



2008

Unthinking the Ticking Bomb

David Luban

Georgetown University Law Center, luband@law.georgetown.edu

This paper can be downloaded free of charge from:
http://scholarship.law.georgetown.edu/fwps_papers/68

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: http://scholarship.law.georgetown.edu/fwps_papers



Part of the [International Law Commons](#), [Military, War and Peace Commons](#), and the [Public Law and Legal Theory Commons](#)

GEORGETOWN LAW

Faculty Working Papers



July 2008

Unthinking the Ticking Bomb

David Luban

Frederick Haas Professor of Law and Philosophy

Georgetown Law

luband@law.georgetown.edu

This paper can be downloaded without charge from:

BePress: <http://lsr.nellco.org/georgetown/fwps/papers/68/>

SSRN: <http://ssrn.com/abstract=1154202>

Posted with permission of the author

UNTHINKING THE TICKING BOMB

David Luban

I

When Henry Shue wrote his now-classic paper on torture in the late 1970s,¹ he had important real-world examples in mind – mostly Latin American dictatorships such as the Pinochet regime, which used torture as a device for terrorizing citizens into complying with the regime. The United States bore some responsibility for supporting and propping up the various anti-communist authoritarianisms that indulged in terroristic torture; and, as we learned in 1996, the School of the Americas in Fort Benning, Georgia had actually helped train Latin American security forces using instruction manuals that advocated torture.² But the United States was not itself a state that tortured. By the 1990s, in fact, the U.S. had joined the international Convention Against Torture, which declares that torture is always illegal even in times of war or national emergency; and, in compliance with the CAT, the U.S. has enacted stringent anti-torture laws.

By the time Shue wrote his second torture paper in 2005, the dictatorships that formed his primary illustrations had disappeared. The chief example was now quite different, and it was probably one that Shue did not anticipate in 1978. Now, the issue was torture by the U.S. The chief motivation is intelligence-gathering rather than terrorizing populations into obedience. The U.S. government has not admitted that it is torturing detainees, and in fact has indignantly insisted that the United States does not torture. But, as is well-known, this statement turns out to mean only that, under highly

¹ Henry Shue, “Torture,” *Philosophy & Public Affairs* 7 (1978): 124-43.

² Dana Priest, “U.S. Instructed Latins on Executions, Torture,” *Wash. Post*, Sept. 21, 1996.

questionable legal interpretations of the anti-torture laws, the government has concluded that its harsh interrogation tactics do not technically qualify as torture.³ This is a result that few analysts outside the U.S. government accept.

The United States has also enacted a law (the McCain Amendment) prohibiting so-called ‘CID’ – cruel, inhuman or degrading treatment that falls short of torture. This law was enacted over the objections of the Bush administration. After it was enacted, President Bush appended a signing statement strongly suggesting that he considers it an unconstitutional encroachment on his authority, so that he is not bound by it. In any event, however, the Department of Justice has contrived an interpretation of the law under which conduct does not count as cruel, inhuman, or degrading if it is undertaken on behalf of a legitimate governmental interest such as intelligence-gathering.⁴ Apparently, the United States government has a strong commitment to its freedom to use cruel techniques in interrogations, strong enough that it will use every legal argument its lawyers can think of to preserve that freedom.

Parallel with the reluctance of the U.S. government to forego harsh interrogation practices, the American public has become decidedly tolerant of torture, provided that the

³ See Luban, “The Torture Lawyers of Washington,” in *Legal Ethics and Human Dignity* (Cambridge UP, 2007), and Luban, “Liberalism, Torture, and the Ticking Bomb,” in Karen J. Greenberg, ed., *The Torture Debate in America* (Cambridge UP, 2006), pp. 55-68.

⁴ The interpretation appears in a letter of April 4, 2005 from Assistant Attorney General William E. Moschella to Senator Patrick Leahy. The letter is available at <http://www.scotusblog.com/movabletype/archives/CAT%20Article%2016.Leahy-Feinstein-Feingold%20Letters.pdf>. For discussion, including a demonstration that the interpretation depends on misrepresented Supreme Court precedent, see David Luban, “Torture and the Professions,” *Criminal Justice Ethics* (forthcoming).

subjects are described as terrorists.⁵ When President Bush admitted in summer 2006 that the CIA was indeed using “enhanced interrogation techniques,” little public outrage was heard, and the U.S. Congress – a reliable weather-vane of public opinion – responded by augmenting the President’s authority to interpret the Geneva Conventions’ protections against cruel treatment as he sees fit. Similarly, when September 11 planner Khalid Sheikh Mohammed declared – as part of his March 2007 confession – that he had been tortured, American media expressed no interest, except when commentators fretted that it might make it hard to try KSM because of pesky evidentiary rules against admitting tortured testimony. More remarkably, U.S. media gave almost no coverage to allegations that U.S. forces “disappeared” the seven- and nine-year-old sons of KSM, and abused them in efforts to learn where their father was located.⁶ The children have not yet reappeared.

⁵ A 2005 public opinion poll asked, “Do you think the use of torture against suspected terrorists in order to gain important information can often be justified, sometimes be justified, rarely be justified, or never be justified?” Forty-six percent of Americans surveyed answered “often” or “sometimes,” while only 32% answered “never.” http://ncronline.org/NCR_Online/archives2/2006a/032406/032406h.htm. A more recent (June 2006) poll found 36% of Americans agreeing that “Terrorists now pose such an extreme threat that governments should now be allowed to use some degree of torture if it may gain information that saves innocent lives.” http://www.worldpublicopinion.org/pipa/articles/btjusticehuman_rightsra/261.php?nid=&id=&pnt=261&lb=bthr. It is unclear whether the lower number here than in the 2005 poll arises from the slightly different questions – the former asking whether torture can be justified, the latter asking what government should be allowed to do. The latter survey was conducted in 25 countries. Those more pro-torture than the U.S. are Indonesia, Iraq, Israel, Kenya, Nigeria, Philippines, and Russia.

⁶ See the blog-post by the extraordinary philosopher-commentator “hilzoy”, http://obsidianwings.blogs.com/obsidian_wings/2007/06/are_we_disappea.html, which contains links to the important documents and notes that only one major American newspaper mentioned the disappearing of KSM’s sons at U.S. hands.

Of course, one can only speculate why poll-respondents answer as they do. It may indicate a kind of collective callousness, or reveal that brutality has always had a much larger following than elites like to deceive themselves into thinking. (It would not be the first time: a December 1944 Gallup poll revealed that fully 13% of surveyed Americans favored committing genocide against the Japanese.⁷)

But one guess about why Americans are so well disposed to torture is the steady and (in my view) astonishing popularity of the “ticking bomb scenario” (or, as I shall abbreviate it, TBS). In the TBS, you have captured someone involved in a bomb plot. He is your only source of information about where the bomb is located, and you have only a few hours before the bomb goes off, killing hundreds of innocent people. (On some versions of the TBS, it is a nuclear bomb in a large city.) He won’t talk. Do you torture him or not?

The TBS is, among other things, a remarkably effective propaganda device. For one thing, it is nearly ubiquitous in discussions of torture. More importantly, it is simple, easy to grasp, emotionally powerful, and – above all – it seems to have only one right answer, the pro-torture answer. Thus, Charles Krauthammer writes:

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

⁷ George Gallup, ed., *The Gallup Poll: Public Opinion 1935-1971* (Random House, 1972), vol. 1, pp. 477-78.

this issue, there can be no uncertainty: Not only is it permissible to hang this miscreant by his thumbs. It is a moral duty.⁸

I note in passing that there are actually two different argumentative routes to reach this conclusion in the TBS. One is that *anyone* would be permitted (or obligated?) to torture under these circumstances. The other, more subtle and circumspect, version of the argument is that only government officials have a special public obligation to dirty their hands if the public welfare demands it. Some philosophers have suggested that public officials must be guided by a largely consequentialist public morality that would be unacceptable as private morality.⁹ At several points Krauthammer suggests that he holds the latter interpretation, that regardless of whether everyone must take a rigorously consequentialist point of view, public officials who fail to do so are irresponsible and feckless. In the same vein, Jean Bethke Elshtain writes, “Far greater moral guilt falls on a person in authority who permits the deaths of hundreds of innocents rather than choosing to ‘torture’ one guilty or complicit person....”¹⁰

Promiscuous invocation of the TBS has real-life consequences. In November 2006, Gen. William Finnegan, the dean of the United States Military Academy, flew to Hollywood to meet with the producers and writers of the popular television series “24”,

⁸ Charles Krauthammer, “The Truth About Torture: It’s Time to be Honest About Doing Terrible Things,” *The Weekly Standard*, Dec. 5, 2006, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/006/400rhqav.asp>.

⁹ See, e.g., Stuart Hampshire’s two papers in his collection *Public and Private Morality*; or Thomas Nagel’s “The Fragmentation of Value.”

¹⁰ Jean Bethke Elshtain, “Reflections on the Problem of ‘Dirty Hands’,” in Sanford Levinson, ed., *Torture: A Collection* (Oxford University Press, 2004), p. 87. It is not clear why Elshtain puts scare-quotes around the word “torture”; perhaps because she doubts that the kind of techniques used by the U.S. government really are torture? Perhaps because “torture” is such a disagreeable word?

in which heroic agent Jack Bauer routinely tortures terrorists in various incarnations of the TBS. Gen. Finnegan's mission was to persuade "24"'s makers to stop dramatizing the TBS, because the show – wildly popular among U.S. military forces – was leading to abuse and mistreatment of detainees, as the TBS overrode the careful training that the soldiers had in how to treat captives.¹¹ He brought along experienced interrogators to explain why the scripts are preposterous. The writers expressed dismay, because they never imagined they were writing anything other than fiction in the first place. Their dismay may even have been genuine. (The producer was another story: a friend and ideological soul-mate of pro-torture politicians, he refused to meet with the general, whose mission failed.) Such is the power and the peril of the TBS: it can even override military training backed by threats of court-martial and prison. At the opening debate among Republican presidential contenders in 2007, the questioner presented them with a version of the TBS, and the response that drew the most applause was one candidate's simple reply: "I'm looking for Jack Bauer at that time, let me tell you."

In June 2007, I attended a conference of anti-torture NGOs who had come to the unhappy conclusion that they were losing the fight against torture, because their arguments about torture's illegality, its worldwide condemnation, and its horrors simply have no traction in the face of the TBS; the purpose of the conference was to produce a response. All participants agreed that doing so is devilishly hard. Not that anyone

¹¹ Jane Mayer, "Letter from Hollywood: Whatever It Takes," *The New Yorker*, Feb. 19, 2007, http://www.newyorker.com/fact/content/articles/070219fa_fact_mayer. A Pentagon survey reveals that one-third of U.S. troops deployed in Iraq believe that torture should be allowed if it reveals information about insurgents; 40% approve of it if it would save the life of a fellow soldier; and 10% admitted to abusing detainees themselves. Thomas E. Ricks and Ann Scott Tyson, "Troops at Odds With Ethical Standards," *Washington Post*, May 5, 2007, p. A1.

among the anti-torture organizations thought the TBS actually does establish the justifiability of torture. Responding to it is hard in the same way, and for some of the same reasons, that epistemologists find it hard to respond to brain-in-the-vat Cartesian hypotheses that seem to establish the truth of radical skepticism. The question-begging assumptions built into Cartesian hypotheses are built in in subtle ways, and it takes a great deal of patient, delicate, argumentation to show this.¹² The Cartesian hypotheses, on the other hand, seem simple, powerful, and irrefutable on their surface. A child can understand them; many children have discovered them on their own. The power of the example seems more direct, more visceral, and (therefore) more convincing than hyper-intellectualized responses. The same is true with the TBS.

The disanalogy between Cartesian hypotheses and the TBS is that nobody except epistemologists takes Cartesian examples as serious threats to common sense; it is not even clear what taking them seriously would amount to. For that reason, nobody except epistemologists needs to work out the arguments, and they do so in academic settings rather than the public forum. Opponents of torture, unfortunately, need to respond in the public forum to the friends of torture; they need to meet the TBS sound bite with something equally short and equally pithy. That is nearly impossible to do.

II

The first thing to notice about the TBS is that it rests on a large number of assumptions, each of which is somewhat improbable, and which taken together are vanishingly unlikely. It assumes that an attack is about to take place, and that “the

¹² See, e.g., Michael Williams, *Unnatural Doubts* (Princeton: Princeton University Press, 1995) and *The Problems of Knowledge: A Critical Introduction to Epistemology* (Oxford: Oxford University Press, 2001).

authorities” somehow know this; that the attack is imminent; that it will kill a large number of innocent people; that the authorities have captured a perpetrator of the attack who knows where the time-bomb is planted; that the authorities know that they have the right man, and know that he knows; that means other than torture will not suffice to make him talk; that torture will make him talk – he will be unable to resist or mislead long enough for the attack to succeed, even though it is mere hours away; that alternative sources of information are unavailable; that no other means (such as evacuation) will work to save lives; that the sole motive for the torture is intelligence-gathering (as opposed to revenge, punishment, extracting confessions, or the sheer victor’s pleasure in torturing the defeated enemy); and that the torture is an exceptional expedient rather than a routinized practice.¹³ Some of these assumptions can be dropped or modified, of course. But in its pure form, the TBS assumes them all.

That makes the TBS highly unlikely. For the authorities to know that an attack is going to take place, and that their captive knows where the bomb has been planted, will normally require substantial human intelligence (‘Humint’) – informants or infiltrators of the enemy organization. That is rare; Israel’s is most likely the only national intelligence service that has first-rate Humint on its adversaries. Rarer still are cases where the Humint exists but is unable to provide independent information on the ticking bomb’s location. Furthermore, torture is notoriously unreliable, not least because its victims sometimes die under torture or fall unconscious. So, to assume that torture will work

¹³ This is a version of a list drawn from the Association for the Prevention of Torture’s report “Defusing the Ticking Bomb Scenario,” available at <http://www.ap.t.ch/>, combined with some of the factors I discuss in my own paper “Liberalism, Torture, and the Ticking Bomb,” in Karen Greenberg, ed., *The Torture Debate in America* (Cambridge University Press, 2005).

while other methods of interrogation will not is to assume something doubtful. The reader will have little difficulty in seeing the improbability of many of the other assumptions in the TBS. It stipulates that the interrogator knows things that interrogators will seldom know.

Thus, for example, Krauthammer writes, “The principle would be that the level of inhumanity of the measures used...would be proportional to the need and value of the information. Interrogators would be constrained to use the least inhumane treatment necessary relative to the magnitude and imminence of the evil being prevented and the importance of the knowledge being obtained.” The incoherence of this “principle” should be clear: you can’t know the need and value of the information until you find out what it is. Krauthammer has somehow assumed that you already know.

Moreover, it is important to notice that some of the methods of “torture lite” used by American agents – prolonged isolation, sleep deprivation, sexual humiliation – are time-consuming, and incompatible with the imminence requirement of the TBS. Ergo, the TBS implies that “torture heavy,” not “torture lite,” is the true subject of discussion.

The second point to notice about the TBS, closely related to its unlikelihood, is the lack of documented cases of it. Authentic cases, not myths; I say this, because the subject is drenched in myths. A few examples will illustrate.

1. In 1995, Philippine authorities captured Abdul Hakim Murad, a Pakistani bomb-maker who accidentally detonated chemicals in his apartment and then was foolish enough to come back to try to retrieve his laptop. They tortured him for 67 days with great brutality, and, in the end, Murad revealed details of a plot to blow up eleven U.S.

airliners, and another to assassinate the pope. Murad is sometimes cited as the poster-child of the TBS, a real-life argument for the efficacy of torture.

In fact, however, he was tortured without his interrogators knowing what his plots were, or even whether there were any imminent plots – they simply had no idea if there was a genuine, time-sensitive, ticking bomb. They were on a fishing expedition, and torture was their first resort, not their last. Furthermore, they themselves expressed surprise that Murad didn't die under their torture, in which case the interrogation would have failed; apparently, they didn't care enough about finding ticking time bombs to stop beating him with chairs. Third, Murad did not in fact reveal information under torture, despite beatings that broke most of his ribs, cigarettes ground out on his genitals, and near-drowning by being pumped full of water. He finally talked only when the interrogators threatened to turn him over to the Israelis, who, as one journalist puts it, he feared as much as he hated.¹⁴ Last, but far from least: all the information about the plots was in Murad's laptop computer. Darius Rejali, in his magisterial book *Torture and Democracy*, describes the Murad interrogation as a textbook case of “how a police force is progressively deskilled by torture.”¹⁵ In other words: when torture is the first resort, decrypting computers becomes only a secondary skill. In that case, torture becomes the A-option; torture breeds more torture. Murad's torture turned out to be unnecessary, as well as insufficient, to discover the life-saving information.

¹⁴ Peter Maass, “Torture, Tough or Lite; If a Terror Suspect Won't Talk, Should He Be Made To?”, *New York Times*, March 9, 2003; see also Marites Dañguilan Vitug and Glenda M. Gloria, *Under the Crescent Moon: Rebellion in Mindanao* (2000), p. 223. Darius Rejali observes that Murad cannot have been merely afraid of Israeli torture, given what he had already been through, and speculates plausibly that his fear was long-term imprisonment in Israel – both because he hated Jews, and because he may have calculated that his prospects for release were greater in the Philippines. Darius Rejali, *Torture and Democracy* (Princeton: Princeton University Press, 2007), p. 507.

¹⁵ Rejali, p. 507.

2. Two years ago, I gave a talk about torture and the TBS to a large audience of cadets at West Point, the U.S. Military Academy. Talking to the cadets and their instructors, I learned that they were preoccupied with the case of an Army officer in Iraq who discovered that his troops were going to be ambushed. He had a captive who knew the details. When the captive wouldn't talk, the officer fired his pistol into the ground next to the captive's head – which frightened him into revealing all. Having saved his men, the officer then did the honorable thing and turned himself in. He was punished for it; and the cadets were extremely upset that this was the outcome. Their questions were straightforward: Isn't this a version of the TBS? And didn't the officer do the right thing? And wasn't it wrong to punish him for doing the right thing?

But the cadets had the facts wrong. The officer – Lieutenant Colonel Allen West – had heard about an assassination plot against himself (not an ambush of his unit), and captured a policeman who may or may not have been a conspirator. Lt. Col. West watched while his troops beat the man for an hour, shouting “Who the fuck is trying to kill him?” – to no avail. That was when West told the man “Either you answer the questions, or die tonight,” and fired one or two shots next to his head. The man stiffened in terror, but still revealed nothing. According to journalist Tom Ricks, “At that point, the senior sergeant present decided he had seen enough. ‘Sir, I don’t think he knows,’ he said to West. (‘It was something I had never experienced before and don’t care to again,’ the sergeant first class added in his statement.) ‘Put him back in the cell,’ West responded.”¹⁶ After self-reporting his actions, West was charged with assault, fined, and relieved of his command. The rumor mill did the rest. There was no ticking bomb; West

¹⁶ Tom Ricks, *Fiasco: The American Military Adventure in Iraq* (Penguin, 2006), pp. 280-81. Ricks footnotes his version of the story to a document titled “CID Report of Investigation—Final” (Feb. 6, 2004), with exhibits and sworn statements.

apparently had the wrong man; and West certainly did not follow Krauthammer's injunction to use "the least inhumane treatment necessary relative to the magnitude and imminence of the evil being prevented and the importance of the knowledge being obtained."¹⁷

3. At the end of the summer in 2006, President Bush made a remarkable speech in which he admitted to the existence of secret CIA prisons, along with "alternative" interrogation procedures which he would not disclose, but which were universally assumed to include stress positions, waterboarding, and other forms of torture.¹⁸ Bush defended these procedures by discussing the case of Abu Zubaydah, a detainee who was interrogated through the alternative procedures. According to the President, Zubaydah was a major Al Qaeda planner, and his "alternative" interrogation revealed important information: the identity of terrorist Ramzi bin al Shibh, information leading to al Shibh's capture as well as the capture of 9/11 mastermind Khalid Sheikh Mohammed, and the terrorist plans of Jose Padilla (although the president did not mention Padilla by name).

However, all the President's assertions are either contested or provably false. Al Shibh's identity was already well known, and had been public before Zubaydah's capture.¹⁹ Al Shibh's capture, according to journalist Ron Suskind, resulted from information provided by the Emir of Qatar, not Zubaydah; the Emir also provided information that helped locate KSM. For that matter, Zubaydah was not an important Al Qaeda figure; he was the equivalent of Al Qaeda's travel agent, and furthermore he was

¹⁷ West, however, maintains that the more flattering version of the story is true. Running for Congress in 2008, his website links to several articles containing that version.

¹⁸ "President Discusses Creation of Military Commissions to Try Suspected Terrorists," Sept. 6, 2006, available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>.

¹⁹ My own Lexis/Nexis search on al Shibh's name turned up 87 hits in major newspapers from before the date of Zubaydah's capture.

insane. Finally, he did not break under torture, but rather began to talk when a new interrogator discontinued torture and successfully persuaded Zubaydah that revealing information was his religious obligation.²⁰ At that point Zubaydah did reveal Padilla's identity, but Padilla was not exactly the purveyor of a ticking bomb. He supposedly hoped to manufacture a radioactive "dirty bomb," but explained that he would centrifuge the radioactive material (which he did not possess) by spinning it in a bucket over his head. (In the interest of fairness, I should note that the value of Zubaydah's interrogation remains a matter of dispute. In December 2007, a former CIA agent named John Kiriakou, who knew about the interrogation of Zubaydah, made headlines by conceding that he was tortured, but called it torture that "probably saved lives." In the wake of Kiriakou's statements, FBI and CIA sources sharply disagreed with each other, with the FBI backing Suskind's account, and the CIA backing President Bush's.²¹)

In other words, there have been no undisputed TBSs in American experience. Perhaps some are unreported. But, given the enormous public-relations advantage that would accrue to the Bush administration by leaking details of an authentic TBS, the fact that the dog has not barked in seven years seems like a significant basis for doubt. The ready public acceptance of TBS myths may reflect the desire of torture supporters for factual validation of their fantasies.

III

²⁰ Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11* (Simon & Schuster, 2006), pp. 99-100 (on Bush's mischaracterizations of Abu Zubaydah), 111, 115-18 (on the interrogation of Abu Zubaydah), 136-40 (on the role of the Emir of Qatar in the capture of KSM and Ramzi bin al Shibh).

²¹ Dan Eggen & Walter Pincus, "FBI, CIA Debate Significance of Terror Suspect; Agencies Also Disagree On Interrogation Methods," *Washington Post*, Dec. 18, 2007.

Once we set out the conditions assumed in the TBS, we are in a position to notice one of the most important ways it cheats in evoking pro-torture moral intuitions. It assumes that it is the terrorist himself, or someone complicit with the terrorist, who will be tortured for information. But that assumption runs the risk that the real source of the pro-torture intuitions in the TBS is not the “rational moral calculus” Krauthammer speaks of – one person’s pain weighed against many people’s lives (and pain) – but rather rage at a guilty terrorist and the desire to punish him harshly. It seems quite likely that many people consciously or unconsciously approve of the torture of terrorists for punitive reasons, which they may deceive themselves into repackaging under a consequentialist, intelligence-gathering rationale. (Krauthammer, for example, seems to enjoy writing sentences like this: “Anyone who blows up a car bomb in a market deserves to spend the rest of his life roasting on a spit over an open fire.”) One might even speculate that the popularity of the TBS grows out of frustrated hatred of terrorists, with many citizens relishing the thought of torturing this monster and therefore gravitating to hypotheticals in which it would happen and seem right.

This is critically important, because a great many detainees claim that they are cases of mistaken identity (and this has been proven to be true in the highly-publicized case of Mohammed El-Masri, a German cab-driver who was kidnapped and rendered by U.S. agents). A former U.S. contract interrogator has explained to me that in Iraq, detainees were brought in whose arrest report stated nothing beyond “Suspected of anti-coalition activity” – and that this often meant only that they were young men in the vicinity of roadside bombs. When the interrogators have no facts to go on (he elaborated), interrogators find it harder to use non-coercive means such as persuading the

detainee that “we already know everything about him, so he might as well talk.” Under these circumstances, interrogators turn to abuse. The upshot is that many innocent men have been wrongly abused by U.S. interrogators. Anyone who uses the TBS to defend torture must, if he is intellectually honest, defend it in cases where it is quite possible that the captive is innocent. Otherwise, the TBS-monger is cheating.

In order to control for this way of cheating, we must make sure that in describing the TBS we build in that the person being tortured for information is completely innocent. Perhaps it is the terrorist’s seven-year-old child, who won’t reveal her daddy’s location out of love and loyalty. Or, to remove even this childish level of complicity, perhaps it will turn out that the only way Jack Bauer can break the terrorist is to torture his child, who knows nothing of intelligence value, in front of him.²² Saddam Hussein used to do things like that. What if the only thing that can break the terrorist is being forced to watch the president of the United States personally torture the terrorist’s innocent children? Or torture someone else’s innocent children? (Two can play at the game of hypothetical-mongering.) Will Krauthammer or Elshtain insist that, as a public official, the president lies under a moral obligation to torture innocent children with his own hands? Krauthammer, at any rate, tries to position himself as a hard-headed consequentialist, by using the phrase “rational moral calculus” to explain why torture is morally required in the TBS. But, if he or Elshtain would flinch at answering ‘yes’ in the grotesque hypotheticals I have just posed, they will reveal that it is loathing of the terrorist, not rational moral calculation, that drives their response to the original TBS, where it is the guilty terrorist who is being tortured. Krauthammer might reply that I am

²² This is Samuel Scheffler’s hypothetical, in his introduction to *Consequentialism and Its Critics* (Oxford UP, 1988), p. 3.

doing the same thing by surreptitiously appealing to our protective instincts toward children. Very well. Would Krauthammer or Elshtain proclaim a moral obligation on the president to torture a completely innocent adult to locate the ticking bomb?

Perhaps they will bite the bullet and answer yes. That would be a consistent consequentialist answer, but it would not be an answer that preserves the persuasive force of the TBS. It would be interesting to hear the audience response if the TBS enthusiast – let’s suppose it is Alan Dershowitz giving a speech²³ – poses the problem thus: “If the only way to get a terrorist to reveal the location of the ticking bomb is to torture *you* – that’s right, you, the audience member, personally, for days on end – do you think the government should do it? You’ll be kidnapped, hooded, have your clothes cut off; you’ll be diapered and dressed in an orange jump suit, blindfolded, shot up with sedative, flown to Cuba, beaten, stripped naked and mocked by members of the opposite sex, tied down, blasted with ear-splitting rap music and strobe lights for hours, hosed down and thrown into a frigid cell overnight, then shackled to an eye-bolt in the floor and made to stand up until your ankles double in size and your kidneys start to fail. Then you’ll be chained to the ceiling with your arms behind your back, and lastly have sterilized needles thrust under your fingernails. The president will do it personally. For some reason or other, that’s the only thing that will make the terrorist talk. Should we do it?”²⁴ It seems likely that the audience member would either dismiss the hypothetical as preposterous or answer with a resounding no.

²³ Dershowitz has said that he often raise the TBS

²⁴ All but the last technique have allegedly been used by U.S. authorities against high-value detainees. The sterile needles idea is Dershowitz’s own: *Why Terrorism Works* (Yale University Press, 2002), p. 144 (“a sterilized needle inserted under the fingernails to produce unbearable pain without any threat to health or life”).

But instead Krauthammer or Elshtain might distinguish the torture of the innocent and the torture of the guilty and respond that interrogational torture can be justified only against someone who has forfeited rights against torture by planting the time-bomb. That would be a coherent deontological response to my hypothetical questions, one that might explain why torturing the terrorist is acceptable but torturing the innocent person is not.²⁵ In that case, however, the notion that public officials must obey a consequentialist dirty hands public morality has been abandoned. Now the morality turns out to be consequentialism limited by a deontological restriction inexplicable on consequentialist grounds. And, having allowed one restriction to consequentialist calculation, Krauthammer and other advocates of torture must explain why it is the only one. In particular, they must answer the question of whether it really is true that our wrongful actions can waive all rights, even the right against torture? Many of us – including all the governments that joined the Convention Against Torture – disagree. We think that wrongful action can waive some rights but not others, and that the right against torture is bedrock – torture is evil enough that, in the words of CAT, “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.”²⁶

IV

Why the special revulsion for torture? Why is it worse than killing? What, specifically, characterizes the evil of torture?

²⁵ So Jeff McMahan argues in “Torture, Morality, and Law,” *Case Western Reserve Journal of International Law* 37 (2005): 244-45. In McMahan’s view, if an agent has made it inevitable that somebody is going to be harmed, either the terrorist or the potential victims, fairness requires that it be the terrorist.

²⁶ CAT, Article 2(2).

One might find this a silly question, and answer in the simplest way: it's the pain, stupid! No experience is more horrible than severe pain; and, one might think, nothing more needs to be said. Many people would prefer death to prolonged severe pain. Those who devised Christian doctrines of Hell imagine it as a place of endless torture, not of endless oblivion; for that reason, Bayle argued that a God who tortures eternally is an unjust monster, since the punishment is disproportionate to any imaginable sin.²⁷ One might melodramatize the point: Find the living being who is enduring the worst pain (physical or mental) at any given moment and you have found, quite literally, the point of greatest horror in the universe at that moment. As you read these words, the locus of greatest horror on Earth may be a hospital bed in Kingston, Jamaica; tomorrow, in a collapsed mineshaft in Szechuan Province; next week, in the house of a man in San Francisco who has accidentally killed his own beloved child; an hour later, in your own house, as your herniated disc leaves you panting in agony on the bathroom floor. Disproportionately often, the point of greatest horror will be in a torture chamber somewhere. Torture is not just one bad thing among many; while it is occurring, it may be, depending on its severity, quite literally the most horrible thing in the world.

There is indeed more to be said than "it's the pain," however. The awfulness of pain, including physical pain, is deeply connected with its context. The pain of childbirth is undoubtedly comparable to or even worse than many tortures, including severe ones. Men, I'm told, could not bear the pain that birthing mothers endure. Yet millions of women who no-one would call irrational have preferred natural childbirth to anesthesia;

²⁷ See Susan Neiman, *Evil in Modern Thought* (Princeton: Princeton University Press, 2002), p. 19.

the connection of birth pangs to a joyful or even ecstatic event changes the sensations' character without diminishing their painfulness.

In the case of torture, the connection is with fearful, degrading, soul-destroying events. Fear is perhaps the most important evil-maker connected with the pain of torture. The torture victim never knows whether his torturer will do even worse things; the uncertainty is perpetual. Today it may be "torture lite" – sleep deprivation or bombardment with loud cacophonous music; tomorrow, the torturer may beat me or mutilate me or kill me. As the example of Murad (who didn't break under torture, but did under the threat of the Israelis) illustrates, fear may be worse than the torture itself.

The difference fear makes should be obvious, but I have discovered that it isn't. Surprisingly often, especially discussing these issues with soldiers or veterans, I have heard the sneering response, "If that's torture, I got tortured in basic training," as if this were a triumphant reductio of claims that forced prolonged standing, extremes of hot and cold, or sleeplessness amount to torture. Sometimes, the friends of torture point out that these interrogation tactics were devised by the architects of the U.S. military's SERE program, which consists of training in how to resist enemy mistreatment. It can't be torture, they argue, because we do it to our own guys and they don't call it torture.

These arguments are silly, because they focus only on physical sensations and neglect the crucial difference: SERE participants and soldiers in basic training know that those inflicting the treatment on them have no intention of killing or maiming them; they also know that within a short, fixed period of time the treatment will stop. They have none of the fear of a torture victim who knows neither of these things, and whose captors

tell him that unless he talks he may be in Guantanamo forever. Torture inevitably intensifies pain with terror.

Many writers have focused as well on the connection between torture and humiliation or degradation. I don't mean only that torturers like to humiliate their victims – they mock their naked bodies, they force them to masturbate or drink their own piss or do dog tricks or beg for mercy. I am referring to two additional facts. First, the experience of acute pain is itself degrading because it collapses our world and reduces us to, as it were, mere prisoners of our bodies.²⁸ Second, the relation between the torturer and the victim is one of absolute domination and absolute subordination. The torturer, as Jean Améry remarks “has control of the other's scream of pain and death; he is master over flesh and spirit, life and death.”²⁹ He elaborates:

But in the world of torture man exists only by ruining the other person who stands before him. A slight pressure by the tool-wielding hand is enough to turn the other – along with his head, in which are perhaps stored Kant and Hegel, and all nine symphonies, and the World as Will and Representation – into a shrilly squealing piglet at slaughter. When it has happened and the torturer has expanded into the body of his fellow man and extinguished what was his spirit, he himself

²⁸ This diagnosis of the evil of torture comes from Louis Michael Seidman, “Torture's Truth,” *University of Chicago Law Review* 72 (2005): 905, and Elaine Scarry's famous analysis in *The Body in Pain: The Making and Unmaking of the World* (Oxford UP, 1985), p. 29. See in addition Jean Améry, “Torture,” in *At the Mind's Limits: Contemplations By a Survivor on Auschwitz and Its Realities*, trans. Sidney Rosenfeld and Stella P. Rosenfeld (Indiana UP, 1980), p. 33: “the tortured person is only a body, and nothing else beside that.”

²⁹ Améry, p. 35.

can then smoke a cigarette or sit down to breakfast or, if he has the desire, have a look in at the World as Will and Representation.³⁰

Améry, a torture victim himself, likens the experience to a rape.³¹ Like fear, humiliation and degradation are horror-multipliers to the physical sensations of cruel treatment.

In an earlier paper, I argued that liberals “put cruelty first” among the vices – Judith Shklar’s famous phrase – precisely because torture is a microcosm of the totalitarian political relationships that liberalism fears the most.³² David Sussman locates the evil of torture in the fact “that the only thing that matters to [the torture victim] is pleasing this other person who appears infinitely distant, important, inscrutable, powerful, and free.”³³ In his 1978 paper, Henry Shue focuses on the defenselessness of the torture victim. Although these diagnoses of torture’s evil have significant points of difference, they all call attention to the degrading relational character of torture, in addition to the pain and the fear. Améry’s remarks highlight as well the corruption and deformation of the torturer. Seidman and Sussman both point to the destruction of the torture victim’s will.³⁴ And Améry identifies one more evil folded into torture:

with the very first blow that descends on him he loses something we will perhaps temporarily call ‘trust in the world.’...

The expectation of help, the certainty of help, is indeed one of the fundamental experiences of human beings, and probably also of animals....The expectation of

³⁰ Ibid.

³¹ Ibid., p. 28.

³² Luban, “Liberalism, Torture, and the Ticking Bomb,” pp. 37-43; also Améry, p. 39.

³³ David Sussman, “What’s Wrong with Torture?”, *Philosophy & Public Affairs* 33 (2005): pp. 25-26. Sussman offers a slightly different explanation in “Defining Torture,” *Case Western Reserve Journal of International Law* 37 (2005): 227-30, where he describes the distinctive evil of torture as forced passivity.

³⁴ Ibid., p. 4; Seidman, p. 907.

help is as much a constitutional psychic element as is the struggle for existence. Just a moment, the mother says to her child who is moaning with pain, a hot-water bottle, a cup of tea is coming right away, we won't let you suffer so! I'll prescribe you a medicine, the doctor assures, it will help you. Even on the battlefield, the Red Cross ambulances find their way to the wounded man. In almost all situations in life where there is bodily injury there is also the expectation of help; the former is compensated by the latter. But with the first blow from a policeman's fist, against which there can be no defense and which no helping hand will ward off, a part of our life ends and it can never again be revived.³⁵

Those who have spent time in the company of torture victims will have little difficulty understanding how terrible a loss this is.

We need not choose among these accounts of the evil of torture; they augment each other (and all of them are found in Améry's famous essay, the most analytical memoir of a torture survivor I have read). Torture is the union of relational and non-relational evils, which function as horror-multipliers of the raw physical sensations. The pain, the fear, the degradation, the domination combine to make torture the greatest human evil. If there are any limits to what people can do in pursuit of legitimate ends, the prohibition on torture seems like an obvious candidate.

V

The ticking bomb is the subject of Shue's 2005 paper on torture.³⁶ Like other writers on the TBS – including me – he focuses on its improbability. In his earlier paper,

³⁵ Améry, pp. 28-29.

³⁶ "Torture in Dreamland: Disposing of the Ticking Bomb," *Case Western Reserve Journal of International Law* 37 (2006): 231-39.

he had offered a methodological point about fanciful hypotheticals in moral philosophy: “there is a saying in jurisprudence that hard cases make bad law, and there might well be one in philosophy that artificial cases make bad ethics.”³⁷ If the improbable features are the ones that secure the desired conclusion, then nothing of significance follows: “one cannot easily draw conclusions for ordinary cases from extraordinary ones.”³⁸

Before turning to Shue’s re-evaluation of this caution in the 2005 paper, let us pause to consider the adage that artificial cases make bad ethics. It might mean one or more of several things; and, in the remainder of the paper I unfold the argument by elaborating on the things it might mean. Here are two:

(1) By focusing on improbable artificial cases, theorists misdirect readers’ attention from genuine issues in the real world to specious issues. They illicitly change the subject from important and authentic questions about the limits of legitimate interrogation in non-TBS cases to intuition-mongering about a tendentious hypothetical.

Or it might mean (emphasizing the “hard cases make bad law” trope):

(2) Policies have to do with rules, procedures, protocols, and laws. Lawmakers should build policies and rules around typical cases and ignore the rare hard cases; and moralists should ignore the weird ones. Thus, even if there were rare cases of morally justifiable torture, procedures and laws should not accommodate them by making exceptions for them.

³⁷ Shue, “Torture,” p. 141.

³⁸ Ibid.

Shue and I both have criticized the TBS on ground (1).³⁹ Politically, I continue to think this is the crucial point: the TBS has displaced genuine issues in the public forum and substituted a fictitious example stacked in favor of torture-permissiveness. That is a good reason for changing the subject away from the TBS, rather than trying to respond to it.

However, changing the subject will seem to many like mere evasiveness, and someone whose mind is not made up about the torture issue may insist that the torture opponent respond to the hypothetical rather than dodging it. Interpretation (1) will not help; it says nothing about whether torture would in fact be justifiable in the TBS, assuming that the improbable happened and it actually occurred. In his 1978 paper, Shue concedes that torture would be permissible in a genuine TBS.⁴⁰ He recants from that view in the 2005 paper; but before examining the recantation, we must ask what follows from the 1978 concession.

In the 1978 paper, Shue argues that very little follows from it, because all he has conceded is “the permissibility of torture in a case *just like this*”⁴¹ – that is, a case in which all the conditions in the TBS are satisfied.

I am not so sure. The problem is that 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. As Krauthammer puts it,

³⁹ See Luban, “Liberalism, Torture, and the Ticking Bomb,” pp. 45-46; Luban, “Torture, American-Style,” *Wash. Post*, Nov. 27, 2005, p. B1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/25/AR2005112501552.html>.

⁴⁰ Shue, “Torture,” p. 141.

⁴¹ *Ibid.*

However rare the cases, there are circumstances in which, by any rational moral calculus, torture not only would be permissible but would be required (to acquire life-saving information). And once you've established the principle, to paraphrase George Bernard Shaw, all that's left to haggle about is the price. In the case of torture, that means that the argument is not whether torture is ever permissible, but when—i.e., under what obviously stringent circumstances: how big, how imminent, how preventable the ticking time bomb.⁴²

“Haggling about the price” means haggling about which of the assumptions in the TBS can be relaxed and still suffice to justify torture. What if one knows only that the captive is a high-ranking terrorist who might know something useful, but maybe nothing that prevents any particular ticking bomb – but, on the other hand, the mistreatment is “only” sleep deprivation? This, after all, is very likely the reality of U.S. torture. After making the initial concession, any prohibition on torture faces significant dialectical pressure toward balancing tests and the unwelcome consequentialist conclusion that interrogational torture can be justified whenever the expected benefits outweigh the expected costs.

This is where (2) becomes important. Interpretation (2) also concedes the logical possibility of cases of justifiable torture but insists, on roughly rule-consequentialist grounds, that the law (or policies, or protocols) should not carve out exceptions for them. The reason is that by carving out an exception, the prohibition on torture is weakened, or becomes less enforceable, and the result will be too many cases of unjustified torture. The argument on the other side, of course, is that rigorously enforcing anti-torture laws in

⁴² Krauthammer. I made the same point in roughly the same words in “Liberalism, Torture, and the Ticking Bomb,” p. 44, in order to explain why torture proponents are so fond of the TBS.

all cases without exception will deter officials from engaging in torture even in the rare TBS cases where, by hypothesis, it is the right thing to do. And the counter-argument to this objection is, simply, that the ticking bomb cases are so rare that the genuine worry about underdeterrence (the result of building exceptions into the anti-torture rule) is far more compelling than the worry about overdeterrence (in a genuine TBS).

Some who agree that the ban on torture must stand may still object to the idea of punishing someone who has, in the rare case of a TBS, done the right thing by violating the ban. That is why most proponents of (2) advocate leaving the anti-torture rule in place but permitting accused torturers to plead necessity in the rare authentic TBS, or, alternatively, to receive a sentencing discount or even a pardon if they are convicted of the crime of torture. The first of these was the strategy adopted by the Israeli Supreme Court in its momentous 1999 decision banning torture. The Court allowed that under Israeli law an accused torturer could plead necessity; but when the Israeli security services argued that in that case the court should create an ex ante permission to torture in ticking bomb cases, the Court refused. An ex ante permission is a “general administrative power” – a rule, not an exception – whereas the necessity defense concerns “an individual reacting to a given set of facts; it is an ad hoc endeavour, in reaction to a event. It is the result of an improvisation given the unpredictable character of the events” and is not to be turned into a rule.⁴³ The Court perceived the trap it would fall into if it turned the possibility of an ex post defense into an ex ante permission: the ex ante permission would be a rule, not an exception. With or without the necessity defense,

⁴³ Israel Supreme Court, Judgment Concerning the Legality of the General Security Service’s Interrogation Methods, 38 I.L.M. 1471 (1999), para. 36. Oren Gross has offered a similar argument.

interpretation (2) allows us to acknowledge the justifiability of torture in the TBS while maintaining rigid prohibitions against torture and CID.

In his 2005 paper, Shue goes beyond (1) and (2) and renounces his earlier concession that torture would be justifiable even in a genuine TBS case. His reason is that he now believes that the true TBS is not merely improbable, it is actually impossible. That is because, among the key conditions defining the TBS, are the requirement that it is an exceptional emergency measure and not an institutionalized practice, and the related point that the torturer is a conscientious, reluctant interrogator who uses torture only in the rare cases where all the TBS conditions are met. But a torturer must be competent; he must have training and the opportunity to practice; his training requires teachers, and his equipment must have been acquired in advance. There will be a doctor present, to insure that the subject of interrogation does not die. The torturer is not Jack Bauer but an apparatchik in a torture bureaucracy. A TBS without a torture bureaucracy is impossible.

To try to leave a constrained loophole for the competent “conscientious offender” is in fact to leave an expanding loophole for a bureaucracy of routinized torture, as I misguidedly did in the 1978 article.⁴⁴

The “moderate” position on torture represented by (2) is, in Shue’s words, torture in dreamland. “So I now take the most moderate position on torture, the position nearest to the middle of the road, feasible in the real world: never again. Never, ever, exactly as international law indisputably requires.”⁴⁵

VI

⁴⁴ Shue, “Torture in Dreamland,” p. 238. I offer similar arguments in “Liberalism, Torture, and the Ticking Bomb,” pp. 47-51.

⁴⁵ Shue, *ibid.*

The trouble is that to those who, like Krauthammer, believe in a “rational moral calculus” of costs and benefits, constructing a bureaucracy of routinized torture may be a price worth paying if the bureaucracy stays small enough and the stakes are large enough. The consequentialist may concede to Shue that you won’t be able to succeed in the ticking bomb case without a bureaucracy of torture, and will surely count this as a negative in the cost-benefit analysis. But the consequentialist will not necessarily concede that the costs outweigh the benefits even accounting for this large negative. The consequentialist does not think that the requirement that torture be an exception and not a practice is an indispensable feature of the TBS.

Shue’s response is this: “You cannot be a little bit pregnant, 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...”⁴⁶ Once torture becomes a governmental practice, it inevitably metastasizes, as the evidence of torture-states like France in Algeria, Argentina under the junta, and Israel before the Supreme Court banned “physical pressure,” illustrates. There are good reasons based in organizational psychology to explain why torture bureaucracies cannot cabin their work to the exceptional cases.

This argument may not persuade, however, because so far the U.S. torture bureaucracy has managed to stay fairly small. The number of people the CIA has subjected to “enhanced interrogation techniques” has been fewer than thirty, while the notorious special interrogation plans of Guantanamo were apparently used on only two detainees. It is unclear how much brutality there has been in Iraq and Afghanistan –

⁴⁶ Shue, *ibid.* I argued in similar fashion in “Liberalism, Torture, and the Ticking Bomb.”

certainly it includes hundreds of victims – but much of it (or so I am told by former interrogators) is unauthorized kicking and beating at the time of arrest rather than authorized interrogational torture. Now, it may be that the unauthorized torture is the causal consequence of officially weakening the prohibitions on detainee abuse, and therefore should be laid at the feet of the torture bureaucracy. And it may also be that only the opposition of anti-torture forces has kept the torture bureaucracy from metastasizing more rapidly than it already has. But whatever the cause, the slow rate of metastasis will be something that emboldens hard-nosed consequentialists to embrace torture, including its bureaucracy, if it wards off greater evils. The general point is simple: any finite costs to torture can be outweighed by sufficient expected benefits. The worse the anticipated evil, the more horrible the things we can do to ward it off.

VII

This is, indeed, a familiar drawback to consequentialism: it always makes morality hostage to evil. “Would you torture to stop the ticking bomb from detonating?” is no different in form from “Would you set up a torture bureaucracy in order to make sure you could torture effectively in a TBS?”; nor is it different in form from “Would you commit genocide to stop a larger genocide?” or “Would you rape one child to prevent ten children from being raped?” Consequentialism has easy answers to all these questions – Bernard Williams thought that fact is itself a fatal objection to consequentialism – and its answer is that enormous evils can nevertheless be lesser evils, and lesser evils can be morally obligatory even though they are enormously evil. The worse the world is, the worse the behavior that morality countenances to combat it, with no limit to how low we can sink.

For many of us, however, a system that imposes no intrinsic limits on how low we can sink lacks the essential character of morality – call it the moral attractiveness of acting morally. What would be the point of morality if moral action no longer has any connection with elemental decency?

Here I mean to be making a different point from Williams's well-known argument that consequentialists' insistence that we do something awful to stop something even more awful fails to account for the agent's integrity. My argument here is not about personal integrity, that is, the special first-personal character of one's own values, but about whether a system in which any atrocity, no matter how vile, can be permitted (or, worse, required) can count as a morality. Consequentialists will not downplay the evils of torture, as I have described them above. They cannot, because their system demands that they assign accurate weights to consequences. But, without knowing what the alternatives are, consequentialists will likewise not believe that any moral conclusions whatever follow from identifying the evils of torture. While their position is not a logical contradiction, it severs the ground of morality – the goodness and evil of states of affairs – from the ground of action.

There may simply be an unbridgeable gulf between the theoretical sensibilities of non-consequentialists, who regard compulsory choice among monstrous evils as morally pointless, the equivalent of rearranging deck chairs on the Titanic, and those of consequentialists, who patiently point out that the rearranged chairs actually would make the doomed passengers a tad more comfortable in their final minutes, and isn't that a good thing?

Another indicator of the unbridgeable gulf is this. To the non-consequentialist, recognizing the surpassing horror of torture provides an iron-clad reason not to engage in it. To the consequentialist, recognizing the surpassing horror of torture provides an iron-clad reason to do anything to prevent it – including committing it in lesser degree. Thus, in a variant of the TBS in which torturing one captive is the only way to learn the location where ten hostages are being held and tortured – not completely fanciful in today’s Iraq – the same revulsion toward torture that underwrites an absolute prohibition on torture also urges us to engage in it.

VIII

These reflections on the unbridgeable gulf between consequentialist and non-consequentialist thinking about torture, manifested in the fact that the identical revulsion toward torture can pull in conflicting directions given a suitably contrived hypothetical, suggest a third interpretation of Shue’s dictum that “artificial cases make bad ethics.”

In an earlier paper, I quoted in connection with the TBS a saying of Williams, that “there are certain situations so monstrous that the idea that the processes of moral rationality could yield an answer in them is insane,” and “to spend time thinking about what one would decide if one were in such a situation is also insane, if not merely frivolous.”⁴⁷

(3) Ordinary practices of moral rationality fail in cases where all courses of action are monstrous. The artificial cases ethicists cook up to control for monstrosity by isolating the right- and wrong-making characteristics of action are misleading.

⁴⁷ Bernard Williams, “A Critique of Utilitarianism,” in J.J.C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge UP, 1973), p. 92.

That is precisely because they cover over the monstrousness with a veneer of rationality.

The thought here is that a genuine TBS, like the hypothetical in which the torture of one is weighed against the torture of ten, or in which committing genocide can avert a slightly larger genocide, represent moral singularities analogous to mathematical singularities: points where otherwise-well-behaved functions misbehave, as $y = 1/x$ has a singularity at $x = 0$.

To explicate this idea, I suggest the following meta-ethical and justificatory picture. Moral systems, including consequentialism and its various alternatives, arise by generalizing and abstracting from prototypical cases in which they make intuitive sense and yield intuitively satisfying answers. By this I mean not only that the answers seem obviously correct, but that they seem correct for just the reason that the system offers. (One might suggest, as a slightly more complex picture, that the systems are not mere generalizations from intuitions about prototypes, but rather the result of a process of achieving reflective equilibrium with those intuitions. For present purposes, the details of the justificatory picture are unimportant.) Moral systems are on this view heuristics, complex rules of thumb, based on a bet that the prototypical cases are sufficiently representative that the moral systems they generate contain principles commitment to which will yield a satisfactory moral life. The three principal secular moral systems that attract allegiance from contemporary philosophers – aretaic, deontological, and consequentialist, focusing respectively on actors, acts, and outcomes – will yield largely identical resolutions of a broad range of cases; and each seems powerfully and intuitively appealing in their prototypical cases. Each, therefore, might lay claim to offering a total

system of morality, and adherents will be tempted to roll up their sleeves and get to work showing how the system can accommodate even the apparent counterexamples that are prototypical cases of the rival systems.

But completeness claims are illusory, and the temptation to smooth out the bumps should be resisted. Even the best heuristics can fail in trick cases; and the heuristics represented by the chief moral systems can yield inconsistent results in unusual cases. This should not surprise us: the origin of moral systems suggests that they are good only over certain domains, those in the neighborhoods of their prototypical cases. Hopefully those are large neighborhoods; but there is no reason to suppose the absence of singularities.

On the picture I have just painted, moral rationality is entitled to be blithely pluralistic, or even theoretically indifferent, over the wide range of cases in which the major systems converge, and monistic in the prototypical cases where the systems are at their strongest. You know them when you see them: what I am describing is intuitionism at the meta-level. When faced with a clear-cut rights violation, think in deontological terms; when faced with a clear-cut cost-benefit tradeoff, think in consequentialist terms. When the cases aren't so clear-cut, take your best shot at it. But there will be cases, like the genuine TBS, in which the systems, regarded as total systems, yield flatly inconsistent outcomes, with no higher-level principle available to remove the contradiction. On logical grounds, such an inconsistency is intolerable. But on pragmatic grounds, one may do better as a blithe pluralist who has no rational answers in some cases than as a principled monist who purchases consistency at the cost of fanaticism in hard cases.

Put in other words, the real mistake may be in assuming that any moral system is universal, rather than simply a good way of systematizing a large class of cases. It may simply be better to shrug our shoulders in intolerable dilemmas and admit that whatever decision we make will be taken on grounds unrelated to moral rationality than to insist on using a system that wasn't designed for cases like this.

IX

Shue began his 1978 paper with a striking observation:

Whatever there is to say about torture, there appear to be moral reasons for not saying it....Mostly, they add up to a sort of Pandora's Box objection: if practically everyone is opposed to all torture, why bring it up, start people thinking about it, and risk weakening the inhibitions against what is clearly a terrible business?⁴⁸

Unfortunately, he adds, it's too late for silence: Pandora's Box is already open, because the torturers are torturing away.

But are the only alternatives silence and dispassionate debate? Williams has suggested that "the *unthinkable* was itself a moral category."⁴⁹ Although he does not elaborate, we can spell out this observation along roughly the following lines: There are some abominations that, as a society, we don't have moral debates about because they fall so far below the threshold of the acceptable that we don't need to argue about them. These make up "the unthinkable." Slavoj Zizek illustrates with an example:

a clear sign of progress in Western society is that one does not need to argue against rape: it is "dogmatically" clear to everyone that rape is wrong. If someone

⁴⁸ Shue, "Torture," p. 124.

⁴⁹ "A Critique of Utilitarianism," p. 92.

were to advocate the legitimacy of rape, he would appear so ridiculous as to disqualify himself from any further consideration.⁵⁰

The prohibition on rape, Zizek suggests, belongs to “the set of unwritten rules that form the background of every individual’s activity, telling us what is acceptable and what is unacceptable.”⁵¹

Obviously, we *can* think the unthinkable, and even debate it. But the debate will not be a dispassionate weighing of options. Staying with Zizek’s example, suppose we raise a version of the TBS in which the only way to break the terrorist is to rape him. Or suppose that the only way Jack Bauer can prevent ten women from being raped is to rape one woman. You will never see that plot-line on television, for obvious reasons: the audience, which is meant to root for Jack Bauer, would find Jack the rapist viscerally revolting. That’s the mark of the unthinkable.

Conversely, if we insist on arguing the costs and benefits of rape with an unblinking accountant’s eye, as if it is just one option among others, we run the risk of normalizing it, moving it out of the category of the unthinkable. That is the Pandora’s Box argument, which, as Shue says, risks weakening inhibitions.

How else can we think about it? Zizek writes that “most of us can imagine a singular situation in which we might resort to torture – to save a loved one from immediate, unspeakable harm perhaps. I can.” In what Zizek calls “the unavoidable brutal urgency of the moment,” it’s unclear what I would do. But if I would torture, that is not a fact about rationality, or justifiability, or, ultimately, about morality. It is a fact about me. The essential thing is that “it cannot become an acceptable standard; I must

⁵⁰ Slavoj Zizek, “Knight of the Living Dead,” *New York Times*, March 24, 2007.

⁵¹ *Ibid.*

retain the proper sense of the horror of what I did.”⁵² Put in other words, torture must remain unthinkable, and that means conversations about it must retain the proper sense of horror.

This is a final reason that artificial cases make bad ethics. They are deeply cartoonish; this is true not only of the TBS, but also of a great many cases populating philosophy journals, with fat men thrown in front of runaway trolleys, blown out of mine-shafts with bazookas, or impaled on pitchforks as they fall from windows. (Fat men fare badly in moral philosophy.) The cartoonishness makes it easy to treat them as brain-teasers, in which case the option-sets they present assume an air of unreality that makes them all equally thinkable. So the fourth interpretation of Shue’s dictum might be put thus:

(4) Artificial cases make bad ethics because their very artificiality makes the unthinkable thinkable.

X

Throughout this paper, I have been struck by an air of paradox involved in the very act of writing it. By analyzing the specific evil of torture, and examining the senses of Shue’s dicta that artificial cases make bad ethics and “whatever there is to say about torture, there appear to be moral reasons for not saying it,” I have aimed to explain why we should stop talking about the ticking bomb. In saying that, I have talked about it incessantly. This is a reluctant decision, based on the fact that ducking the hypothetical simply seems evasive. But enough is enough.

Whereof one should not speak, thereof one must be silent.

⁵² Ibid.