophers who have written on the topic. We have already pondered some of Sussman's and Améry's pertinent remarks. Let us here glance at a few germane observations by a handful of other writers.

#### 3.2.1.2.1. *Beccaria on the filling of the sensory field*

Among the theorists deserving of commendation here is Cesare Beccaria. Writing in the eighteenth century, he excoriated judges for their use of torture to extract confessions from suspects. In the course of his denunciation, he highlighted the tendency of severe pain to overwhelm all other aspects of a person's consciousness of her situation:

Every act of our will is always proportional to the force of the sensory impression which gives rise to it; and the sensibility of every man is limited. Therefore, the impression made by pain may grow to such an extent that, having filled the whole of the sensory field, it leaves the torture victim no freedom to do anything but choose the quickest route to relieving himself of the immediate pain... And thus the sensitive but guiltless man will admit guilt if he believes that, in that way, he can make the pain stop. (Beccaria 1995, 41)

What is most important in the present context is Beccaria's recognition that the exquisite pain undergone by a victim of torture is so clamorously preoccupying that it dominates everything else in the victim's outlook. Notwithstanding that a victim might retain some awareness of other things as well, her attunedness to any of the other things will be mediated through her overwhelming sensations of agony. Those sensations, usually compounded by great fear, screechingly draw attention to themselves. Although a hardy victim might successfully resist any temptations to do what will bring her ordeal to a halt—and although some types of torture do not involve any opportunities for victims to do things that will terminate their hellish ordeals, in any event—the temptations are so powerful because the agony induced by torture is something on which a victim cannot but concentrate harrowingly.

#### 3.2.1.2.2. *Luban on the tyranny of severe pain*

In one of the best articles on torture published during the last decade, Luban has powerfully recounted the way in which severe pain focuses the consciousness of a victim inexorably on the pain itself:

[T]orture is a microcosm, raised to the highest level of intensity, of the tyrannical political relationships that liberalism hates the most. I have said that torture isolates and privatizes. Pain forcibly severs our concentration on anything outside of us; it collapses our horizon to our own body and the damage we feel in it. Even much milder sensations of prolonged discomfort can distract us so much that it becomes impossible to pay attention to anything else, as anyone knows who has had to go to the bathroom in a situation where it cannot be done. Ludwig Wittgenstein wrote that the world of the happy is different from the world of the unhappy, and this is not simply a figure of speech when we suffer severe pain.

The world of the man or woman in great pain is a world without relationships or engagements, a world without an exterior. It is a world reduced to a point, a world that makes no sense and in which the human soul finds no home and no repose. (Luban 2005, 1430—footnotes omitted)

Although the closing sentences of this passage rather loosely use ontological language to describe a plight of epistemic shrinkage and misery—in a manner that would have been largely unexceptionable if Luban had refrained from suggesting that the language is ‘not simply a figure of speech’—the gist of the passage is squarely on target. Excruciating pain does indeed contract the horizons of a victim by fixating her attention grimly on her own distress. It takes control of her outlook by suffusing all of her thoughts with its own strident clamour. Even if a victim of torture can manage to remain attuned to some other things as well, her consciousness will be trained principally on the agony that she is undergoing. The power of that agony to transfix a victim is what Luban eloquently delineates.

### 3.2.1.2.3. Kreimer on the occupation of the self

Kreimer too has given vivid expression to the consumingness of severe pain. Though he writes with reference to the autonomy of victims of torture, his comments can readily be extended to victims who are incapable of autonomous action in any full-blown sense:

The pain of torture by design negates the vision of humanity that lies at the core of a liberal democracy. Justice Kennedy recently set forth the constitutional importance of the ‘autonomy of self’ in *Lawrence v. Texas*. Torture seeks to shatter that autonomy. Torture’s evil extends beyond the physical; extreme pain totally occupies the psychic world; the agony of torture is designed to make choice impossible. Effective torture is intended to induce the subject to abandon her own volition and become the instrument of the torturer by revealing information. Such government occupation of the self is at odds with constitutional mandate. (Kreimer 2003, 298–9, footnotes omitted)

Kreimer obviously has in mind only interrogational torture in this passage, but the general tenor of his pronouncements is dis severable from that focus. In other words, the consumingness of the anguish caused by torture is hardly confined to interrogational contexts. Regardless of the type of torture that is carried out, the severe pain inflicted by it will dominate the consciousness of the victim while the pain lasts.

### 3.2.1.2.4. Scarry on the body in severe pain

Elaine Scarry is the theorist who has most frequently directed attention to the consumingness of agony. She is not a philosopher, and her book *The Body in Pain* is sometimes disconcertingly imprecise and overblown in its argumentation. All the same, despite its shortcomings, it contains a number of astute observations on the power of severe pain to exert a dismal grip over the psyche of any victim of torture.

One of the briefest of her relevant observations does not pertain specifically to the effects of torture, though its applicability to those effects is manifest. Scarry adverts memorably to the painfulness of the debility of old age: ‘As the body breaks

down, it becomes increasingly the object of attention, usurping the place of all other objects, so that finally, in very, very old and sick people, the world [as they perceive it] may exist only in a circle two feet out from themselves’ (1985, 32–3). My bracketed insertion has forestalled here an ontological/epistemic conflation that surfaces quite frequently in Scarry’s book.<sup>12</sup> Still, with that lapse out of the way, her remark insightfully captures the epistemic shrinkage that ensues from the enveloping painfulness of old age.

Scarry’s comment on the harrowing debilitation of elderly people occurs in a chapter of her book that focuses sustainedly on the processes and effects of torture. In that chapter, most of her remarks on the consumingness of severe pain do pertain specifically to contexts of torture. At the same time, the parallels between the anguish of victims of torture and the anguish of victims of other adversities often remain in view, as in the following passage:

Perhaps only in the prolonged and searing pain caused by accident or by disease or by the breakdown of the pain pathway itself is there the same brutal senselessness as in torture... It is the intense pain that destroys a person’s self and world, a destruction experienced spatially as either the contraction of the universe down to the immediate vicinity of the body or as the body swelling to fill the entire universe. Intense pain is also language-destroying: as the content of one’s [experience of the] world disintegrates, so the content of one’s language disintegrates; as the self disintegrates, so that which would express and project the self is robbed of its source and its subject. (Scarry 1985, 35)

Now, as will become evident in § 3.2.1.3, we should be somewhat wary of the tone of this passage. On the one hand, Scarry’s strong wording about the destruction or disintegration of one’s self and one’s language is undoubtedly appropriate with reference to any victim of techniques of torture that are especially brutal or long-lasting. Furthermore, if Scarry allows that the destruction can be temporary and less than comprehensive, her remarks are much more broadly applicable to victims of torture. On the other hand, her strong wording lends itself to being taken at face value. So construed, her assertions are too sweeping. Though numerous victims of torture do indeed undergo the complete dissolution of their epistemic access to the world—as their agony engulfs them to the exclusion of everything else in their consciousness—the dissolution in many such cases is temporary, even though it is typically followed by long-term effects which are often serious but which fall short of the wholesale obliteration of all other mental states by pulses of searing pain. Moreover, even during the very period when torture is wielded against a victim, the power of her severe pain to fixate her thoughts upon itself does not always wipe out every other aspect of her awareness. The disintegration of her connection to the world can be partial rather than thoroughgoing. Though her intense pain dominates everything else in her consciousness during her ordeal, its dominance does not always consist in the outright expunction of everything else.

<sup>12</sup> Indeed, the conflation is salient in the subtitle of her volume: *The Making and Unmaking of the World*. What Scarry in fact describes in her chapter on torture is the unmaking of victims’ epistemic connections to the world.

Still, although Scarry's phrasing in the passage above is too strong in application to some instances of torture, the transfixingness of agony is perhaps best conveyed through such phrasing. Let us examine two of the many further germane passages from her book. In the first of these, which prefigures much of Sussman's later analysis of the matter, Scarry again keeps in view the affinities between the grievous pain produced by torture and the grievous pain produced by some illnesses and accidents:

Regardless of the setting in which he suffers (home, hospital, or torture room), and regardless of the cause of his suffering (disease, burns, torture, or malfunctioning of the pain network itself), the person in great pain experiences his own body as the agent of his agony. The ceaseless, self-announcing signal of the body in [severe] pain, at once so empty and undifferentiated and so full of blaring adversity, contains not only the feeling of 'my body hurts' but the feeling 'my body hurts me.' This part of the pain, like almost all others, is usually invisible to anyone outside the boundaries of the sufferer's body, though it sometimes becomes visible when a young child or an animal in the first moments of acute distress takes maddening flight, fleeing from its own body as though it were a part of the environment that could be left behind. (Scarry 1985, 47)

Like the earlier quotation from Scarry on the infirmities of old age, the closing sentence in this excerpt valuably makes clear that the consumingness of agony can engulf not only autonomous human adults but also non-autonomous beings such as animals and young children. Because such beings are vulnerable to the enveloping force of dire pain, most types of torture practised against them are always and everywhere morally wrong in all possible worlds.

In the final extract from the book by Scarry that will be considered here, she summarizes the way in which severe pain tends to overwhelm the outlook of anyone who suffers from it (1985, 54–5):

Pain begins by being 'not oneself' and ends by having eliminated all that is 'not itself.' At first occurring only as an appalling but limited internal fact, it eventually occupies the entire body and spills out into the realm beyond the body, takes over all that is inside and outside, makes the two obscenely indistinguishable, and systematically destroys anything like language or world extension that is alien to itself and threatening to its claims. Terrifying for its narrowness, it nevertheless exhausts and displaces all else until it seems to become the single broad and omnipresent fact of [a victim's] existence.

Scarry here again vividly recounts the culmination of the workings of severe pain in a victim of torture. Some victims of torture do not experience that full culmination, if the techniques brought to bear upon them are insufficiently brutal or insufficiently protracted. Nevertheless, even when the severity of a victim's pain does not reach the point of blotting out everything else in her field of awareness, it permeates everything else and pressingly obliges the victim to direct her thoughts to itself in all its ugliness.

### 3.2.1.3. *The perils of overstatement*

Central to my account of the wrongness of torture is the consumingness of the agony induced by the use of torturous techniques. However, we should be alert

to the dangers of overstatement. My account seeks to specify why most types of torture are always and everywhere wrong in all possible worlds; hence, it has to eschew claims (about the effects of agony) that are applicable to only some victims of those types of torture. In § 3.2.1.2.4, I have briefly looked askance at the hyperbole that detracts from some of Scarry's otherwise evocative descriptions of the effects of severe pain on victims of torture and on other sufferers. Here we should consider in somewhat more detail the inadvisability of overstatement in these matters.

#### 3.2.1.3.1. Preliminary remarks

My account of the wrongness of torture will highlight the self-betrayal induced by torturous mistreatment and the oblitative power of the agony inflicted by such mistreatment, and will bring those points together into a perpetrator-focused perspective. At present we are concentrating on the oblitative power of the agony that is caused by torture. If the torturous techniques applied to a victim are especially harsh or prolonged, they can elicit in her such scorching pain that they block out everything else in her field of awareness. They can of course prove lethal. However, even when the victim remains alive, her sentience can be thoroughly blanketed by the pulsating agony to which she has been reduced. If she is a reflective agent, her agency will have been destroyed either temporarily or permanently. In the event that her agency is not permanently destroyed, it may well be permanently impaired.

Moreover, even when techniques of torture are not sufficiently harsh or sufficiently protracted to educe pain of such severity as to wipe out everything else in a victim's field of consciousness, they will (unless quickly aborted or foiled) educe pain severe enough to dominate everything else in that field of consciousness. In other words, although a victim of such techniques might retain some awareness of various other things in her environment, her perceptions of those things will be filtered through the dominant feature of her consciousness: her terrible pain. As this chapter has already remarked, severe pain is unlike mild pain in that someone suffering from it cannot relegate it to a subordinate level of her attention in order to concentrate principally on other matters. She might be aware of some other matters and might be able to deal with them to some degree, but the shrieking intensity of her pain inexorably draws her attention primarily to the pain itself. In that regard, then, the agony of a victim of torture is consuming even when it is not quite all-consuming.

#### 3.2.1.3.2. Hyperbole best avoided

When the points made in § 3.2.1.3.1 are combined with this book's exposition of the nature of torture and with my elaboration of a perpetrator-focused perspective and with Sussman's insights about the self-betrayal forced upon victims of torture, they are sufficient to support my main thesis that most types of torture are always and everywhere wrong in all possible worlds. Accordingly, my account of torture's wrongness does not presuppose any excessively strong claims of the sort in which Scarry sometimes indulges. Another theorist who has indulged in such

claims is the philosopher Jeremy Wisniewski, on whose work I will focus briefly here. (Wisniewski uncritically quotes an array of passages from Scarry.)

Notwithstanding that the quality of Wisniewski's philosophical argumentation is uneven, his book makes a number of salutary contributions to the debates over torture. In particular, Wisniewski commendably documents the effects of torture by adducing many pertinent quotations from survivors of torture and from investigators who have studied such survivors (2010, chap. 4). Their testimony vividly underscores the lastingness of many of those effects; long after victims have undergone the administration of torturous techniques to their bodies, they often still experience various physical and psychological ailments from their ordeals. Still, valuable though his writings on torture have been in those respects and in some other respects, Wisniewski goes astray through the exaggeratedness of some of his principal contentions.

In particular, Wisniewski goes amiss by maintaining repeatedly that the key to the wrongness of torture (and to the distinctiveness of its wrongness) is that the reflective agency of every victim of torture is destroyed by the measures to which she is subjected. He contends that 'torture *destroys* the person, and with this, it destroys the very capacity for rational deliberation,' and that 'torture dismantles the agency of the person tortured'. He likewise asserts that the pain experienced by a victim of torture 'is born of another agent whose very intent is to *destroy your agency*—to make you incapable of directing your own actions, and even incapable of determining the significance of the things that populate the world around you' (2010, 64, emphases in original).

One shortcoming of these statements, and of the many similar statements that appear in Wisniewski's two principal chapters on the wrongness of torture, is that they exclude any victims of torture who are not possessed of reflective agency. Consequently, they do not address the plight of animals or mentally infirm people who are subjected to torture. Perhaps Wisniewski would reply that his conception of agency is sufficiently expansive to encompass some non-human animals. Even so, any plausible conception will omit some animals as well as senile people and severely retarded people. Given that such people and animals are potential victims of torture, Wisniewski has failed to explain why torture of any type is always and everywhere wrong.

Even more important in the present context is that Wisniewski's specification of the central wrong-making property of torture is formulated too strongly. On the one hand, as this chapter has already observed, some instances of torture do temporarily or permanently destroy the agency of the people who undergo the torture. Such instances are especially vile. On the other hand, not every instance of torture produces such a devastating effect. Every torturous ordeal that is not quickly aborted or foiled will inflict severe pain on the victim,<sup>13</sup> but not every such ordeal goes so far as to demolish the victim's mental faculties. Some torturous techniques

<sup>13</sup> Here and elsewhere, I use the words 'or foiled' to leave aside victims who are congenital analgesiacs.

leave those faculties generally intact, even while suffusing the victim's mental states and processes with exquisite pain.

Wisniewski himself, despite all his pronouncements about torture's destruction of the agency of victims, acknowledges that quite a few instances of torture do not eventuate in such destruction. He accepts that 'there are instances where torture methods have been applied, and the victim of these methods has not been broken by them, or where victims seem to recover from the unmaking of [their epistemic connectedness to] the world' (2010, 87). Having acknowledged that point, he immediately impugns the motives of anyone who might invoke it against him: 'If it is meant to show that torture can be acceptable in certain cases, it is surely a very misleading way of proceeding. The fact that a practice aimed at the destruction of agency might not achieve its goal is hardly evidence that the practice is sometimes acceptable' (2010, 87). At least in application to me, these strictures by Wisniewski are misconceived. My motives for criticizing him are the opposite of what he envisages here. Far from trying to show that some instances of interrogational or act-impelling or sadistic torture are morally legitimate, I am trying to show that all such instances are morally impermissible. My concern is that, by singling out the destruction of agency as the key wrong-making effect of torture, Wisniewski has left himself unable to indicate why most types of torture are always and everywhere morally wrong. After all, given that the demolition of agency does not ensue in some situations of torture, Wisniewski's theory does not tell us why those situations are nonetheless wrong.

Wisniewski endeavours to square his theory with the fact that not every instance of torture results in the dismantling of the agency of its victim. Instead of outlandishly insisting that torture always does in fact bring about such a result, he retreats to insisting that the *aim* of every instance of torture is to destroy the agency of its victim (2010, 87–8, 122–3). He draws an analogy to baseball games. Although the aim of the participants in a professional baseball game is to carry on the game for at least nine innings, that aim is not always fulfilled (because of electricity failures or rain-induced abridgements, for example). So too, Wisniewski maintains, the objective of every torturer is to destroy the agency of any victim. That objective is the very hallmark of torture:

The aim of torture is to destroy the agent... To point out that torture sometimes fails to achieve the goal postulated in torture manuals, however, is irrelevant to determining what torture *aims to do*. To say otherwise would be as crass as saying that torture does not always destroy the capacity for agency because sometimes a person is executed before the torture is complete. (Wisniewski 2010, 88)

One problematic feature of these pronouncements by Wisniewski is that he again excludes all instances of torture in which the victims are not capable of reflective deliberation. When wanton boys torture a hamster or a senile human adult, they are scarcely seeking to destroy the victim's status as a reflective agent—for such a creature or human being is not endowed with reflective agency. Instead, the boys are seeking to inflict grievous pain on a creature or human being who is susceptible to feeling such pain. They derive sadistic gratification from their infliction of the



pain, even though their actions do not impair anyone's agency and are not aimed at impairing anyone's agency. Wisniewski appears to have committed himself to the strange conclusion that the delinquent boys are not engaging in torture at all when they subject a hamster or a senile human adult to deliberately agony-inducing mistreatment.

Equally problematic is that Wisniewski's pronouncements also exclude some instances of torture in which the victims are normal adult human beings. Quite implausible is the notion that *every* such instance is undertaken with the aim of destroying the victim's agency. Recall, for example, Sussman's scenario of the obese man. When the police twist the arm of the man behind his back to oblige him to desist from his action of smothering the person who is trapped beneath him, they are hardly endeavouring to dismantle his agency. On the contrary, they want him to exercise his agency by lifting himself up. In no way are the policemen's actions aimed at terminating the agency of the corpulent man either permanently or temporarily.

Of course, the twisting of the obese man's arm is one of the morally legitimate instances of ephemerally incapacitative torture. Hence, Wisniewski might retort that he is focusing only on the sundry types of torture that can never be instantiated legitimately. Such a retort, however, would be unavailing. Not every morally impermissible instance of torture involving a normal human adult as the victim is aimed at destroying the victim's reflective agency. Recall, for example, my slightly embellished version of *Leon v. Wainwright* in § 2.2.1.3 of Chapter 2. When the policemen there resort to choking the captured kidnapper and twisting his arm behind his back in order to prevail upon him to disclose the whereabouts of his hostage, they scarcely are seeking to demolish his status as a reflective agent. Rather, they are attempting to impel him to exercise his agency through his divulgence of the information which they desperately need. Though the severe pain which they elicit in him is such that it dominates everything else in his consciousness, it is not so severe (and is not intended to be so severe) as to destroy his agency by blotting out everything else. Were we to characterize the policemen's efforts or the aim of their efforts in line with Wisniewski's pronouncements, the characterization would be hyperbolically distortive rather than illuminating.

In short, with reference to *Leon v. Wainwright* and any relevantly similar instances of interrogational torture, the hyperbole in which Wisniewski indulges has confronted him with two uninviting alternatives. Either he might choose to deny that any such instances of interrogational torture are torture at all, or he might choose to deny that any such instances of interrogational torture are morally wrong. In either event, he will have left himself unable to explain why actions correctly classifiable as interrogational torture are always and everywhere morally wrong. Thus, although Wisniewski suspects that anyone who objects to his exaggerated pronouncements is thereby seeking to affirm the permissibility of interrogational torture in certain situations, the chief vice of those pronouncements is that they impede efforts to establish that such torture is never morally permissible (even in circumstances like those of *Leon v. Wainwright*).

This discussion should close with a caveat. My criticism of Wisniewski's penchant for overstatement needs to steer clear of overstatement in turn. Many instances of torture throughout the world—especially the brutal instances of torture carried out by officials of thuggishly repressive regimes in parts of Asia and Africa and South America—do temporarily or permanently destroy the agency of the victims. Even when techniques of torture are somewhat less brutal, they can often temporarily destroy the agency of the victims of those techniques (and impair their deliberative abilities thereafter). My point has simply been that such devastating effects do not always occur in situations of torture and are not always sought in those situations. Wisniewski himself acknowledges that such effects do not always occur, but he unsustainably contends that they are always pursued by torturers. Whereas torturers always seek to inflict agony—or are extravagantly reckless about the infliction of agony—they do not always endeavour to go as far as Wisniewski's excessively strong wording suggests. By recognizing as much, and by not tying the wrongness of torture to the presence of effects or aims that are sometimes absent from situations of torture, my account of that wrongness avoids the pitfall into which Wisniewski has plummeted. In other words, my account covers the situations (such as that in *Leon v. Wainwright*) which his excessively strong phrasing omits. Consequently, unlike his approach to the matter of torture's wrongness, my approach can establish that all possible instances of most types of torture are morally wrong.

### 3.2.2. Combining two insights

Although this chapter will submit that a satisfactory account of torture's wrongness must incorporate a perpetrator-focused perspective, the considerations adduced so far have been largely victim-focused. Quite understandable is the focus on victims in most indictments of torture, for the interests of victims in being free from excruciating pain are morally determinative in the vast majority of situations where any torturous techniques are employed. In the large majority of such situations, those interests of victims are sufficient to endow them with moral rights against being subjected to torturous techniques. Hence, most applications of those techniques to people or animals are morally wrong because of victim-focused considerations. Accordingly, before we move on to ponder why a victim-focused perspective has to be supplemented with a perpetrator-focused perspective—and why some possible instances of ephemerally incapacitative torture and edifying torture are morally permissible—we should take stock of the two main strands that have heretofore been woven together into my account of torture's wrongness.

#### 3.2.2.1. The two main strands

The first such strand derives from Sussman's insight into the subtlest type of self-betrayal induced by torture. That special self-betrayal consists not in the abandonment of allegiances or the imparting of precious information—though of course those consequences often ensue from the administration of torturous

techniques—but instead in the turning of a victim's own feelings and vulnerabilities into instruments to be used by her torturer to consolidate and express his ascendancy over the victim. When somebody is subjected to a torturous mode of treatment, her susceptibility to feelings of intense pain becomes the chief means by which her torturer exerts his will against her. Whether a torturer is seeking information or submissiveness or sadistic gratification or any other objective that can be attained through the infliction of severe pain on someone else, the agony which he elicits in his victim is both serviceable for the realization of his objective and expressive of the power over her with which he pursues that objective. The intimate sensations of the victim are marshalled against her, as they become implements and messengers of the torturer's control over her. Even in the extremely rare circumstances where a victim of torture is unaware that her agony has been evoked by torturous measures rather than by a natural ailment, her susceptibility to severe pain has been turned against her by her tormentor. Notwithstanding that the sufferer in those circumstances has failed to recognize that her woes are the products of someone else's mastery over her, those woes mark the extent to which her body has been employed by someone else to betray her. (Though my remarks here have focused on bodily torment, they can easily be extended to cover psychological agony as well. Likewise, although my remarks here have focused on cases of torture in which the inducement of severe pain is deliberate, they can easily be extended to cases of torture in which the inducement of severe pain is instead extravagantly reckless.)

The second strand of my account pertains to the consumingness of severe pain. Whereas mild pain or discomfort can be largely ignored by somebody who carries on with his or her ordinary activities, the severe pain educed by torture—like the severe pain caused by various natural maladies—cannot be put aside in such a fashion. Even if it does not reach the level of intensity where it completely obliterates everything else in a victim's field of consciousness, it inexorably fixates the victim's thoughts on itself. It might not wholly blot out her awareness of certain other things, but any such awareness pulsates with the agony that prevents her sustained concentration on any of those other things. Her agony smashes its way into any aspects of her experience that have not been altogether swept from view by it.

### 3.2.2.2. *The combination*

In combination, the foregoing two points constitute a powerful victim-focused basis for the proposition that torture is generally wrong as a moral matter. Without a perpetrator-focused perspective, they are not sufficient to establish that the moral prohibition on interrogational or act-impelling or placatory torture is absolute—as we shall see presently—but, together with Chapter 2's exposition of the nature of torture, they can establish that most applications of torturous measures are morally impermissible. By contrast, neither of the two strands on its own (in isolation from the other or in isolation from Chapter 2's conception of torture) would suffice to establish that torture is generally wrong.

### 3.2.2.2.1. *Not enough in isolation*

Insufficient in isolation to generate a conclusion about moral wrongness is the fact that torture evokes grievous pain in the people and animals who undergo it. After all, people and animals who suffer any number of natural afflictions (illnesses or injuries) also experience grievous pain; the consumingness of the agony produced by torture can be paralleled by the consumingness of the agony that results from those natural afflictions. Given that the natural ailments are not themselves morally wrong at all, we cannot infer the wrongness of torture from the sheer fact that it elicits severe pain—with the attention-transfixing power of such pain—in its victims. That is, we cannot infer the wrongness of torture from the fact that it is endowed with a feature that assimilates it to sundry natural maladies.

Likewise insufficient in isolation to generate a conclusion about moral wrongness is the fact that any instance of torture turns a victim's sensations into instruments and emissaries of the torturer's will. After all, quite a few morally legitimate activities can yield a similar effect. Some persuasively enticing blandishments from a salesman can exploit the feelings of a potential customer as the means by which the salesman can realize his objective of selling some merchandise. Provided that the blandishments are not fraudulent or coercive, their effectiveness in marshalling the feelings of the customer as implements and messengers of the salesman's will is morally unexceptionable. Similarly, if Emily is sincerely attracted toward Richard, and if she speaks to him and touches him in ways that are designed to kindle in him a passionate attraction toward her, she will have mustered his feelings and susceptibilities in the service of her objective of winning him over. Provided that her romantic advances are not dishonest or coercive, her success in trading on Richard's sentiments and vulnerabilities—her success in putting Richard's primal feelings to work in behalf of her—is not morally illegitimate at all. Hence, the sheer fact that a torturer employs the elemental sensations of a victim as instruments and expressions of the torturer's will is not sufficient to ground an ascription of moral wrongness to his actions.

Indeed, even when the two main strands of my account of torture's wrongness are combined, they in isolation from Chapter 2's exposition of the nature of torture are insufficient to establish the conclusions for which this book is arguing. Detached from that exposition, the two strands recounted here do not suffice to distinguish between the actions of a torturer and the actions of a wrestler who applies a very painful hold to an opponent. As has been discussed in § 2.1.4.1.4 of Chapter 2, wrestlers often enwrap their opponents in holds for the purpose of inflicting pain that is severe enough to induce the opponents to surrender. Unless Walter the Wrestler has cheated in some fashion during a match in which he entangles his opponent Orville in an excruciating hold, his deliberate infliction of agony that will oblige Orville to yield is not morally impermissible. Yet, although Walter has not done anything wrong, he has deliberately exploited the feelings and vulnerabilities of his opponent as instruments for the achievement of his own objective of winning the match. Walter has made those feelings plead in support of the fulfilment of that objective, by imposing on Orville a level of agony that is so consuming as to force him to capitulate. Thus, unless the two principal components of my account of

torture's wrongness are conjoined with my specification (or some other credible specification) of the nature of torture, they will fail to sustain the proposition that torture is morally wrong—for they will fail to differentiate between torture and the morally irreproachable activity of wrestling.

### 3.2.2.2.2. Morally vitiating purposes

Even before we draw together the two chief elements of my account of torture's wrongness with Chapter 2's investigation of the nature of torture, that investigation itself (in combination with some elementary moral assumptions) has enabled us to see straightaway that countless possible instances of torture are morally wrong. The table in § 2.2.13 of Chapter 2 indicates as much. For example, given that the purposes pursued through sadistic torture and discriminatory torture and humiliating torture and extravagantly reckless torture are inherently illegitimate, all possible instances of those types of torture are likewise morally illegitimate. Furthermore, although the general purposes behind the remaining types of torture are not inherently wrong, they are wrong in most of their possible instantiations. For example, intimidatory torture—whether victim-specific or broadly addressed—is typically used by vile regimes to consolidate their ascendancy over the people whom they tyrannize. Such an evil purpose is sufficient in itself to render illegitimate every instance of torture that pursues it. Similarly, interrogational torture and act-impelling torture are frequently employed by despotic regimes to obtain information and bring about patterns of behaviour that can help to maintain the evil sway of those regimes. Again, such a purpose morally invalidates any instances of torture that are aimed at serving it. Without having to penetrate beyond the level of purposes, we can know that those instances are morally impermissible. (Of course, even though an enquiry that penetrates more deeply is not necessary for our knowing that the aforementioned instances of torture are morally impermissible, such an enquiry would be necessary for a full moral assessment of the gravity of the wrong that has been committed in each case.)

In diverse other situations, however, the purposes sought through torture are not themselves morally illegitimate. In such situations, then, any assessments of torture as morally wrong have to go beyond the objectives that are being pursued through it. For example, in the ticking-bomb scenarios that have preoccupied so many philosophers and jurists and politicians in Western liberal democracies during recent years, we encounter predicaments in which some officials resort to interrogational or act-impelling torture for the morally worthy purpose of saving numerous lives. In the more realistic settings of small-scale emergencies, the use of interrogational or act-impelling torture can again sometimes serve the morally worthy purpose of saving lives. Much the same is true of the use of placatory torture in the scenario by Alan Gewirth which I have recounted (with some modifications) in § 2.1.4.1.2 of Chapter 2. Intimidatory torture can likewise play such a role in some imaginably extreme situations, and ephemerally incapacitative torture can play such a role on many possible occasions.

Moreover, even when torture is undertaken for purposes other than the saving of people's lives, the ends sought can be morally worthy. For example, if constables

or adjudicative officials administer interrogational torture to gather information that can help to identify the perpetrator of a serious crime, the objectionableness of their actions does not lie in the purpose which they are pursuing. Similarly, if the officials in a system of criminal justice administer punitive torture to visit a heinous malefactor with a form of hard treatment which he deserves for his crimes, the retributive principles with which they seek to comply are not morally illegitimate. Even more clearly, the aims that underlie quite a few instances of edifying torture are not morally dubious. For example, toughening the endurance of a soldier through open-ended resistance training is a way of pursuing a commendable goal.

In all the situations mentioned in the last couple of paragraphs, and in any other relevantly parallel situations, torturous techniques are brought to bear for the attainment of ends that are morally unexceptionable in themselves. To be sure, this chapter will argue—in line with what has already been suggested in Chapter 2—that some possible instances of ephemerally incapacitative torture and edifying torture are morally permissible. However, in regard to other possible instances of those two types of torture and in regard to all possible instances of the sundry remaining types of torture, this chapter will contend that the moral prohibition on torture is firmly applicable. In relation to each of those remaining types of torture, that moral prohibition is absolute. Given as much, and given that some instances of several of those remaining types are oriented toward objectives and concerns that are morally unexceptionable in themselves,<sup>14</sup> this chapter has to look beyond the objectives which torturers pursue in their pain-inflicting endeavours. We have to turn our gaze instead on those endeavours themselves.

### 3.2.2.2.3. The Minimal Invasion Principle

In my book *The Ethics of Capital Punishment* (2011), I relied heavily at many junctures on a basic principle of political morality: the Minimal Invasion Principle. According to that precept, the pursuit of any morally legitimate public end by legal-governmental officials is itself morally illegitimate if it is undertaken through measures that are more invasive than some other feasible measures that would have been sufficient to achieve the specified end. On the basis of that principle, we can judge many further instances of torture to be morally wrong. Even a superficial inspection of the practice of torture in interrogational contexts, for example, will reveal that it is a highly invasive method of obtaining information from uncooperative suspects or witnesses. Whenever any less invasive methods of interrogation are feasible and are at least as likely or nearly as likely to succeed in uncovering the desired information, legal-governmental officials in pursuit of a legitimate public

<sup>14</sup> As has already been remarked here, and has been indicated in § 2.2.13 in Chapter 2, the objectives pursued through sadistic torture, discriminatory torture, humiliating torture, and extravagantly reckless torture are morally illegitimate in all cases. For each of the other eight types of torture that I have delineated in Chapter 2, some possible instantiations are oriented toward objectives that are themselves morally legitimate.

purpose are morally obligated under the Minimal Invasion Principle to refrain from resorting to torture. (Of course, if the officials are not in quest of a legitimate public purpose, that fact on its own is sufficient to vitiate the moral status of their use of torture.)

This point about the availability of less invasive alternatives is quite far-reaching, for—as I have suggested in Chapter 2—constables and other legal-governmental officials (along with members of the general public) are oft inclined to overestimate both the need for torture and the probable efficacy of torture in interrogational contexts. If a less invasive means of attaining the officials' information-seeking ends is feasible, the Minimal Invasion Principle obligates the officials to eschew any recourse to torture. Much the same is true, *mutatis mutandis*, in non-interrogational contexts. For example, if the thwarting of a very serious criminal act in a given situation can be accomplished through some method that is less invasive than ephemerally incapacitative torture, the police or other officials in that situation are morally obligated to abstain from such torture. Although ephemerally incapacitative torture can be morally permissible in some of its possible instantiations, it is never permissible when its salutary effects can be achieved through an approach that is less harmful.

Although here and in my book on capital punishment I have presented the Minimal Invasion Principle as a precept of political morality, its requirement is generalizable to private individuals. Whenever someone is pursuing a morally legitimate end, he is morally obligated to forgo any tactics that are more invasive or restrictive than some other available tactic for attaining that end. If a private individual in an extreme emergency is confronted with a quandary in which his resorting to torture might resolve the emergency, and if some other feasible course of action might resolve the emergency and would be significantly less harmful, the generalized Minimal Invasion Principle morally obligates the individual to decline to wield any torture. In that respect, the public/private divide is not of any fundamental moral importance. (Chapter 5 will return to the moral significance of the public/private distinction.)

In every case where the Minimal Invasion Principle requires the eschewal of torture because of the availability of some less harmful approach to a predicament, its applicability is sufficient to render morally illegitimate any recourse to torturous measures. A myriad of possible instances of torture are indeed proscribed by the Minimal Invasion Principle. However, not all possible instances of interrogational torture run afoul of that principle. In a grave emergency, such as the situation depicted in Chapter 2's retelling of *Leon v. Wainwright*, the use of interrogational torture can be the only feasible course of conduct that is likely to avert the occurrence of some calamity. In a plight of that kind, the use of such torture would not contravene the requirements of the Minimal Invasion Principle. In a plight of that kind, moreover, the objective sought is itself morally worthy. Consequently, if this chapter is to show that interrogational torture (along with most other types of torture) is always morally impermissible even in dire emergencies, it cannot simply invoke the Minimal Invasion Principle or the morally vitiating force of wrongful objectives.

### 3.2.2.2.4. Consequentialist calculations

On the one hand, this chapter has expressed some doubts in response to consequentialists who argue that a metastasizing spread of torture will inevitably occur—or very likely occur—in the event of any recourse to torture in a dreadful emergency. On the other hand, those consequentialist concerns and other consequentialist concerns can clearly be pertinent in some possible contexts. On some conceivable occasions, if legal-governmental officials resort to torture to avert calamities, they will foreseeably render more probable the employment of torture in future circumstances where it is not needed or where it is unlikely to be efficacious or where in some other way it will be more harmful than beneficial. Insofar as the use of torture in any given emergency will probably engender such an effect, and insofar as the future drawbacks of that effect outweigh any present benefits that are apt to be gained through torture in the particular emergency, consequentialist considerations weigh decisively against the permissibility of resorting to torturous techniques.

Notoriously, however, consequentialist calculations are resistant to absolute moral prohibitions. Consequentialist considerations can on balance indeed weigh against the employment of torture in this or that emergency, but in various other dire emergencies such considerations can militate decisively in favour of the employment of torture. This point becomes especially evident when we recall that, among the philosophers and jurists in Western countries who affirm the moral permissibility of the use of torture for the extraction of calamity-averting information in terrible emergencies, most are firmly opposed to any institutionalization of the practice. That is, most of those philosophers and jurists contend that the wielding of torture for the extraction of such information is ever morally permissible only on an ad hoc basis. Whereas consequentialist concerns about the institutionalization of torturous methods of interrogation are quite far-reaching, the consequentialist considerations against the use of torture on an ad hoc basis in some desperate emergencies are much more variable. Though it would be implausible to maintain that the consequentialist factors against the wielding of ad hoc torture are always outweighed by consequentialist factors that cut in the opposite direction, it would likewise be implausible to maintain that the latter factors are always outweighed by the former. (To be sure, as we have seen in § 3.1.3.2, some consequentialists submit that any ad hoc employment of torture would not really occur ad hoc—since it would have to draw on the skills of torturers who had undergone institutionalized training for the task. However, as I have argued in response, that consequentialist line of reasoning is unfounded.)

In short, although consequentialist considerations will of course sometimes militate against the use of torturous measures even in this or that dreadful emergency, such considerations will in other cases militate in favour of those measures. As some earlier portions of this chapter have indicated—and as is similarly indicated by the voluminous philosophical literature on consequentialism, including the relevant parts of Chapter 1 of this book—consequentialist doctrines are decidedly unreliable as a basis for the justification of any absolute moral prohibition on torture. Accordingly, this book's effort to vindicate just such a prohibition on most types of torture has to proceed from a different basis.

### 3.2.2.2.5. Agony and oppression: the factors of consent and control afresh

When the two main strands of my account of torture's wrongness are brought together with Chapter 2's explication of the nature of torture, they furnish the materials for a vindication of an absolute moral prohibition on most types of torture (including interrogational torture—the type that has received far more attention than any other in recent years). Admittedly, if the absoluteness of that prohibition is to be fully upheld, those elements of my account of torture's wrongness will have to be subsumed into a perpetrator-focused perspective. Still, even before we explore the need for such a perspective, we can begin to understand from those elements why torture in nearly all of its instantiations is an especially abhorrent mode of conduct.

Because a process of torture induces in the victim the self-betrayal highlighted by Sussman, it is a process in which the victim's very bodily feelings and vulnerabilities become the vehicles and expressions of the torturer's ascendancy. As the torturer turns the victim against herself by making her primal sensations the offshoots of his will, his power over her is singularly intimate in its workings. Because that power exerts itself through the evocation of exquisite pain in her, it subjects her to the radical absorbingness of agony. Even in the exceptionally rare circumstances where a victim is unaware that her tribulations are due to her having come within the power of someone else, her attention cannot but be fixated on those tribulations. Agony screeches for attention. It does so, furthermore, because it is overwhelmingly disagreeable (outside sado-masochistic contexts); its clamours for attention are *pari passu* clamours for relief. Hence, the ascendancy of the torturer over the victim not only is peculiarly intimate in its reach and operations, but also is peculiarly consuming. So long as the excruciating effects of that ascendancy last, they dominate the psyche of the victim. Although those effects might not completely obliterate everything else in the outlook of the victim, they permeate her awareness of everything else. Even in an extraordinarily uncommon situation where a victim of torture is able to defend herself to some degree (as in Steinhoff's scenario of the jeweller and the robber), she does so while in the thrall of the terrible pain that the torture is eliciting in her. She does so, in other words, while her own sensations are serving as vehicles of the torturer's will by engulfing her in the torment which insistently racks her and which thereby advances his purposes.

Now, as has been suggested at the end of § 3.2.2.2.1, the remarks in the preceding paragraph have not yet furnished a basis for distinguishing between situations of torture and some situations of the morally legitimate activity of wrestling. However, the basis for a germane distinction emerges from Chapter 2's explication of the nature of torture. Whereas a process of torture is very rarely consensual and whereas it never involves control by the victim over the duration of the process, a wrestling match in any typical circumstances is consensual, and—unless it is itself a form of torture—each participant can terminate it when he so chooses by conceding the match to his opponent. Of course, if a wrestling contest is such that a participant P and his opponent know that P will incur a severe penalty (such as the loss of his life) in the event of his surrendering to the opponent, then P does not have any genuine control over the duration of the contest. Any control exercisable by him

is egregiously coerced rather than genuine. In such a situation, the opponent's enfolding of P in a grievously painful grip would amount to a form of torture. Bitingly, then, a nightmarishly grotesque contest of that sort is hardly what people have in mind when they contrast the infliction of pain by a torturer with the infliction of pain by a wrestler. Rather, they have in mind an ordinary match in which each participant enjoys genuine control over the duration of any agony that he might undergo at the hands of his opponent. In such a wrestling match, where each participant does possess genuine control over the lengthiness of his own suffering, any pain inflicted—however searing it may be—is not a product of torture.

My focus on consent and control in the preceding paragraph not only enables us to distinguish between the deliberate inducement of severe pain in a process of torture and the deliberate inducement of severe pain in the non-torturous activity of wrestling. In addition, that focus alerts us to a key moral difference. Let us assume for now that, in any contrast between a process of torture and a match of wrestling, the torture is of a type that is always and everywhere morally wrong. Hence, the distinction between torture and a non-torturous pastime is here conjoined with a distinction between moral illegitimacy and moral legitimacy. In the present context, the factors of consent and control underlie the latter dichotomy as well as the former. Why do they make a moral difference?

Situated within my account of torture's wrongness, the answer to this question becomes plain. When a victim is used for a torturer's purposes by being subjected to excruciating pain that turns her feelings into servants of the torturer, her subordination is both distinctively profound and distinctively consuming. Though her ability to move her body might in some cases be less tightly restricted than the ability of someone who is non-torturously shackled, her inner impulses are being marshalled against her to a degree that is not equalled by any non-torturous methods of confinement. Now, given that a wrestler W has consented to participate in a match, and given that he enjoys genuine control over the prolongedness of any agony that he will suffer during the match, the subjection of W to severe pain by his opponent does not reduce him to an instrument or offshoot of the opponent's purposes. His opponent is of course pursuing the purpose of winning the match and is making use of W's elemental feelings and vulnerabilities in furtherance of that purpose, but the two wrestlers also share the central purpose of putting each other to a test of strength and dexterity. That central purpose is, indeed, what structures their whole contest. When W is subjected to dire pain by the opponent, that shared purpose is being fulfilled just as is the opponent's unshared purpose of prevailing over W. As W retains genuine control over the duration of any agony that he will experience, and as he shares the central purpose that is realized through the occurrence of the contest with his opponent (whether he wins or loses), the opponent's exploitation of W's susceptibility to severe pain does not treat W as a mere plaything or as a mere vehicle of the opponent's objectives. Unlike a victim of torture, then, W has been treated with the respect and concern that are owed to him by his opponent and by everyone else as a fundamental matter of morality.

### 3.2.2.2.6. Some implications: edifying torture and sado-masochism

In the past couple of paragraphs, I have assumed that the type of torture under discussion is any of the types that are always and everywhere wrong. However, the remarks in those paragraphs help to clarify why some possible instances of edifying torture are morally permissible. Suppose for example that a soldier or an intelligence official chooses to undergo a course of resistance training in which he will not have any control over the protractedness of the torturous hardships to which he will be subjected. His reason for forgoing any control is that he will thereby make the resistance training considerably more effective in toughening him against the physical and psychological adversities that he might subsequently encounter in his dangerous line of work. Thus, although the resistance training in the open-endedness of its deliberate inducement of severe pain is a process of veritable torture rather than just a simulation of torture, it is not morally impermissible. As Chapter 2 has suggested, the moral legitimacy of such a course of resistance training derives from its edifying and consensual character: that is, from the benevolence of its orientation toward the victim's bodily and psychological well-being, and from his genuine consent to the process. With those factors present, the resistance training does not treat the victim as a toy or as a mere implement of someone else's purposes. On the contrary, it is one of his projects (or an element in one of his broader projects), and its exploitation of his susceptibility to agony is centrally aimed at enhancing his physical and mental hardihood. Like *W* in the wrestling match, then, the soldier or intelligence official has been treated with the elementary respect and concern that are morally due to him.

My remarks in the last few paragraphs might also appear to imply that some possible instances of sado-masochistic torture are morally permissible. In any sado-masochistic interaction that amounts to veritable torture rather than just to a simulation of torture, the infliction of severe pain is open-ended; the victim cannot terminate it at a time of his choosing. However, if the open-endedness is something to which the victim eagerly consents (in order to augment his sexual pleasure), the eliciting of severe pain in him might appear to be morally assimilable to the inducement of severe pain in a soldier or an intelligence official during resistance training. Although the process of afflicting the sado-masochistic victim with agony is not aimed at strengthening his physical and psychological fortitude, it is aimed at providing him with sexual gratification. It therefore counts as one of his projects, on which he has very willingly embarked. Still, despite those similarities between the situation of the sado-masochistic victim and the situation of the soldier or intelligence official, we should not leap to the conclusion that sado-masochistic torture can sometimes be morally permissible. Although there are no victim-focused considerations that undermine the permissibility of such torture, this chapter will later adduce some perpetrator-focused considerations that do indeed vitiate the moral status of torture that is undertaken for sado-masochistic excitement. A victim of such torture does not commit a wrong by consenting to undergo it, but the perpetrator of the torture commits a wrong by taking advantage of the victim's consent. We shall return to this matter presently.

### 3.2.2.2.7. Some implications: the problem of animals

Even knottier than my discussion's implications concerning resistance training and sado-masochism are its implications concerning animals. Like infants and lunatics, non-human animals are incapable of the sophisticated understanding and evaluation and reflection and communication that would enable them to furnish genuine consent to processes of edifying torture. (Likewise, they are incapable of exercising informed control over the duration of any processes in which they are subjected to severe pain. They of course can and would exhibit attitudes of aversion in response to such processes, and they would escape from any pain-inducing measures at the earliest opportunities open to them. However, that primitive form of control over the lengthiness of those measures would not be grounded in any informed understanding of the benevolence of the purpose which the edifying inducement of pain is designed to achieve.) Now, given that meaningful consent is never operative in any case of edifying torture in which the victim is a non-human animal, some readers might presume that the application of such torture to any non-human creature is always morally illegitimate. However edifying the torture might be, it would not amount to a project undertaken by the animal who is its victim. Consequently, some readers might conclude, the administration of such torture would not show due respect and concern toward an animal as a sentient creature with a life of its own and with a constitution susceptible to the overwhelming unpleasantness of severe pain.

A conclusion to that effect, however, would be hasty. Very rare are any circumstances in which the administration of torture is truly edifying for an animal, but some such circumstances are conceivable. Suppose for example that, before some particular animal can be safely released into the wild, it has to become inured to certain major adversities that it will face there. Given as much, a process of subjecting the animal to grievous pain—akin to the pain that it will experience through those adversities—can be an instance of genuinely edifying torture. Though the animal is incapable of assenting (or informedly refusing to assent) to such a process, the absence of any consent is due solely to that inability; the torturers have not declined to seek consent whenever it can be meaningfully rendered or withheld. In such circumstances, if the animal will benefit greatly from being released into the wild despite the hardships that it will encounter there, and if the only adequate way of preparing it for those hardships is to put it through a process of edifying torture of the kind envisaged here, the administration of such a process will be morally legitimate. The orientation of the whole endeavour toward the animal's physical and mental well-being is benign, and the lack of consent by the creature derives not from any high-handedness on the part of the torturers but from the sheer infeasibility of the provision or refusal of such consent. Accordingly, the torturers do not exhibit any disrespect or unconcern for the creature when they subject it to agony.

By contrast, the subjection of an animal to experimental torture—of the sort described in § 2.2.12.2.1 of Chapter 2—is generally not morally permissible. Though such torture can be aimed at the morally legitimate end of adding to medically valuable knowledge, that end does not render permissible the morally

illegitimate means by which it is pursued. That is, it does not render permissible the deliberate and non-consensual infliction of severe pain on an animal solely for the benefit of others. Such a way of treating an animal does not show proper concern for its susceptibility to agony or proper respect for its status as a creature with a life of its own. To be sure, in some imaginable circumstances, a process of experimental torture could be aimed at benefiting greatly the very animal on which it is brought to bear. In such circumstances, although the experimental torture could never be truly consensual, it could be morally permissible on grounds similar to those on which the edifying torture described in the last paragraph is morally permissible. Still, notwithstanding that such circumstances are imaginable, they are rarely if ever actual. Usually, the deliberate inducement of severe pain in an animal for the purpose of expanding medical knowledge is not aimed at benefiting the particular animal in whom the pain is elicited. Any such experimentation is morally impermissible.

This short discussion of animals and torture should close with two caveats. First, the experimental torture assessed in the preceding paragraph involves the *deliberate* infliction of severe pain on an animal. I have not there ruminated on experimentation in which the affliction of an animal with severe pain is an undesired though amply foreseeable side-effect rather than something sought as a means. If some experimentation with such a side-effect will predictably be of little or no medical value—like the Mengelian experimentation envisaged in § 2.2.10 of Chapter 2—then its amply foreseeable infliction of agony on an animal is an instance of extravagantly reckless torture. As has already been remarked in this chapter, extravagantly reckless torture is never morally permissible. Similarly, even if the experimentation is likely to be of significant medical value, its amply foreseeable inducement of agony in an animal is an instance of extravagantly reckless torture if the agony could have been avoided through reasonable precautions. However, if the experimentation is likely to be of considerable medical value, and if its affliction of an animal with terrible pain is unavoidable through any measures short of the outright cessation of the experimentation, then the affliction is not an instance of extravagantly reckless torture. Because the process that induces the pain is undertaken for ethically weighty reasons rather than without any substantial justificatory grounding, it is not reckless (even though the experimenters who undertake the process have knowingly hazarded a very high risk of causing exquisite pain). It therefore does not amount to an instance of extravagantly reckless torture. Moreover, whereas the eliciting of severe pain through the experimentation is abundantly foreseeable, it is not intentional; the pain is not sought either as a means or as an end. Thus, since every instance of torture inflicts agony either intentionally or in an extravagantly reckless fashion, the medically valuable experimentation contemplated here is not an instance of torture at all. Hence, there is no occasion for this book to take a position on the question whether such experimentation can ever be morally legitimate.<sup>15</sup>

<sup>15</sup> Among the challenges to be faced by someone who wants to answer that question affirmatively is the task of differentiating an animal such as a chimpanzee or a dog from a severely retarded or demented human being.

A second caveat pertains to a different kind of limit on the present discussion. My remarks here have focused on animals and edifying torture. (Recall that § 2.2.12.2.1 of Chapter 2 construes the category of edifying torture expansively enough to include the sorts of experimental torture that I have pondered in the current subsection.) My present discussion has therefore left open the possibility of morally legitimate instances of ephemerally incapacitative torture wielded against animals. On the one hand, the moral legitimacy of the use of such torture against a normal human adult partly depends on whether the adult is performing a very seriously wrongful action at the time. Given that animals are not moral agents and are thus not capable of performing very seriously wrongful actions, the conclusion might seem to follow that they can never permissibly be subjected to ephemerally incapacitative torture. On the other hand, although animals are not capable of performing very seriously wrongful actions, they are obviously capable of performing extremely harmful actions (actions that would be very seriously wrongful if the animals were possessed of moral agency). If the infliction of ephemerally incapacitative torture is the least injurious feasible way of preventing an animal from wreaking major harm—a less injurious way than killing the animal outright, for example—then the plying of such torture against the creature, for the specific purpose of preventing or minimizing the harm, can be morally permissible. Much the same is true of the plying of such torture against a mentally infirm human being. A bit later in this chapter, after I have elaborated a perpetrator-focused perspective on these matters, we shall return to the topic of ephemerally incapacitative torture to explore why the use of such torture can ever be morally permissible.

### 3.2.2.2.8. Agony and oppression redux: a recapitulation and a transition

Key among the wrong-conducive characteristics of torture, visible from a victim-focused perspective, are the considerations that have been adduced heretofore: the marshalling of the primal feelings and vulnerabilities of a victim against her as expressions and instruments of the ascendancy of the torturer; the infliction of intense pain which, in its overpowering disagreeableness, fixates the victim on itself and hence dominates her consciousness; and the absence of any genuine control by the victim over the duration of the process of torture. Torture is also usually non-consensual, and the employment of it usually bespeaks the torturer's hostility or indifference toward the bodily and psychological well-being of the victim. In most contexts those properties of torture are jointly sufficient to undermine its moral legitimacy, for in most contexts those properties are inconsistent with the elementary respect and concern that are due to a victim as a sentient and vulnerable creature. Given those features of torture, the infliction of it on anyone treats her—with her susceptibility to excruciating pain—as a plaything or as a mere vehicle for the realization of the torturer's purposes. In most contexts, being treated in such a way is at odds with a victim's fundamental dignity (her human dignity as a reflective agent, or her basic dignity as a creature capable of feeling agony and of undergoing positive experiences).

As is suggested by the qualification 'in most contexts', however, the victim-focused considerations just adduced are not always sufficient to undermine

the moral legitimacy of torture. In particular, even when all those considerations are operative, ephemerally incapacitative torture can be morally permissible in some contexts. Of course, not all those considerations are operative on some of the occasions when such torture is wielded. If the prevention of a very serious criminal act is possible not only through ephemerally incapacitative torture but also through the outright slaying of the malefactor, and if the police opt to employ such torture because it is the less harmful of the two feasible ways in which they can stymie the performance of the very serious criminal act, then they are not displaying hostility or indifference toward the malefactor's bodily and psychological well-being. In some other cases, however, ephemerally incapacitative torture is the only feasible way of preventing the performance or culmination of a very serious criminal act. In Sussman's scenario of the obese man, for example, the slaying of the man would be woefully counter-productive. Given that the man does not respond to desperate exhortations, the plying of ephemerally incapacitative torture against him is the only way of saving the person who is squashed beneath him; such torture is not chosen as the less harmful of two available alternatives. In those circumstances, then, the ephemerally incapacitative torture does bespeak hostility or indifference toward the bodily and psychological well-being of the corpulent man—yet, as a means of thwarting his continuation of his very serious criminal act, the use of the torture is morally legitimate. Hence, in some contexts of ephemerally incapacitative torture, all the considerations adduced so far are not sufficient to render the torture morally wrong.

In a sense, the fact that ephemerally incapacitative torture can in certain circumstances be morally permissible—despite the presence of all the wrong-conducive factors that we have pondered so far—is attributable to the forfeiture of various rights by people who commit or seek to commit grave wrongs. Such people forfeit their rights against being fined or imprisoned. In cases of extreme evil, as I have argued elsewhere (Kramer 2011, 258–9), they even forfeit their rights against being executed. Accordingly, given that ephemerally incapacitative torture can be morally permissible when it is the least invasive means of foiling the commission of a very serious crime, we should conclude that someone who commits or endeavours to commit a crime of that sort has forfeited his right against being subjected to such torture. Still, that conclusion gives rise to more questions than it resolves. After all, this chapter is maintaining that interrogational torture and punitive torture are always and everywhere morally wrong. Nobody can ever forfeit his right against being subjected to punitive torture or interrogational torture, yet some of the people who might undergo torture as a method of interrogation or punishment are guilty of crimes at least as grave as those that could legitimately be prevented through the use of ephemerally incapacitative torture. Why does such a difference obtain? Why can major malefactors sometimes be subjected legitimately to ephemerally incapacitative torture, whereas no such malefactor (or anyone else) can ever be subjected legitimately to punitive or interrogational torture?

Neither the doctrine of forfeiture nor the several victim-focused considerations recapitulated in the opening paragraph of this subsection will suffice to answer this question. An appeal to the possibility of the forfeiture of rights is unavailing in

itself, since we need an explanation of why that possibility applies to ephemerally incapacitative torture but not to punitive or interrogational torture. An appeal to the victim-focused factors rehearsed in this subsection's opening paragraph is likewise unavailing in itself, since all of those factors are operative in many contexts where the use of ephemerally incapacitative torture is morally permissible. The applicability of all of those victim-focused considerations to any torturous methods of punishment or interrogation does not differentiate those methods from many morally legitimate impositions of ephemerally incapacitative torture.

Quite plain, then, is the need for my account of torture's wrongness to go beyond the victim-focused perspective that has prevailed hitherto. Although the insights gained from that perspective are vital, and although they will continue to be invoked herein, they have to be supplemented and reconfigured by the introduction of a perpetrator-focused perspective. Only thus will this chapter be able to indicate why some possible instances of ephemerally incapacitative torture are morally permissible whereas all possible instances of punitive or interrogational torture are morally impermissible.

### 3.2.3. A perpetrator-focused perspective

We have just found one reason why this chapter has to supplement its victim-focused perspective with a perpetrator-focused perspective. We should here mull over two further reasons why the former perspective on its own is inadequate for an account of the wrongness of torture. Each of those additional reasons is closely related to the reason that has already been broached, and each of them pertains to situations that do not tally with the central premise of any victim-focused account of the wrongness of torture: namely, the premise that the justificatory basis for the moral prohibition on torture resides in the interests or inviolability of the potential victims thereof.

#### 3.2.3.1. *Monstrous victims of torture*

In the standard presentation of the ticking-bomb scenario, the person under interrogation is a mass-murdering terrorist (such as Khalid Sheikh Mohammed) who is seeking to add to the string of atrocities for which he has been responsible. This chapter, with its insistence that the moral prohibition on interrogational torture is absolute, has to maintain that the use of such torture against a mass-murdering terrorist is always morally wrong. Now, if my account of the wrongness of torture were exclusively victim-focused, I would be committed to the proposition that the impermissibility of the use of interrogational torture against any mass-murdering terrorist is attributable to his interests or inviolability. His interests or inviolability would constitute the justificatory basis for the absolute moral ban on the wielding of such torture against him.

In fact, however, the interests of a mass-murdering terrorist in being free from excruciating pain are of no positive ethical weight. Were such a person to experience agonizing pain as a result of purely natural causes while in isolation from any society



whose medical resources might alleviate his suffering,<sup>16</sup> the world would not be ethically inferior to an otherwise identical alternative world in which he never undergoes any agony. His interest in being free from terrible pain does not weigh in favour of a world where that interest is realized. (If it were necessary for me to do so here, I would argue for a bolder proposition. That is, I would contend that a world in which a mass-murdering terrorist suffers from agonizing pain through purely natural causes is ethically superior—on grounds of ‘just deserts’—to an otherwise identical alternative world in which the terrorist never experiences any such pain. However, the present context requires only the milder proposition that the former world is not ethically inferior to the latter.) Hence, if we concentrate solely on the interests of potential victims of torture when we explain why interrogational torture is wrong, we shall be unable to say why the use of interrogational torture against Khalid Sheikh Mohammed or any other heinous murderer is morally wrong.

As can be inferred from my remarks about the forfeiture of rights in § 3.2.2.2.8, we shall face a parallel difficulty if we concentrate solely on the inviolability of the potential victims of torture. Although every person is endowed with absolute inviolability (weakly absolute inviolability) by dint of his or her status as a reflective agent,<sup>17</sup> an extravagantly evil criminal will have forfeited many of the rights that are held by any ordinary human being. If we are to ascertain whether his right-not-to-be-subjected-to-interrogational-torture has been forfeited along with his right-not-to-be-deprived-of-his-freedom-through-incarceration (for example), we have to go beyond appealing to his inviolability. Because the protective sway of his inviolability encompasses only the rights which he has retained despite his responsibility for iniquities, one’s invocation of that inviolability will go no way toward telling us whether he still enjoys a right-not-to-be-subjected-to-interrogational-torture. By contrast, a shift to a perpetrator-focused perspective will enable us to answer that latter question affirmatively. It will enable us to apprehend the correctness of John McCain’s insistence that the moral basis for our abstention from the use of torture against wicked terrorists is not about the terrorists but is instead about us (McCain 2006).

### 3.2.3.2. *Being killed versus being tortured*

A further reason for embracing a perpetrator-focused perspective (along with a victim-focused perspective) is that the deliberate killing of people is morally permissible in some contexts. For example, if a gunman has taken several people hostage, and if he begins to murder them when the demands which he has issued are not met, sharpshooters from the police will be acting permissibly if

<sup>16</sup> My reason for including this qualification about the evildoer’s isolation is that one’s deliberate sustenance of another person’s pain through one’s inaction can itself amount to torture and can thus be wrongful. For an account of an instance of torture-through-deliberate-inaction, see Moore 2007, 37 n7.

<sup>17</sup> I am not here implying that such a status is the only basis for weakly absolute inviolability. Rather, I am simply indicating that it is a sufficient basis.

they resort to lethal force against him as the only feasible means of saving the remaining hostages. Similarly, if Joe and his young daughter are attacked by a murderous assailant as they are walking down some street, and if the only effective way in which Joe can fend off the attack is to kill the assailant, he will be acting permissibly in so doing. Furthermore, as I have argued elsewhere (Kramer 2011, 256–60), executions conducted on the basis of the purgative rationale for capital punishment can be morally legitimate in cases where verdicts of guilt are returned against defilingly evil offenders who have been placed on trial fairly for the iniquities which they have committed.

Now, being killed is more harmful than being subjected to certain techniques of interrogational torture (such as the twisting of one’s arm behind one’s back for a limited period). It amounts to a much greater invasion of the victim’s interests. Given as much, and given that the deliberate killing of a person can be morally permissible in some circumstances, we cannot explain the absoluteness of the impermissibility of interrogational torture while focusing exclusively on the interests of potential victims. A shift to a perpetrator-focused viewpoint will enable us to understand that, although the use of interrogational torture is not always more harmful or more gravely immoral than deliberate killing, it differs from such killing in that it is always and everywhere morally wrong.

### 3.2.3.3. *An additional perspective*

In sum, by supplementing its victim-focused perspective with a perpetrator-focused perspective, this chapter can resolve at least three cruxes: why ephemerally incapacitative torture is sometimes morally permissible whereas interrogational torture and punitive torture are always morally impermissible; why the use of interrogational torture for the extraction of calamity-averting information from monstrous terrorists in circumstances of extreme desperation is morally impermissible; and why the use of interrogational torture is always morally impermissible even though deliberate killings are sometimes morally permissible. Another crux that can be resolved here, outlined in § 3.2.2.2.6 above, is the question why all possible instances of sado-masochistic torture are morally wrong even though some other possible instances of edifying torture are morally permissible. Were we to cleave to a purely victim-focused perspective, we would not be able to come to grips adequately with any of these cruxes. As a consequence, this book would not be able to vindicate fully the absoluteness of the moral prohibition on interrogational torture and punitive torture. A switch to a perpetrator-focused viewpoint will enable us to see why that prohibition is absolute, and will also reveal that that absolute prohibition extends to placatory torture and act-impelling torture and extortionate torture and intimidatory torture. Although some possible instances of each of those types of torture are undertaken in pursuit of morally worthy ends, certain perpetrator-focused considerations tell decisively against the moral legitimacy of every such instance. (As has already been noted in this chapter, the ends sought through sadistic torture and discriminatory torture and humiliating torture and extravagantly reckless torture are always themselves morally wrongful. Hence,

a vindication of the absoluteness of the moral ban on each such kind of torture can simply advert to those ends. Of course, if we were to seek to gauge the gravity of the wrong committed by someone who engages in any of those kinds of torture, we would need to go beyond the general purpose of the act of torture in order to examine its specifics.)

### 3.2.3.3.1. A perpetrator-focused justificatory basis

What, then, is the perpetrator-focused viewpoint that should supplement the victim-focused viewpoint on which this chapter has relied heretofore? As has been suggested in Chapter 1's terse remarks on the matter, we supplement the latter viewpoint with the former by moving away from an exclusive concentration on the interests of the potential victims of torture (most notably their interests in being free from excruciating pain and from the controlling ascendancy of others). We have to concentrate additionally on the moral integrity of the potential perpetrators of torture. Of course, this redirection of attention does not mean that the victim-focused considerations simply get left by the wayside. On the contrary, those considerations importantly inform the perpetrator-focused concerns that here come to the fore.

The latter concerns, which bear on the moral integrity of the people who prescribe or undertake acts of torture, pertain to the outlooks through which those acts occur. However, this chapter is not embarking on a psychological or sociological study of the mental states and ulterior motivations of individuals who perpetrate torture. Insofar as those mental states and motivations are ascertainable through the methods of the social sciences, they are multifarious empirical phenomena. My philosophical and moral enquiry here prescind from most of the empirical minutiae that would come under scrutiny in a social-scientific approach to the matter. Instead, the enterprise in this discussion is one of moral and philosophical assessment. What are the moral bearings of the general outlooks that are credibly ascribable to people who inflict the agony of torture on others?

An answer to this question can become clearer if we begin by contemplating a morally permissible instance of edifying torture. Suppose that Brenda is a soldier who has consented to undergo the open-ended infliction of severe pain as a component of her resistance training, and suppose that Daniel is one of the soldiers entrusted with the task of eliciting that pain. What is the moral character of the outlook of Daniel in relation to Brenda? He knows that she has consented to undergo the ordeal that is to be administered, and he further knows that the ordeal is designed to enhance her overall physical and mental well-being. Thus, notwithstanding that his inducement of severe pain in her is deliberate rather than an unintended though foreseeable side-effect, it is salutary rather than destructive in its orientation toward her bodily and psychological welfare. It manifests Daniel's ascendancy over Brenda during the open-ended period of the torture, but it involves no animosity on his part, and it does not stem from any effort by Daniel to treat Brenda as a plaything or to exploit her susceptibility to exquisite pain as a mere vehicle for the realization of his own ends (however laudable those ends might be). Consequently, it is not an endeavour that morally degrades him by requiring his

adoption of an outlook that would be suitable for an exploitative effort. On the contrary, the outlook that best fits with his conduct is benevolently supportive of one of Brenda's own projects.

Suppose now, by contrast, that Sylvia is a mass-murdering terrorist—akin in her iniquity to Khalid Sheikh Mohammed—and suppose that Walter is one of the interrogators assigned to extract information from her that can help to avert an imminent calamity. After Walter tries several non-torturous techniques of interrogation without any success, the urgency of the situation and the absence of any effective alternatives lead him to resort to certain torturous methods of interrogation against Sylvia. His general purpose in availing himself of those methods, in circumstances of dire desperation, is per se morally unexceptionable. In fact, his pursuit of that morally worthy purpose in those circumstances might render his conduct weakly justified (in the sense specified by Chapter 1). Nevertheless, although his torturous actions might be morally optimal in the terrible predicament in which he performs those actions, they are not morally permissible. Even if the consequentialist duty fulfilled through his recourse to such conduct is more stringent than the deontological duty which he thereby breaches, that latter duty has indeed been breached.

Of key importance here is that my absolutist position on the wrongness of Walter's conduct does not attach any positive ethical weight to the interests of Sylvia. Because of her responsibility for past atrocities and for the impending atrocity, her interests in being free from searing pain do not contribute to any justification for a ban on the use of interrogational torture against her. Quite baseless is the allegation that someone who adopts an absolutist position on the wrongness of such torture has failed to grasp that 'the putative victims of an atrocity deserve more care than the would-be perpetrators' (Bobbitt 2008, 380). My insistence on the wrongness of Walter's employment of interrogational torture does not derive from any solicitude whatsoever for the interests of Sylvia. No victim-focused considerations are sufficient to undermine the moral legitimacy of Walter's wielding of torture against her for the purpose of averting a calamity. Rather, the illegitimacy of his use of interrogational torture derives from his sully of his moral integrity through his adoption of a self-aggrandizing course of conduct.

Walter has sullied his moral integrity—even if he has acted optimally—because of the differences between the outlook associated with his conduct and the outlook associated with Daniel's subjection of Brenda to edifying torture. Whereas the latter outlook is neither hostile nor indifferent toward the victim's bodily and psychological well-being, the former outlook partakes of just such hostility or indifference. Whereas Daniel's inducement of intense pain in Brenda does not exploit her susceptibility to such pain as a mere vehicle for the realization of his own objectives, Walter's inducement of intense pain in Sylvia does indeed exploit her susceptibility to such pain as a mere vehicle for the realization of his own objectives. His calamity-averting objectives are of course highly commendable and morally pressing, and Sylvia's terrorist objectives are of course thoroughly odious. Still, because Walter has had to pursue his morally worthy objectives by treating another human being as a locus of vulnerability to severe pain that is to be employed as an instrument and an expression of his ascendancy over her, and

because he has had to exert that ascendancy to impel her toward the performance of the type of action that suits his purposes—highly commendable purposes—he has taken (or has sought to take) control over her in a way that is inconsistent with his own elementary humility as a moral agent. That elementary humility would involve his showing basic concern even for a loathsome terrorist.

Of central importance here, again, is that Walter's owing of basic concern to Sylvia is not attributable to her interests in receiving such concern. As has already been emphasized, her interests are of no positive ethical weight. Instead, Walter's owing of basic concern to her is attributable to his own moral integrity. Sylvia has led a profoundly evil life devoted to the unleashing of atrocities, but she remains a human being whose existence as such has to be acknowledged by Walter if his interaction with her is to be morally legitimate. In this context, his acknowledging her existence as a human being (or, indeed, as a sentient creature) would consist chiefly in his not afflicting her with excruciating pain as a means of taking control of her to direct her performance of some action. His taking control of her in that way is morally wrong not because it redounds to the detriment of her interests—interests that carry no positive ethical weight—but because it elevates him to a position of overweening dominance. His elevation of himself to such a godlike position morally degrades him, for it is incompatible with the fundamental modesty that is incumbent upon him. It is incompatible with his treating Sylvia as a separate human being (or sentient being) whose proneness to agony is not to be exploited as a vehicle for reducing her to an instrument or a marionette.

### 3.2.3.3.2. A first query: why is ephemerally incapacitative torture ever permissible?

We should now ponder several queries, the first of which pertains to ephemerally incapacitative torture. Why is torture of that sort ever morally permissible, given that Walter's recourse to interrogational torture against Sylvia is morally impermissible? On the one hand, every instance of ephemerally incapacitative torture (as understood throughout this book) is aimed at preventing a very serious criminal action.<sup>18</sup> On the other hand, however, Walter likewise resorts to interrogational torture for the purpose of preventing a calamitous crime. His torture of Sylvia is of course non-consensual, but so too is any instance of ephemerally incapacitative torture against some malefactor. Walter's torturous methods of interrogation bespeak his hostility or indifference toward Sylvia's physical and mental well-being, but some legitimate instances of ephemerally incapacitative torture are similar in that respect. Furthermore, any instance of ephemerally incapacitative torture exploits a criminal's vulnerability to severe pain, just as Walter's plying of interrogational torture against Sylvia exploits her vulnerability. Why, then, is interrogational torture always morally impermissible—even in the circumstances of a dire emergency like the circumstances in which Walter acts—whereas some possible instances of ephemerally incapacitative torture are morally permissible?

<sup>18</sup> Recall, from § 2.2.11.2 of Chapter 2, that this book employs the phrase 'ephemerally incapacitative torture' as shorthand for the more cumbersome phrase 'evil-averting ephemerally incapacitative torture'.

Before I present my main reply to this question, we should remember that the moral impermissibility of interrogational torture in all of its possible instantiations is consistent with its moral optimality in some of those possible instantiations. While this chapter is arguing that the moral prohibition on interrogational torture is weakly absolute, it is not arguing that that prohibition is strongly absolute. On the contrary, the chapter's final main discussion will suggest that the use of such torture in some extreme emergencies (whether actual or only possible) can be morally optimal even though it is morally illegitimate. That is, in some conceivable situations, the wielding of such torture can fulfil a duty even more stringent than the duty which it breaches. Consequently, although my insistence on the absoluteness of the moral impermissibility of interrogational torture does differentiate torture of that kind from torture of the ephemerally incapacitative kind, the divergence between them is somewhat less sharp than it might initially appear. In extremely rare circumstances, torture of either kind can be morally optimal.

My chief response to the question at the end of the penultimate paragraph above, however, does not reside in playing down the divergence between ephemerally incapacitative torture and calamity-averting interrogational torture. To understand the key moral difference between those types of torture, we should return to the act/omission distinction that has been expounded at length in Chapter 2 (§ 2.2.11.2). Let us recall that acts are distinguished from omissions by reference to the numerosity of the ways in which someone can move or position her body and any concomitant objects. Given that an effect E occurs and that the conduct of someone S has had some bearing on E's occurrence, S's contribution to E is an action if most of the movements and positions available to S would not have led to E. Conversely, S's contribution to E is an omission if most of the movements and positions available to S would have led to E.

Now, any instance of ephemerally incapacitative torture is aimed at preventing the performance of a very serious criminal action, whereas any instance of calamity-averting interrogational torture is aimed at preventing an omission by impelling the performance of an act of disclosure. Accordingly, the dominion exerted through an instance of calamity-averting interrogational torture is much more minutely controlling than the dominion exerted through an instance of ephemerally incapacitative torture. An instance of torture of the latter sort is undertaken to induce the victim to forgo only a small proportion of the bodily movements and positionings available to her—some bodily movements or positionings that would amount to a very serious criminal action. By contrast, an instance of calamity-averting interrogational torture is undertaken to induce the victim to forgo most of the bodily movements and positionings available to her (namely, all such movements and positionings that do not involve her divulging the information that is demanded of her). Thus, although ephemerally incapacitative torture induces the distinctive self-betrayal described by Sussman, and although it is expressive and promotive of the ascendancy of the torturer over the victim through the exploitation of the victim's susceptibility to agony, and although the victim has not consented to the torture and does not enjoy any genuine control over its duration, and although the torturer in his determination to thwart the victim's performance of a very serious criminal action is firmly

disposed to impair the victim's physical and psychological well-being if necessary, the torture does not betoken the overweening dominance that undoes the moral legitimacy of every instance of interrogational torture. It does not reduce the victim to being an instrument or a marionette. Instead, it is aimed simply at preventing her from engaging in some act-type that is very seriously wrong. In circumstances where the torture is the least invasive feasible means of keeping her from engaging in that act-type, it can be morally permissible.

Any instance of calamity-averting interrogational torture is quite different. It does reduce the victim to an instrument or a marionette at least for a certain period, as it seeks to force (rather than prevent) the performance of some act-type. Through the use of searing pain, it aims to steer the victim away from the vast majority of the bodily movements and positionings that are available to her. It pushes her toward the relatively small array of bodily movements and positionings that consist in her performance of the act-type of revealing the information which her interrogators are trying to ascertain. While so doing, it also partakes of all the wrong-conducive properties that have been attributed in the preceding paragraph to ephemerally incapacitative torture. That is, it brings about the peculiar self-betrayal highlighted by Sussman, and it both expresses and implements the ascendancy of the torturer over the victim through the exploitation of the victim's vulnerability to severe pain; the infliction of it is non-consensual, and the victim does not possess any genuine control over the length of the infliction; and the torturer is hostile or indifferent toward the victim's physical and mental welfare. In combination with the minutely controlling character of the measures plied against the victim, the properties just recounted are not only wrong-conducive but also wrong-making. In combination, those features of calamity-averting interrogational torture render it morally impermissible even though the purpose for which it has been undertaken is morally commendable. Notwithstanding that such torture in extreme circumstances can be morally optimal, it is never morally legitimate.

#### 3.2.3.3.3. Four caveats concerning my response to the first query

In sum, the moral difference between ephemerally incapacitative torture and calamity-averting interrogational torture—that is, the reason why torture of the former kind can sometimes be morally permissible whereas torture of the latter kind is always and everywhere morally impermissible—resides in the act/omission distinction. Because ephemerally incapacitative torture is aimed at preventing certain actions whereas interrogational torture is aimed at preventing certain omissions, a minimally invasive instance of the latter is much more heavy-handedly directive than a minimally invasive instance of the former. Four caveats or clarifications should be appended at this juncture.

First, this point about the moral difference between the two types of torture is focused on their characteristic objectives rather than on their effects. Someone who resorts to ephemerally incapacitative torture is seeking to avert an action, while someone who resorts to interrogational torture is seeking to avert an omission. Some methods of ephemerally incapacitative torture might be as far-reaching in their injurious effects as some methods of calamity-averting interrogational

torture, but the aim of any of those former methods is to stymie the performance of a wrongful action, whereas the aim of any of the latter methods is to impel the performance of a calamity-averting act of disclosure. Given the way in which acts and omissions are distinguished, the aim of thwarting a certain action is much less minutely directive than is the aim of forcing the performance of a certain action. That former aim is much less fine-grained in its controllingness. For that reason, some possible instances of ephemerally incapacitative torture are morally permissible even if their injurious effects might match or exceed the injurious effects of some possible instances of interrogational torture. When we ask whether all possible instances of some kind of torture are overweeningly dominative, the answer lies in the general purpose for which the torture is conducted rather than in the extent of the injurious effects that might be produced by a given instance.

Second is a related point. My discussion above has compared minimally invasive instances of ephemerally incapacitative torture with minimally invasive instances of calamity-averting interrogational torture. Such a comparison is uniquely germane because no instance of ephemerally incapacitative torture can ever be morally legitimate if it is not minimally invasive; in other words, no such instance can ever be morally legitimate if it is more invasive than some other feasible means of achieving the same end. My discussion above has revealed that, although every instance of calamity-averting interrogational torture is morally impermissible even when the use of such torture is no more invasive than any feasible alternative, some minimally invasive instances of ephemerally incapacitative torture are morally permissible. We do not need to go ahead with any further comparisons, since we can know from the outset that every instance of torture of either kind is morally illegitimate if it is not the least invasive approach available in the circumstances.

Third, Jonathan Bennett, on whose work I have drawn in differentiating between acts and omissions, has contended that the act/omission division is without any inherent moral significance (Kramer 2003, 342–3). Bennett acknowledges that that division is strongly correlated with some other dichotomies that are of inherent moral significance, but he maintains that the act/omission distinction itself is morally neutral. Given as much, and given that I have concurred with his way of drawing that distinction, my invocation of it to differentiate morally between ephemerally incapacitative torture and calamity-averting interrogational torture might seem problematic. In fact, however, the difficulty just broached is illusive. There is no need for me here to contest Bennett's assertions about the moral neutrality of the act/omission dichotomy, since his focus is markedly different from mine. Bennett is assessing the conduct of somebody who seeks to bring about a specified result either through an act or through an omission; Bennett is contending that the act/omission duality is morally neutral in the context of any such assessment. My own assessments have been very differently oriented. I have not principally been judging the moral status of the conduct of a terrorist who is subjected to calamity-averting interrogational torture. Nor have I principally been judging the moral status of the conduct of a criminal who is subjected to ephemerally incapacitative torture. Instead, I have chiefly been judging the moral status of the measures undertaken by the police or soldiers or intelligence officials who

respond to the conduct of a terrorist or a criminal. Thus, even if Bennett is correct in suggesting that the act/omission dichotomy does not per se affect the moral bearings of the terrorist's conduct or the criminal's conduct, my invocation of that dichotomy to differentiate morally between a torturous response to the terrorist's conduct and a torturous response to the criminal's conduct is apposite. Because the terrorist's conduct is an omission whereas the criminal's conduct is an action—and thus because a torturous response to the former is aimed at inducing an action whereas a torturous response to the latter is aimed at inducing an omission—a minimally invasive use of torture against the terrorist is far more minutely controlling in its objectives than is a minimally invasive use of torture against the criminal. That difference grounds the division between a type of torture that is absolutely wrong and a type of torture that can sometimes be morally permissible.

Fourth, my way of distinguishing morally between ephemerally incapacitative torture and calamity-averting interrogational torture is robustly perpetrator-focused. What underlies the absolute impermissibility of the latter type of torture is hardly the fact that every mass-murdering terrorist has an interest in not being treated as a marionette or a mere instrument through the exploitation of his susceptibility to agony. As has been remarked several times, the interests of any such evildoer are of no positive ethical weight. Instead, what carries the justificatory burden in this context is the moral integrity of any perpetrators of the calamity-averting interrogational torture. If they do indeed avail themselves of such torture, they will have sullied their moral integrity by using another human being's vulnerability to severe pain as a means of minutely directing his conduct. When they arrogate to themselves such fine-grained direction through the subjection of another person (indeed, another sentient creature) to agony, they deal with that other person from a position of godlike dominion. They gain and exert that dominion for a highly worthy and pressingly urgent purpose, but their recourse to it renders their actions morally illegitimate even in circumstances where those actions are morally optimal. When they assume a position of quasi-divine ascendancy, they are departing from the elementary modesty that is required of them as agents interacting with another sentient creature. In this context, the justificatory basis for the requirement of elementary modesty resides not in the interests of the victim of the perpetrators' behaviour but instead in the integrity of the perpetrators themselves. Their integrity depends on their not using the misery of someone else to elevate themselves to a level that transcends their own humanity. (Note that the point made in this paragraph is applicable whether or not the use of interrogational torture succeeds in eliciting the information that is being sought. What is of key importance morally is not the actual attainment of godlike dominance, but the aim of attaining such dominance. By bringing to bear torturous techniques on somebody who is undergoing interrogation, the torturers seek to control her conduct minutely. Whether or not they achieve and exert the fine-grained control which they are hoping to achieve and exert through the imposition of unbearable pain, their very quest for such control through such pain renders their conduct wrongful as a mode of overweening self-aggrandizement.)

### 3.2.3.3.4. A second query: why is deliberate killing ever morally permissible?

In §§ 3.2.3.3.2–3, with my discussion of ephemerally incapacitative torture versus calamity-averting interrogational torture, I have submitted that the latter type of torture differs from the former in being absolutely wrong and that it is absolutely wrong because its aim is so much more minutely controlling than the aim of the former. Having maintained as much, however, I have also earlier maintained that some deliberate killings are morally permissible. In addition, some highly restrictive modes of confinement (involving straitjackets, for example) can be morally permissible in circumstances where such measures are necessary to prevent very dangerous people from inflicting grievous injuries on themselves or others. With a focus in the present subsection chiefly on deliberate killings, then, let us address the following question:

**Legitimacy of Killing Inquiry.** If deliberate killings (and close confinement) can be morally legitimate in certain situations, why is the fine-grained directiveness of interrogational torture morally wrong in quandaries where the use of such torture is necessary for the prevention of calamities?

Subsequently, in § 3.2.3.3.6, I shall address squarely the matter of highly restrictive confinement.

Just before this discussion tackles the Legitimacy of Killing Inquiry directly, we should briefly recall afresh that the absolute moral wrongness of interrogational torture is consistent with the moral optimality of such torture in some circumstances of desperate emergencies. Morally illegitimate though such torture always and everywhere is, the perpetration of it can be less gravely wrong than the eschewal of it in some imaginable predicaments. Accordingly, although calamity-averting interrogational torture differs from deliberate killings and highly restrictive confinement in that it is always and everywhere morally impermissible, it shares with them the property of being sometimes morally optimal.

Let us now return to the Legitimacy of Killing Inquiry. Two replies are pertinent here. First, whereas killings and close confinement involve severe pain only incidentally, the intentional eliciting of such pain is central to calamity-averting interrogational torture and most other types of torture. My account of the wrongness of torture focuses above all on the fact that torturers exploit the susceptibility of individuals to feelings of agony. In so doing, a torturer designedly takes advantage of a fundamental and precious property of human beings by using it to afflict them with excruciatingly disagreeable sensations.<sup>19</sup> Any fine-grained control that a torturer gains over somebody else's conduct is acquired by him through his arousal of such sensations. By contrast, if any morally legitimate killings or instances of highly restrictive confinement ever give rise to excruciating pain, their doing so is extrinsic

<sup>19</sup> I characterize the susceptibility to severe pain as precious because it plays a vital role in keeping people from incurring serious injuries and—even more—in keeping people from exacerbating serious injuries that have already been incurred. See, for example, Wisniewski 2010, 52–3. See also Scarry 1985, 333 n62.

to the effects which they are supposed to produce. Although the intended effects of such measures are far-reaching—more far-reaching than the effects of some instances of torture—the production of those effects does not proceed through any deliberate evocation of severe pain.

My first reply to the Legitimacy of Killing Inquiry has highlighted a major way in which the killing or close confinement of someone differs from the torturing of someone for any purpose. Second, and even more important, is a reply that underscores the divergences between ephemerally incapacitative torture and other types of torture; the killing or restrictive confinement of someone is assimilable to the former type of torture rather than to any of the latter types. If the deliberate killing of some captors or assailants is necessary to rescue oneself or anyone else, or if the deliberate killing of enemy troops in combat is necessary to eliminate the threat which they pose to oneself or to one's fellow soldiers, the acts of killing can be morally legitimate. In such circumstances, however, those acts of killing are closely akin to acts of ephemerally incapacitative torture. Of course, in one obvious respect (in addition to the respect noted in the preceding paragraph) the former acts are very different from the latter, for their intended effects are permanent rather than transitory. Nonetheless, in the respect that is decisive here, the two types of acts are assimilable. Whenever ephemerally incapacitative torture is morally legitimate, it is undertaken as the least invasive means of preventing the occurrence or completion of a very serious criminal act. Similarly, whenever a deliberate killing is morally legitimate (in the circumstances envisaged above), it is undertaken as the sole feasible means of preventing the occurrence or completion of a very serious criminal act—or, in the context of military combat, as the sole feasible means of eliminating a mortal threat posed to oneself or to one's fellow soldiers by enemy troops who have declined to surrender. In other words, the aim of any morally legitimate instance of deliberate killing is relevantly similar to the aim of any morally legitimate instance of ephemerally incapacitative torture. That is, the objective is to thwart some injurious action(s) rather than to impel some beneficial action(s). As a consequence, the objective of a morally legitimate instance of deliberate killing is far less minutely controlling than the objective of any instance of calamity-averting interrogational torture. From a perpetrator-focused perspective, therefore, we can discern that some instances of deliberate killing do not partake of the hubris that is characteristic of every instance of calamity-averting interrogational torture. For that reason, in combination with the reason expounded in the preceding paragraph, the absolute wrongness of calamity-averting interrogational torture is not paralleled by the moral status of deliberate killing. Some possible tokens of the act-type of deliberate killing are indeed morally permissible.

In the last paragraph, I have concentrated on killings that are undertaken in defence of oneself or others. Nothing is said there about executions. Yet, as has been remarked in § 3.2.3.2, I have elsewhere argued at length that executions of defilingly evil offenders can be morally legitimate in liberal democracies. How can any executions be morally permissible while all instances of calamity-averting interrogational torture are morally impermissible? The answer to this question broadly resembles my answer to the more general Legitimacy of Killing Inquiry.

When someone is executed on the basis of the purgative rationale for capital punishment, the aim of such a sanction obviously does not consist in minutely controlling him by prodding him to perform some action. Corpses do not undertake actions. Rather, the aim is to terminate a life that would constitute a standing affront to humanity if it were to continue (Kramer 2011, chap. 6). Of course, I cannot here present the long and complex arguments that support the purgative rationale for the death penalty. Still, there is not any need for me here to re-elaborate those arguments, since the dispositive point at present is that no purgative execution is designed to achieve any fine-grained control over someone's behaviour. Nor does any such execution, conducted in the most humane manner that is technologically feasible, deliberately exploit a person's vulnerability to severe pain. Hence, although the effects of a purgative execution are more wide-ranging than the effects of most techniques of torture, the minutely controlling and agony-exploiting features of interrogational torture (and most other types of torture) are not present in such an execution. Accordingly, readers who disagree with me about the moral permissibility of executions of the most egregiously iniquitous criminals will have to adduce alternative grounds for condemning those executions as morally wrong. No such condemnation can warrantably advert to the key wrong-making properties of calamity-averting interrogational torture, since purgative executions do not partake of those properties. In other words, even readers who disagree with me about the morality of capital punishment can recognize that my affirmation of the moral permissibility of purgative executions (in appropriate circumstances) is perfectly consistent with the thesis that all instances of calamity-averting interrogational torture are morally wrong.

### 3.2.3.3.5. Clarifying the issue

Before we move on to the matter of highly restrictive confinement, this chapter should clarify the issue addressed by my contrast between deliberate killings and calamity-averting interrogational torture. Let us note the following two propositions:

**Proposition 1.** Some deliberate killings are morally worse than many wrongful acts of torture.

**Proposition 2.** The victims of any deliberate killings (apart from certain acts of euthanasia) are harmed more than the victims of some acts of calamity-averting interrogational torture.

Those two propositions are fully consistent with the following two further propositions:

**Proposition 3.** Calamity-averting interrogational torture is always and everywhere morally wrong.

**Proposition 4.** Some deliberate killings are morally legitimate.

These two further propositions are likewise consistent with each other, notwithstanding that the victims of any morally legitimate killings—apart from certain

acts of euthanasia—are harmed more than are the victims of many instances of calamity-averting interrogational torture.

Some philosophers, writing from a firmly victim-focused perspective, have supposed that Proposition 3 and Proposition 4 are inconsistent with each other and have concluded that Proposition 3 is false. Helen Frowe, for example, invokes Proposition 2 in support of just such a claim about inconsistency and just such a conclusion about Proposition 3:

It is certainly proportionate (and permissible) to *kill* in self-defence a person who will otherwise kill me. Unless torture is a significantly worse harm than death, it looks as though torture should also be a proportionate form of defence against a lethal harm... [E]ven if inserting needles under someone's fingernails is very painful, it's hard to imagine that anyone would rather *die* than suffer, say, an hour of that sort of pain. People undergo painful operations precisely because suffering some level of pain (especially temporary pain) is better than dying. Of course, as we discussed above, the wrongness of torture might not be limited to the physical pain inflicted, but might also include the wrong of violating autonomy. But even if by causing you an hour's worth of pain, I (might) get you to reveal your plans to me and thereby act against your own autonomous preferences, it still seems a stretch to say that what I did was worse than if I had killed you. After all, I may have subdued your will to my ends for an hour, but you still have the rest of your life to go about forming and pursuing autonomous preferences. There would be something odd about a view that urged respect for autonomy, but held temporary violations of autonomy to be worse than its permanent elimination.<sup>20</sup>

Frowe is correct in endorsing Propositions 2 and 4, but she errs in thinking that those propositions are inconsistent with Proposition 3. Her error stems principally from her implicit assumption that the wrongness of calamity-averting interrogational torture must be attributable to the injurious effects of such torture on its victims. She has reasoned as follows:

- I. The deliberate killing of an assailant in order to stave off his lethal attack can be morally permissible.
- II. The harm suffered by an assailant who has been killed in self-defence is typically greater than the harm suffered by a terrorist who has been subjected to calamity-averting interrogational torture.
- III. The calamity which such a terrorist has sought to bring about is typically even more heinous than the murder which the assailant has sought to commit.
- IV. Ergo, some instances of calamity-averting interrogational torture are morally permissible.

<sup>20</sup> Frowe 2011, 204–5, emphasis in original. For some views broadly similar to Frowe's, see Cohan 2007, 1602; Dershowitz 2002, 148–9; Himma 2007, 236, 241; Kamm 2011, 3–4, 15–26; Kershnar 2005, 231; Posner and Vermeule 2006; Posner and Vermeule 2007, chap. 6; Seidman 2005, 897; Steinhoff 2006; Steinhoff 2009.

Although the premises in her line of reasoning are true, the conclusion therein does not follow from those premises. As should be evident by now, her conclusion is a non sequitur because it ignores the perpetrator-focused considerations that nullify the permissibility of calamity-averting interrogational torture even in cases where no victim-focused considerations are sufficient to disallow such torture.

That is, her line of reasoning disregards the ways in which all instances of interrogational torture (including morally optimal instances that help to avert the occurrence of atrocities) morally degrade the people who prescribe and administer the torture. Those people morally degrade themselves because they aim with their torturous measures to achieve fine-grained control over the conduct of others through the subjection of the others to agony. Striving for such control through the infliction of harrowing pain, the torturers sully their moral integrity by endeavouring to elevate themselves to a position of minutely directive dominance—godlike dominance—that exceeds what can legitimately be sought by human beings in their interaction with one another and with sentient beings more generally. Although the measures undertaken by the torturers might be morally optimal in some dire emergencies, and although the outlooks of the torturers might be desperately well-intentioned, their outlooks are besmirched by the hubristic overreaching to which they have to resort in fulfilment of their good intentions. Their worthy ends might weakly justify, but never strongly justify, the torturous means through which those ends are pursued.

In short, the question addressed here is not whether some deliberate killings are morally worse than most instances of torture, nor whether the victims of deliberate killings are harmed more than are the victims of many instances of torture. Albeit the answer to each of those questions is affirmative, the point at issue in the present discussion is not a matter of comparative gravity or comparative harmfulness. Accordingly, the correctness of an affirmative answer to each of the questions just broached has no bearing on the answer to the question that is my central concern here: namely, whether the act-type of deliberate killing differs from the act-type of calamity-averting interrogational torture in that some tokens of the former but no tokens of the latter are morally permissible. When we supplement our victim-focused perspective with a perpetrator-focused perspective—that is, when we pay attention to the moral integrity of torturers even in predicaments where their victims' interests are of no positive ethical weight—we can see that the answer to the relevant question here is affirmative. Unlike deliberate killing, calamity-averting interrogational torture is wrong always and everywhere in all possible worlds.

### 3.2.3.3.6. A third query: why is highly restrictive confinement ever morally permissible?

Let us return to the matter of highly restrictive confinement. Some instances of such confinement are morally legitimate when they are necessary to keep extremely dangerous people from harming themselves or others. If the need to avert the commission of some very serious crimes is what can render permissible the use of

such confinement, then why is interrogational torture not also permissible when law-enforcement officials need to avail themselves of it in order to avert calamitous crimes?

The framing of this question is tendentious, for it conveys the impression that calamity-averting interrogational torture is akin to ephemerally incapacitative torture in its workings. Contrary to any such impression, the former type of torture is markedly different from the latter in that the direct effect of any successful instance of it is the prevention of an omission (specifically the prevention of the withholding of information) rather than the prevention of an action. Of course, the information extracted through the use of interrogational torture can then be employed to prevent a very serious criminal action. However, the direct effect of the torture resides in the prevention of an omission through the forced inducement of an act of disclosure. Consequently, the administration of such torture involves the minute control of someone else's behaviour through the exploitation of her susceptibility to agony. As has already been contended, the aim of exerting such control by such a means is hubristically corrosive of the moral integrity of everyone responsible.

Highly restrictive confinement is significantly different. It is not imposed with the aim of evoking severe pain either as a means or as an end, nor is it designed to prevent an omission and induce an action. On the contrary, it is designed to be incapacitative. It prevents some very seriously wrongful action(s) that would have been carried out by the confined person if he had not been restrained. Seeking to induce omissions rather than actions, the officials who impose the close confinement are not engaged in the fine-grained direction of someone else's behaviour. In that respect, as well as in the absence of any intention on their part to inflict severe pain, their recourse to the imposition of close confinement is very different from any recourse to interrogational torture.

To be sure, although the dominion (over someone else's behaviour) that ensues from highly restrictive confinement is not fine-grained, it is far-reaching. Such confinement, in addition to precluding the performance of the very seriously wrongful action(s) which it is designed to preclude, rules out the performance of many other actions that would have been possible in its absence. Still, much the same is true of some morally legitimate instances of ephemerally incapacitative torture. Although the aim of such torture is to thwart the performance of some very seriously wrongful action(s), its effects are often considerably more far-reaching; for a certain period, the pain that the torture causes can be sufficient to stymie the performance of many other actions as well. In regard to restrictive confinement, just as much as in regard to these morally legitimate instances of ephemerally incapacitative torture, the distinction between the aim and the effects is crucial. While the objective of each such measure is to preclude the quite small proportion of bodily movements and positionings that amount to some very seriously wrongful action(s), an incidental effect of any given measure—which, though incidental, is often amply foreseeable—will typically be the preclusion of many other bodily movements and positionings as well. The moral status of restrictive confinement is differentiated from the moral status of

calamity-averting interrogational torture by the modesty of the confinement's aims despite the sweepingness of its effects.

Of course, I am hardly suggesting that the probable effects of close confinement or of ephemerally incapacitative torture are morally irrelevant. Those effects are of great importance, for, under the sway of the Minimal Invasion Principle, no instance of restrictive confinement or of ephemerally incapacitative torture is ever morally permissible unless it is the least invasive means of preventing the very serious crime(s) which it is undertaken to prevent. Furthermore, any such instance is morally impermissible if its own harmfulness significantly exceeds the harmfulness of the crime(s) which it foils. Still, when those conditions of minimal invasiveness and proportionality are satisfied, the stymieing of very seriously wrongful actions through the use of tight confinement or ephemerally incapacitative torture is morally permissible. Because the objective of such confinement or torture is to preclude certain actions rather than to impel certain actions, the officials who desperately resort to the confinement or torture—in circumstances where the conditions of minimal invasiveness and proportionality are satisfied—will not have sullied their moral integrity through a quest for superhuman ascendance.

#### 3.2.3.3.7. A fourth query: why is punitive torture absolutely wrong?

My way of distinguishing morally between ephemerally incapacitative torture and calamity-averting interrogational torture might lead some readers to wonder why punitive torture is always and everywhere wrong. Though punitive torture is carried out on some occasions as a form of interrogational or act-impelling torture, it is on other occasions purely punitive. On those latter occasions, then, the perpetrators of punitive torture do not aim to impel the performance of any actions; while eliciting agony in their victims, they are not thereby seeking to exert any minute control over the victims' behaviour. In that respect, the character of such torture on those occasions is markedly different from that of interrogational torture and is assimilable to the character of ephemerally incapacitative torture. Given that the last-mentioned type of torture is sometimes morally permissible, why is purely punitive torture always and everywhere wrong?

This query overlooks a key way in which ephemerally incapacitative torture is similar to calamity-averting interrogational torture and different from punitive torture. On any of the rare occasions when ephemerally incapacitative torture is a morally permissible tack, an official or a private citizen is confronted with an emergency in which a miscreant is seeking to perform a very seriously wrongful action. On an occasion of that kind, the use of such torture is the least harmful way of keeping the miscreant from performing the action in question, and the infliction of searing pain through the administration of the torture is not significantly more injurious than the effects which the thwarted crime would probably have caused if it had occurred. In other words, the moral permissibility of ephemerally incapacitative torture on such an occasion does not derive solely from the absence of any effort on the part of the torturer to gain fine-grained control over the victim's conduct. In addition, it derives from the absence of any superior alternatives in a pressingly grim emergency. By contrast, typically, the exigencies of



an emergency are not operative in a criminal-justice system where punishments are imposed on malefactors. Even if the officials in a given system adhere to a consequentialist rationale for their levying of punishments on criminals—such as the deterrence-oriented rationale which I have critically assessed elsewhere in the context of capital punishment (2011, chap. 2)—their endeavours to lower the future incidence of crimes will very rarely if ever take place in circumstances of grave urgency that sharply limit their options.

To be sure, there can *in extremis* arise social upheavals that render the imposition of punishments a matter of grim urgency. In Herman Melville's famous novella *Billy Budd*, for example, Captain Vere reluctantly imposes the death penalty on the eponymous seaman because he believes that his declining to do so would invite mutinous conduct among the sailors on his own ship and in other parts of the British fleet. Let us suppose that Vere's perception of the danger of insubordination is accurate. In a quandary of that kind, an official has levied a punitive measure in response to an outright emergency. However, even if we leave aside the rarity of any relevantly similar predicaments in the workings of an ordinary criminal-justice system, the prospect of a mutiny on Vere's ship would not render morally permissible the wielding of torture against Billy Budd. A torturous sanction imposed as a deterrent, which would be an instance of both punitive torture and broadly addressed intimidatory torture, would differ starkly from an instance of ephemerally incapacitative torture. Were Vere to inflict severe pain on Billy as a punishment, he would scarcely be seeking to prevent the young man from performing a very seriously wrongful action. Rather, he would be using Billy's susceptibility to agony as a means to discourage the spread of refractoriness among the crew. Any such instrumentalization of somebody's proneness to terrible pain—that is, any measure that uses somebody and his proneness to terrible pain purely as a means for influencing the conduct of others—would be morally illegitimate, regardless of the exigencies of the emergency to which the instrumentalization would be a response. Though those exigencies might conceivably render the employment of torture morally obligatory on consequentialist grounds, the moral obligatoriness would be unaccompanied by moral permissibility. No demands of any emergency, however dire, could bestow moral legitimacy on the exploitation of someone's vulnerability to agony as a mere means for channelling the behaviour of other people. (For cognate reasons, the execution of Billy by Captain Vere is morally wrong even if Vere is under a moral obligation to impose such a punishment. Though the execution does not trade on the susceptibility of the young man to sensations of exquisite pain, it uses him and his life in an emergency purely as a means for the furtherance of discipline on Vere's ship and in the British fleet.)

### 3.2.3.3.8. *Retributivism and the perpetrator-focused perspective*

In sum, if punitive torture were ever undertaken in an emergency to realize some consequentialist goal such as the deterrence of unrest, it would be a morally illegitimate use of the victim purely as a means for the advancement of others' ends. Can punitive torture ever be morally permissible if it is instead conducted on

retributivistic grounds? Insofar as the rationale for torturous punishments is retributivistic, the analogy between any such punishment and a morally permissible instance of ephemerally incapacitative torture is plainly unsustainable. Whereas a permissible instance of ephemerally incapacitative torture is aimed at preventing the performance of a very serious criminal action that will occur if the torture is not wielded, a punishment levied for retributivistic purposes is aimed at rectifying the commission of a crime that has already occurred. Whereas ephemerally incapacitative torture is forward-looking, retributivistic punishments are backward-looking. Hence, although the pressures of an emergency can render the employment of ephemerally incapacitative torture morally legitimate in certain circumstances, those pressures are not applicable to the imposition of punishments for retributivistic purposes. Such punishments are not ways of dealing with emergencies or of foiling very seriously wrongful actions.

In short, although retributivistic torture is similar to ephemerally incapacitative torture in that it is not aimed at exerting fine-grained control over anyone's behaviour, it is morally inassimilable to the latter type of torture in that its exploitation of the susceptibility of people to agony is not aimed at preventing those people from performing very serious criminal actions. Still, even though punitive torture for retributivistic ends is never morally permissible on the basis of any analogy to ephemerally incapacitative torture, some readers might think that it can sometimes be morally permissible independently of such an analogy. Let us ponder a situation in which the use of punitive torture on retributivistic grounds might seem peculiarly apposite.

Suppose that Theodore has committed a number of grisly murders during which he has tortured his victims mercilessly, and suppose that he is eventually apprehended and tried and convicted in a system of criminal justice that is oriented toward the principles of retributivism. Would the imposition of punitive torture—either on its own or in combination with some other sanction—be morally legitimate? Such a punishment would be consistent with the main tenets of retributivism. Specifically, it would accord with the principle of commensurateness (quantitative equivalence) between the severity of a punishment and the seriousness of a crime, and it would likewise conform to the *lex talionis* principle of a qualitative homology between the wrong-making features of a crime and the equality-restoring features of a punishment. Would such a sanction also be consistent with the broader demands of morality?

Worth noting straightaway is that the consistency (in certain cases) between the use of punitive torture and the chief tenets of the doctrine of retributivism has quite often been invoked by opponents of that doctrine in order to discredit it. What has particularly drawn the ire of those opponents is the principle of *lex talionis* (which is often misrepresented as a principle of revenge). Supporters of that principle, such as Jeffrey Reiman, have correspondingly felt a need to distance it from the notion that torture is ever a legitimate sanction: '[S]trict adherence to the *lex talionis* amounts to allowing criminals, even the most barbaric of them, to dictate our punishing behavior... [T]here are at least some crimes, such as rape or torture, that we ought not to try to match... [E]ven though it would be just to

rape rapists and torture torturers, other moral considerations weigh against doing so' (Reiman 1998, 94–5). Now, on the one hand, my arguments elsewhere concerning the principle of *lex talionis*—in the context of debates over the death penalty (Kramer 2011, 128–35)—strongly suggest that that principle does not ever require the imposition of punitive torture. Hence, regardless of what Reiman has in mind when he writes of 'strict adherence', justice never requires the levying of a torturous sanction. On the other hand, as I have stated above, the *lex talionis* is indeed consistent with the imposition of punitive torture on villains who have themselves made use of torture in their crimes. Given as much, Reiman is correct in thinking that the *lex talionis* principle does not provide reliable guidance on what can legitimately be done to punish those villains.

When we contemplate the example of Theodore sketched in the penultimate paragraph above, a victim-focused perspective will not enable us to perceive why the wielding of punitive torture against him is morally impermissible. Because of the numerousness and vileness of his terrible crimes, his interests in being free from excruciating pain are of no positive ethical weight. He has forfeited his right against being imprisoned and also his right against being executed. If he has not similarly forfeited his right against being tortured, the reason for his retention of that right is not discernible from a purely victim-focused point of view.

When we shift to a perpetrator-focused perspective, we concentrate not on the interests of a potential victim of punitive torture—which, in the case of Theodore, are justificatorily weightless—but on the moral integrity of the officials in a system of criminal justice who would prescribe and administer the torture. We also concentrate on the moral integrity of the society in which the torture would be administered as a sanction. From such a perspective, we know that calamity-averting interrogational torture is always and everywhere wrong partly because it involves a quest for minute control over a victim's behaviour through the exploitation of her susceptibility to intense pain; a self-aggrandizing quest of that sort, through such an agony-inducing route, sullies the moral integrity of anyone who directs or undertakes it. Punitive torture, like ephemerally incapacitative torture, does not aim at any comparably fine-grained control. Accordingly, the moral wrongness of such an aim is not a factor in determining the moral status of punitive torture. Should we conclude that punitive torture, like ephemerally incapacitative torture, can be morally permissible in certain situations?

Here we return to the gist of the opening paragraph of this subsection. Precisely because any punishment inflicted in conformity to the tenets of retributivism is aimed at rectifying some past wrong(s) rather than at forestalling the occurrence of some impending wrong(s), the use of torture in conformity to those tenets is not rendered morally permissible as the least invasive way of thwarting a calamitously wrongful action. Someone responsible for prescribing or administering punishments on retributivistic grounds is not thereby coming to grips with an emergency in which he faces no other options that could achieve what the torture can achieve. On the contrary, anyone who performs such a role can select among a number of options; some of the sanctions that can serve as retributivistic punishments are fines and imprisonment and executions. When dealing with a deprived

mass-murderer and torturer like Theodore, the officials in a retributivistic system of criminal justice have to impose some especially harsh sanction(s). The death penalty, humanely implemented, would tally with the principles of retributivism—and would be independently justifiable on the basis of the purgative rationale for capital punishment which I have expounded elsewhere—but also consistent with the tenets of retributivism would be lifelong imprisonment-without-parole in solitary confinement with few amenities. (Since the death penalty would be more invasive than the lifelong imprisonment, the Minimal Invasion Principle disallows the former sanction within a purely retributivistic system of criminal justice.)

Proponents of retributivistic torture will undoubtedly grant that it is not the only sanction that can suitably be imposed on someone like Theodore, but they will insist that it is one further option available to the officials who have to prescribe and administer his punishment. Moreover, since certain techniques of torture are less injurious than the death penalty or lifelong imprisonment-without-parole in austere conditions, the Minimal Invasion Principle in a retributivistic system of criminal justice forbids the use of either of those non-torturous punishments. So, at any rate, the proponents of retributivistic torture will be apt to contend.

One relatively minor weakness in the position of the proponents of retributivistic torture is that any techniques of torture that are significantly milder than lifelong imprisonment-without-parole will be too lenient to serve satisfactorily as a retributivistic punishment in application to a monstrous evildoer like Theodore. For example, if Theodore were sentenced to undergo ten blows with a cane or the twisting of his arms behind his back for half an hour or the drilling of the unanaesthetized roots of some teeth for half an hour, the enormity of his murders and rapes and grisly acts of torture would not be reflected in the punishment meted out to him. In application to him, such sanctions would not adequately give effect to the principles and requirements of retributivism as a doctrine of deserved punishments.

Of course, the problem just broached could be overcome through a substantial intensification of the harshness and prolongedness and frequency of the torture to be inflicted on anyone of Theodore's turpitude. However, that very 'solution' to the first problem brings us to a far more formidable weakness in the position of the proponents of retributivistic torture. Their position fundamentally misconstrues the character of retributivism. Contrary to what numerous opponents and some supporters of the principles of retributivism have contended, those principles do not constitute a doctrine of revenge. Retributivism does not call for the wreaking of vengeance or the satisfaction of vindictive impulses. If it were a doctrine of revenge along those lines, it would fail to provide a morally worthy rationale for punishment. Its moral credibility as such a rationale ensues from its character as a doctrine of impersonal justice. It prescribes the imposition of punishments to vindicate the dignity of victims of crimes and to uphold the moral order of a community and to offset the self-indulgence to which malefactors have stooped in their criminality (Kramer 2011, chap. 3). Pursuing those morally worthy objectives in the context of a liberal-democratic society, a retributivistic system of criminal justice can invest its punishments with moral legitimacy. Retributivism, in other

words, can serve as one of the underpinnings of a morally upright system of governance. Were it a doctrine of revenge, by contrast, it could never serve as such an underpinning.

Now, let us recall that some punishments other than torture can fulfil the requirements of retributivism in application to a heinous criminal such as Theodore. Given as much, a decision by judges to sentence Theodore to a regimen of brutal torture in a retributivistic system of criminal justice would partake of vindictiveness. Regardless of what the conscious motivations of the judges might be, the imposition of such a sentence would not be plausibly construable except as an act of revenge. Subjecting Theodore to harsh torture, in contrast with sentencing him to lifelong imprisonment-without-parole in solitary confinement or to a humanely conducted execution, would squarely cater to impulses of vindictiveness harboured by members of the general public and especially by people who have suffered directly from his iniquities. There is no other plausible reason for choosing such a sanction in preference to one of the available alternatives (or in combination with one of those alternatives). Perfectly understandable though the impulses of vindictiveness are, the gratification of them is not among the purposes that can legitimately be pursued by any system of criminal justice. It is not among the purposes prescribed by any morally tenable version of retributivism.<sup>21</sup> Even if *mirabile dictu* a judge were not consciously endeavouring to gratify any feelings of vengeance when imposing a regimen of torture on Theodore, she would be culpably remiss in failing to recognize that such a sanction so directly marshals and reaffirms those feelings. It marshals and reaffirms sadistically vindictive urges, and is morally impermissible as a consequence.

What should be emphasized again is that the moral illegitimacy of the use of torture as a punishment to be imposed on Theodore is not due to the justificatory weight of his interest in being free from excruciating pain. As has already been stated, the justificatory weight of his interests is nil. Having led a flagitious life whose ethical bearings are overpoweringly determined by the atrocities which he has gleefully committed, Theodore deserves no better than the agony that would be inflicted on him through a regimen of harsh torture. Only from a perpetrator-focused perspective can we see why the imposition of such a regimen as a sanction would be morally impermissible. Undeserving though Theodore is of any restrainedness in his punishment, the use of torture as a sanction would sully the moral integrity of a criminal-justice system and its officials. If they avail themselves of such a sanction, they will have turned their punitive endeavours into a vehicle for the pursuit of vengeance (even in the exceedingly unlikely event that their choice of a torturous sanction has not been consciously motivated by such a pursuit or by the desire to pander to such a pursuit). Officials who so grossly cater to sadistically vindictive

<sup>21</sup> A quite distinct theory of punishment, the denunciatory theory, does attribute to sanctions the role of satisfying ordinary people's urges for revenge against criminals. See my critical assessment of the denunciatory theory in Kramer 2011, chap. 5. Because the denunciatory theory is thoroughly consequentialist in its orientation, it suffers from most of the same weaknesses that afflict the deterrence-oriented conception of punishment.

instincts are adulterating the retributivism of their system of criminal justice and are *pro tanto* depriving the system of its moral uprightness. Their indulgence of such ignoble instincts is morally unworthy, even in application to someone like Theodore who deserves no better.

Also worth noting here is a closely related point. That is, the moral forbiddenness of the use of torture as a punishment is not attributable (or is not always attributable) to the Minimal Invasion Principle. In other words, the moral wrongness of such a sanction is not attributable—or is not always attributable—to its excessive harshness. Even if some course of torture would be less harsh for the victim than every alternative sanction that is retributivistically suitable, it would contravene the moral requirements that are incumbent on the officials in a system of criminal justice. Notwithstanding that it would be less severe than the other retributivistically suitable punishments, it would tie the officials' system too tightly to dubiously base impulses from which the system must be distanced if the endeavours of the officials therein are to be morally legitimate. Although the victim-focused Minimal Invasion Principle does not per se disallow the plying of such a course of torture against Theodore as a punishment for his reprehensible crimes, the employment of such a sanction is excluded by a perpetrator-focused delimitation of the promptings with which a system of criminal justice can permissibly and closely associate itself.

### 3.2.3.3.9. A fifth query: why is consensual placatory torture impermissible?

In § 2.1.4.1.2 of Chapter 2, I have recounted Alan Gewirth's scenario of a mother who is to be tortured by her son (a prominent politician) in order to appease some terrorists who will otherwise detonate several catastrophic explosions in major cities. Let us now mull over an embellished version of that scenario. Suppose that the mother learns of the terrorists' nefarious threats, and that she implores her son to go ahead with the torture in order to spare the lives of hundreds of thousands of people. She repeatedly adjures him that he must put the elementary safety of those people ahead of his own compunctions and her own comfort. She firmly indicates that she is prepared to undergo the agony of brutal torture in the dire circumstances that confront them. Will the politician be acting permissibly if he accedes to the entreaties of his mother by subjecting her to placatory torture? Manifestly, the terrorists are behaving impermissibly and indeed evilly in this modified scenario as much as in the original scenario. However, does my embellishment of Gewirth's thought-experiment alter the moral status of the conduct of the politician if he now goes ahead with the placatory torture?

One reason why the answer to this question is negative is that the modified scenario does not involve any genuine consent by the mother to the administration of torture. When she beseeches her son to avert the calamitous explosions by subjecting her to torture, she is pleading with him under conditions of extreme coercion (where the coercion is exerted not by him, of course, but by the terrorists). Hence, her impetrations do not amount to genuine consent. Consequently, any legitimizing force that attaches to the presence of genuine

consent in some edifying contexts is not operative in this scenario of placatory torture.

Moreover, the orientation of the placatory torture in my embellished scenario—like its orientation in Gewirth's original scenario—is markedly different from the orientation of any morally legitimate instance of edifying torture. In any instance of the latter sort, the severe pain is inflicted to further the physical and psychological well-being of the victim. In my extension of the Gewirthian thought-experiment, by contrast, the son tortures his mother not to enhance her bodily and mental hardihood but to mollify the terrorists. Of course, in the respect which I have highlighted in Chapter 2, the son's orientation toward his mother is benign. That is, the son shudders with dismay at the prospect of torturing his mother, and he desperately hopes that his administration of torturous techniques to her body will not elicit any sensations of agony in her. Nonetheless, while harbouring such a hope, he naturally recognizes that the torturous techniques will almost certainly afflict her with excruciating pain. He further recognizes that the terrible pain will do nothing to enhance her physical and psychological well-being and will instead detract dreadfully therefrom. In that regard, despite the horrified yearning and anguish of the son who has to apply the torturous measures to his mother, the orientation of those measures in relation to her is decidedly inimical rather than benevolently wholesome.

While the foregoing victim-focused considerations are sufficient to indicate why my embellishment of Gewirth's scenario has not altered the moral status of the placatory torture from impermissible to permissible, they can and should be supplemented with some brief perpetrator-focused reflections. Although the politician is acting both for the good of the broader public and in response to the exhortations of his mother, and although the gravity of the wrong committed by him is greatly extenuated by those factors, he is indeed committing a wrong when he applies torturous techniques to an innocent person for any objective other than her own physical and mental edification. He is not seeking to gain fine-grained control over her behaviour, nor is he associating himself with instincts for revenge, but he is demonstrating that he is ready to do whatever the terrorists bid him to do. He is thereby using himself, as well as his mother, for their ends. He is of course doing so not for any discreditable purposes, but instead for the commendable purpose of saving hundreds of thousands of lives. He is fulfilling a stringent duty owed to the general public even while he is transgressing some stringent duties owed to himself and to his mother. Still, notwithstanding that his behaviour might be morally optimal, he is behaving wrongly by using himself and his mother as playthings of the terrorists. He morally degrades himself by complying with their behests—behests squarely aimed at psychologically humiliating him and morally debasing him—even though his self-degradation is perhaps the least terrible course of conduct available to him in conditions of extreme duress.

### 3.2.3.3.10. A final query: why is sado-masochistic torture morally wrong?

The factor of the mother's consent (albeit coerced consent) in my modified Gewirthian scenario brings us back to the matter of sado-masochistic torture, on

which I have already remarked in this chapter and the preceding chapter. Why is the infliction of sado-masochistic torture always morally wrong? After all, such torture is typically consensual, and in a salient respect it is oriented toward the physical and psychological well-being of the victim. That is, the perpetrator of the torture aims to provide the victim—as well as himself—with sexual gratification. Moreover, the perpetrator is not hubristically seeking to exert minute control over the behaviour of the victim and is not acting in a fashion that gives vent to vindictive urges. Nor is he treating himself as a plaything of his enemies; he does not engage in his peculiar pastime as a way of complying with humiliating behests from anybody else. Why, then, is his perpetration of sado-masochistic torture morally wrong?

Let us note that this question is indeed about the *perpetration* of sado-masochistic torture. More doubtful is whether the consensual *undergoing* of such torture is always morally wrong. At any rate, that latter issue will be left aside here as we ponder why the act-type of wielding sado-masochistic torture against a consenting victim is always morally impermissible. Let us further note that the matter under scrutiny here is the *moral* status of such torture rather than its appropriate *legal* status. As Chapter 2 has intimated, and as Chapter 5 will maintain at greater length, sado-masochistic torture should not be legally proscribed unless the administering of the torture is non-consensual or unless it results in permanent and very serious harm. Nonetheless, although sado-masochistic ordeals should be legally unforbidden in most circumstances, they are morally wrong in all circumstances.

A sado-masochist Samuel who inflicts searing pain consensually on a similarly inclined person Peter is seeking to elicit sexual pleasure in Peter but is also seeking to derive sexual pleasure for himself from the experience of causing Peter to undergo dire pain. That latter aspect of his conduct—his derivation of sadistic gratification from the knowledge that he is causing someone else to suffer grievously—is what renders his behaviour morally illegitimate. If Samuel were instead participating very reluctantly in response to numerous importunate requests from his friend Peter, and if his sole aim were to satisfy Peter's craving for sexual arousal, then his conduct might not be morally impermissible. (Its moral permissibility would hinge on the specifics of the torture, especially on the extent of the harm that is likely to ensue from it.) Still, if Samuel were a reluctant participant with the sole objective of indulging Peter's masochistic predilections, his infliction of severe pain would not amount to *sado-masochistic* torture at all. Hence, the permissibility of his conduct in those circumstances would be consistent with the proposition that the perpetration of sado-masochistic torture is always morally wrong.

To apprehend why the infliction of sado-masochistic torture is wrong in all of its instantiations, we have to adopt a perpetrator-focused perspective. If the victim of the torture such as Peter has eagerly consented to the process, and if the techniques of torture are not likely to result (and do not actually result) in death or in very serious and permanent injuries, then there are no victim-focused considerations that would undermine the moral permissibility of the actions of

the perpetrator. What does undermine the permissibility of those actions is the sadism with which they are undertaken. Samuel's derivation of pleasure from Peter's misery is morally debasing—it demeans both Samuel and Peter—regardless of how enthusiastically Peter has chosen to participate as a masochistic victim. To be sure, the sadism in Samuel's outlook is coupled with his desire to stimulate sexual euphoria (as well as severe pain) in Peter. His outlook is not unalloyedly self-centred or ghoulish. Still, the delight that Samuel experiences at the prospect of another person's anguish and at his knowledge of his own role in bringing about that anguish is morally unworthy. It is a feature of his conduct that places him in contravention of moral duties which he owes to himself and to Peter.

### 3.3. Moral Optimality without Moral Permissibility

This lengthy chapter will close by contemplating briefly a matter which Chapter 1 has explored in a more general form. Given that most types of torture are always and everywhere morally impermissible, can any instances of those types of torture be morally optimal despite being morally wrong? In other words, is the wrongness of those types of torture strongly absolute or only weakly absolute? Let us ruminate on this question with reference to calamity-averting interrogational torture, the kind of torture that has received far more attention than any other in the contemporary philosophical investigations of the topic. The moral impermissibility of such torture is only weakly absolute rather than strongly absolute; there are some possible instances (and even some credible instances) of calamity-averting interrogational torture that are morally optimal.<sup>22</sup> Before we mull over several of the main considerations that bear on the matter of moral optimality, we should take account of a couple of examples.

#### 3.3.1. A first example

In § 2.2.1.3 of Chapter 2, I have presented a slightly modified account of the facts in *Leon v. Wainwright*. Given the facts as I have recounted them there, the use of calamity-averting interrogational torture by the police to extract vital information from the kidnapper is morally optimal. On the one hand, by resorting to such torture, the police have acted wrongly in that they have exploited the kidnapper's susceptibility to severe pain and have done so for the purpose of exerting fine-grained control over his conduct. Gaining and exercising such dominance over the kidnapper, the police arrogate to themselves the role of gods. On the other hand, they do so in a dire emergency where their attainment of a position of overweening ascendance vis-à-vis the kidnapper is the sole effective means of saving the life of his captive. Although they have contravened the absolute moral

<sup>22</sup> In a thought-experiment that is wildly fanciful but not unintelligible, even sadistic torture can be morally optimal (though such torture is of course odiously wrongful even in the conditions delineated by the fanciful thought-experiment). See Kramer 2009, 158.

prohibition on any recourse to interrogational torture—a prohibition whose moral force, in its applicability to their conduct, derives from perpetrator-focused considerations—they have fulfilled some even more stringent moral duties which they have owed to the captive and to the general public. They have achieved that feat, moreover, while employing techniques of torture that will not permanently injure the kidnapper. Hence, notwithstanding that their use of interrogational torture is morally impermissible (on perpetrator-focused grounds), it is morally optimal.

#### 3.3.2. A second example

Though I have slightly modified the facts of *Leon v. Wainwright*, my version of those facts (which I have sketched in Chapter 2) is highly credible. It reveals that calamity-averting interrogational torture can be morally optimal—though still morally wrongful, of course—in circumstances that are not outlandishly fanciful. For an even more vivid example of calamity-averting interrogational torture that is morally optimal, however, we should turn to a far-fetched scenario propounded by Steinhoff. The unreality of his scenario is offset by its piquancy, and is in any event untroublesome because I could have broached here many other possible situations of morally optimal interrogational torture that are far more credible than Steinhoff's lively thought-experiment.

Steinhoff's presentation of his example is long and complicated, and there is no need for me to quote it in full. The opening portion of his presentation should be quoted directly, whereas the rest of it can aptly be paraphrased:

Bill works for a company that has a lot of trolleys on its enormous property to transport different goods. He is in charge of the maintenance of the trolleys. There is some kind of animal in the region that often enters the trolleys from below and bites through the wires. Therefore, Bill planted several foot traps, which, however, can also trap humans. The traps have combination locks, and Bill knows the combination. In order to set in motion certain trolleys, one has to hold on to a lever well above one's head. Since Bill is very small, he has to jump to reach the lever. One day, Jeanette and Paolo, two completely innocent persons, cross the tracks and both accidentally step into a foot trap. Jeanette shouts to Bill: 'Help us!' 'You wish', he shouts back. 'I prefer to kill you.' And he jumps up to a lever and sets in motion a trolley, which is slowly but fatally moving in Jeanette's and Paolo's direction. If not stopped, it will crush them. Jeanette has with her both her explosive projectile gun (these projectiles can blow people into small pieces but do not much affect trolleys) and her pain-infliction ray gun. Bill, for whatever reasons, would rather die than let the two escape. Fearing that they might shoot at him with normal guns so that he lets go of the lever, which would stop the trolley, he handcuffs himself to the lever and throws away the keys, and shouts sneeringly: 'I know the combination of your traps—but I won't tell you. I will watch you die.' Even if they shoot him dead, that would not stop the trolley since Bill would still be hanging on to the lever by the handcuffs. Jeanette draws her pain-inflictor and shows it to Bill: 'If you do not tell me the combination of the traps, I will torture you! This gun inflicts pain like a dentist drilling on an unprotected nerve.' Bill remains silent. Jeanette sadly aims the pain inflictor gun at him. (Steinhoff 2009, 51, italics removed)

As Jeanette prepares to operate her pain-inflicting device, Paolo vigorously expostulates with her. He urges her not to stoop to the perpetration of torture,

and he reminds her that killing in defence of oneself or others against a lethal attack can be morally permissible. Paolo implores Jeanette to use her explosive projectile gun to blow Bill to pieces and thereby prevent him from completing his fatal attack against them. She resists any such exhortation, by pointing out that her pain-inflicting device will harm Bill far less severely than her projectile gun. Instead of blowing him into small pieces, she will cause him for a fairly short period to experience pain which—though harrowingly intense—will not produce any permanent injuries or debility. However, because Paolo is so incensed by her intention to employ torture, he knocks her out and grabs her projectile gun and fires it squarely at Bill. Having pulverized Bill's body into tiny fragments, Paolo manages to stop the trolley from its lethal progress toward Jeanette and himself. He is delighted at his success and especially at his having achieved that success without any recourse to torture. As he brushes off some bits of Bill's corpse that have been strewn over his jacket by the explosion of the projectile, he commends himself for having upheld human dignity.

Steinhoff believes that his scenario recounts a situation in which the use of calamity-averting interrogational torture would be morally permissible. In fact, however, his scenario recounts a situation in which the use of such torture would be morally optimal despite being morally impermissible. We should attend to the subtleties of that situation (subtleties paralleled in some of the examples of torture adduced independently by Kamm). Although the wielding of deadly force in defence of oneself or others against a wrongful and lethal attack can be morally legitimate, it is not always so. In particular, the wielding of such force is not morally legitimate if a significantly less harmful tactic is feasible as an alternative. In the situation outlined by Steinhoff, a less harmful tactic is indeed feasible and is known to be feasible. Hence, contrary to what Paolo thinks, his firing of the explosive projectile gun at Bill is a serious breach of a moral duty. Still, the impermissibility of Paolo's employment of deadly force does not mean that the use of torture by Jeanette would be morally permissible. Rather, the predicament portrayed by Steinhoff is a situation of moral conflict.

Under the Minimal Invasion Principle as applied to private individuals, Jeanette and Paolo are morally obligated not to use the explosive projectile gun as their means of fending off Bill's fatal attack. On independent grounds, furthermore, each of them is morally obligated to do what is necessary and feasible to fend off the fatal attack in order to save the life of the other as well as his or her own life. The latter obligation requires them to employ either the explosive projectile gun or the pain-inflicting device to thwart Bill's onslaught, while the Minimal Invasion Principle requires them to forgo any use of the explosive projectile gun. However, they are likewise morally obligated to refrain from any recourse to interrogational torture with the pain-inflicting device. For the reasons already discerned through this chapter's adoption of a perpetrator-focused perspective, any plying of interrogational torture is morally illegitimate as a quest for overweeningly fine-grained control of another person's conduct through the exploitation of his or her susceptibility to feelings of severe pain. Such torture is morally illegitimate even when it is undertaken to avert a calamity, for it is then a morally improper means to a morally

worthy end. Hence, given that Jeanette and Paolo are each morally duty-bound to do what is necessary and feasible to stave off Bill's deadly assault, and given that they are morally obligated not to wield the projectile gun and also morally obligated not to wield the pain-inflicting device, they are morally duty-bound to commit a moral wrong. They are faced with a plight in which some stringent moral duties incumbent on them are in conflict. In that plight, the morally optimal course of action for them lies in resorting to interrogational torture.

Steinhoff's scenario, like a few of Kamm's examples, nicely brings out the moral complexities that arise in certain emergencies. Were Jeanette possessed only of the explosive projectile gun without the pain-inflicting device, she or Paolo would be morally permitted (strongly permitted) to use the gun in the circumstances to blow apart Bill's body. However, because of the availability of the pain-inflicting device, neither Jeanette nor Paolo is morally permitted to resort to the projectile gun. Still, although the availability of the pain-inflicting device produces such an effect—through its triggering of the Minimal Invasion Principle as applied to private individuals—any employment of that device against Bill would itself be morally impermissible. The sheer fact of its moral impermissibility is unaffected by its moral obligatoriness, though of course the gravity of the wrong committed through the subjection of Bill to interrogational torture would be markedly attenuated by the exigencies of the situation.

### 3.3.3. Some general considerations

Let us conclude by glancing at some general considerations that bear on the matter of moral optimality. My terse discussion of some of those considerations will take for granted that, in any situation under scrutiny here, the use of interrogational torture is the sole feasible course of action—or the mildest feasible course of action—that is likely to avert a calamity. In other words, this discussion will take for granted that the employment of such torture in any situation broached here would not contravene the Minimal Invasion Principle.

#### 3.3.3.1. Harshness and protractedness

One major factor that affects the gravity of the wrong committed through the use of interrogational torture is the specific nature of the torture. As has been noted *en passant* at several junctures in this book, some techniques of torture are much worse than others. Although the recent efforts by some politicians and scholars to distinguish between torture and 'torture-lite' (or 'enhanced interrogational techniques') are to be discountenanced,<sup>23</sup> the correct point underlying those dubious efforts is that the methods by which torture can be inflicted on victims are multifarious and are of many different degrees of injuriousness. In addition, the

<sup>23</sup> For one of the efforts to which I refer, see Elshstain 2004, 85–8. For some critical treatments of such efforts, see Green and Ward 2009, 167; Kreimer 2005; Luban 2005, 1436–8; Meisels 2008b, 186–8; Miller 2011, § 4; Waldron 2010a, 7–10. See also Moore 1997, 726; Moore 2007, 77–8.

prolongedness of the application of any such methods is obviously something that can vary markedly. While every instance of interrogational torture is a breach of a stringent moral duty, the gravity of the breach generally increases in direct proportion to the lengthiness of the torture and to the harshness or brutality of the techniques.

Among the reasons for the moral optimality of the interrogational torture in my variant of *Leon v. Wainwright* is that the techniques of torture applied to the kidnapper—the twisting of his arm and the choking of his neck—are undertaken for only quite a brief period and are unlikely to produce any permanent and very serious injuries. Though the pain induced by those techniques is certainly severe enough to be correctly classifiable as torturous, it is not likely to be physically, or psychologically debilitating over the long term. Similarly, the torture to be wielded by Jeanette against Bill in Steinhoff's scenario would not be very protracted. Though the pain elicited by it would be agonizing, it would not be likely to damage Bill's bodily and mental well-being over the long term or even over the medium term. Partly as a consequence, Jeanette's use of the pain-inflicting device against Bill would be morally optimal even though it would be morally impermissible.

### 3.3.3.2. *The exigencies of an emergency*

Among the contemporary philosophers and jurists who believe that interrogational torture can sometimes be morally justified, nearly everyone is focused on contexts in which the use of such torture is aimed at averting the occurrence of calamities. Those writers err in thinking that interrogational torture can ever be morally legitimate, but their concentration on dire emergencies is apposite—for only in such emergencies can the plying of interrogational torture ever be morally optimal. Only in such terrible circumstances can a duty that conflicts with the absolute duty-to-eschew-interrogational-torture be sufficiently stringent to exceed the latter duty in moral importance.

While the recent endeavours to justify the employment of torturous interrogational techniques have most frequently adverted to ticking-bomb quandaries in which the lives of thousands or even millions of people are imperilled, the employment of some such techniques can be morally optimal even in certain emergencies where the lives at stake are numerically on a much smaller scale. Steinhoff's scenario of Jeanette and Paolo recounts an emergency of that kind, and so does the scenario which I have modelled on *Leon v. Wainwright*. In each of those cases, someone desperately needs information in order to rescue one person or a couple of people from a dire fate. Because of that pressing need, and because the techniques of torture to be employed are toward the milder end of the spectrum, the wielding of those techniques can be morally optimal in either situation despite the small number of lives at stake—provided, of course, that in each situation there are reasonable grounds for believing that the use of those techniques is likely to be effective in extracting the vital information. No recourse to interrogational torture is ever morally permissible, but the recourse by the police in my scenario and the recourse by Jeanette in Steinhoff's scenario (if she had not been stymied from acting) are morally optimal. In each

predicament, the use of such torture can fulfil a moral duty even more stringent than the moral duty which the use of such torture contravenes.

### 3.3.3.3. *Threateningness and responsibility*

In my variant of *Leon v. Wainwright* and in Steinhoff's scenario of Jeanette and Paolo and Bill, the person to be subjected to interrogational torture is directly responsible for the extremely dangerous quandary that has given rise to the need for calamity-averting information. In each case, moreover, the person to be subjected to interrogational torture is posing a continuing threat by withholding the vital information. Those two closely related factors do not render the interrogational torture morally permissible, of course, but they do mitigate the gravity of its wrongfulness. Partly because of those factors, the interrogational torture in each case is (or would be) morally optimal.

The properties of threateningness and responsibility are scalar; people can partake of them to many different degrees. Hence, the extent to which those properties attenuate the gravity of the wrongfulness of interrogational torture in any number of settings is highly variable. What can be said at a general level, however, is that someone who does not partake of either of those properties in any given emergency is vested with an overtoppingly robust moral right against being subjected to interrogational torture therein. For example, if legal-governmental officials subject the young child of a terrorist to torture in the hope of extracting some calamity-averting information from the terrorist, they will have breached a moral duty that is even more stringent than any moral duty (relating to the safety of the public) with which they are seeking to comply. Though the dire circumstances that have prompted the perpetration of the torture do mitigate its enormity, any moral duties fulfilled are less important than the moral duties that are transgressed. No recourse to interrogational torture against an unthreatening and innocent person can ever be morally optimal.

### 3.3.3.4. *Probable efficacy*

As has been stated at the outset of this discussion of some general considerations that bear on the matter of moral optimality, I am assuming that the use of interrogational torture in any emergency under examination here would be in compliance with the Minimal Invasion Principle. Unless that principle is satisfied, no resort to calamity-averting interrogational torture (or any other kind of torture) can ever be morally optimal. Likewise, the employment of such torture is never morally optimal if there are hardly any reasonable grounds for believing that it will be efficacious. Though the grounds in question do not have to be highly specific, the absence of any reasonable basis for attaching a significant probability of success to the use of some envisaged technique of torture will hugely accentuate the gravity of the wrong that is constituted by any such use. Naturally, certainty is not required for the moral optimality of a decision to use torture—since well-founded certainty relating to any area of human interaction

is utterly unattainable—but reasonable grounds for a significant level of confidence are indeed required.

This point deserves emphasis because Steinhoff has ill-advisedly contended that even a tiny probability of success is enough to render permissible the use of interrogational torture for the purpose of averting a calamity (2006, 342–3). Of course, one reason for rejecting his contention is that the wielding of such torture is never morally permissible. However, even if he were referring to moral optimality rather than to moral permissibility, his position concerning the probable efficacy of torture would be untenable.

Steinhoff conjures up a situation in which the probability that the use of torture will succeed in averting a calamity is 0.000001. Though his example involves ephemerally incapacitative torture with a pain-inflicting gun, he adduces the example to make a point about interrogational torture. As he affirms, 'the application to the torture of ticking bomb terrorists and Dirty Harry kidnapers is obvious' (2006, 343). Squarely addressing the question whether any torture should be undertaken with such a vanishingly low probability of success, Steinhoff declares that 'I cannot even begin to make sense of the suggestion that, given these odds, the defender should not use the [pain-inducing] gun against the aggressor. Yes, the pain inflicted by the weapon on the aggressor is extremely unlikely to secure the survival of the defender, but there still is a chance that it will, so why should the defender forgo this chance for the benefit of the aggressor? Obviously, there is no reason' (2006, 343, emphases in original).

Despite Steinhoff's closing suggestion that his view of the matter is obviously correct, the appropriate retort to his view is in fact obvious. Let us assess his argument with reference to interrogational torture. Given the odds which Steinhoff specifies, the overwhelmingly likely upshot of any recourse to interrogational torture is not only the sully of the moral integrity of the perpetrators but also the occurrence of the calamity which the perpetrators have sought to prevent. Furthermore, the perpetrators will have administered the torture while knowing that it stands virtually no chance of attaining the purpose for which they are resorting to it. Hence, although the employment of interrogational torture would have been morally illegitimate even if it had been morally optimal as a desperate tack with a significant prospect of success in averting a calamity, the gravity of its wrongfulness is greatly augmented by the overwhelming odds against such success. Any recourse to interrogational torture under these circumstances will fall radically short of being morally optimal. Indeed, any recourse to such torture in these circumstances is not morally obligatory at all. There is no moral conflict. In such circumstances the abiding duty to eschew the use of interrogational torture is not countervailed by any conflicting moral duty, since—even in the context of a grim emergency—the officials responsible for public safety are not under any moral duty to proceed with torture that will predictably prove to be futile.

Very different is the situation recounted in my variant of *Leon v. Wainwright*, and very different as well is the situation recounted in Steinhoff's narrative of Jeanette and Paolo and Bill. When the police in my scenario twist the arm and choke the neck of the kidnapper in their custody, they have reasonable grounds for believing

that the severe pain inflicted by those methods of torture is likely to loosen his tongue. Their grounds for harbouring that belief are probably not very specific in relation to the particular suspect, but their general familiarity with the forcible restraint of wrongdoers is sufficient to provide a basis for the belief. Because of the significant likelihood that the methods of torture carried out by the constables will prove to be efficacious, and because of the other features of the situation that have been highlighted in the last few subsections, the recourse to those methods is morally optimal. Such techniques of torture are morally wrong, but they are less gravely wrong in the dreadful circumstances than would be the remissness of not resorting to them after the other feasible interrogational approaches have failed.

Similarly, Jeanette has a reasonably solid basis for thinking that her use of the pain-inflicting device against Bill will induce him to reveal the information that will save her life and Paolo's life. Though she probably does not have any detailed knowledge of Bill's psychology, her general awareness of the ways in which human beings respond to the drilling of the unanaesthetized roots of teeth is sufficient to ground her expectation that the pain-inflicting device will extract the vital information from Bill. In that respect, her situation differs pronouncedly from the situation of someone who knows that a torturous measure's chances of success are 0.000001. Unlike the latter measure, then, her use of the pain-inflicting device in a dire emergency can be morally optimal even though it is morally wrong.

### 3.3.3.5. Legal sanctions

Chapter 5 will explore at length the proper legal responses to any instances of torture that are undertaken by public officials or private individuals. For the moment, the present chapter will conclude by emphasizing afresh that the moral optimality of some such instances does not entail their moral permissibility. Though ephemerally incapacitative torture and edifying torture can sometimes be morally permissible, every other type of torture is morally wrong in all of its possible instantiations. Consequently, although calamity-averting interrogational torture can sometimes be morally optimal, it is in breach of a redoubtable moral duty even when it is indeed optimal. Given as much, and given that it involves some major physical or psychological violence, any wielding of such torture should trigger a reaction from the system of legal governance in the jurisdiction where it occurs.

This book's closing chapter will ponder in more detail the legal sanctions that are appropriate in the aftermath of acts of torture or attempted torture. At present, the key point is that the moral optimality of an instance of torture should not be legally exonerative any more than it is morally exonerative. Even when an instance of ephemerally incapacitative torture is morally permissible, it should evoke a legal reaction in the form of an enquiry into the circumstances that have led to the use of the torture (just as shootings of suspects by constables are routinely investigated in liberal democracies even when the shootings have been morally legitimate applications of force). *A fortiori*, when a morally optimal instance of torture is not morally permissible, it should evoke a legal reaction. It should be met with



the imposition of some sanction(s), whether collective or individual, and whether criminal or civil or institutional. Moral optimality uncombined with moral permissibility is no shield against such an imposition. Though the moral optimality of a morally impermissible act of torture does considerably extenuate the gravity of the act's wrongness and does therefore warrant a considerable reduction in the heaviness of any sanction(s) imposed, it does not eliminate altogether the need for some sanction(s). The torture has sullied not only the moral integrity of anyone who has perpetrated it, but also the moral integrity of the society on whose behalf the torture has been conducted. That society would be further tarnished if its legal system were to acquiesce in the commission of such a wrong. Hence, while this chapter accepts that calamity-averting interrogational torture can in some extreme circumstances be morally optimal, I am hardly suggesting that those circumstances are fully exculpatory. The closing pages of this chapter have not been aimed at letting anyone 'off the hook'.

## 4

## The Rationality of Deontological Constraints

My third chapter has argued that most types of torture are morally wrong in all of their possible instantiations. That absolutist position on the morality of torture is in need of some further defence here, for quite a few philosophers have queried whether such a position is reconcilable with the requirements of practical rationality. These doubters have in mind especially the agent-centredness of our duties to refrain from perpetrating acts of torture. While granting that those duties are operative in any ordinary contexts, the opponents of deontological constraints insist that the duties would be perverse if they continued to be binding in circumstances where the perpetration of acts of torture can lower the overall incidence of such acts. That charge of perverseness—amounting to a charge of irrationality—is what the present chapter will seek to rebut.

Chapter 1 has presented two ways in which deontological doctrines can be distinguished from consequentialist doctrines. First, whereas the former doctrines hold that the moral permissibility or impermissibility of many types of conduct is independent of the consequences that are likely to ensue from any instances of those types of conduct, the latter doctrines contend that the moral permissibility or impermissibility of every type (or instance) of conduct is determined fully by the consequences that are likely to ensue from the occurrence of the conduct. Second, whereas deontologists maintain that many of the moral duties incumbent on us are agent-centred, consequentialists declare that every moral duty is agent-neutral. Now, as Chapter 1 has remarked, these two ways of framing the deontology/consequentialism division are not really distinct; the second way is comprehended within the first as one of its chief aspects or implications. Nonetheless, the separate presentation of the agent-centred/agent-neutral dichotomy is salutary, since the insistence of deontologists on the agent-centredness of many of our moral duties is the leading point of contention in the debates between deontologists and their consequentialist opponents. It is the very point of contention that will be addressed sustainedly in this chapter.

As Chapter 1 has acknowledged, the consequence-independence of the impermissibility of various act-types is not per se tantamount to the absoluteness of our duties to refrain from those act-types. More specifically, then, the agent-centredness of those duties is not per se tantamount to the absoluteness of their sway. Threshold deontologists such as Michael Moore affirm that our duties to refrain from