

Fantasy, Conceivability, and Ticking Bombs

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During the debates about the “McCain Amendment” that would ban cruel, inhuman, or degrading treatment of any prisoner by any agent of the United States, commentator Charles Krauthammer invoked a ticking-bomb scenario in defense of the handful of United States senators who failed to support it:

Let's take the textbook case. Ethics 101: A terrorist has planted a nuclear bomb in New York City. It will go off in one hour. A million people will die. You capture the terrorist. He knows where it is. He's not talking. Question: If you have the slightest belief that hanging this man by his thumbs will get you the information to save a million people, are you permitted to do it? Now, on most issues regarding torture, I confess tentativeness and uncertainty. But on this issue, there can be no uncertainty: Not only is it permissible to hang this miscreant by his thumbs. It is a moral duty.¹

Note Krauthammer's conclusion: it is not merely morally permissible but obligatory to torture in these circumstances. No surprise that he concludes that “the McCain amendment... cannot be right” and “There must be exceptions” to prohibitions of torture.

Krauthammer's example is a minimal construal of a ticking-bomb scenario (henceforth: TBS). And while its rhetorical force is obvious, it is unclear what follows.

¹ Charles Krauthammer, “The Truth About Torture,” *The Weekly Standard* (December 5, 2005).

TBSs are unreliable intuition-pumps since no shortage of ethicists maintain that torture is morally impermissible even in extreme or unlikely cases. But some opponents of torture make an even stronger claim: Bob Brecher dismisses TBSs as “fantasy”²; Henry Shue complains about imaging torture in “dreamland”³; David Luban calls TBSs “vanishingly unlikely”⁴ and suggests that their use constitutes “intellectual fraud”⁵; Jamie Mayerfeld declares them “unreal.”⁶ This is *the fantasy complaint* and its upshot is that reflection on TBSs tells us nothing about the moral permissibility of torture because TBSs are *not really possible*.

Shue’s complaint is perhaps surprising since Shue himself seems to allow that *something* follows from a “standard philosopher’s example”:

...suppose a fanatic, perfectly willing to die rather than collaborate in the thwarting of his own scheme, has set a hidden nuclear device to explode in the heart of Paris. There is no time to evacuate the innocent people or even the movable art treasures—the only hope of preventing tragedy is to torture the perpetrator, find the device, and deactivate it.⁷

² Bob Brecher, *Torture and the Ticking Bomb* (Malden, MA: Blackwell Publishing, 2007), p. 16.

³ Henry Shue, “Torture In Dreamland: Disposing of the Ticking Bomb,” in *Arguing About Law*, Aileen Kavanah and John Oberdiek, eds. (New York: Routledge, 2009), p. 380.

⁴ David Luban, “Unthinking the Ticking Bomb,” in Charles Beitz and Robert Goodin, eds., *Global Basic Rights* (Oxford: Oxford University Press, 2009), pp. 181-206.

⁵ David Luban, “Liberalism, Torture, and the Ticking Bomb,” *Virginia Law Review* 91:6 (2005), p. 1427.

⁶ Jamie Mayerfeld, “In Defense of the Absolute Prohibition of Torture,” *Public Affairs Quarterly* 22 (2008), p. 111.

⁷ Henry Shue, “Torture,” *Philosophy and Public Affairs* 7 (1978), p. 141.

Shue's assessment comes quick: "I can see no way to deny the permissibility of torture in a case *just like this*."⁸

What is going on here? Can scenarios from "dreamland" yield substantive results for theorizing about torture? I have no desire to add another version of the TBS to an already burgeoning collection. Nor do I contend that there is or ever has been an actual real-life TBS: there is no agreement among commentators here. Instead, I hope to offer a fair assessment of what the TBS can show and what it cannot. To assess the fantasy complaint, it will be useful to consider just what it is for a TBS to be "conceivable." The bad news for absolutist opponents of torture is that the fantasy complaint is mistaken insofar as some TBSs are genuinely conceivable and, therefore, possible. The good news is that not much follows. In the penultimate section of this paper, I suggest two different theses consistent with allowing that TBSs are genuinely conceivable that nonetheless capture at least much of what the absolutist opponent of torture is committed to.

The Many Moral Absolutisms

Moral absolutism typically implies that some action is morally forbidden—say, intentionally targeting or killing the innocent⁹—although an absolutist could require the

⁸ Ibid. The comments of two different anonymous reviewers suggest that I be clearer here. I do not mean to be critical of Shue here by suggesting that he has articulated an inconsistent position. It may be that Shue has changed his mind about the moral permissibility of torture over the course of his distinguished career: the two papers referenced above were written more than 30 years apart. It may also be that Shue's view is more subtle than I let on. Indeed, I shall suggest an interpretation of Shue below that allows that his considered view in both papers is perfectly consistent.

⁹ G.E.M. Anscombe, "War and Murder," in *Nuclear Weapons: A Catholic Response*, Walter Stein (ed.), (London: Merlin, 1961), pp. 43-62.

performance of some action.¹⁰ One popular contemporary example of an absolutist position is Thomas Nagel's characterization of pacifism as "the view that one may not kill another person under any circumstances, no matter what good would be achieved or evil averted thereby."¹¹ This prohibition is not the *material* claim that, in the actual world, killing another person is morally impermissible since Nagel's pacifist prohibits killing another person "under any circumstances." Nagel's pacifist endorses the *modal* claim that the deontic status of killing another person is invariant across possible worlds. A parallel position concerning torture implies that there are no possible worlds in which it is morally permissible to torture another person. No surprise, then, that absolutist opponents of torture tend to advocate the fantasy complaint, since the typical TBS is used to elicit the intuition that torture is sometimes morally permissible. As one proponent of the fantasy complaint notes, "once one has conceded the permissibility of torture in a TBS case, one has apparently admitted that the prohibition on torture is not moral bedrock."¹²

One complication is that this robust version of absolutism is not advocated by every commentator who self-identifies as an absolutist about torture. Some opponents of torture advocate only "practical absolutism," the view that while torture may be morally permissible in some possible world, "In fact, no act of torture is morally justified" such

¹⁰ See Richard Norman's entry "Absolutism, Moral" in *The Oxford Companion to Philosophy*, Ted Honderich, ed. (Oxford: Oxford University Press, 1995), pp. 2-3.

¹¹ Thomas Nagel, "War and Massacre," in his *Mortal Questions* (New York: Cambridge University Press, 1979), p. 56.

¹² David Luban, "Unthinking the Ticking Bomb," p. 24.

that “For all practical purposes... torture is absolutely wrong.”¹³ More generally, Mayerfeld notes in this very journal that:

There are different kinds of absolutists. Some hold that torture is always wrong in this or any other possible world; some, that torture is always wrong in this world, never mind the others; some that torture, in this world, is wrong in every realistically imaginable case, and could at most be permitted in cases so infinitesimally unlikely that they are not worth talking about. Absolutists are united in opposing the view that torture could be permitted in any realistically imaginable case.¹⁴

For his own part, Mayerfeld contends only that TBSs are “almost impossible” and “almost certainly” will never occur.¹⁵ This is a perfectly defensible claim, but it suggests only a minimalist version of absolutism, not the robust thesis that “Torture is always wrong” that Mayerfeld advocates in the final line of his paper.¹⁶

All this matters if we are to get the fantasy complaint right. Again, the fantasy complaint implies that the TBS is not really possible, but what is the modal status of ‘possible’ utilized here? For purposes of what follows, I accept Mayerfeld’s claim that all versions of absolutism about torture are united in their contention that torture is not permitted “in any realistically imaginable case.” While stronger versions of absolutism are available, the proponent of the fantasy complaint must deny, at least, that TBSs are

¹³ Michael Davis, “The Moral Justifiability of Torture and other Cruel, Inhuman, or Degrading Treatment,” *International Journal of Applied Philosophy* 19:2 (2005), p. 170. Similarly, Claudia Card argues that “Perhaps one can imagine a world in which some kind of torture might be morally tolerable. But that world is not ours.” See Card, “Ticking Bombs and Interrogations,” *Criminal Law and Philosophy* 2 (2008), p. 1.

¹⁴ Mayerfeld, “In Defense of the Absolute Prohibition of Torture,” p. 112.

¹⁵ *Ibid.*, p. 111.

¹⁶ *Ibid.*, p. 125.

realistically imaginable. And if this minimalist absolutist thesis does not survive scrutiny then neither do more robust versions. So, if we have good reason to doubt that there are realistically imaginable TBSs then the fantasy complaint is justified, but if we have good reason to think that they *are* realistically imaginable then the fantasy complaint is bunk.

In What Sense ‘Conceivable’?

Assessing the fantasy complaint requires answering a question begged thus far: what *is* it to realistically imagine a TBS? What does it mean to hold that they are *not* realistically imaginable? One currently trendy philosophical position holds that conceivability entails possibility, such that if some state of affairs is conceivable then it obtains in some possible world. By contraposition, the impossible cannot even be conceived of. A fair bit of philosophical ink has been spilled to provide an account of just what sense of ‘conceivable’ is relevant for assessing claims about possibility.¹⁷ Undoubtedly, terms like ‘imaginable’ and ‘conceivable’ are philosophical terms of art but several distinctions are useful.

First, “prima facie conceivability” is distinct from “ideal conceivability”: *P* is prima facie conceivable for a subject when *P* is conceivable on first appearances while *P* is ideally conceivable when *P* is conceivable only after ideal rational reflection.¹⁸

Something that is prima facie conceivable might not be ideally conceivable and vice versa: the belief that water might not have been H₂O might only be sustainable if we

¹⁷ See, for example, Tamar Szabó Gendler and John Hawthorne, *Conceivability and Possibility* (Oxford: Oxford University Press, 2002).

¹⁸ David Chalmers, “Does Conceivability Entail Possibility?” in *Conceivability and Possibility*, Gendler and Hawthorne, eds., p. 147. I borrow from Chalmers’ especially helpful discussion in this paragraph and the next.

don't think too hard about it. Articulating what is needed for ideal conceivability is tricky, but it probably depends upon undefeatable justification—that is, on justification that cannot be defeated by better reasoning. Undefeatable justification involves, at least, the absence of the usual cognitive limitations and external impediments to knowledge; it requires the absence of external conditions that undermine justification; it requires that acquisition of further true beliefs do not result in the revision of the relevant belief, and so forth. Things can surely come in degrees here: the more apt a subject's belief is to be defeated, the less she approximates ideal conceivability; by contrast, the less apt her belief is to be defeated, the more she approximates ideal conceivability.

Second, “positive conceivability” is distinct from “negative conceivability”: P is negatively possible for a subject when P cannot be “ruled out” a priori while P is positively conceivable when, roughly, a subject can form some sort of positive conception of a situation in which P is the case.¹⁹ Idealization does some work here too: if I cannot rule out P a priori but some idealized agent can, then P is not really negatively conceivable. P might be positively conceivable only given some contingent ability: perhaps understanding quantum physics is necessary to positively conceive of a many-worlds interpretation. Roughly, P is positively conceivable just in case a subject can “coherently modally imagine” a situation that verifies P such that it is possible to fill in any missing details about that situation without contradiction.²⁰ If a subject thereby

¹⁹ Chalmers, “Does Conceivability Entail Possibility?”, pp. 149-50.

²⁰ Ibid., pp. 151-2. See also Stephen Yablo, “Is Conceivability a Guide to Possibility?”, *Philosophy and Phenomenological Research* 53, pp. 1-42. Generally, “The more detailed the imaginary scenario in the relevant aspects, the better the thought experiment”; James Robert Brown and Yiftach Fehige, “Thought Experiments”, *The Stanford Encyclopedia of Philosophy (Fall 2011 Edition)*, Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2011/entries/thought-experiment/>.

produces a detailed and internally consistent model then she coherently modally imagined a possible world and can conclude that what she has conceived of is possible.²¹

It would be too much to hope for an argument that fixes just what sense of ‘conceivable’ is relevant for assessing claims about possibility. But there is a strong case to be made that the most reliable guide is adequately idealized positive conceivability: if any variety of conceivability entails possibility it is some variety of ideal conceivability and positive conceivability is always at least as good a guide as negative conceivability.²² So insofar as we are interested in determining whether TBSs are realistically imaginable, we would be well-advised to consider whether they ever approach ideally positive conceivability.

To see the relevance of demanding idealized positive conceivability, consider how often the television show *24* is referenced in debates about the morality of torture. For the unaware, each season of the show depicts a single day—24 hours—in the life of government operative Jack Bauer who must prevent disaster on an enormous scale, all while battling fringe elements and conspiracies. It is common for suspects to be harshly interrogated and tortured; one creator of the show declares that while “Most terrorism experts will tell you that the ‘ticking time bomb’ situation never occurs in real life, or very rarely... on our show it happens every week.”²³ No small number of prominent politicians and jurists have appealed to Bauer and *24* to support their position concerning torture, including former Homeland Security Chief Michael Chertoff, Justice Department

²¹ Rachel Cooper, “Thought Experiments,” *Metaphilosophy* 36 (2005), p. 338.

²² Chalmers, “Does Conceivability Entail Possibility?,” p. 171.

²³ Jane Mayer, “Whatever It Takes: The Politics of the Man Behind ‘24’,” *The New Yorker* (February 19, 2007).

lawyer John Yoo, and Supreme Court Justice Antonin Scalia.²⁴ Professional philosophers have invoked *24* as well: Stephen Kershner notes that TBSs “occur within a number of fictional television shows... and the depicted cases don’t seem unrealistic.”²⁵ But how convincing are these appeals? It is crucial that such programs rarely reflect upon the consequences of torturing beyond the 24-hour window into Jack Bauer’s world. The TBSs that inevitably occur in *24* omit so many relevant details that they cannot really be said to be coherently modally imagined, and noting merely that they “don’t seem unrealistic” promises only negative conceivability. Since *24* does not really supply any TBS that adequately approaches idealized positive conceivability, the utility of appealing to it is pretty minimal.

Which is not to say that *no* TBS approaches idealized positive conceivability. It is worth wondering what an adequate TBS would look like. That is the task of the next section.

What Would an Adequately Conceivable TBS Look Like?

My contention thus far is that if TBSs are ever plausible counter-examples to absolutism about torture they must be realistically imaginable cases, and that demands that they are positively and sufficiently ideally conceivable. But are there any other standards for judging their plausibility? What follows is not a list of necessary and sufficient conditions for a TBS; it may be possible to conceive of a TBS that fails to meet

²⁴ Dahlia Lithwick, “The Fiction Behind Torture Policy,” *Newsweek* (July 25, 2008).

²⁵ Stephen Kershner, “For Interrogational Torture,” *International Journal of Applied Philosophy* 19 (2005), p. 235. In fairness, Kershner’s argument for the moral permissibility of interrogational torture is not exhausted by this strategy. The quoted passage above follows his argument that there are some actual cases of permissible interrogational torture.

some or several of them.²⁶ But the practitioner of the TBS can be more certain that she has produced a scenario that is genuinely conceivable if she meets more of the following plausibility conditions.

The first plausibility condition captures the “ticking bomb” aspect of the TBS:

- 1) *Urgency*: disaster is imminent, such that some causal chain is in motion that *will* terminate in an especially morally grave event unless adequate measures are taken.

A genuine TBS could demand only that disaster is merely probable or likely the case, but to the extent that disaster is guaranteed the moral justification of torture is more compelling. It is an open question whether “the safety of the whole state” must be endangered, as Bentham contends; surely the deaths a million innocent residents of Manhattan constitutes an especially morally grave event even if New York and the United States survive the attack. What is not negotiable is that the resulting disaster is sufficiently grave such that its occurrence cannot be regrettably tolerated.

While disaster looms in the TBS, all is not lost:

- 2) *Optimism*: there is good reason to think that if adequate measures are taken disaster can be avoided and that there is sufficient time and there are sufficient resources available to take adequate measures.

Some hand-waving is necessary. To say that there is “good reason” to think that torture will work implies that there is a sufficiently high probability it will work, whatever that

²⁶ Bentham proposes to “state in a more concise manner the Rules that seem requisite to be observed in order to prevent [torture’s] being employed to an improper degree, or in improper Cases.” See W. L. Twining and P. E. Twining, “Bentham on Torture,” *Northern Ireland Legal Quarterly* 24 (1973), pp. 313. Unlike Bentham, I only hope to illuminate what a prima facie plausible TBS must be like.

sufficiently high probability must be. It requires thinking that we have Bentham’s “good proof” that the victim of torture can do what is required of him: namely, produce the desired information in a timely manner. Generally, we need to be sufficiently confident that we will have the time and resources to reliably extract useful information and to act upon it to prevent the imminent disaster.

It is the next plausibility condition that introduces torture into the TBS:

- 3) *Exclusivity*: No other alternative besides torture suffices as an adequate measure to prevent disaster.

Importantly, ‘torture’ here denotes *interrogational* torture, not punitive torture or some other variety. *Exclusivity* implicitly puts constraints on what manner of torture is performed as well; anything that obviously prevents or inhibits the victim’s ability to reveal that information—say, by beating him unconscious—is unjustifiable. *Exclusivity* is also consistent with thinking that interrogational torture is out of bounds if some other means are available that promise to reliably extract the desired information in a timely manner. Including *Exclusivity* among the relevant plausibility conditions is thus consistent with the attractive thesis that interrogational torture is not justified just because *Urgency* obtains.²⁷

Another condition is crucial:

- 4) *Reliabilism*: legal officials must have reasonable and rationally formed beliefs in light of the available evidence that ground their belief that *Urgency*, *Optimism*, and *Exclusivity* obtain.

²⁷ Fritz Allhoff, *Terrorism, Ticking Time-Bombs, and Torture: A Philosophical Analysis* (Chicago: University of Chicago Press, 2012), pp. 167-8.

Reliabilism does fall short of demanding certainty and thus might seem objectionable given that some commentators lament that even the best consequences hoped for in a TBS are not certain.²⁸ Indeed, it might be thought that the main problem with TBSs as usually presented is that the principal conditions (a bomb is about to go off, torture is necessary to elicit the information, the person in our custody has the life-saving information, and so forth) are presented as facts. Omniscience is assumed, although there is no such thing in real life; an interrogator deciding whether to torture must proceed on the basis of beliefs, so the question of confidence in those beliefs is absolutely central.²⁹ Still, even some absolutist opponents of torture acknowledge that requiring certainty is too demanding.³⁰ Is *Reliabilism* adequate? Or is something stronger needed for plausibility?

One could deny that certainty is never found in real life, but let that slide. It is not generally the case that certainty is a prerequisite for morally permissible action even when the stakes are high and the consequences for being wrong are quite grave. And it is an open question whether the intuition that the moral permissibility of torture turns on certainty is widely shared. Fritz Allhoff has constructed a series of vignettes to test intuitions about the moral permissibility of torture in TBSs when certain variables are in play. For example, our confidence about the moral permissibility of torture seems to depend on whether or not the victim of torture is guilty of causing the imminent

²⁸ Mayerfeld, "In Defense of the Absolute Prohibition of Torture," p. 114; Christopher Tindale, "Tragic Choices: Reaffirming Absolutes in the Torture Debate," *International Journal of Applied Philosophy* 19:2 (2005), p. 217.

²⁹ I borrow here from a persuasive anonymous reviewer who urged me to resist dodging concerns about certainty here.

³⁰ Vittorio Bufacchi and Jean Maria Arrigo, "Torture, Terrorism and the State: A Refutation of the Ticking-Bomb Argument," *Journal of Applied Philosophy* 23 (2006), p. 361.

disaster.³¹ But interestingly, Allhoff's foray into experimental philosophy reveals *no* statistically significant difference in subjects' assessment of the morality of torture when subjects are told that there is a 99 percent chance that torture will accomplish nothing—that is, when subjects are told that there is only a 1% chance that disaster will be prevented by torturing.³² Perhaps not everyone is as enamored with experimental philosophy as I but this at least some evidence that the intuition that certainty is required for morally permissible torture is not *that* widely shared.

Still, the complaint with respect to *Reliabilism* might not concern the certainty of preventing disaster; it might instead concern the certainty of the prospective victim's guilt. Even if the folk are not terribly concerned about the likelihood of preventing disaster when it is stipulated that the victim of torture is responsible for priming and placing the ticking bomb, that says nothing about the relevance of being certain that he *is* so responsible. Indeed, Allhoff's data suggests that the guilt or innocence of the victim of torture *does* have a statistically significant effect on judgments about torture; it matters whether the victim of torture is a guilty terrorist or his innocent daughter, for example.³³ I suspect that the guilt or innocence of other parties considered in a TBS matters too; if only the guilty and the damned were doomed by the ticking bomb, then it is an open question whether their suffering amounts to an “especially grave event” demanded by *Urgency*. So, the next two plausibility conditions are also probably needed to construct a plausible TBS:

³¹ Allhoff, *Terrorism, Ticking Time-Bombs, and Torture*, pp. 103-10.

³² *Ibid.*, p. 108.

³³ *Ibid.*, p. 107.

- 5) *Innocence*: The majority—perhaps the overwhelming majority—of those harmed should disaster occur are moral innocents.
- 6) *Guilt*: The person being tortured is guilty of especially grave wrongdoing and would be in some way responsible for the disaster that occurs, supposing that disaster is not prevented.

Innocence allows for the possibility that some non-innocent people will be harmed, as will surely be the case in any large-scale disaster scenario. So long as some sufficiently large number of innocents will be harmed in a TBS, *Innocence* will be met and the promised disaster will be a sufficiently morally grave event.³⁴ There are probably good moral reasons for endorsing *Innocence* and *Guilt* in any case. Perhaps the moral status of innocent persons *as* innocents rules out the permissibility of seriously violating them.³⁵ That is an independent reason to endorse *Innocence*. Perhaps the perpetrator responsible for planting the ticking bomb owes it to his victims to allow himself to be tortured to stop the attack on them that he is culpable for.³⁶ That is some independent reason to endorse *Guilt*. The practitioner of the TBS who constructs a TBS that meets these two plausibility conditions can also dodge a common objection utilized in the dialectic between absolutists and non-absolutists about torture. The absolutist opponent of torture might, when confronted with the TBS, question whether we can torture an innocent if *that* would prevent grave disaster and answering in the affirmative would strike at least many of us

³⁴ Thanks to two anonymous reviewers for urging me to be more precise here.

³⁵ Frances Kamm, *Ethics for Enemies: Torture, Terror, and War* (Oxford: Oxford University Press, 2011), p. 5.

³⁶ *Ibid.*, p. 27.

as profoundly wrong.³⁷ But the practitioner of the TBS who observes *Innocence* can reasonably answer in the negative and deny that meeting the first four plausibility conditions is sufficient justify torturing.

Another condition is needed to ensure that TBSs do not stray *too* far from the realm of the realistically imaginable:

- 7) *Realism*: disaster is imminent in some nearby possible world, not a distant one—that is, in a possible world whose operative laws of nature are the same as those operative in the actual world and in which the overwhelming majority of basic scientific truths in the actual world similarly obtain.

Departing too far from reality may well result in scenarios with dubious relevance: some distant possible worlds are populated by super-Spartans who feel pain and don't mind its infliction, but it is hard to know what moral rules govern human behavior in *that* sort of world. A general point about thought-experiments: the more distant the possible world, the less reliable the intuitions that the thought experiment is supposed to generate. And thought-experiments that occur in *very* distant possible worlds with radically different laws of nature and states of affairs compared to our actual world probably fail to generate intuitions that are reliable at all. *Realism* is thus necessary lest opponents of absolutism about torture get to play tennis without a net.

With these conditions in place, it is possible to evaluate the fantasy complaint: the proponent of the fantasy complaint has to show that, for any TBS, either more idealized reflection will reveal that torture does not occur within the confines of the above

³⁷ This sort of response is offered by the Association for the Prevention of Torture in a pamphlet titled “Defusing the Ticking Bomb Scenario: Why We Must Always Say No to Torture, Always” (Geneva, 2007), pp. 7-8.

plausibility conditions or that it is not possible to fill in the details without contradiction and meet the above plausibility conditions. If every TBS fails in at least one of these two ways, then the TBS *is* mere fantasy. A victorious proponent of the fantasy complaint is thus something of an error theorist: she will wind up explaining just why any number of TBSs *prima facie seem* conceivable to so many of us while denying that any of them genuinely are.

Rather than gesture at arguments for the fantasy complaint, it is better to consider three of the best arguments for it. Ultimately, I contend that none are successful.

Shue's Argument for Absolutism

Shue seems to be on record in 1978 as allowing that there are conceivable TBSs in which torture is morally permissible, but his position is perhaps more subtle than I let on. Having stipulated that some instance of torture would not yield “the enormous potential harm which would result if what was intended to be a rare instance was actually the breaching of the dam which would lead to a torrent of torture” Shue concludes that torture is permissible “in cases *just like this*”—his emphasis. But if there are no cases *just like that*, then the appropriate conclusion to draw is that there is no convincing TBS. Shue allows that if there is evidence that “interrogational torture can sometimes be used with... surgical precision” then “such rare uses would have to be considered”³⁸ but his post-1978 work suggests pretty clearly that he doubts such evidence exists. Part of Shue’s 1978 argument concerns torture’s “metastatic tendency”: the available psychological and historical evidence suggests that states tend to practice torture more frequently once the

³⁸ Shue, “Torture,” p. 143.

initial rare case occurs. Shue post-1978 argues that “the exceptional case” in which torture lacks any metastatic tendency “is probably in fact impossible.”³⁹ So, there is a reading of Shue’s corpus that implies that morally permissible torture in a TBS isn’t really conceivable: there aren’t really any cases *just like that*.⁴⁰

Shue offers a pathology for this apparent failure of TBSs. TBSs are plagued by two fatal flaws: idealization and abstraction. The former adds positive features to an example and the latter removes negative features making the thought experiment “better than reality”—that is, *unreal*.⁴¹ The typical TBS idealizes insofar as it stipulates that institutions governing torture will be controlled by virtuous legal officials capable of resisting temptation to stray from the mere occasional use of torture. But this is “virtually impossible” and thinking otherwise is “utopian and naïve.”⁴² An imaginary state that can torture just once is like:

...an imaginary alcoholic who drinks two beers only a night. There are former alcoholics, who do not drink at all, and active alcoholics. To think that there may be rare alcoholics who drink moderately is to fail to understand alcoholism.⁴³

Hoping for a functional alcoholic who drinks is to hope for what cannot be had, but so is hoping for a state that tortures only rarely without unleashing a torrent of suffering.

Shue’s discussion of alcoholism is relevant insofar as it supports the fantasy complaint:

³⁹ Shue, “Torture in Dreamland,” p. 381. Shue’s initial suggestion that “we can imagine hypothetical cases, like the notorious ticking-bomb cases in which it seems excusable” (379) is not dispositive. What *seems* to be the case might only be *prima facie* conceivable.

⁴⁰ It would be easier to read Shue in 1978 as an absolutist if not for a series of suggestions in “Torture in Dreamland” that his 1978 position is untenable, especially p. 383.

⁴¹ *Ibid.*, p. 379.

⁴² *Ibid.*, p. 381.

⁴³ *Ibid.*, p. 380.

morally permissible torture cannot *really* be coherently modally imagined. Prima facie, it might *seem* like an alcoholic who takes the occasional drink with no consequences is conceivable, but that appearance depends on a mistaken conception of what alcoholism *is*. Similarly, prima facie, it might *seem* like metastasis-free torture is conceivable, but that appearance depends upon a mistaken conception of how torture *works*.

Shue's argument by analogy is problematic, however. It calls for imagining that something akin to alcoholism affects the state that tortures, that a state that practices torture will be unable to control itself just as an alcoholic is unable to control himself. My complaint is not the cheap accusation that Shue commits the fallacy of composition by supposing that what is true of the individuals who compose a state will be true of the state itself. The point is that assumptions about compulsion and inevitability have been smuggled into Shue's conceptions of alcoholism and torture.

Consider Shue's discussion of alcoholism. We are told that "you cannot—if you are an alcoholic—have a drink only on special occasions, and you cannot—if your politicians are not angels—employ torture only on special occasions."⁴⁴ But what is the status of this modal claim that an alcoholic can't "just have one"? Is it a conceptual truth? It is possible to *define* alcoholism in terms of a literally irresistible impulse to drink, but that is at odds with clinical conceptions of it. Alcoholism is typically thought to be partly constituted by compulsive behavior and the DSM-IV characterizes alcohol dependence in terms of "an uncontrollable drive to drink." But it doesn't follow that alcoholics *must* invariably succumb, and attributing irresistible desires to addicts is not an illuminating

⁴⁴ Ibid., p. 383.

way of depicting addiction.⁴⁵ Of course, compulsive behavior is a defining feature of alcoholism in the clinical sense. But, without minimizing the challenges faced by alcoholics, it is too much to suppose that addiction quite literally deprives its victims of the ability to stop.

Thus, Shue is faced with a dilemma. Either his argument for the fantasy complaint depends upon a stipulated conception of alcoholism that guarantees an inability to stop drinking or upon the clinical conception where alcoholism is understood as an impulse-control disorder. The first conception of alcoholism is unrealistic while the latter conception does not support the stronger claim that Shue needs: that the resulting undesirable behavior is inevitable. Either way, Shue's analogy does not yield the conclusion that states cannot torture rarely and without metastasis. If Shue's point is merely that the available empirical evidence strongly suggests that states who start out torturing rarely will torture more frequently, point well taken. But it does not follow, consistent with *Realism*, that state-sponsored torture must metastasize.

A final comment. Perhaps Shue's appeal to alcoholism is merely an illustration and not an argument per se, an analogy to underline his concern that, in fact, torture will almost certainly metastasize. Perhaps the concern is that, given the available historical evidence, any authorization of torture is likely to metastasize and lead to the wider use of torture including the torture of the innocent, among other horrors. And perhaps that is a good enough reason to oppose torture: torture is always likely to produce unacceptable consequences.⁴⁶ For what it is worth, I think that this interpretation of Shue yields an

⁴⁵ George Graham, *The Disordered Mind: An Introduction to Philosophy of Mind and Mental Illness* (New York: Routledge, 2010), p. 166.

⁴⁶ Thanks to an anonymous reviewer for pursuing this interpretation of Shue.

independently attractive position; indeed, it anticipates a thesis I discuss to below. But it does amount to abandoning the fantasy complaint since this interpretation is perfectly consistent with thinking that TBSs really are realistically imaginable and thus conceivable in the relevant sense. There is simply nothing about holding that torture's metastasizing tendencies are very, very real that requires banishing the TBS to the realm of fantasy. So proponents of the fantasy complaint must look elsewhere.

Brecher's Argument for Absolutism

Brecher is also on record as endorsing the fantasy complaint. Indeed, he contends that no argument appealing to the TBS "should even get off the ground."⁴⁷ But why? We are told at one point:

The first reason why the ticking bomb scenario remains a fantasy, and not just a description of a rare but realistic possibility, is that it fails to distinguish between what you or I *might* do in that imagined case and what you or I *could* do in an actual case.⁴⁸

But this complaint is a *non sequitur*. The practitioner of the TBS attempts to describe a scenario in which morally permissible torture seems conceivable, not one in which anyone could actually bring themselves to engage in the garish business of torture. I am not so naïve to think that I could bring myself do it, but it hardly follows that actually torturing would be morally wrong.

⁴⁷ Brecher, *Torture and the Ticking Bomb*, p. 12.

⁴⁸ *Ibid.*, p. 22.

Elsewhere, Brecher worries that “the likelihood of accurate information is very far from certain”⁴⁹ if acquired by torture and that torture is “largely ineffective in eliciting intelligence.”⁵⁰ These are generally accepted claims about the expected utility of torture. But the problem—as Brecher acknowledges—is that uncertainty that *P* is consistent with a reasonable and rational belief that *P*. *Reliabilism* does not demand certainty, and Brecher allows that we can imagine a TBS in which the suspect being interrogated has truthfully admitted planting the bomb, that legal officials really do know where the bomb is planted, and so forth.⁵¹ Perhaps it is unlikely that the demands of *Reliabilism* can be met, but success is hardly inconceivable.

Brecher’s best defense of the fantasy complaint is to deny that TBSs can be positively conceived. The problem is not that every TBS must fail to meet some particular plausibility constraint but that no TBS can jointly meet all of them. In his response to Alan Dershowitz’s call for “torture warrants,” Brecher argues that:

When we look closely at the [ticking bomb] scenario... it is really just a fantasy—and not merely in the sense of being unrealistic or far-fetched. It is a fantasy *because its conditions run counter to each other*... It is central for the argument that there be sufficient urgency to justify torture—but not so much that there is not enough time for the judge(s) (or whoever) to consider whether or not the case merits a warrant to torture; that the torture be effective enough to elicit the

⁴⁹ Ibid., p. 16.

⁵⁰ Ibid., p. 25.

⁵¹ Ibid., p. 31.

information needed in the short time available... The time and the effectiveness conditions run against each other...⁵²

Brecher does not describe the “time and effectiveness conditions” in detail, but they appear to track *Urgency* and *Optimism*. Brecher’s response to Dershowitz’s particular proposal can be generalized:

...the more urgent the situation, and thus the more justified the torture and the warrant authorizing it, the smaller the chance of stopping the bomb going off. Conversely, the greater that chance, the less urgent the situation. But it is urgency that is said to justify the torture.⁵³

There is an implicit dilemma here: the more likely that either *Urgency* or *Optimism* is met the less likely that the other is. Constructing a plausible TBS is thus a delicate balancing act of accommodating both, and Brecher clearly doubts that a balance can be struck. But that suggests that TBSs cannot *really* be coherently modally imagined, that we cannot really fill in the relevant details so that the relevant plausibility conditions are jointly met, and that TBSs cannot really be positively conceived.

A delicate balance, to be sure, but impossible? There is no logical impossibility in supposing that *Urgency* and *Optimism* can be jointly met. And stipulating that there is just enough time to both torture and successfully disarm the ticking bomb does not obviously run afoul of any laws of nature or material matters of fact in the actual world. A very general point about thought-experiments is relevant here: what is neither logically nor nomically impossible (relevant to that local world) can simply be stipulated to be the case—within a constraint, noted below. Familiar thought experiments just *stipulate* that

⁵² Ibid., p. 16, emphasis added.

⁵³ Ibid., p. 28.

innocents will be run over by a trolley unless a switch is pulled, that there is no other means of escape besides blowing the fat man out of the cave, that some prospective “organ donor” really is a perfect match for five terminal patients awaiting transplants, and so forth. All of this is unlikely but ruled out by neither the laws of logic or local laws of nature. And what crafters of thought-experiments get to do in general, practitioners of the TBS get to do in particular. Absent some argument that jointly meeting both *Urgency* and *Optimism* is logically impossible or violates some local law of nature—and it is simply unclear what that argument would be—it can be stipulated that the delicate balance can be struck consistent with *Realism* in some nearby possible world.

It is at this point that absolutist opponents of torture are likely to complain that practitioners of the TBS *are* playing tennis without a net. The laws of logic and nature do permit an awful lot, after all. And there are more constraints on the construction of thought experiments than I have let on. Still another argument for the fantasy complaint looks to other failed thought-experiments to reveal what is wrong with the TBS.

Wisnewski's Argument for Absolutism

A series of thought-experiments designed to motivate the causal theory of reference illustrate that what is *prima facie* conceivable need not be ideally so. On one account of things, the referent of ‘water’ is fixed by the intentions of the speakers that introduced the term and by “what’s around here.” The speakers who introduced ‘water’ had the *de re* intention of referring to stuff that has the chemical composition of H₂O. There might be a possible world—a “twin-Earth”—with lakes and rivers filled with a clear potable liquid superficially indistinguishable from the clear potable liquid in our

lakes and rivers but with a different chemical composition: XYZ. As the argument goes, that stuff isn't water, even if residents of twin-Earth call it 'water.' Once the relevant details about water and the introduction of 'water' are filled in, it turns out that it is not possible to coherently modally imagine a scenario in which 'water' picks out XYZ.

Jeremy Wisnewski contends that someone who appeals to a TBS to make the case that torture might be morally permissible is in error very much in the way that someone who points to twin-Earth to make the case that water could have been XYZ is in error. Wisnewski complains that:

...a thought experiment will only *be about* a particular thing if it actually *corresponds* to that thing. I cannot conduct a thought experiment about circles, for example, if I describe them as bounded geometrical objects with three sides. Such a case would not be *improbable*; it would be utterly impossible: circles do not have three sides. This is part of the *essence* of what it means to be a 'circle.' To ask us to imagine a case of a circle with sides is simply to ask us to imagine something *that is not a circle*. The same problem emerges... in the case of torture—in particular in the way that the ticking bomb case asks us to imagine successful interrogation, on the one hand, and pain, on the other.⁵⁴

The problem, apparently, is that what we are asked to imagine in the TBS *just isn't torture* in just the same way that what we are asked to imagine in the lakes and rivers of twin-Earth *just isn't water*. And if we can't conceive of morally justified torture in a TBS, the fantasy complaint is vindicated.

⁵⁴ J. Jeremy Wisnewski, *Understanding Torture* (Edinburgh: Edinburgh University Press, 2010), p. 129.

Return to the example of someone who wrongly thinks that water could have been XYZ. Illustrating her error requires getting clear about a number of empirical facts, including facts about the essence of water: its chemical composition. But what is the essence of torture? We are told that the “empirical reality” of torture reveals that “it *inevitably* has negative consequences.”⁵⁵ That which does not result in horrible, blinding pain is implausibly regarded as torture. If so, then part of the essence of torture is that it causes harm, just as it is part of the essence of punishment that it causes harm.⁵⁶ Trying to conceive of consequence-free torture is very much like trying to conceive of water with a different chemical composition: it *can't* be done, not once we are clear about the essence of thing in question. Perhaps consequence-free *schmorture*—that is, something that superficially resembles torture but lacks torture’s distinctive essence—is conceivable, but that tells us nothing about the conceivability of TBSs since the TBS involves torture, not *schmorture*.

All of this requires some controversial assumptions, most notably that there are *a posteriori* necessities, but it would be unfortunate if a response to Wisnewski requires showing that there are none. Better to agree that consequence-free torture *is* impossible and deny that the fantasy complaint follows. After all, supposing *ad arguendo* that torture inevitably results in grave suffering doesn’t settle the question of its moral permissibility. It is no necessary truth, *a posteriori* or otherwise, that the harmful consequences of torturing must outweigh the harm prevented. The advocate of act-consequentialism could argue that we can full well conceive of a particular TBS in which the person being

⁵⁵ *Ibid.*, p. 100.

⁵⁶ David Boonin, *The Problem of Punishment* (Cambridge: Cambridge University Press, 2008), p. 24.

tortured suffers greatly, the person inflicting the torture suffers terribly in the aftermath of what he has done, and Shue's torrent of torture is unleashed. Nonetheless, the disaster averted would have caused so much harm to so many innocents that whatever the costs of torture—and those costs might be quite high—that particular token instance of torturing in that particular TBS is morally justified.

Invoking act-consequentialism here is potentially distracting. To be sure, I do not endorse act-consequentialism nor do I think that embracing any particular variety of consequentialism is necessary to defeat the fantasy complaint. My point is simply that we *can* conceive of some TBS in which we do coherently imagine torture, properly understood, with all its horrors and not something wrongly called 'torture' lacking that distinctive essence and inquire into the morality of torture properly understood.

Wisnewski has another argument in defense of the fantasy complaint, that promises to reveal a "fundamental incoherence" in the TBS.⁵⁷ This second argument also demands getting clear about a number of empirical facts relevant to torture: "To understand what torture *is* and how it *works*, we will of necessity require some empirical content."⁵⁸ And our experience of torture reveals not only that it *will* result in horrible pain, but that "interrogational torture, to be effective, cannot be carried out in the amount of time postulated" in the TBS.⁵⁹ This argument is not quite Brecher's argument disposed of above. Wisnewski's position is not that successful interrogational torture requires a delicate balancing act but that our empirical knowledge of interrogational torture suffices to demonstrate the impossibility of successfully torturing in the TBS in just the same way

⁵⁷ J. Jeremy Wisnewski, "It's About Time: Defusing the Ticking Bomb Argument," *International Journal of Applied Philosophy* 22:1 (2008), p. 103.

⁵⁸ *Ibid.*, p. 111.

⁵⁹ *Ibid.*, p. 109.

that our empirical knowledge of water suffices to demonstrate the impossibility of water on twin-Earth.

Wisnewski begins with the observation that successful interrogational torture does not happen quickly: breaking wills requires regression which itself requires manipulation and confusion and disorientation, all of which takes time.⁶⁰ So, if successful interrogational torture requires breaking the will of the interrogated subject, it is hopeless to think that successful interrogative torture can occur in a short period of time. Admittedly, these are empirical facts about torture, not conceptual truths. But understanding the nature of interrogational torture cannot proceed *a priori* precisely because torture is a human practice; in considering what it really is we will have to consider how it really works. So just the referent of ‘water’ is partly fixed by empirical facts about what’s around here, the referent of ‘torture’ partly fixed by the empirical facts as we find them.⁶¹

The problem is that the typical argument invoking the TBS simply stipulates that successful interrogational torture proceeds quickly. Since “It is part of the nature of *effective* interrogational torture... that one has potentially *limitless* time”⁶² we cannot really conceive of successful interrogational torture in the TBS just because successful interrogational torture requires what we do not have in the TBS: time. Postulating that one can quickly engage in effective torture involves a semantic contradiction, rather like postulating that one can draw a triangle with four sides.⁶³ The TBS is a fantasy because what is being conceived of in the TBS *just isn’t torture*; it might involve interrogational

⁶⁰ Ibid., pp. 112-3.

⁶¹ Ibid., p. 110.

⁶² Ibid., p. 112.

⁶³ Ibid., p. 109.

schmorture, but not torture, since what is being conceived of, again, lacks torture's distinctive essence.

What to say about this inconceivability argument? Things are complicated by the fact that Wisnewski himself allows that successful interrogational torture is possible—that torture might result in actual information.⁶⁴ Once that much is granted, we are left to haggle about the semantics of terms like 'quickly.' More problematically, Wisnewski's conception of torture has puzzling consequence: it implies that some putative cases of torture just can't be. First, the variety of torture that Wisnewski is especially interested in involves regression—that is, breaking down the victim's understanding. But *must* torture involve regression? If so, then it looks like it is impossible to torture non-human animals and human beings who lack the requisite capacity for understanding. It strikes me as odd to suppose that we cannot torture cats and squirrels, for example, no matter how much pain and suffering we inflict on them.⁶⁵ Second, consider the famous scene in *Dirty Harry* in which notorious police detective, Harry Callahan, stomps on the wounded serial killer, Scorpio, to learn the location of Scorpio's still-living but buried victim. This cannot be a case of torture given Wisnewski's conception since Harry *does* successfully extract the desired information from Scorpio but does so fairly quickly. Here too, no matter how much pain and suffering Harry inflicts on Scorpio, he does not torture Scorpio so long as Harry proceeds quickly and succeeds. The astute cinematic observer might point out that Harry ultimately *fails* to save Scorpio's buried victim—she is found

⁶⁴ *Ibid.*, p. 114.

⁶⁵ Frances Kamm similarly suggests that the inability to account for the possibility of torturing non-human animals is an implausible consequence of David Sussman's argument in his "What's Wrong with Torture?", *Philosophy and Public Affairs* 33:1 (2005), pp. 1-33. For Kamm's complaint, see her *Ethics for Enemies*, p. 12.

dead in later scenes—such that this is not a case of successful interrogational torture, despite the fact that Harry secured the desired information. But that response only highlights the oddity of Wisniewski's view: whether Harry's conduct counts as torture or not depends on something *extrinsic* to the interplay between Harry and Scorpio: namely, on finding Scorpio's victim alive. Again, if Scorpio's victim is saved, *nothing* Harry does to Scorpio counts as torture so long as he does it quickly.

Dirty Harry generates a further problem for Wisniewski. Does Harry's brutal interrogation of Scorpio involve regression? If so, then quick regressive torture does seem possible. If not, then either non-regressive torture is possible or Harry doesn't torture Scorpio. But I find it wildly counter-intuitive to suppose that Scorpio isn't being tortured when Harry stomps on his wounded leg. So, either quick interrogational torture is possible or non-regressive interrogational torture is. Either way, Wisniewski has no bulwark against supposing that effective interrogational torture is possible within the time constraints essential to the TBS.

I think this enough to show that there is something wrong with what Wisniewski says about the essence of effective interrogational torture. But I also doubt that Wisniewski's conclusions about the empirical reality of torture really track the facts as we find them. Not everything that we know by experience reveals the essence of some thing; perhaps the empirical reality of cats is that they like to chase mice and play with string, but that is not part of the essence of being a cat. So even if the empirical reality of interrogational torture is that it takes time, it does not follow that taking time is part of torture's essence. Of course, there are degenerate examples of cats that blithely lay still as mice and bits of string pass by. But in that respect, the facts as we find them concerning

cats resemble the facts as we find them concerning torture. In response to the suggestion that we could expedite the process by torturing harshly, Wisnewski appeals to the following passage from the CIA's *Human Resources Exploitation Manual*:

Intense pain is quite likely to produce false confessions, fabricated to avoid additional punishment. This results in a time-consuming delay while investigation is conducted and the admissions are proved untrue. During the respite, the subject can pull himself together and may even use the time to devise a more complex confession that takes still longer to disprove.

Wisnewski concludes: "The result here, I think, is clear: all interrogation takes time."⁶⁶ But that is not the result that Wisnewski needs. The reason that the TBS is a fantasy, we are told, is because taking an extended period of time is part of the nature of effective interrogational torture. This cited passage only states that the intense pain of torture "is quite likely" to be ineffective, a much weaker result and consistent with the existence of deviant cases of interrogational torture that do quickly produce accurate information. But then there is no semantic contradiction in conceiving of a TBS in which accurate information is elicited quickly.

The arguments for the fantasy complaint offered by three of the fiercest opponents of torture fail and at this point its prospects look dim. The moral absolutist about torture is not without responses, of course. She could deny that there is any substantial link between conceivability and possibility. Or she could argue, quite generally, that philosophical use of thought experiments is illegitimate, that appealing to intuition pumps

⁶⁶ Ibid., p. 114.

is not a reliable way of tracking philosophical truths.⁶⁷ But this strategy is somewhat desperate. On a modest reading of what experimental philosophers have shown, it is philosophically imprudent to suppose that there is cross-disciplinary and cross-cultural consensus in response to some thought-experiment without actually *providing* empirical evidence that such consensus exists (with the addendum that the available evidence suggests that consensus is less common than sometimes suggested).⁶⁸ But it would be premature to conclude that *every* TBS must fail to garner consensus. And it is equally premature to insist that intuitions about TBSs are not widely shared absent empirical evidence to demonstrate this.⁶⁹ Worse, this response threatens to prove too much: if it is illegitimate to utilize thought-experiments in debates about torture then it is illegitimate to utilize them in metaphysics and epistemology, and so forth. If there are good reasons to abandon the philosophical practice of appealing to thought-experiments, so be it. But denying their legitimacy to hold onto absolutism about torture is ad hoc.

I submit, then, that it is very likely the case that we can positively and adequately ideally conceive of TBSs within the plausibility conditions outlined above. What, if anything, follows?

Still More Absolutisms

To be sure, if we can positively and adequately ideally conceive of TBS within the relevant plausibility conditions, then TBSs are not “unreal” and the fantasy complaint

⁶⁷ Wisnewski, *Understanding Torture*, pp. 136-7.

⁶⁸ See the essays in Joshua Knobe and Shaun Nichols, *Experimental Philosophy* (Oxford: Oxford University Press, 2008) for discussion.

⁶⁹ Michael Davis, “The Moral Justifiability of Torture and Other Cruel, Inhuman, or Degrading Treatment,” pp. 171-2.

is bunk. But beyond *that*, what follows? The short answer is: probably not much. For while TBSs are conceivable if the fantasy complaint is false, it does not follow that *morally permissible* torture is conceivable. Again, if some version of act-consequentialism is correct, then morally permissible torture is probably conceivable. But the proponent of the fantasy complaint could, of course, reject act-consequentialism. Certainly, any number of rule-consequentialist and non-consequentialist ethical theories will imply that torture is always wrong. Accordingly, proponents of the fantasy complaint would do better to concede that TBSs are conceivable and instead articulate their moral objections to the practice and institutionalization of torture. Even if the fantasy complaint functions as a bulwark against a fairly common argument that torture is permissible, the demise of the fantasy complaint does not amount to defeat for the absolutist opponent of torture.

Further, abandoning the fantasy complaint is perfectly consistent with advocating two other theses that approximate what the moral absolutist wants. First, the opponent of torture could allow that the TBS is conceivable but insist that the probability of jointly satisfying all of the relevant plausibility conditions is *extremely* low, so low that encountering morally permissible torture in the actual world is substantially improbable—not inconceivable or infinitesimally unlikely, just substantially improbable. And arguably there is something irrational or even immoral about dedicating resources to and preparing for what is, by one's own lights, substantially improbable, especially if doing so accrues costs and risks that are themselves very real and grave. Allowing that TBSs are conceivable is consistent with *probabilistic absolutism* about torture, the thesis that while morally permissible torture might be realistically imaginable and therefore

possible in the actual world, it remains immoral take any steps to enable its occurrence since the expected utility of doing so is so very low—much, much lower than the expected utility of committing to refrain from its practice. This is not practical absolutism, since the probabilistic absolutist allows that TBSs might occur in the actual world. Instead, the probabilistic absolutist holds that since we are so much more likely to torture wrongly if we torture at all, taking any and all measures to prevent the practice and occurrence of torture is the right thing to do. Our best bet, on this way of thinking, is to talk and act as though torture were absolutely forbidden even if TBSs are conceivable. That is a position worth fighting for and one that is immune to the conceivability of some TBS.⁷⁰

Second, the opponent of torture can note there is no incoherence in holding that moral absolutism about torture is false and, its rare moral permissibility notwithstanding, that torture should be *legally* prohibited and absolutely so. The conceivability of the TBS yields no quick conclusions about whether torture should be tolerated as a matter of social or legal policy. It certainly does not follow that standing international and domestic prohibitions of torture are illegitimate, that previous administrations that sanctioned or authorized torture are beyond just prosecution, or that the current administration's refusal to investigate and prosecute those complicit in the practice of torture are on solid moral footing. Respect for the rule of law might settle these latter issues even if the TBS is not inconceivable.

⁷⁰ Mayerfeld actually comes close to endorsing probabilistic absolutism when he argues that “if you think you are faced with a ticking bomb scenario—there is a ticking bomb, the person in your custody has planted it, etc.—there is a very high probability that you are wrong. This alone is a strong argument that you should never torture.” See Mayerfeld, “In Defense of the Absolute Prohibition of Torture,” p. 124.

It might be argued that there is something dubious about punishing torturers if they are morally permitted to do what they do.⁷¹ And even some opponents of torture who oppose lifting standing international and domestic prohibitions of torture nonetheless support only a weak variety of legal absolutism. Here is Shue:

An act of torture ought to remain illegal so that anyone who sincerely believes such an act to be the least available evil is placed in the position of needing to justify his or her act morally in order to defend himself or herself legally. The torturer should be in roughly the same position as someone who commits civil disobedience. Anyone who thinks an act of torture is justified should have no alternative but to convince a group of peers in a public trial that all necessary conditions for a morally permissible act were indeed satisfied. If it is reasonable to put someone through torture, it is reasonable to put someone else through a careful explanation of why. If the situation approximates those in the imaginary examples in which torture seems possible to justify, a judge can surely be expected to suspend the sentence.⁷²

Given that *any* actual TBS is likely to be the sort of case where torturers can appeal to some familiar affirmative defense—say, necessity or exigency—how likely is it that a jury *wouldn't* be convinced? What judge *wouldn't* be inclined to suspend a torturer's sentence, especially if the trial is a public one and the decision to punish is unpopular? As Justice Scalia is reported to have declared: "Is any jury going to convict Jack Bauer? I

⁷¹ Allhoff, *Terrorism, Ticking Time-Bombs, and Torture*, p. 178.

⁷² Shue, "Torture," p. 143. See also Richard Posner, "Torture, Terrorism, and Interrogation" and Owen Gross, "The Prohibition on Torture and the Limits of Law," both in *Torture: A Collection*, Sanford Levinson, ed. (Oxford: Oxford University Press, 2004), p. 296 and 241, respectively.

don't think so.” Prospective torturers could reasonably lack any fear of prosecution or punishment if weak legal absolutism were practiced. Weak legal absolutism can be understood as an attempt to hold onto some strain of absolutist opposition to torture while accommodating the intuition that there is something suspect about punishing those who do what is morally permissible. But weak legal absolutism is bound to lack any deterrent effect and is functionally equivalent to legalizing torture in emergency scenarios, the only scenarios in which we would expect anyone to countenance the use of torture at all.

Worse, there are empirical grounds for doubting that weak legal absolutism has any significant deterrent effect. In 1999, Israel’s Supreme Court held that the General Security Service (GSS) did not have the authority to employ methods of “moderate physical pressure”—some of which certainly count as torture—but allowed that the necessity defense found in Israeli penal law allows GSS investigators to employ them in interrogation.⁷³ Yet calls for Israel’s Supreme Court to investigate still more cases of torture persist; on some accounts of things, there were 598 complaints about torture and mistreatment against the agency between 2001 and 2008, none of which were investigated by Israel’s Public Prosecutor.⁷⁴ Insofar as weak legal absolutism lacks any real deterrent effect, it is, in short, not a kind of absolutism worth wanting.

But a stronger version of legal absolutism is available. For all that has been said, there might be good reason to legally prohibit and punish otherwise morally permissible actions. On the most widely accepted account of civil disobedience, civil disobedience is

⁷³ See [Public Committee Against Torture v. State of Israel, HCJ 5100/94, 15 July 1999](#).

⁷⁴ “Israel Supreme Court Rejects Demands to Investigate Torture,” *Middle East Monitor* (August 8, 2012). Available at <http://www.middleeastmonitor.com/news/middle-east/4123-israeli-supreme-court-rejects-demands-to-investigate-torture> (last accessed December 12, 2012).

a public, non-violent and conscientious breach of the law undertaken to bring about a change in laws or government policies, and those who practice civil disobedience willingly accept the legal consequences of their actions and their punishment shows their fidelity to the rule of law.⁷⁵ On this account, someone guilty of a morally permissible criminal act—say, non-violently disobeying an unjust law—might by their own lights be punished justly, within obvious side-constraints, on the grounds that promoting and securing fidelity to the law is terribly important. If it is not generally unjust to legally punish those who do not perform any morally wrong action⁷⁶ then perhaps it is not unjust to legally punish torturers, even those who torture in a TBS. There is no incoherence in thinking that TBSs are conceivable *and* that all torturers must be punished harshly, that no affirmative defense should be permitted at trial, that they should be held strictly liable for their transgressions—more or less the position advocated in Article 2 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This is *strong* legal absolutism and arguably a commitment to minimizing the frequency of torture calls for nothing else. And it too is consistent with the possibility of realistically imaginable TBSs.

Conclusion

I have, perhaps unfortunately, multiplied the existence of absolutist positions concerning torture. Or perhaps not: neither probabilistic absolutism nor strong legal

⁷⁵ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999), pp. 319-23.

⁷⁶ And of course, not everyone concedes this point. See Ronald Dworkin, “On Not Punishing Civil Disobedience,” in his *Taking Rights Seriously* (Cambridge, MA: Harvard, 1977), pp. 206-22.

absolutism really falls under the extension of ‘absolutism’ as the term is defined above since both are consistent with thinking that TBSs are realistically imaginable. But I care less about whether these positions deserve to be called ‘absolutist’ and more about their implications in actual practice. Both positions have real and obvious implications for minimizing or eliminating the occurrence of torture as a matter of law and public policy, and *that* is surely the goal of the opponent of torture. If all this is right, opponents of torture do best to simply bite the bullet and allow that TBS are realistically imaginable: little of consequence follows and there are other and better battles to be fought to minimize the frequency and severity of torture. It looks as though Shue had it right in 1978: the TBS may well be conceivable, but consistent with a demand that we do not base any institutional preparations on imaginary cases, an “absolutish” opposition to torture as a matter of law and policy remains defensible.⁷⁷

⁷⁷ Thanks to Fritz Allhoff, Walt Schaller, and Jeremy Wisnewski for helpful comments on earlier drafts as well as audiences at Ohio Wesleyan University, Western Michigan University, and the 2011 Central Division meeting of the American Philosophical Association.