

## **Restraints on the Treatment of Innocent Persons in State Responses to Large-scale, Terrorist Violence: the position in the United Kingdom**

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*Large-scale, terrorist violence.*

First, some matters of definition and scope. For the United Kingdom,<sup>1</sup> terrorist violence means violence intended to influence a government, or to intimidate the public or a section of the public, to advance a political, religious or ideological cause.<sup>2</sup> Although this is a broad definition, some forms of violence readily perceived as acts of terrorism, may, none the less, not fit snugly within its terms. For instance, some acts, regarded as terrorist acts, seem to be extreme forms of religious observance, sufficient unto themselves, such as the killing of infidels to attain the status of martyr, rather than an attempt to advance a cause in any programmatic sense. We shall not explore this complication, and for the purposes of this paper, we shall take such acts to be terrorist acts.<sup>3</sup> Furthermore, we shall not concern ourselves with the merits of the grievances, real or imagined, that lead persons to perform or support terrorist activity. We will make the blanket assumption that the United Kingdom is justified in using all proportionate means to suppress and minimise the effects of terrorist violence.

There is a large element of latitude in the phrase ‘large scale terrorist violence’. The idea behind the choice of this phrase is to limit discussion to situations where the stakes can reasonably be perceived to be very high. We shall be taking situations where terrorist violence is in the process of perpetration or where there is reason to think that a specific terrorist attack may be activated at any moment. Typically, in such circumstances, any effective intervention by the state will require an immediate response. Yet not invariably. Within the ambit of our discussion will be situations where a life-threatening device, or terrorist operatives are in a concealed place primed for immediate action, but where the decision to launch the attack has yet to be finally taken. Outside the scope of our discussion will be state action directed at thwarting future terrorist threats which have yet to resolve themselves as target directed plans. The terrorist projects which are our concern are in the process of realisation or are in a state of readiness fit for immediate implementation. And they are large scale events in that they threaten multiple deaths and many serious casualties, significant destruction of property and

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<sup>1</sup> The original intention was to discuss responses to terrorism without reference to a particular jurisdiction but as some of the discussion takes a prescriptive tone it was thought best to confine the discussion to the jurisdiction with which I am familiar. In strict terms, there is no criminal law jurisdiction corresponding to the territory of the United Kingdom, but rather the three separate jurisdictions of England and Wales, Scotland and Northern Ireland. There are no local differences relating to legal responses to terrorism that affect the central features of our discussion.

<sup>2</sup> Terrorism Act 2000 s.1.

<sup>3</sup> The 19<sup>th</sup> and early 20<sup>th</sup> century anarchist terrorists, indelibly portrayed in Conrad’s *The Secret Agent* (1907), were essentially nihilists for whom the explosion was the thing in itself. They were, in their time, regarded as terrorists just as much as their contemporaries, the Fenians, who, of course, had a coherent political rationale for their violent campaign. It is thought that anyone who uses violence with intent to cause general mayhem and apprehension will be regarded in the United Kingdom as a terrorist and fall within any special legal provisions relating to terrorists. The Terrorism Act 2000 s.1(3) provides that any serious violence against the person involving firearms or explosives is to be regarded as terrorism notwithstanding the lack of any political, ideological or religious cause. Although that will resolve the status of most terrorist acts done without reference to any achievable cause, it does so on too wide a basis. Many acts involving use of firearms will not be terrorist acts in any useful sense and the special powers of arrest and detention applicable to terrorist offences should not be invoked in those cases.

infrastructure, and general consternation. The threat of truly catastrophic events cannot be ruled out if terrorism should be with us for decades to come. But we will not consider state responses to terrorist threats of an existential dimension in this paper for the reason that there is no reason to think that the United Kingdom faces any plausible threat of that gravity in current circumstances.<sup>4</sup> It is important that assessments of the legitimacy of state action not be influenced by threats which have yet to pass a threshold of plausibility, a matter which to which we will return.<sup>5</sup>

When a polity which is reasonably cohesive is confronted with large scale terrorism, above all else, citizens will expect its government to be effective and resolute. For the large scale terrorist acts we have in mind, no democratic government could survive the electoral process if its responses were widely perceived to be weak and ineffectual. On the other hand, if a government is taken to have acquitted itself well in responding to terrorist attacks or in thwarting an imminent attack, its prospects of re-election should be considerably enhanced, particularly in a time of managerial, non-ideological politics. These observations are in no way intended to denigrate democratic politics. Responsiveness to the legitimate expectations of the electorate is a large part of the point of such arrangements. But the democratic process does contain problematic dynamics, which may have cumulative and wide ranging effects on law and policy. Our focus is on state responses at the very time of or while expecting an imminent and serious terrorist attack. Yet the threat of such attacks as a permanent element in any conception of the future of the United Kingdom, is a staple of daily British politics and has been a catalyst for legislative changes. In the United Kingdom, the actuality and threat of terrorist operations has been present since the late 1960's<sup>6</sup> and seems set to continue indefinitely.<sup>7</sup> In response to the threat of terrorism, we have resorted to special powers of search<sup>8</sup> and arrest,<sup>9</sup> pre-charge detention for interrogation<sup>10</sup>, reverse burdens of proof<sup>11</sup>, trials

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<sup>4</sup> For a very well informed and recent discussion of the risks arising from international terrorism, see Gardner, *Risk* (2008) chapter 11 and references therein. See too, Langewiesche, *The Atomic Bazaar :dispatches from the underground world of nuclear trafficking* (2007) which takes the view that the current risk of international terrorists possessing any form of usable nuclear capacity, including 'dirty' bombs, to be small although he considers there may be significant risks of nuclear terrorism in the longer term, should there be covert assistance from certain states.

<sup>5</sup> See note 87 and associated text.

<sup>6</sup> What may be considered the modern era of terrorism in the United Kingdom began when the Provisional IRA demonstrated a capacity to sustain a long term bombing campaign in mainland Britain. Happily, there are grounds for thinking that major terrorist events arising from the Irish question are not a present risk. The serious risk is currently perceived to come from what is sometimes termed jihadist terrorism which seems, in terms of the particular experience of the United Kingdom, to be a form of protest terrorism, executed by UK nationals or residents, with a large component of cultural enmity. There was a major jihadist terrorist event in London on 7.7.05 and there have been a number of unsuccessful attempts by jihadist terrorists to stage other large scale events. Apart from recent terrorist events occurring within the United Kingdom, there is a considerable institutional history of engagement with what were officially designated terrorist groups. Aside from Ireland, the imperialist history of the United Kingdom saw coercive measures taken by British agencies in the 20<sup>th</sup> century against movements officially portrayed as terrorists in what was then Palestine, and also Kenya, Malaysia, Cyprus and Aden. This colonial legacy was influential in terms of the formulation of law and policy implemented in Britain and Northern Ireland in matters such as special powers, interrogation techniques, and police/military relations: see further, Walker, *A Guide to the Anti-Terrorism Legislation* (2002).

<sup>7</sup> The cultural differences and power relations which shape the agenda of international jihadist terrorism have a long history and seemingly a long future: see for instance, Ruthven, *A Fury for God* (2002); Lewis, *Where Did It All Go Wrong?* (2002) ; Burke, *Al-Qaeda* (2003) .

<sup>8</sup> The Terrorism Act 2000, ss44;45 allow unlimited powers of stop and search in designated areas for articles which could be used in connection with terrorism following authorisation by a police officer of at least the rank of Assistant Chief Constable and confirmation by the Home Secretary within 48 hours. In deciding to stop and search, a police officer need not have reasonable grounds for suspicion that the person to be searched has terrorist related articles in his possession.

without juries,<sup>12</sup> offences based on a reasonable suspicion of facts rather than proof of facts,<sup>13</sup> widely drawn offences embracing conduct far removed from the commission or assistance of terrorist acts,<sup>14</sup> internment on ministerial order<sup>15</sup> and control orders imposed by a special tribunal, entailing a complete loss of liberty.<sup>16</sup> Control orders do not require a criminal conviction and are based on evidence sufficient to raise a 'reasonable suspicion' of terrorist risk. The evidence is not disclosed to the persons to be detained.<sup>17</sup> Some of this legislation has required derogations from the European Convention for Human Rights.<sup>18</sup> Interrogation methods and 'shoot to kill' arrest procedures have been the subject of adverse judgments against the United Kingdom before the European Court of Human Rights.<sup>19</sup>

It is beyond the scope of this discussion to evaluate the efficacy and the legitimacy of these responses to the terrorist threat. The only point to be made here is that there has been no political cost attached to the passing of these measures, at least in mainland Britain,<sup>20</sup> even though they contravene some of the most fundamental features of the common law tradition. Rather, a political price would likely have been paid by a government which set its face against such things. That said, there has been parliamentary and extra parliamentary debate on

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<sup>9</sup> The Terrorism Act 2000 s.41 provides that suspicion of involvement in terrorism is a sufficient ground of arrest: a specific terrorist offence does not have to be specified.

<sup>10</sup> Terrorism Act 2000 s.41 and Schedule 8.

<sup>11</sup> Following successful challenges to reverse burdens invoking Article 6(2) of the European Convention for Human Rights, for most terrorist offences, reverse burdens are reduced to an onus to produce evidence sufficient to raise an issue favouring the defence whereupon the burden of persuasion reverts to the prosecution: Terrorism Act 2000, s.118.

<sup>12</sup> Terrorism Act 2000 Part VII provides that for 'scheduled offences' a special court may be convened where a single judge acting as the sole arbiter of fact and law decides the case against the accused. There are appeals from his verdict in the normal way. These special courts are confined to Northern Ireland and reflect the divided community and the difficulty of empanelling juries which would have the confidence of citizens regardless of their allegiances.

<sup>13</sup> For example, s.57 of the Terrorism Act 2000 which makes it an offence to possess an article in circumstances giving rise to a reasonable suspicion that it might be used in connection with assisting or perpetrating terrorist offences.

<sup>14</sup> See Terrorism Act 2006, s5(1) (a): engaging in *any* conduct (emphasis supplied) in preparation for committing acts of terrorism.

<sup>15</sup> Civil Authorities (Special Powers) Act (Northern Ireland) 1922, reg 12 (SI 1956/191). Internment based on ministerial order has been confined to Northern Ireland.

<sup>16</sup> Anti-Terrorism, Crime and Security Act 2001 Pt. 4. Initially the control order scheme was confined to foreign nationals who could not be deported because of the risk of torture in the receiving country. The scheme was found to be unlawful on the basis of discrimination against foreign nationals by the House of Lords and the Terrorism Act 2006 extended the scheme to all persons present in the United Kingdom, irrespective of nationality.

<sup>17</sup> Security vetted counsel who will hear and see the evidence are appointed by the tribunal on behalf of those who may be made subject to control orders but they cannot present any part of this evidence to the suspect.

<sup>18</sup> Derogations can be made from the Convention in conditions of general emergency. The United Kingdom has obtained derogations in respect of internment (for Northern Ireland), pre-charge detention and control orders.

<sup>19</sup> *Ireland v the United Kingdom* (1978) 2 EHRR 251 (five separate methods of interrogation each found to constitute inhuman and degrading treatment within the terms of Article 3 ECHR); *McCann and others v the United Kingdom* (inadequate planning of procedures for using fatal force, entailing breach of Article 2 ECHR).

<sup>20</sup> In Northern Ireland, anti-terrorist legislation was acutely controversial and divisive. This did not have any repercussions on the level or kind of support for the major political parties of mainland Britain. To date, law and policy related to the jihadist terrorist threat has been stressful for community relations and was one of the influences leading to the formation of the Respect party, but it has not been a political issue in terms of the level and kind of support for the main political parties. In the electioneering associated with the contest to be London Mayor (April 2008), the claim has been made that the Labour candidate has actively courted what is termed the Muslim vote and has sought to depict the Conservative candidate as an anti-Muslim bigot: *London Evening Standard*, 2008, April 16<sup>th</sup>. The facts of the matter are far from clear.

the virtues and vices of the various tranches of terrorist legislation, where critical voices have at least been heard. Unless completely alienated from the political process and civil society, no-one can claim that terrorist legislation ‘was not in my name’. By contrast, there has been little discussion and no legislative initiatives in the matter of the subject of this paper, namely responses to terrorist attacks that are happening or which may be activated at any given moment. What are the rules of engagement for these eventualities? In particular, what legal restraints are there on the treatment of innocent persons if their drastic treatment by agents of the state is considered essential to respond effectively to a present attack or a specific attack which can be activated at any given moment?

*Innocent persons and state action.*

In strict criminal law discourse, innocent persons are those persons who, any previous convictions to one side, have yet to be convicted for any criminal offence at the time an agent of the state intervenes in a manner adverse to their safety or freedom. Clearly we need a less formal account of innocence for the purposes of our discussion. The following classes of innocent persons will be discussed:-

- (i) Persons caught up in terrorist operations such as passengers in hijacked planes, hostages in buildings under siege, or pedestrians caught in crossfire.
- (ii) Persons known by state agents to be innocent of any terrorist connection in the sense of committing terrorist acts or being complicit in terrorist acts but whose hard treatment may prevent or mitigate current attacks or specific, threatened attacks.
- (iii) Persons mistakenly assumed by state officials to be terrorists, either involved in or complicit in terrorist attacks, and who are mistakenly assumed to have the wherewithal to revoke or mitigate a specific threatened attack.

Why this focus on innocent persons? Part of the answer is that the legal position regarding forceful interventions to prevent present attacks or imminent terrorist attacks by persons who are in fact terrorists, is relatively straightforward. Invariably, such persons will be committing or be about to commit a crime and English law allows a person to ‘such force as is reasonable in the circumstances in the prevention of crime.’<sup>21</sup> If we remind ourselves that our concern is large scale terrorist acts, it is hard to envisage circumstances where the forceful, preventative interventions of state agents against the terrorists themselves are likely to be found unreasonable by a jury.<sup>22</sup> Where forceful interventions are made against persons who are not terrorists, the legal position becomes considerably more complex and uncertain.

It is this uncertainty that requires examination, particularly discussion of what restraints should be imposed on state preventative action. Certainly, if expressions such as the ‘war on terror’ are to be allowed a currency beyond rhetoric, concern must arise about the latitude that might be allowed to state agents in their treatment of innocent persons if the agent’s actions can be likened to the prosecution of a just war. There is, apparently, a wide,

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<sup>21</sup> Criminal Law Act 1967 s.3.

<sup>22</sup> The jury finds the primary facts and also resolves the normative issue. Merely because the defendant believes the force used to be reasonable does not raise a defence of mistaken belief as it is for the court, acting through the jury to impose the normative standard :*Owino* [1996] 2 Cr App R 128 explaining *Scarlett* [1993] 4 All ER 629. The courts frequently emphasise that juries, when judging the question of reasonableness, must seek to put themselves in the circumstances of the defendant, taking heed of all the pressures and fears that would have been present: see for instance *Palmer* [1971] 1 AC 814.

trans-cultural consensus against killing and harming non-threatening innocent persons, even in pursuit of outcomes highly beneficial from an impersonal perspective.<sup>23</sup> And yet we know such inhibitions may count for very little if a country takes itself to be facing an unjust, existential threat. One salient feature of *ex post* debate about events such as Dresden and Hiroshima is that their moral status is still keenly disputed. No one can plausibly deny that thousands of non-threatening persons were intentionally killed as a means to advance the defeat of the Axis powers.<sup>24</sup> Yet arguments are still put with great vigour that these killings of innocents were warranted responses to extreme circumstances.

Confining our observations to the United Kingdom, we will assert that the country is not in a state of war with terrorism, however that expression is taken. We should deal with attacks and imminent threats within constraints applicable to peace time, liberal democracies. We will examine the constraints that this conception of our polity will impose in relation to the three classes of innocent persons we have identified. But before that we must make some preliminary remarks on the distinction between justification and excuse in the context of terrorist emergencies because of the practical implications differing accounts of the distinction may have in terms of the legitimacy of state action.

### **Justification and excuse.**

When we come to examine specific cases involving hard treatment of innocent persons in the context of terrorist emergencies, we will conclude that even tokens of very hard treatment indeed may not involve illegal conduct on the part of officials. The absence of illegality may hold constant over a spectrum of circumstances, involving action taken against the terrorists themselves to cases where adverse action is taken against wholly innocent persons. For instance, D, an armed police officer, correctly identifies V as a man on the point of activating a bomb on a crowded tube train. D expertly kills V with minimum risk to passengers, saving many lives. By contrast D (1) unreasonably identifies V (1) as the man with the bomb and kills him. V (1) was an innocent man, leaving V free to detonate the bomb at the cost of many lives. It is certainly the case that D commits no offence in killing V<sup>25</sup> and it may well be the case that D (1) commits no offence when he kills V(1).<sup>26</sup> English law draws no formal distinction between the two cases in terms of verdict. If each man had been charged with murder, each man would be acquitted of murder (assuming, as seems likely, that D (1) would be acquitted of murder). In criminal law theory, the two defendants would be differentiated.

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<sup>23</sup> Hauser, *Moral Minds* (2006) pp 121-131. Hauser and his associates administered a Moral Sense Test ([moral.wjh.harvard.edu](http://moral.wjh.harvard.edu)) to 60,000 subjects across 120 countries. With great consistency, subjects from a multiplicity of cultural backgrounds expressed strong sentiments against killing innocent, non threatening persons as a means to some societal good. The consistency also held for age and gender. There was far less consistency where the killing was a side-effect of an otherwise good outcome.

<sup>24</sup> For an authoritative account of the nature and extent of the Allied bombing campaign in Germany 1945, see *United States Strategic Bombing Survey, vol 4* (1976) pp 7-10.

<sup>25</sup> This is not a formal proposition of law, yet it is most unlikely that a jury would find that the force employed was unreasonable.

<sup>26</sup> Although D (1)'s belief that V(1) was a suicide bomber was unreasonable, taking him beyond the protection of s.3, he will have the defence of mistake of fact if he believed, however unreasonably, in the existence of facts which would have justified the degree of force used had the belief been warranted by the facts: *Williams (Gladstone)* [1987] 3 All ER 411. For an argument that Article 2 (right to life) of the ECHR requires the conviction for offences in the case of state officials unless they possessed a reasonable belief that the circumstances required the use of fatal force see, Leverick, 'Is English Self- Defence Law Incompatible with Article 2 of the ECHR?' [2002] *Criminal Law Review* 347. But see Smith, 'The Use of Force in Public and Private Defence and Article 2' [2002] *Criminal law Review* 958.

We would say that D was justified and that D (1) was merely excused. Does this distinction matter in terms of the responses of state agents to terrorist threats?<sup>27</sup>

It is commonly said that a person who is justified is acting within the realm of right. Anyone who violently resists justified conduct offends. As the justified agent is exercising a right, he may call upon third parties to assist him and those third parties will act lawfully if they do so. By contrast, a person who is merely excused, leaves persons affected by his actions with their full range of options. V (1), knowing himself to be innocent, may lawfully defend himself against D (1) and anyone who is assisting D (1). So we can see that the distinction might matter very much in the context of fast reaction responses to highly dangerous events.

That being so, we require a serviceable distinction between those actions of state agents which are justified, and those which are merely to be excused.<sup>28</sup> For some theorists, justification is to be found in the external elements of concrete states of affairs (Vis dead because he was killed at the hands of D) rather than in the motivations and dispositions of those whose actions have brought into being that state of affairs.<sup>29</sup> From this objectivist perspective, if V was killed by D before he could detonate the bomb, only the external conduct of D and the consequences it brought about fall to be justified. It is not to the point, say, that D had no reason to believe that V was a suicide bomber: it is fine if D acted on some 'sixth sense' provided D is vindicated by the facts. Indeed, it is fine if we turn D into a private citizen killing V because he was his rival in love, as long as it turns out that V also happened to be a suicide bomber about to detonate a bomb.<sup>30</sup> Also in the clear would be D's friend S who came along to offer help and support in what he took to be a purely private matter. Contrast D (1), who on this occasion has killed V (1), on the basis of superior orders instructing him that V (1) was a suicide bomber who must be killed immediately. If it turns out that V (1) is an innocent man, D (1)'s conduct is at best excused, however reasonable it was for D (1) to comply with the order. V (1) would act lawfully in defending himself against D (1) and so too any persons helping V (1) to defend himself.

We may consider that these are questionable rules of engagement for state agents confronting or interrogating terrorists or those they reasonably take to be terrorists. Must we accept that justification is a fact of the matter thing and that the motivating reasons of agents are beside the point? On the contrary: there are no reasons of principle or policy mandating such a thin conception of justification.<sup>31</sup> To be sure, when things turn out for the best there may be relief all round. All things considered, it is a bad thing to shoot your wife's lover on a London tube train but this time the bad thing was in some senses a good thing as many lives were saved. But a justified thing? Surely not. Once we leave behind our euphoria at the way things worked out, we may revisit the case of D and take him to be a bad man who demonstrated how bad he was by killing someone for reasons of jealousy and revenge.<sup>32</sup>

Motivating reasons cannot be left out of account when determining whether a particular act or omission of the agent was justified. Sound and reasonable motivation can afford sufficient justification in its own right. Let us return to D (1), the armed police officer who has received an order from a superior officer to kill V (1). If D (1) acted reasonably in following this order, his actions in killing V(1) should be considered justified even should it

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<sup>27</sup> For the importance of the distinction for the criminal law generally see Fletcher, *Rethinking Criminal Law* (1978) chapter 10.

<sup>28</sup> For an excellent account of the nuances of the distinction see Greenawalt, 'The Perplexing Boundaries of Justification and Excuse' (1984) 84*Columbia Law Review* 1897.

<sup>29</sup> Robinson, 'Competing Theories of Justification; Deeds v Reasons' in Simester and Smith, eds, *Harm and Culpability* (1996) 45.

<sup>30</sup> Robinson, 'The Strange Case etc

<sup>31</sup> See Gardner, 'Justifications and Reasons' in Simester and Smith, *op cit*, 103.

<sup>32</sup> See further, Sullivan, 'Bad Thoughts and Bad Acts' [1990] *Criminal Law Review* 559.

turn out that V(1) was an innocent victim of circumstance ( and even should it be the case that P, D (1)'s superior officer made a bad mistake in identifying V(1) as a suicide bomber). There is something almost oxymoronic in asserting of the same token of conduct that it was the reasonable thing to do ( subordinate police officers should follow orders if their content is not patently illegal or obviously based on misinformation) and that D (1) should be merely excused for killing an innocent man. When we are excused for something we have done or failed to do, there is always the implication that we should try our best to avoid a similar mishap again. Excuses wear thin. But we would want D (1) to trust the judgment of his officers and follow his orders in the future. A reasons based account of justification is particularly in point for state agents who have to act quickly in circumstances of danger for themselves and others. Indeed there will arise circumstances where we would want such agents to act in drastic ways on the basis of rapid risk assessments. A decision, say, to destroy a passenger plane in mid-air may be reasonable and justifiable even if the decision takers are aware of the possibility that there may be an innocent explanation for the highly suspicious flight path.

Against this conception of justification is the claim that an account of justification which bases findings of justification on motivating reasons rather than on felicitous outcomes is not logically possible. The argument builds on the fact that inherent in the concept of justification is the notion of right. If a man without any justification or excuse is about to explode a bomb, he cannot legitimately use force on anyone who would prevent him from doing so. That will obtain even for the case of our fanciful example where a revengeful husband kills his wife's lover, unwittingly preventing many deaths from an explosion. The fact that the bomber would commit an offence on the husband if he acted violently by way of self-defence is said to demonstrate that the latter has right on his side, a right constituted by the facts of harm prevention, and not, of course, on his motivation. But the true explanation of why the bomber would commit an offence if he attacked the husband lies in the wrong that the bomber intends. If he intends to preserve his life in order to detonate his bomb, his acts need not be characterised as self-defence but as force employed in order to perpetrate murder. We need not be committed to the strange idea that the homicidal husband had in some primitive sense right on his side.

Of course, the position of victims of violence will differ in cases where the victim is a wrongdoer and where he is not. If D reasonably suspects that V is about to detonate a bomb and V is about to detonate a bomb, then clearly V has no right to defend himself against D. Yet if V is an innocent man, a strong inclination arises to allow him to defend himself against D, however reasonable D's suspicion of V. To allow him to do so seem to raise the spectre of logical impossibility again. On the position argued for here, we would want to say that D's reasonable suspicion about V justifies D's forceful intervention against V. Moreover, this justification is not something personal to D. If D is in a position to order S to assist him in killing V, S too is justified in assisting D unless he has good reason to know that V is innocent. But allowing V to defend himself does not require peeling away the justified status of D's conduct. It is well established that there is a right of self-defence against innocent threats.<sup>33</sup> There is no good reason to curtail the right of self defence with respect to innocent threats, to threats made by innocent persons who are merely excused rather than justified.<sup>34</sup>

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<sup>33</sup> Simester and Sullivan, *Criminal Law; Theory and Doctrine* (3<sup>rd</sup> ed, 2007) 710-12.

<sup>34</sup> The claim is made that unless an innocent threat is in some sense unlawful (tortious) or unjust there is no basis for the law to determine which innocent person can use force against or resist the other: Uniacke, *Permissible Killing-the Self- Defence Justification of Homicide* (1994) 158-93. But if it is accepted, as it generally is, that if D's life depends on it, he may, for instance, remove by deadly means V who is blocking the route to safety through immobility caused by fear, or even undue size, the unlawfulness and injustice brought to the party by V are hard to discern. The position seems to be that if D is in mortal danger, he can use force against V if V is

Even if V is aware of the circumstances which make him a plausible suspect from the perspective of D, there is no duty of self sacrifice.

We will now go on to discuss in what circumstances drastic yet justified action can be taken by state agents against innocent persons in the three classes we have identified. If certain drastic actions may be justified if state agents are in possession of the true facts, we will also hold them to be justified on the basis of facts they reasonably perceived and believed in good faith to be the case, even if their perceptions are at variance with the true facts. Further, we will allow action to be justified if it is taken in good faith on the basis of the best risk assessment that can be made in circumstances requiring prompt action, notwithstanding awareness on the part of officials that they may not be in possession of the full facts.

### **Drastic treatment of innocent persons.**

(i) *Innocent persons caught up in terrorist operations.*

Police and other state agencies will confront situations where to take any effective action against terrorists will almost certainly bring about the death or injury of persons who, through no fault of their own, are in close proximity to terrorists in operational mode. These situations are only too familiar: passengers on scheduled flights; hostages in buildings; pedestrians in the line of fire and so forth.

We will focus our discussion on passengers caught in a plane hijacked by terrorists. The most clear cut situation will be where state authorities take themselves to have reliable information of the terrorist objective in hijacking the plane and where carrying out the objective – crashing the plane into a tall building – will bring about the death of everyone on the plane and is highly likely to kill many hundreds of persons occupying the building. We may start with what in such terrible circumstances appears to be the best case response, namely diverting the plane by means which do not cause death or injury, hoping to ensure any ensuing crash, were it to occur, takes place in circumstances where deaths and casualties are minimised. Given some form of tragic outcome seems inevitable, and that a failure to consider the available options would be a dereliction of duty,<sup>35</sup> this seems the best thing the responsible authorities should do, whenever possible. To be sure, not everyone will be enamoured of this option. The inhabitants of the small village who survived the impact of the crashing plane may well experience deep anger against the state, as well as the terrorists, as they contemplate a scene of death and destruction.<sup>36</sup> Yet none of the canonical objections to

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preventing his escape unless D would be usurping a place of safety already lawfully obtained by V. Self preference is permissible in such deadly circumstances, a principle that applies to the situation of an innocent V about to be killed by an innocent D. Both parties are lawfully entitled to use proportionate force against the other, which is not tidy but it is not a logical contradiction. See further, Montague, 'Self-Defence and Choosing between Lives', (1981) 40 *Philosophical Studies* 207.

<sup>35</sup> As well as the specific responsibilities that state officials will have under applicable legal and administrative regimes, Article 2 of the ECHR places a responsibility on the state and its officials to take proportionate, anticipatory measures to minimise the loss of life in circumstances where state responsibility is engaged: *Osman v United Kingdom* (2000) 29 EHRR 245.

<sup>36</sup> Although the anger is understandable and should not be reproved of, it does not rest on any ground of grievance against the state and its officials if we take the view that the cause of the death and destruction did not originate with the state and that the state owed a general, impersonal duty to mitigate the quantum of death. A ground of grievance might arise if the state fails to pay adequate compensation to those who have sustained personal and material losses as a result of the crash. Those adversely affected have paid a price exacted for the benefit of society as a whole and should be adequately compensated from public funds.

the taking of innocent life appear to have been breached by the state.<sup>37</sup>

But of course the diversion option may not be available. The authorities may be confronted with a situation where a plane can only be prevented from crashing into what seems its intended target—the houses of parliament; a full Wembley stadium—by its destruction in mid air, something which if successfully done will entail the death of everyone on board. The terrorists and the innocent passengers will be intentionally killed<sup>38</sup> by the authorities to avert the deaths of innocent persons who, unlike the unfortunate passengers, are not virtually certain to die irrespective of what the state may do. The German Federal Supreme Court has adamantly set its face against the intentional killing of innocent passengers by the state in such circumstances.<sup>39</sup> For the purposes of the judgment,<sup>40</sup> it was assumed that many innocent persons, including the trapped passengers, would be killed when the plane was crashed by the terrorists. Yet no innocent, non-threatening lives could be precipitately taken to avert that catastrophe. It was not in point that the innocent passengers would be doomed in any event when the plane crashed at the hands of the terrorists. Neither did numbers matter. The analysis does not change if there is but one innocent passenger aboard no matter how many lives will be lost in the building when the plane crashes. What mattered for the court was that to intentionally kill an innocent person for the benefit of others was to treat that person as a means to someone else's end, which was to treat that person as a mere object, something that contravened the Basic Law of the German constitution.

What is the position for England and Wales? The starting point would be s.3 of the Criminal Law Act 1967 which allows the authorities (and any one else) to use such force as is reasonable in the circumstances. It is well accepted that killings can be justified as reasonable if the preventative force is proportionate and directed against a wrongdoer. There is no guidance to be had whether an English appellate court would find that it is within the terms of s.3 to kill one or more non threatening innocent persons, seemingly virtually certain to die in any event, to secure the lives of other innocent persons not doomed to die should the other set of innocents be killed sooner at the hands of the state rather than later at the hands of the terrorists. Some guidance can be obtained from cases concerned with the (in English law) fitfully recognised general defence of necessity,<sup>41</sup> where the preponderant opinion is that non-threatening lives cannot be lawfully taken,<sup>42</sup> but our circumstances have not arisen.

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<sup>37</sup> Even if on some versions of causal salience the state can be portrayed as a causal agent in the deaths (and a deflection scenario can be rendered in different ways), the deaths of the villagers are a side-effect of the state's life saving strategy rather than a means to the saving of lives: Finnis, 'Intention and Side-effects' in Frey, and Morris, eds, *Liability and Responsibility* (1991) 32.

<sup>38</sup> There is some English authority which would support the conclusion that the deaths of the terrorists are intended whereas the deaths of the passengers are merely foreseen: *A (children)* [2001] 1 Fam 147 (Walker LJ). Yet even though the deaths of the terrorists does not logically entail the deaths of the passengers (there are possible worlds where the passengers float to earth unharmed) under our current understanding of the state of the world it seems difficult to drive a wedge between the intentional destruction of a plane in mid-air and the intentional killing of everyone aboard, albeit some killings will be regretted more than others.

<sup>39</sup> Judgement of the German Federal Constitutional Court of February 5, 2006, [www.bverfg.de/entscheidungen/rs200060215\\_1bvr035705.html](http://www.bverfg.de/entscheidungen/rs200060215_1bvr035705.html). I am much indebted to Professor Michael Bohlander for conversations about this case and also his article, 'In *Extremis* ? Hijacked Airplanes, "Collateral Damage" and the Limits of the Criminal Law' [2006] *Criminal Law Review* 579.

<sup>40</sup> The judgment was assessing the constitutional propriety of s.14(3) of the Air Traffic Security Act 2005 which provides:-

"The direct use of weapons is only allowed if under the circumstances it must be assumed the airplane will be used against the lives of human beings and that such use is the only means of averting the present danger."

This provision was declared unconstitutional and void.

<sup>41</sup> Simister and Sullivan, *Criminal Law :Theory and Doctrine* (3<sup>rd</sup> ed, 2007) 713-724.

<sup>42</sup> Innocent life was taken under the head of necessity in *Re A (Children)*, *op cit* note 38 ( Brooke LJ) but on the very particular facts of separating conjoined twins where one twin had excellent life prospects were she

Consideration would have to given Article 2 of the European Convention for Human Rights (guarantee of right to life) which is now part of domestic English law.<sup>43</sup> There is not much guidance here. The article allows lives to be lawfully taken if ‘absolutely necessary...in defence of any person from unlawful violence’. The lack of guidance stems from the entirely reasonable and unavoidable fact that the right to life of the passengers and the right to life of the occupants of the targeted building are within the circle of concern of Article 2. While the Article 2 jurisprudence imposes in certain circumstances a pro-active duty on the state to install measures that will save lives,<sup>44</sup> there is no hint in this jurisprudence whether these prophylactic measures can encompass the taking of innocent lives to save other innocent lives.

The fact of the matter is that if an event reminiscent of 9/11 were on the radar in the United Kingdom, what reactions would be lawful reactions is far too conjectural a matter. This is highly unsatisfactory, not least for those whose duty it is to decide what to do and order others to do it. Specific legislation covering such eventualities is highly desirable<sup>45</sup> but unlikely in the United Kingdom any time soon. For what it is worth, it is considered here that such legislation should allow the taking of innocent lives to save other innocent lives when the set of innocents to be killed appear virtually certain to die in any event, on the basis of one or more reasonable assumptions. This empowerment should cover not only situations where the catastrophic terrorist event seems virtually certain but also where it seems likely on a balance of probabilities on the basis of the best risk assessment that can be made in the circumstances. It is considered that this scheme is just as between the two sets of innocent persons. Although the state must be even-handed in affording protection to all innocent persons present in the jurisdiction, it is entitled to take into consideration the fact that some persons are beyond protection. Arguably, it owes a duty under Article 2 to focus its protection on those who can be saved. If allowing events to take their course will likely ensue in the deaths of those who can and cannot be saved, it is not unreasonable to assert a breach of Article 2 in respect of the failure to take measures in favour of those who could have been saved.<sup>46</sup>

We should emphasise that we are discussing state action. We should allow a defence, akin to conscientious objection, for any private citizen who refuses to participate in state action involving the taking of innocent life, even though it is arguable that they were legally obliged to participate.<sup>47</sup> But it may be the state’s duty to take innocent life because of public law duties owed to all its citizens.<sup>48</sup> There are also strong reasons of policy for following this approach. Abstaining from intervention may allow the terrorists to carry out their project with all its propaganda value. The purist German approach gives terrorist group a valuable trump card. In a airplane scenario, if the authorities are aware that at least one innocent is aboard, non-life taking diversion seems the only permissible response. That option may not be

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separated from a non-viable twin whose physiological demands would have entailed the deaths of both twins within approximately 18 months should a separation operation not be carried out.

<sup>43</sup> The Human Rights Act 1998 makes the ECHR a direct source of English law.

<sup>44</sup> See *Osman*, *op cit* note 35.

<sup>45</sup> As has been done in a number of jurisdictions: see Bohlander, *op cit* note 39, at 588-590.

<sup>46</sup> This assumes that a non-denominational state with a population of different faiths and no faith should take decisions of this kind on the basis of what may be termed ‘secular rationality’ decisions which may well offend against the strictures of particular religious interpretations; see further Sullivan, ‘Ministering Death’ (1997) 17 *Oxford Journal of Legal Studies* 123 at 134.

<sup>47</sup> For instance, a civilian air traffic controller may find herself in a situation where contractually she is obliged to assist a process intended to result in the death of innocent passengers. If that should offend against her deepest moral beliefs she should be entitled to disengage even though the state may be empowered by its general duty to its citizens to take some innocent lives.

<sup>48</sup> See note 46 and associated text.

available.

- (ii) *Innocent persons known not to be terrorists or complicit with terrorists but whose harsh treatment may avert or mitigate terrorist attacks.*

Consider the following facts. D and his terrorist group have bombed a London night club causing much death, serious injury and destruction. Shortly after, they bombed a Glasgow air terminal to like effect. D and his group have let it be known that other bombings of places of public resort are imminent. The current whereabouts of the group are not known but they are believed to be hiding somewhere in the United Kingdom, preparing further attacks.

The police have taken into custody V, the wife of D, and E, their three year old daughter. The responsible officer P does not suspect V of any involvement or support for D's terrorism but he is convinced that V knows where D and his group are hiding. He proposes to use all means necessary, including her torture, in the endeavour to find out from her where D currently is. Should this drastic treatment of V fail to produce this information, he proposes to threaten V that E will be tortured and should V still prove obdurate, to simulate the sounds of torture of a young child from an adjoining room. As a very final resort, he is prepared to have E tortured in front of V.

It requires no imagination to appreciate the pressure on the responsible authorities to bring these atrocities to an end. If we want to use our imaginations, we can feed in some of the nightmare possibilities that the security forces are obliged to take seriously in terms of long term planning and resource allocation. We can make the bombs effective biological weapons or portable nuclear devices, and sketch in details of the devastation already caused. But we will stay with the example given, which is well within the range of the currently possible.<sup>49</sup> The facts that we have posed would place enormous pressure on the authorities to respond effectively. There is no need to bring into the discussion dangers yet to be faced: indeed it is not useful to do so.<sup>50</sup>

We will conclude that there are some responses that cannot be entertained either under law or at morals, notwithstanding a reasonable assumption that they may help bring the bombings to an end. We will argue that the matters to be discussed are exhaustively discussed within the spheres of law and morality. Putting to one side for now truly existential threats, we will resist the idea that when things get bad enough, we can leave law and morality behind because they have nothing useful to say when figuring a response to extreme circumstances.<sup>51</sup>

What can be legitimately done to V?

Under current English law, it is a criminal offence to fail to disclose information which he knows or believes might help or prevent another person carrying out an act of terrorism or might help bring a terrorist to justice in the UK.<sup>52</sup> Under the regime allowing pre-

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<sup>49</sup> In December 2007, a car parked outside a London nightclub crammed full of high grade explosives failed to detonate despite best efforts. Some days later, an attempt to drive an explosive filled 4 by 4 vehicle into the crowded concourse of a Glasgow air terminal was thwarted at the point of entry. Both incidents have been attributed to the same terrorist group.

<sup>50</sup> See further at note 91 and associated text.

<sup>51</sup> See Williams, 'A Critique of Utilitarianism' in Smart and Williams, *Utilitarianism, For and Against* (1973), 93 questioning the appropriateness of moral appraisal in circumstances lacking 'minimum sanity'. For criticism see Bennett, *The Act Itself* (1995) 167-171.

<sup>52</sup> Anti-Terrorism, Crime and Security Act 2001, s.117.

charge detention of those suspected of involvement in terrorism or terrorist related offences could be invoked to detain V for questioning.<sup>53</sup> What physical and psychological pressure could lawfully be brought to bear on V? As we have had cause to mention, English law permits the use of 'such force as is reasonable in the circumstances' in the prevention of crime.<sup>54</sup> Although, controversially, the use of fatal force to arrest someone taken to be a terrorist in order to prevent his escape and the commission of future terrorist offences (the man shot was merely a joy-rider failing to stop at a manned barrier) has been considered permissible,<sup>55</sup> it has never been claimed that any degree of force can be used when interrogating innocent persons about the whereabouts of dangerous and currently active terrorists. The conventional view would be that an official who uses or even threatens force would commit a criminal offence. Furthermore, if serious violence were used and it could be said to be officially condoned or insufficiently safeguarded against, the United Kingdom would be in breach of the European Convention for Human Rights which proscribes in all circumstances the infliction of inhuman and degrading treatment.<sup>56</sup> It may well be that if the suffering endured by V is extreme, officials ordering and inflicting the treatment would be guilty of the crime of torture.<sup>57</sup> If the torture were officially condoned or insufficiently safeguarded against, the United Kingdom would be in breach of the European Convention and the United Nations Convention,<sup>58</sup> instruments which unequivocally ban recourse to torture by parties to these conventions. If the suffering endured by V in consequence of the imagined or real suffering of E reaches the requisite thresholds, inhuman treatment and torture may well occur against V, with the legal consequences outlined above including personal criminal liability on the part of officials ordering and inflicting such treatment.

There seems here a concordance between the legal position and the correct ethical response to V's situation. Failure to disclose knowledge of the whereabouts of a criminal who is about to commit a crime has never, without more, been regarded as a sufficient basis for liability in the offence as an accomplice.<sup>59</sup> As we have noted, V would be guilty of a lesser statutory offence than the principal's.<sup>60</sup> V could be vigorously questioned about where D is in order to lay the ground to charge this offence but that would be all. Were it otherwise, there would be a radical shift in power between the state and its subjects, quite incompatible with a liberal democracy. Apart from any offences committed against V, any evidence associated with the use of force would be inadmissible. But, of course, a liberal democracy enduring a series of terrorist attacks with the immediate prospect of more of the same, is a democracy being attacked by the most undemocratic of means. Are exceptional protective measures warranted here?

Michael S. Moore would say that they were.<sup>61</sup> It seems that he regards a person withholding information germane to the prevention of terrorist acts as effectively in the same moral case as terrorists themselves. He claims that a person with information concerning a

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<sup>53</sup> Terrorism Act 2000 s.41 and schedule 8.

<sup>54</sup> Criminal Law Act 1977, s.3.

<sup>55</sup> *Kelly* [1989] NI 341. Surprisingly this decision was not taken to contravene Article 2 of the European Convention: *Kelly v UK* (1993) 74 DR 139. As Sir John Smith remarked, how can a shooting carried out with intent to kill be characterised as an arrest? Essentially, it was an extreme use of preventative force, directed at crimes to be committed at some unascertained time and place: Smith, 'The Right to Life and the Right to Kill in Law Enforcement' (1994) 144 *NLJ* 354.

<sup>56</sup> Article 3.

<sup>57</sup> Criminal Justice Act 1988, ss. 134;135.

<sup>58</sup> Convention against Torture and other Inhuman and Degrading Treatment (entered into force 26<sup>th</sup> June 1987).

<sup>59</sup> If a person has some special legal responsibility to control the conduct of another, a failure to exercise that control by way of encouragement or assistance to the principal offender is sufficient for complicity in the principal's offence but not otherwise: Simester and Sullivan, *op cit* 204-207.

<sup>60</sup> See note 51.

<sup>61</sup> Moore, 'Torture and the Balance of Evils' (1989) 24 *Israel Law Review* 280.

terrorist threat effectively becomes part of the threat itself if she fails to make available information that would negate or mitigate the threat.<sup>62</sup> Although there may be some intuitive appeal to this conception of the constituents of the threat, it goes beyond the boundaries of complicity recognised by English law.<sup>63</sup> There may be all manner of reasons falling well short of any parity of culpability with the perpetrators, why a person might not reveal details of what she knows of the crimes of others. Hence a specific and lesser offence of failing to disclose information about terrorists was created. From our perspective, V may be regarded as innocent of any terrorist connection if the most that can be proved against her is that she knows where D is. For Moore however, on establishing a moral equivalence between V and D, undermining her innocent status, he considers that she can be treated for the purpose of interrogation as a terrorist. He considers that a democracy under attack by terrorists is entitled to use all means against terrorists, including torture, to ward off terrorist attacks.

But what of the cut and dried legal proscriptions, domestic and international, which deny recourse to torture (and inhuman and degrading treatment) against any person in any circumstances? In the extreme circumstances of terrorist attacks, he considers that the defence of necessity trumps these prohibitions, and justify torture used to prevent or mitigate the death and injury of innocent people.<sup>64</sup> Moore's judgment of what kind of treatment can be meted out to V by interrogators is highly problematic. Any torture she endures will involve suffering of an intensity beyond any lawfully imposed criminal punishment. And, of course, she may not know where D is. The fact that P is convinced that she does may not be borne out by the facts.

What can be legitimately done to E?

We can be brief in terms of the position under English law. Taking E into custody for reasons unconnected with her health, safety or general welfare will constitute criminal offences on the part of those who ordered and maintained her detention.<sup>65</sup> Any physical or psychological mistreatment of E will constitute criminal offences. One would anticipate that English courts would summarily reject any argument that the mistreatment of E constituted reasonable force in the prevention of crime, and would not allow that justificatory claim to negate any crimes on the part of responsible officials *even if the mistreatment of E coerced V into revealing the whereabouts of D*. That children in the position of E should be left safe and unharmed is for all intents and purposes a moral absolute.

For Moore, the inviolability of E is not a moral absolute. He does lay great stress on the moral gravity of torturing innocent persons. Yet the anchor can be pulled up:<sup>66</sup>

'To justify torturing one innocent person requires that there are horrendous consequences attached to not torturing that person—the destruction of an entire city or, perhaps, of a lifeboat or a building full of people. On this view, in other words, there is a very high threshold of bad consequences that must be threatened before something as awful as torturing an innocent person can be justified.'

It is suggested that Moore's threshold is not high enough, at least for the situation that currently obtains in the United Kingdom. Though qualified by a 'perhaps' it seems that the threshold is not set at some truly existential threat but would cover circumstances such as our

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<sup>62</sup> *Ibid*, 333.

<sup>63</sup> See note 58.

<sup>64</sup> *Op cit*, note 60, 340-342.

<sup>65</sup> Child abduction; kidnapping.

<sup>66</sup> *Op cit*, 330.

example. His views are of particular interest because they are held not by someone with a utilitarian or consequentialist view of the criminal law but by someone who is a hard-edged retributivist, with a belief in values which are firmly grounded in 'moral reality'.<sup>67</sup> Interestingly, he agrees that proscriptions of torture of innocent persons should be cast in absolutist terms.<sup>68</sup> And yet he takes the position that even an adherent to the principle that torture of innocents should be completely and unequivocally proscribed, can, consistent with that position, hold that that norms cast in absolute terms can be breached if the cost of keeping the norm becomes too high. He insists that he is not a deontologist who becomes a Shavian consequentialist when the cost of observance becomes too high. Rather, he claims his position rests on a true understanding of the nature of moral norms. For him, there is no such thing as a value which retains its value in all possible states of the world. If the cost of adhering to the value becomes too high in terms of horrendous consequences, we go beyond the field of application of that value. It becomes not worthwhile in terms of the best interpretation of a non-consequentialist morality to intransigently hold to one value if observance comes at too great a cost to other values, such as saving innocent lives. This is not to defect to a non-agent relativist consequentialism argues Moore. It is an avoidance of Kantian excess and an acceptance of the incommensurability of values which, when taken individually, may still be conceived in absolute terms.<sup>69</sup>

It is thought a tenable reading of Moore to state that the prospect of the further deaths and injury to innocent persons in our example would justify the torture of the innocent E, should all else fail in terms of yielding the information so desperately required.<sup>70</sup> Yet such a conclusion is enormously problematic in terms of principle and policy. A contrast between the deaths and injury of many hundreds of innocent persons on the one hand and the torture of one innocent person on the other, is too stark and atomised. For a liberal democracy, the proscription on torture is among other things a declaration of the terms on which we wish to live as a politically organised society. It is a decision which is taken *ex ante* and which is intended not to be revised while the form of life that, all things considered, we wish to live remains feasible. The possible loss of innocent life that may be entailed from abstaining from torture is factored into the decision to renounce its use. Similar decisions have been taken by many democracies in relation to renouncing the death penalty. And indeed the cost in innocent lives is conjectural and contested. The effectiveness of torture as a source of reliable information and the efficacy of the death penalty as a deterrent are highly contested empirical questions.<sup>71</sup> In the context of the United Kingdom, the threat from terrorism is presently nowhere close to existential levels.<sup>72</sup> The horror that is torture can be refrained from without

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<sup>67</sup> Moore, 'Moral Reality' (1982) *Wisconsin Law Review* 1061.

<sup>68</sup> *Op cit*, note 60, 340-342.

<sup>69</sup> It is hoped that this is a fair if brief rendition of a complex argument. In candour, I find the difference between Moore's deontological position and a consequentialism *in extremis* position, difficult to grasp.

<sup>70</sup> When elaborating his view that the avoidance of horrendous consequences may justify torture of the innocent, Moore does not make any age related exemptions. Earlier in his article (at 292) he states that the torture of children for consequentialist gains is 'morally repugnant' and that, 'No-one should torture innocent children-even when done to produce a sizeable gain in aggregate welfare.' It may be that Moore would hold to the impermissibility of torturing children in all circumstances despite his claim that there are no moral absolutes when the cost of observance is too high.

Recall that persons with information about terrorist activities which they do not divulge to the responsible authorities do not, for Moore, come within the class of the innocent. Accordingly, for him, the innocent are those not involved in terrorism or who have not failed to divulge their knowledge of terrorist activities. Therefore, the most obvious reason for torturing persons within the class of innocents so defined is to encourage disclosures from those outside the class.

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<sup>72</sup> Very recently the UK Government published its national security strategy ([www.guardian.co.uk/politics/2008/mar/19/terrorism.uk.security](http://www.guardian.co.uk/politics/2008/mar/19/terrorism.uk.security)) where it is stated that the United Kingdom was

threat to the fundamentals of our liberal democracy. A commitment to abstaining from torture entails abstaining from its use even at the cost of some innocent lives.

Arguments from policy add to the case for abstinence from the practice of torture. In our example, P, the responsible official is 'convinced' that V knows where D is. Even if we accept that it is morally permissible to torture persons who are not themselves terrorists nor complicit with terrorists in an attempt to stymie imminent and large scale terrorist attacks (something we do not accept) it is in practice inevitable that many acts of torture will not produce useful information. P's conviction that V knows D's whereabouts and that torturing E will cause her to reveal them may be well founded and the torture of E may avert a serious terrorist attack. But there all manner of alternative possibilities which will entail that the torture is futile suffering and, among other things, a great disadvantage in the cultural struggle against terrorism. In the context of the United Kingdom, we may note that all the post Irish settlement terrorist attacks, either successful or thwarted, have involved persons who are UK citizens or persons settled in the United Kingdom with a legal right of abode. If D falls within either class, there may well be many persons in the jurisdiction, in addition to V, who may be reasonably suspected of knowing D's whereabouts or his plans. Consequently, there would be a considerable risk of several episodes of futile torture, increasing community tensions.

We conclude that for the United Kingdom at least there are no grounds for changing the legal position with respect to the treatment of E.

- (iii) Persons who are assumed by officials to be terrorists or complicit with terrorists but in fact have no terrorist connection and no knowledge nor influence on future terrorist attacks.

When D and his group successfully exploded a bomb at a London night club, causing much death and destruction, F just happened to be in the vicinity. He correctly guesses the nature of the incident and as a jihadist sympathiser he is in a state of exultation, a state that continues when he is arrested some moments later by the police, who have descended in numbers. On questioning in custody he falsely claims to be a member of the terrorist group that carried out the attack and assures his questioners that there are many attacks to come. Although in great sympathy with Islamist terrorism, he has been uninvolved in terrorist activity and has no knowledge of the plans of any terrorist group.

What can be legitimately done to F?

In assessing the propriety of anything done to F while he is in custody, we take as the basis for appraisal what it was reasonable for officials to believe concerning the terrorist proclivities of F. Our discussion will precede on the basis that it was reasonable for officials to adopt a working assumption that F is a member of D's terrorist group and that he has knowledge of the immediate plans of that group.

In terms of the formal legal position there is little to choose between the position of V and that of F. There is a legislative power to detain F before any charge is brought<sup>73</sup> and we can assume intensive and lengthy interrogation with little respite for sleep when he is first taken into custody. But he cannot be physically mistreated in any way, nor put under psychological pressure which results in psychiatric harm. If working within these parameters

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estimated to face 30 known terrorist plots, with monitoring of 200 networks and 2,000 individuals. No reference is made to risks arising from terrorist operations involving nuclear or biological weapons.

<sup>73</sup> Terrorism Act 2000, s.41 and schedule 8.

produces no useful information (and F has no useful information to give) there are no coercive resources legally available to investigators, save for continued detention and questioning.

In the literature on responses to terrorism, there is a commonly expressed empirical claim that officials responsible for the interrogation of terrorists will not allow formal legal restraints to inhibit the use of effective means of investigation.<sup>74</sup> Furthermore, there is some support for the view that officials should not allow legal norms to hamper the investigation, particularly in cases where it is reasonable to assume that the suspect is an active terrorist possessed of information concerning imminent terrorist activity.<sup>75</sup> Certainly, for our case, if P was prepared to countenance the torture of V and E, it would be perverse under his terms of reference, not to order the torture of F, if there is a sense that there is information to be had and all else has failed to obtain it. As described above, under the explicit legal norms in play, the torture of F is unequivocally proscribed in English law. And yet explicit norms can be rendered inapplicable juridically, if there is a legally recognised form of justification to block the application of the norm.

The justificatory claim again would be that the torture of F to obtain information of imminent terrorist attacks would be 'reasonable force in the prevention of crime'. Nothing would change in substance if the ground of justification claimed was general necessity.<sup>76</sup> We found that this justificatory claim failed in the cases of V and E. The failure was based on the implicit yet embedded right of innocent persons not to be used as a means to the end of crime prevention, however efficacious a means their bodily and mental mistreatment might prove to be. The only way that V plausibly became a presumptive candidate for lawful mistreatment was to turn her silence into a form of collusion with the terrorist group, a move we found to be unconvincing. From the vantage of our privileged access to the true facts of our case, we know that F too is innocent. But that is not how he will be perceived by those officials responsible for obtaining information from him. From their perspective, he seems to be a member of a continuing terrorist conspiracy. He has participated in a recent terrorist atrocity and claims to know about further atrocities. Do these reasonable assumptions concerning F change the analysis in terms of his right not to be tortured?

English courts should resolutely protect F's right not to be tortured (we will leave lesser forms of mistreatment to one side for now). Two binding treaty obligations oblige the United Kingdom to ban recourse to torture in all circumstances and to make torture a criminal offence. History and morality make a compelling case for the unyielding proscription of torture. If it were wished to hollow out a commitment against torture yet retain the façade of proscription, recourse to necessity is the best implement to hand.<sup>77</sup> Necessity is essentially based on consequentialist assumptions uncertainly mediated by the current state of play within a jurisdiction regarding what constitutes a fundamental right. F's entitlement to his right not to be tortured can be undermined by making his failure to reveal the whereabouts of D's terrorist group part of the continuing threat presented by the group. Though conceptually

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<sup>74</sup> For instance, the controversial proposal from Dershowitz for judicially authorised torture warrants is premised on a firm assumption that torture whether officially sanctioned or not is certain to occur where information is urgently required concerning terrorist attacks: Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (2002).

<sup>75</sup> For a useful collection where considered statements favouring torture in certain circumstances are made by some distinguished contributors see Levinson, ed, *Torture: a collection* (2004).

<sup>76</sup> In the absence of a criminal code, there is no a statutory provision creating a necessity defence, but it is fitfully recognised at common law, *Simester and Sullivan, op cit*, 713-723. As elsewhere, the defence rests on a balance of harms approach but with uncertain limits imposed by fundamental rights.

<sup>77</sup> Moore, *op cit*, note 67 favours absolute provisions prohibiting torture which, as we have discussed yield to the defence of necessity. For a similar approach see Gross, 'Is Torture Warranted? Pragmatic Absolutism and official Disobedience' (2004) 88 *Minnesota Law Review* 88. This approach is criticised above.

dubious, receptiveness to such reasoning will be facilitated by F's claim to have participated in one link of a developing chain of terrorist atrocities. Justifying coercive measures taken against him can draw on asserted affinities with forceful action taken to prevent crimes at the point of commission. Proportionate means to prevent serious crimes can include taking the life of the perpetrator whose danger to others entails forfeiture of the perpetrator's right to life. The ground is prepared for asserting the claim by analogy that F has forfeited his right not to be tortured.<sup>78</sup>

It will be argued in the next section that there are no grounds of principle that require the United Kingdom to renounce its proscription of torture at the present time. Additionally, there are strong prudential reasons for not doing so. We know that the torture of F will be a futile business in terms of providing useful information and there will be many cases of torture with the same outcome were the practice to be permitted. Moreover, should the practice be permitted for imminent risk cases, there is a risk that once the taboo is broken, it will become an investigatory tool for terrorism cases in general. The concept of necessity is a problematic concept in terms of legal certainty in the hands of high powered appellate courts;<sup>79</sup> the boundaries of the concept are likely to be creatively explored by investigatory bodies under great institutional pressures to produce results. This conclusion, which will be more fully defended below, will be castigated in some quarters as naïve, even hypocritical. For those convinced of the need to resort to torture in response to terrorist activities, the way forward is not to have a bold sign front of house that proclaims 'no torture allowed here' but with a dimly lit back door where small lettering says 'save in cases of necessity'.<sup>80</sup> The way forward for those determined on that route is to pass legislation which spells out what can be done by way of coercive interrogation and in what circumstances.<sup>81</sup> If such legislation is incompatible with a particular country's international commitments to proscribe the use of torture in its jurisdiction, it should renounce those commitments. That route is not endorsed here, but it has the virtues of honesty and clarity.

### **Terrorism in the United Kingdom.**

Even with sufficient concern and commitment, it is not possible to state with anything close to precision the extent and nature of the terrorist threat that the United Kingdom faces. To an extent, this reflects the uncomfortable fact there is much that cannot be known even by those

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<sup>78</sup> Even commentators who reject recourse to a general defence of necessity as a means of undermining proscriptions against mistreatment in interrogation because such an approach may be used to mistreat wholly innocent persons, may allow recourse to self defence as a justification in the case of terrorists themselves: see for instance Gur-Aye, 'Can the War against Terror Justify the Use of Force in Interrogations?' in Levinson, ed, *Torture: a collection* (2004) 183. It should be noted that Gur-Aye does not endorse the use of torture, rather interrogative force against terrorists( not bystanders) if essential to obtain vital information about an imminent and concrete danger. The application of self-defence to legitimate forceful interrogation is not smooth. For cases where it is believed the person interrogated has himself planted or assisted others to plant some device primed to explode shortly, self defence or defence of others seems apposite. But where, as in the case of F, a suspected terrorist has been arrested and is now non-operational but who may know of the imminent plans of his fellow terrorists, recourse to self defence seems to add no limiting effect to that of general necessity. What is needed in this situation is information about the activities of persons other than the person interrogated. F is only in different case from someone like V in terms of eligibility for harsh interrogative treatment if a reasonable suspicion that he is a terrorist is reckoned to put him in different case and is not clear how invoking self-defence does this.

<sup>79</sup> The decision of the Supreme Court of Canada in *Perka* (1984) 13 DLR (4<sup>th</sup>) 1 contains excellent discussion of the difficulties of containing a necessity defence within manageable bounds.

<sup>80</sup> An approach sometimes dignified as 'acoustic separation'.

<sup>81</sup> To this extent one must agree with Dershowitz, *op cit* note 73 that if such things are ever to be done, knowledge of what is done should be in the public domain.

with the right expertise and access to all classified information. The actualities of the terrorist threat will be revealed in the resolution of countless future contingencies. Faced with this uncertainty, it would be tempting to adopt a precautionary principle left to experts in terrorist risks to apply. But that would be to withdraw crucial matters of normative and political judgment from the arena of public debate. To what extent particular institutional measures passed or proposed are a fitting response to the terrorist threat can only be judged by non-expert citizens on the basis of past history and facts currently available in the public domain. When in 1953, the United Kingdom became a party to the European Convention for Human Rights, which contains an outright proscription of torture and inhuman and degrading treatment, it is safe to assume the kind of terrorist activity and risk that subsequently materialised were not in contemplation. It is well to remember that what was in contemplation were the many terrible human rights abuses that occurred in Europe before and during the Second World War. The Convention is not intended to be something lightly set aside when civil peace and stability are threatened. When in 1988, the United Kingdom incorporated the United Nations Convention against Torture into its domestic law, making officially endorsed torture a crime, terrorist activity centred on the Irish question was a familiar reality but what we may loosely term jihadist terrorism had yet to take place within the jurisdiction. In the light of this latest terrorist threat, should the United Kingdom rethink its commitments to the proscription and criminalisation of torture?

The term ‘commitments’ is important, reflecting values to be kept even at a high consequentialist price. In the matter of its security and criminal justice policy, the United Kingdom has borrowed extensively from the penal practices of the United States. There is a great emphasis on populist reassurance that crime and its associated risks will be firmly and effectively dealt with. The slogan ‘victims are at the heart of criminal justice’ has recently been placed in the preamble of yet another proposed criminal justice legislative measure.<sup>82</sup> Levels of imprisonment have increased markedly, in large part due to sentences which depart from a retributivist model and incarcerate on the basis of strong presumptions based on past convictions about the future risk of offending.<sup>83</sup> The influence of similar US models is palpable. But there remain distinctively British, or, if you will, European strands to our penal policy. It is in point to mention in this context the death penalty. Effectively, the death penalty was abolished in the United Kingdom in 1965.<sup>84</sup> The political commitment to the abolition of capital punishment has remained stable despite consistent and large majorities among the general population for its restoration. Indeed, the commitment to its abolition was recently fortified when the United Kingdom ratified the sixth protocol of the European Convention which obliges parties to renounce the death penalty. This demonstrates a resistance to populist pressure on the part of the political class and other influential elites when the issue is seen as sufficiently salient to the quality and tone of civil society. Within those classes, there remains a strong sentiment that peace time liberal democracies are in better civic condition if executions are remaindered to history.

At the present time, a similar judgment can be made about the use of torture. In the late 1970’s the European Commission for Human Rights found that interrogation practices employed against suspected terrorists in Northern Ireland amounted to torture, although the European Court of Human Rights reduced the category of abuse to inhuman and degrading treatment.<sup>85</sup> From that time until the present, there have been no corroborated allegations

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<sup>82</sup> Criminal Justice and Immigration Bill 2008.

<sup>83</sup> Most notably a range of measures introduced by the Criminal Justice Act 2003, endorsing sentences premised on public protection where conclusive or strong presumptions about minimum terms of imprisonment are based on past convictions

<sup>84</sup> Murder (Abolition of Death Penalty) Act 1965.

<sup>85</sup> *Ireland v the United Kingdom* (1978) 2 EHRR 25.

concerning the torture of persons detained as terrorist suspects within the territory of the United Kingdom.<sup>86</sup> In the matter of torture, there may be a greater alignment between the views of decision making elites and the general population. Whereas there are overwhelming majorities in favour of the execution of convicted terrorists whose activities have caused deaths, there has been no general clamour for the introduction of torture and other forms of coercion to be used when interrogating suspected terrorists. The UK government has consistently disavowed recourse to torture and lesser forms of coercion when interrogating terrorists and on this matter it seems as good as its word, at least as far as conduct within the jurisdiction is concerned.

Of course, this state of affairs may change. The example we have used of D and his group envisaged a successful bombing campaign which was still ongoing. It is loosely based on a bombing campaign that failed. It would be pointless to predict the public and political reaction were large scale terrorist violence to become a regular feature of life in the United Kingdom but one cannot rule out the possibility that public sentiment towards coercive interrogation techniques would change, particularly for circumstances such as we have used for our example. There is reason to think there would resistance to extreme measures from elite decision makers. For instance, British judges have consistently ruled inadmissible any evidence obtained by torture from overseas jurisdictions and have refused to deport terrorist suspects to countries where there is reason to believe that torture is employed as an investigatory method. The latest decision in this series refused to take at face value assurances obtained from certain overseas governments that torture would not be used if a terrorist suspect were returned to his country of origin.<sup>87</sup>

But one should not be complacent. The fact that the United Kingdom has sought 'on the face' non torture guarantees from regimes known to use torture can be seen as pragmatic rather than principled response to an intractable problem. Attitudes could change radically if terrorist violence becomes large scale, frequent and rooted. One would hope that certain measures, such as the torture of persons such as E and V would never be contemplated. One cannot rule out coercion against persons such as F, who was reasonably believed to be a terrorist with information concerning imminent attacks. If that route were taken, as we have argued already, it should be done *ex ante* and explicitly, with prior debate. Recourse should not be had to below the radar methods such as executive clemency for those breaking laws which are effectively non-operational. Neither should there be recourse to legal doctrines such as self defence and necessity, while leaving in place the façade of outright proscription of torture.

Unfortunately, these gloomy ruminations are well within the bounds of credible speculation about the future prospects for terrorist activity and institutional responses within the United Kingdom. Other forms of speculation are less credible yet may have strongly adverse effects on policy and action. The kind of speculation in mind is the giving of serious credence to the immediate prospect of terrorist groups effectively deploying weapons of mass destruction. A remarkable document emanating from the US Department of Justice, recently forced into the public domain,<sup>88</sup> speaks of al Qaeda 'seek[ing] to acquire weapons of mass destruction'<sup>89</sup> in the context of 'an international armed conflict between the al Qaeda terrorist organisation and the United States'<sup>90</sup>. This contextualisation of the nature of the terrorist threat facing the United States laid the ground for the removal of all forms of legal protection

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<sup>86</sup> There have been consistent allegations of brutal treatment of detainees by British forces in Basra which are the subject of various ongoing legal actions.

<sup>87</sup> *Othman (Jordan) v The Secretary of State for the Home Department*, Court of Appeal, Times, April 15<sup>th</sup>, 2008.

<sup>88</sup> Memorandum for William J. Haynes II, General Counsel of the Department of Defense, March 14, 2003.

<sup>89</sup> *Ibid*, 2.

<sup>90</sup> At 4.

for persons taken into custody as terrorist suspects by or on behalf of the US, anywhere other than in the US.

There is, of course, a literal truth to the claim that al Qaeda seeks weapons of mass destruction. If the organisation could acquire and use them, it most certainly would. The fear of weapons of mass destruction has played a prominent role in recent British politics but not to date as a reason to relax the proscriptions on torture and inhuman and degrading treatment. Such fears have been deployed as matters to be taken into account when considering other changes to terrorist legislation, most notably increasing the period of pre-charge detention<sup>91</sup>. And yet there is a strong consensus among security experts that the effective use by terrorists of nuclear and biological weapons is currently a remote risk<sup>92</sup>. That risk assessment could change over time, particularly if there is evidence of material and logistical support to terrorist groups from nation states with the requisite resources and expertise. But presently, the fear of existential threats from terrorists is a distracting element in debates about responses to terrorism, at least in the United Kingdom.

### **Conclusion.**

At the present time there are no reasons of principle in favour of the United Kingdom abandoning or modifying the outright proscription of torture and inhuman and degrading treatment. There are no cogent grounds of policy requiring rethinking the commitment of principle to the banning of torture and inhuman and degrading treatment. It is hoped that this state of affairs can be maintained whatever the level of terrorist activity provided it is functionally possible for the United Kingdom to conduct itself as a liberal democracy. If terrorist activity were in some future time to make impossible the sustaining of a liberal democracy, one would anticipate the use of all possible means to restore democracy. What this might mean in practical terms cannot be usefully discussed *ex ante*. Indeed it may be dysfunctional to discuss such things in terms of practical steps, as non present dangers may drive current law and policy.

One matter found less than satisfactory was the legal position regarding the treatment of innocent persons caught up in life threatening terrorist acts. Using by way of illustration passengers aboard a hijacked airplane, we argued that it would be legitimate even to intentionally kill such unfortunate and innocent persons if, on the best risk assessment that could be made in the circumstances, those passengers would very likely die in any event and that another set of innocent persons would be saved from a likely death. The complex legal and ethical issues arising in such circumstances cannot be resolved under the formula 'such force as is reasonable in the circumstances in the prevention of crime.'

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<sup>91</sup> For instance the Minister of State 9 (Beverley Hughes) justified a derogation from the European Convention in terms of extending pre charge detention by reference among other things, '...threats by Bin Laden and his supporters to use nuclear, chemical and biological weapons': House of Commons Debates, Vol 375, col. 146, November 19, 2001.

<sup>92</sup> See references at note 4.