

Interrogating the ‘Ticking Bomb Scenario’: Reassessing the thought experiment

The terrorist attacks on 9/11 and the subsequent so called ‘War on Terror’ led to a flurry of discussion about whether, under some very special circumstances, a liberal democracy could legally and morally use torture to protect its citizens. Our use of the term ‘torture’ here refers only to ‘Forward-Looking-Interrogational-Torture’ (FLIT) which seeks to obtain vital information to prevent the occurrence of a terrible event(s) and thereby save lives.¹ This profoundly disputed issue deeply divides commentators, moral and legal theorists and the general public², and the resulting disagreements do not always follow the usual left/right or progressive/conservative divides in the political spectrum.³ Both sides feel passionately that their opponents’ views are catastrophically wrong and would, if enacted, lead to disastrous consequences: on the one hand it is claimed that the acceptance of FLIT would, perhaps by way of a slippery slope, undermine the very foundations, legal and moral, of liberal democratic societies; on the other hand, it is argued, its total rejection might leave innocent citizens at greatly increased risk of a devastating terrorist attack, with hundreds or thousands or tens of thousands of innocent deaths and the concomitant wrecking of the economic and social order.

These heated arguments about the permissibility or otherwise of FLIT have been conducted primarily through a thought experiment generally referred to as the ‘Ticking Bomb Scenario’ (hereafter TBS).⁴ The aim of this paper is to evaluate the manner in which the TBS, a thought experiment in philosophical enquiry, has been used in the discussion of FLIT. We are concerned that its use has been

problematic and that the criticisms commonly raised against it, are often inappropriate or irrelevant. We argue that a great many critics misunderstand the way in which thought experiments in general, and this one in particular, are supposed to work in philosophical (and for that matter scientific) inquiry. Consequently, the paper is not seeking to decide on the acceptability or otherwise of FLIT *per se* but rather in the problematic use of a particular mode of argumentation about the justifiability or rejection of torture. We believe that FLIT is never justified⁵ but do so for reasons that do not require the erroneous endorsement or rejection of the TBS. While it is now commonplace that the TBS is the focus of both non-philosophers and philosophers arguing about FLIT, it is important to make clear just why this particular thought experiment is not used correctly in such contexts. In order to do this, the paper examines the standard arguments against using the TBS in discussions of FLIT and concludes that for the most part they are simply irrelevant due to a misunderstanding of how thought experiments work in philosophical argument. By rescuing the TBS from its erroneous use we can then see its proper worth as part of an argumentative device in uncovering intuitions in our search for moral truths.

1. The TBS and Thought-Experiments in Philosophy

The various forms in which the TBS is presented share a common structure, which Brecher sets out as follows:

Suppose there is good reason to think that someone has planted a bomb in a public place. And suppose there is good reason to think

that it is going to go off in the next two hours or so, and that it is going to kill and maim dozens of people, maybe hundreds. ... But no one knows where the bomb is – except one person, who is already in custody. Naturally, they have no intention of revealing where the bomb is. Maybe they have planted it themselves, maybe not. Either way, they remain silent. Should they be tortured to force them to reveal where the bomb is?⁶

From this we can derive the core characteristics of any TBS:

1. The security forces know (or have a very good reason to think) that a terrorist attack is imminent in a heavily populated city.
2. The security forces have captured a terrorist who they know is involved in this attack and who knows the whereabouts of the bomb or bombs which will detonate in the very near future – typically within 24 hours.
3. The terrorist can be forced to reveal the whereabouts of the bomb so that detonation can be prevented in time to save many innocent lives.
4. The only way to achieve (3) in the time available is to use torture.
5. There is no other viable way to prevent the attack occurring.
6. The only motive for using torture is to save lives, (not to punish the terrorist or obtain vengeance).
7. The circumstances are exceptional and very rare.

The TBS can be tweaked in various ways to make the example even more dramatic and desperate. For example, the politician (a President or Prime Minister) is told that the bomb is a nuclear device and the person to be tortured is not the terrorist himself (he is inured to such treatment) but a family member – his child or wife or mother. These modifications also attempt, firstly, to forestall a response that says accepting *some* civilian casualties from a bombing is the unfortunate cost civilized and moral societies must face rather than engage in any form of torture. But many people would regard such a position as amounting to moral fanaticism when it involves accepting the preventable deaths and injury of tens of thousands of people.

Secondly, if it is the family member who is tortured rather than the terrorist himself, then the moral dilemma is made even starker, since it can't be resolved by claiming that the torture victim deserves his fate because he aims to commit mass murder. Whatever we think about the acceptability or otherwise of FLIT, there can be no doubt whatever that torturing the terrorist's young child is an appallingly immoral act.⁷

The different possible filling-in of details in the various versions of the TBS serves as a reminder that we are dealing with an imaginary scenario – a thought-experiment. So what exactly is the role played by such experiments in philosophical argumentation?

2. Two paradigm cases of Thought Experiments

Before evaluating the TBS as a thought-experiment, let us take a look at two paradigmatic thought-experiments in the philosophical literature. Firstly, here is Judith Jarvis Thomson's 'Famous Violinist' scenario.

Let me ask you to imagine this. You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, "... To unplug you would be to kill him. But never mind, it's only for nine months. By then he will have recovered from his ailment, and can safely be unplugged from you". ... I imagine you would regard this as outrageous.⁸

Thomson presents this scenario as a counter-example to a particular moral principle that tends to be held up as absolute: the principle that an individual's right to life *always* outweighs somebody else's right to decide what happens in and to their body. Thomson hopes that your outraged response to the situation described, in which you were not consulted and would not have made such a decision, implies that you do not believe that the right to life *always* trumps your

right to decide. In this way, an appeal to the right to life as the principle which necessarily ends discussion in a relevantly analogous case is blocked. The case against abortion cannot then be won by that one easy move. If you accepted the principle that the right to life has universal precedence, you would have to accept that abortion is always wrong. But since you do not accept such universal precedence, other arguments are needed.

Here the thought-experiment has some similarity to a scientific experiment, in that it produces data that conflict with a generalized claim; but it is worth noting that its workings differ in various ways from the scientific case. The data to which it appeals is not offered as some direct route to moral reality: the argument in which it occurs *does not claim to prove* that the right to life does not always outweigh other rights. What it offers is evidence about the responder's *beliefs*. It is presented as showing that you do not believe that the right to life trumps all your other rights. The hypothetical scenario serves to draw out the other relevant implicit commitments you have (which might otherwise have been kept in isolation), alongside your explicit commitment to the right to life.

As with data in science, there remains the question of how to systematize the data of intuitive responses. It has become common to introduce the method of 'reflective equilibrium' at this point: there needs to be interplay between intuitive response and theory in an attempt to get them to match.⁹ But one route is clearly not open: blunt rejection of the data because of its clash with theory. It may be that the data can be 'explained away' – that will require a plausible account of the factors that led to this false positive, independent of the theory with which it

clashes.¹⁰ The high ground (as in science) is with the data: as in the case of Thomson's violinist, your response suggests that your other commitments are stronger than your commitment to the principle of the supremacy of the right to life.

The second thought-experiment to consider is an equally famous one from Bernard Williams. Williams tells the story in some detail, but the gist of it is that Jim is faced with the prospect of saving nineteen individuals by shooting one. If he chooses not to shoot the one, all twenty will be executed. There is no other way out. 'What should he do?' asks Williams.¹¹

Although the presentation of the story ends with a straightforward question that appears to require a straightforward answer, the aim of the experiment is significantly more complex than refutation of a moral principle. It occurs as part of a case against utilitarianism, but that case is not of the form 'utilitarianism yields the result that Jim should shoot the Indian; our intuitive response is that would be wrong, so utilitarianism is false'. Williams accepts, with the utilitarian, that shooting the Indian is probably the right thing to do.¹² But Williams takes issue with the utilitarian implication that shooting the Indian is *obviously* the right thing to do, suggesting that even if it is the right thing, there is room to wonder if it is obviously the right thing, and suggests that other considerations (especially about integrity) 'come in to finding the answer' (1973: 99). One way of capturing his argument is that he is using the case to show that we do not use the word 'right' in the way that Utilitarians say we do.

These two cases serve to provide an illuminating (though by no means exhaustive) picture of how thought experiments are actually used: not in isolation, but embedded in larger arguments. While they are used as ‘intuition pumps’ to provide data, that data is rarely taken to be a reflection of reality in the way in which observation stands as a route to reality in scientific experiments. The data here concerns our beliefs or commitments, and the way in which our concepts (or the words that express them) relate to each other. The arguments in which the fictional scenarios are embedded, as well as the scenarios themselves, are more about conflicts of commitment than the simple refutation of a general principle by the use of an example, and need to be understood as such if they are to receive an appropriate and adequate response.

One last point should be discussed here before we return to the TBS, one that relates to the *aims of the method*. This concerns how realistic thought-experimental scenarios need to be. Now, if you were trying to discover some empirical fact about the world or test an empirical theory, there might be a strong requirement of realistic detail, and the details which are omitted must be rigorously shown to be irrelevant. But then you would hardly be likely to be using a thought-experiment. Thought-experiments are sometimes used against empirical theories, but then they tend to serve as heuristic devices rather than experiments in any serious sense, as in the case of Einstein’s imagining what you would see if you travelled at the end of a beam of light in countering Maxwell’s theory of electrodynamics. The thought-experiment reveals that a theory has commitments it cannot accept, commitments which would otherwise be hard to see. To say that

the imagined scenario is unlikely or unrealistic is beside the point, given the role it is playing in the argument – empirical likelihood simply doesn't matter here.

Like Einstein's case, Thomson's violinist example serves to reveal implicit commitments that are in conflict with the theory or principle in question. In the Thomson case, they are commitments in the responder rather than in the theory itself. Nevertheless, given that the role of the thought experiment is to reveal relevant commitments that otherwise remain hidden, a complaint that the scenario is unlikely or unrealistic is just as irrelevant in Thomson's as it was in Einstein's case. The implausibility of the scenario would only be relevant if it undermined the argument altogether – that is, if its conditions ruled out any sort of rights-attribution, and not just that of the right in question. Thomson's case clearly does not do that. In the case of a thought-experiment like Williams's, which works on how we use our words, there would be a relevant problem only if the imagined scenario disallowed the application of the terms in question – if they had no purchase under the specified conditions (and not just that they are incorrectly being applied in the view of the theory being questioned).

Thomson's thought-experiment in no way relies on the claim that it presents a realistic scenario. It is highly unlikely that we could actually plug a violinist into someone else's kidneys and it is certain that no respectable hospital would allow such an event. However all this is beside the point, since the thought-experiment simply stipulates that this is done along with a number of other conditions in order to explore the permissibility or otherwise of abortion. It focuses on the failure of one particular argument against the permissibility of abortion to

distinguish two concepts that are inadvertently being run together.¹³ And when we turn to Williams' thought experiment, we find a scenario which may well also be impossible in reality, but which is readily intelligible and in a position to contribute to the semantic issues with which its surrounding argument is concerned.¹⁴

3. Criticisms of the TBS

Opponents of the TBS regard it as the best available argument for torture: a deeply seductive argument that mesmerises theorists and others looking for justification for torture.¹⁵ So if the TBS can be shown to be unreliable or based on false assumptions then, its opponents feel, there can be no credible case for justifying torture under any circumstances. Conversely if the TBS cannot be refuted then its acceptance, so it is argued, could undermine the very fabric of liberal democratic societies, and undo all the work which has been done to remove torture, along with slavery and genocide, as acceptable activities of civilised persons and states. This is the source of the deep emotions displayed in the arguments, with the concomitant talk of 'torture lawyers', and the denunciation of those who invoke the TBS as being guilty of bad faith, pernicious motives and intellectual fraud.

What then are the criticisms raised against the TBS? There are at least five different ones¹⁶: the first two raise concerns about the wisdom of discussing the TBS itself, while the other three focus on the way the thought experiment is set

up and used in discussions of moral, political and legal theory. We briefly outline each concern below.

i) Moral concerns with discussing the TBS

This criticism does not address the structure or content of the TBS itself since it argues that the mere consideration of such scenarios is morally corrupting and must therefore be avoided. This concern takes two forms, the first focusing on individuals who engage in discussions of this sort. The fact that one can even imagine a scenario where torture could have moral legitimacy and is not unequivocally condemned reveals, so it is claimed, a corrupt mind that has lost its moral compass¹⁷, because even considering the justifiability of FLIT is to fail to respect persons as one ought to do - as moral beings. Scenarios such as the TBS, either deliberately or through ignorance, obscure the horror of torture and thereby illegitimately manipulate moral and ethical judgments.¹⁸

The second version of the moral concern looks to the external and general effect of discussing whether any form of torture could be legitimate. Žižek, for example, once argued that any discussion about torture, especially one conducted by decent and well-meaning persons, that does not argue for a total abolition confers a spurious legitimacy that is very dangerous indeed. It has an even more dangerous effect than the explicit endorsement of torture as it allows and encourages unscrupulous and immoral persons to claim that their views on torture are supported by strong arguments and mainstream opinion.¹⁹

ii) *Reality and Frequency of the TBS*

The next objection to the use of the TBS in literature, films and academic discussions about torture is the claim that it erroneously implies that the TBS is a state of affairs that does actually obtain in the real world.²⁰ Critics dispute that this is indeed the case and claim that even if it were, its frequency is very rare indeed. There is no clear empirical evidence that such scenarios arise even in countries such as Israel which has faced frequent terrorist attacks for decades. The frequent presentation of the TBS in fictional or hypothetical situations is a self-indulgent and ultimately dangerous philosophical parlour-game, whose lack of realism necessarily leads to a serious distortion of our moral reasoning, particularly when used to help form social and political policy. We should instead follow the rule that legal and moral principles ought not to be based on (or strongly influenced by) extreme scenarios, with their dangerously distorting power.

iii) *Erroneous assumptions underlying the TBS*

This third criticism of the TBS, perhaps the most common one, claims that very nearly all the core assumptions underlying this thought experiment are either false or unrealisable in practice. Essentially, the TBS erroneously assumes a degree of knowledge and certainty that is impossible (or so unlikely that genuine cases are vanishingly rare), yet that assumption is crucial to the plausibility of the thought experiment. When the core assumptions that underlie the TBS are examined, critics argue that the first five are deeply problematic.

Recall the seven core assumptions:

1. The security forces know (or have a very good reason to think) that a terrorist attack is imminent in a heavily populated city.
2. The security forces have captured a terrorist who they know is involved in this attack and who knows the whereabouts of the bomb which will detonate in the very near future – typically within 24 hours.
3. The terrorist can be forced to reveal the whereabouts of the bomb so that detonation can be prevented in time to save many innocent lives.
4. The only way to achieve (3) in the time available is to use torture.
5. There is no other viable way to prevent the attack occurring.
6. The only motive for using torture is to save lives, not to punish the terrorist.
7. The circumstances are exceptional and very rare.

Critics argue, with respect to assumptions 1 – 3, that here the TBS scenario rests on the claims that the relevant authorities *know* that the detonation of the bomb is imminent, and that they have definitely captured the *right person* (the terrorist) who *can be forced* to reveal the location of the bomb in time and this *will* save many innocent lives. But in real-life situations none of these claims could be made with anything like the necessary certainty. Empirical evidence demonstrates that such supposed certainties prove to be mistaken time and time again, especially since security services rely on intelligence gathering that is frequently incomplete and based on probabilistic reasoning.

Furthermore, even if we grant assumptions 1 – 3, then assumptions 4 and 5, that the use of torture is the only way to obtain the information in the time available, are highly questionable. The reason is this. The TBS stipulates that there is enough time to torture the information out of the captive *and* simultaneously that there is not enough time for any alternative method of acquiring the information. The TBS requires both claims to be true, but critics such as Brecher²¹ and Rejali²² among others argue that there is much compelling evidence to show it would take a very long time to get any reliable information by torture, if any reliable information could actually be gained, thereby making the no-alternative assumption unreasonable. The use of torture would also compromise what has been shown to be the most valuable resource for obtaining such information, namely public cooperation. Rejali points to how the British police managed to catch five men thought to have planted bombs on London's buses on July 21 2005, 2 weeks after the bombing on 7/7. Their capture occurred within 10 days due to the accurate public information given, information unlikely to have been forthcoming if the British police had a policy of torturing suspects to obtain information.

iv) Legalising torture requires its institutionalisation

This claim, of which the most sophisticated version is given by David Luban, argues that allowing torture must bring with it an institutionalised *culture of torture*, involving doctors, lawyers, police and many others. Furthermore it necessitates state-sanctioned official training of persons to be torturers. Civilised

societies, the argument goes, simply don't do this: it is both wrong and deeply destabilising. As Luban eloquently says:

Treating torture as a practice rather than as a desperate improvisation in an emergency means a group of interrogators who learn to overcome their instinctive revulsion against causing physical pain [m]edieval executioners were schooled in the arts of agony as part of the trade: how to break men on the wheel, how to rack them
Should universities create an undergraduate course in torture?

v) *Torture as lesser evil*

This fifth criticism of the TBS is essentially a slippery slope argument seeking to counter the utilitarian claim implicit in assumption 6 that in some situations torture is necessary to bring about the lesser evil, to avoid catastrophic consequences.²³ But, it is said, once we open the door to torture even a crack, we begin the slide to its widespread use by Governments and their law enforcement agencies. Empirical evidence suggests that liberal democracies which have used torture have discovered that it became more and more prevalent rather than being confined to extreme and very rare situations.²⁴ As a result, theorists such as Bufacchi and Arrigo insist that torture can never bring about the lesser evil²⁵: 'the empirical evidence suggest[s] that the negative consequences of implementing a policy of torture interrogation always outweigh any possible

positive consequences'²⁶. They conclude that any argument for FLIT can be properly refuted on consequentialist grounds alone.

The five types of criticisms we have outlined are intended to demonstrate that the TBS has no legitimate use in arguments about torture. It is possible should one want to do so address each of the criticisms and try to show why they have no force or can be dismissed. For example, to counter the concern that the TBS relies on impossible certainties it could be argued that what is needed in such situations is not certainty (there are no aspects of human conduct of which we are absolutely certain) but rather a genuine reasonable expectation given available information at the time. The authorities need not be certain a bomb has been planted, and that they have captured the person who planted it, and that torture will reveal its whereabouts. Rather all that is needed is that they have a reasonable expectation that this is the case.

However, if one properly understands the TBS as an aid to understanding conceptual issues in moral (and legal) philosophy, then the five criticisms and possible responses are wide of the mark. As with Thomson's violinist, Parfit's tele-transporter, and a host of other thought experiments, the issues of whether the TBS is based on realistic assumptions or will lead to slippery slopes or require a culture of torture in liberal societies are simply irrelevant. The purpose of the TBS is not to discover moral facts based on an example of what occurs in the world but rather to establish, as Parfit points out, what *we believe* would be the right action in *such stipulated* situations, thereby revealing the shape of our moral commitments. Furthermore, concerns about the influence the TBS has on social

policy are not concerns about the use of thought experiments in philosophical argument but rather about how they can be misused and abused by those who hold a particular ideological view in favour of torture. We return to this point below when discussing the TBS and social policy.

4. TBS as a conceptual aid

Like Thomson's and Williams's thought experiments discussed in section 2, the TBS occurs embedded in complex arguments. As used by its proponents, it hardly ever occurs in the bald way in which we originally presented it. To find it in that form, you have to look, as we did, to its detractors. The point is significant in that *the aim of any particular use of a thought-experiment* affects what requirements the experimental scenario must meet and how it might suitably be criticized; furthermore, criticisms which affect the basic scenario might well be eluded by more sophisticated versions.

To illustrate this, the *locus classicus* of the TBS is Michael Walzer's seminal article 'Political Action: The Problem of Dirty Hands'. He sets it out as follows:

So consider a politician who has seized upon a national crisis - a prolonged colonial war-to reach for power. He and his friends win office pledged to decolonization and peace; they are honestly committed to both, though not without some sense of the advantages of the commitment. In any case, they have no responsibility for the war; they have steadfastly opposed it.

Immediately, the politician goes off to the colonial capital to open negotiations with the rebels. But the capital is in the grip of a terrorist campaign, and the first decision the new leader faces is this: he is asked to authorize the torture of a captured rebel leader who knows or probably knows the location of a number of bombs hidden in apartment buildings around the city, set to go off within the next twenty-four hours. He orders the man tortured, convinced that he must do so for the sake of the people who might otherwise die in the explosions—even though he believes that torture is wrong, indeed abominable, not just sometimes, but always. He had expressed this belief often and angrily during his own campaign; the rest of us took it as a sign of his goodness. How should we regard him now? (How should he regard himself?)²⁷

What is the aim of this thought-experiment? One thing it is clearly *not* doing is setting up an intuition-pump to elicit the response ‘the rebel leader should be tortured’, thereby revealing a moral fact and showing torture to be justifiable. Rather, Walzer is illustrating a possible tension between strong commitments, a tension that might well not appear under ordinary conditions. We suggested in section 2 that a central use of thought-experiment could be to draw out which of two commitments we feel more deeply; in this case, Walzer is suggesting a tension that cannot be resolved. Here he is making an argument for the phenomenon of ‘dirty hands’ where, paradoxically, one does wrong in order to do right. In the TBS, the duty to fulfil one’s political commitments requires you to

break another cherished value – namely, never to engage in the evil of torture²⁸.

At no point in the article is Walzer setting up an argument for why torture can be justified; instead, he claims that even if you are justified in a dirty hands scenario in committing torture, this action nevertheless remains an evil for which you ought to suffer the appropriate moral opprobrium and punishment. Whatever we think about the plausibility of the ‘dirty hands’ claim, it’s clear that the TBS is not being used here simply to show that torture is justified.²⁹

The criticisms outlined in section 3 above take it to be the aim of the thought experiment to demonstrate that instances of torture can be justified, or even to provide a justification for a policy of state torture. But this is simply wrong. Their claims about the TBS, at the very least, should raise strong suspicions that a straw person argument is at work here, or that the role played by it in philosophical discourse has been misunderstood. We now turn to the detail of the objections to show that this is the case.

5. The problem with the standard criticisms

i) Responding to the moral concerns

The first criticism raised a general objection to the contemplation of any situation involving torture, on prior moral grounds. But this appeal to prior moral grounds is problematic, because the basic version of the TBS questions precisely what might appear to be the prior moral grounds. To reject a counterexample to your view on the grounds that it is not an instance of your view is obviously

unacceptable. Brecher's version of the argument describes the very process of torture as having to recognize the victim as a person, but then treating them as not a person; 'to describe it as such is already to make the normative claim that no person *ought* to be treated like that'.³⁰ Brecher is arguing that the meaning of the term 'torture' by definition rules it out as morally or legally justifiable. But think again of Williams's use of Jim and the Indians thought experiment. According to Williams, our response to this hypothetical scenario reveals that we do not use our words in the way that Utilitarians say we do. The positions are reversed in the TBS, but the result is similar. A response to the TBS that elicits the judgment that the prisoner ought to be tortured – the position that the deontologist who is wedded to an absolute ban rule outs – suggests that we do not use our words in the way that we are supposed to do according to Brecher et al. Consequently, the TBS cannot be ruled out in the way Brecher intends with his definitional argument about what torture implies.³¹

ii) Responding to the Reality concern

The first concern about lack of realism is that to base policy or moral principles on extreme cases is misleading and dangerous. We agree with this concern, which is reflected in the legal adage that hard cases make bad law. Policy must fit the cases that people actually face all of the time. And a few extreme cases cannot provide the basis for any respectable moral principle. If these were indeed the aims of a TBS-based argument, it would be in trouble. But these are not aims of most uses of the TBS, and perhaps not of any mainstream philosophical ones.

As we have explained, a thought-experiment like the TBS stands only to show a moral principle to be false or at least not absolute. Absolute principles must apply in all possible cases; the rarity or improbability of a counter-example is just irrelevant to the aim of showing a purportedly absolute principle to be false or at least not invariably applicable. What is more, thought-experiments like the TBS and those set out in section 2 don't even have such basic aims. Note also that universally philosophical discussions of the TBS are made within the context of supporting a policy against torture, suggesting only that this conflicts with other commitments. This is entirely compatible with the view that although one might have very strong reasons to transgress the policy under certain conditions, nonetheless a rule against torture always remains the best policy.

The most that an objection about the unreality of the TBS could establish is that a policy which is based upon it is superfluous since the circumstances for its use will never arise. This does not demonstrate that the TBS is an illegitimate or harmful thought-experiment – and those are the points that proponents of the unreality objections are seeking to make.

iii) Responding to the epistemological concerns - erroneous assumptions

The charge here is that the TBS rests on erroneous assumptions about what we can know for certain in such a scenario - the interrogators are presented as knowing things they would not (perhaps could not) know. Sometimes the objection concerns the conditions of knowledge itself, and comes in the form of rhetorical questions: how can they be sure that the suspect is responsible? How

can they know that the captive knows where the bomb is? How can they know he is telling the truth under torture?

However, questions like these cannot be taken as seriously affecting the TBS as a *philosophical device*. They lose sight of it as a thought-experiment – that is, presenting a counterfactual scenario in which, like any author of fiction, the proposer is entitled to stipulate what her characters know or do not know or what the relevant facts are. In our earlier example, Williams is entitled to stipulate as he does that Jim has no alternatives; the case requires that condition to be interesting, and the stipulation is not in any way an absurd one. In the same way, if this objection is to count, it will have to be to the effect that some absurdity is involved in the stipulation - that the particular assumptions are things that nobody logically *could* know. But this charge is largely implausible. The stipulation is not that the interrogators have unobtainable Cartesian certainty. They only need knowledge in a much more familiar sense of having reasonable or strong evidence for the truth of their beliefs. Whatever evidence is needed is part of the stipulation, as is the truth of the beliefs, and that is legitimate as long as the TBS itself has reasonable aims. The only obvious exception is the claim that the interrogators know that this is a one-off situation and that no regular pattern of torture will ensue. It is plausible that nobody can have strong enough evidence for this: the claim is a ‘future contingent’, and stipulation of its truth is a different matter from stipulating the current facts. But in any case the problem of creating a precedent is, once again, only an issue where questions of policy are at stake. And the proper use of the TBS is not intended, contrary to what Brecher and others charge, as a policy-making device.

One aspect of this class of criticisms focuses on the assumption that there is both enough time to torture the information out of the captive and that there is not enough time for any alternative method of acquiring the information.³² This *prima facie* looks like the kind of conceptual problem that would render the TBS fatally flawed as a thought experiment. Essentially, if one of these assumptions is true, then the other must be false; and the TBS requires the truth of both.

However, this criticism is not persuasive: even if there were no evidence that reliable information can be quickly acquired through torture, such evidence is not required to defend these assumptions. Once again, these points are up to the thought-experimenter to stipulate. Williams was entitled to stipulate that Jim had no alternatives and the same stipulation can be made here. The thought-experimenter can stipulate that there is good evidence that this particular captive gives in quickly to torture and provides reliable information even then. There is only a problem if the amount of time required *necessarily* implied that there would be time to find the bomb by other means or not enough time to find the bomb before it went off. Since that necessity is not of the logical, conceptual or metaphysical variety, it is up to the thought-experimenter to stipulate what can and can't be done.

Perhaps the most strenuously argued epistemological concern about the TBS is that it erroneously assumes that torture is efficacious in getting the information required. Critics claim that although it is undoubtedly successful as a tool of humiliation and oppression, it is not a reliable means of extracting what people

know from them - especially not in a limited time period.³³ But once again, this seems to be beside the point. It can be stipulated in the description of the case that this captive will succumb to torture, or at least that the interrogators have strong evidence that he will. The claim that torture does not work will only affect the thought-experiment if either (i) it is a necessary truth that torture does not work or (ii) the aim of the TBS was the creation of a policy on when to torture, and the evidence shows that torture never actually works. But both (i) and (ii) are clearly false.

iv) Responding to the institutionalization of torture concern

Here the claim is that the TBS fails to include, in its assessment of the harm done by allowing torture, the inevitable social consequences: the institutionalisation of torture, and the pernicious effect this would have on a range of caring, legal and educational professions.

There is some force to this objection, but its effect is at best limited. As we have stressed, a positive response to the TBS in no way implies agreement with the legalization of torture. Sensible philosophical use of the TBS examines a collision of impossible values; it does not seek to justify a social policy of torture. Consequently, the fact that the TBS omits to mention the issue of institutionalisation is not a problem; the TBS is emphatically not involved in a discussion about the wisdom of *legalized* torture. This issue may be relevant to work such as Dershowitz's³⁴ when he advocates torture warrants, but then it is an

objection to a different thought-experiment from the TBS altogether – one which might be called the Legalized TBS - ‘LTBS’.

v) *Responding to torture as lesser evil*

Critics such as Bufacchi and Arrigo argue that the TBS’s conclusion that torture is justified is based on a mistaken understanding of the consequences of allowing torture. One-off situations open the door to a torture policy and this can never be the lesser of evils. But this criticism is irrelevant in the same way as the ones previously discussed: those introducing the TBS can in effect stipulate whether torture in this scenario is indeed the lesser evil by stipulating the alternative outcomes. Again, it is important to underline the point that provided such stipulation is not absurd or logically impossible, it does not render the TBS useless or misleading as a philosophical thought experiment.³⁵

6. TBS and social policy

The response we have offered to the various objections above raises another thought, one that is relevant and should be addressed. If the TBS need not be realistic, if the assumptions it is based on are not realisable in the real world, then what does the TBS teach us about whether we should ever justify FLIT? At best the TBS is irrelevant to the debate on torture and it is pointless (and probably irresponsible) to raise it.

This argument is, however, rather too quick. Firstly, the TBS gives us some useful and important insight into the problem of impossible moral oughts, providing intuitions which we can then use to equilibrate with our moral principles. It highlights the problem with moral claims or principles based on a monistic moral theory. It might illustrate, for example, how a particular understanding of moral obligation fails to fully comprehend the complexity of conflicting obligations that can occur in a person's life. For instance, deontological solutions to the TBS with the insistence on inviolable absolute moral principles³⁶ sit very uncomfortably with the terrible consequences they are obliged to accept; 'Justice be done though the heavens fall'³⁷ is a credo for fanatics. Similarly, it might be used to argue that a consequentialist attempt to resolve the problem by reducing the issue to calculating possible harms or choosing the lesser evil does violence to our intuitions about our moral reality. The TBS both raises and illuminates the possibility that in some situations we are faced with inescapable moral wrongdoing no matter what we choose – we are condemned to get dirty hands. The TBS illustrates this conceptual problem rather well but it is only part of a bigger and more complex argument. Our moral reality, it seems, includes a range of conflicting demands on our practical moral reasoning, each demand backed by credible independent claims which can sometimes pull in incompatible directions.

So the TBS has a valuable place in investigating conceptual issues in moral theory. But does it tell us anything useful about the issue that most concerns its opponents, namely which policy implications we ought to adopt? Here we need to be very clear about what insights arise from using the TBS in our discussions

about FLIT. Firstly, the TBS by itself tells us nothing about a sound or wise social policy about FLIT or anything else. It is not designed to do this, even though both those who oppose and those who seek to justify FLIT seem to think that it does.

Secondly, as Walzer points out, even if the TBS does justify FLIT in rare one off dirty hands situations, this does not change our strong beliefs that torture always is a horrendous moral crime and ought never to be practised. Some may claim, using a battery of arguments among which is the TBS, that under these rare and special circumstances FLIT may be the right thing to do, but that it nevertheless remains a moral crime to be unequivocally condemned and punished. This is the paradox of dirty hands where you are both praised and condemned for doing wrong to do right. However we need to stress that this is just one conclusion we could draw from the TBS. There could be (and indeed are) different conclusions which might be drawn. Some might argue, for example, that abhorrent though torture is, and wrong-making though it always is, torture may be right in some rare cases, though it doesn't follow that it ought to be legalised. Or if it is reasonable to believe that even engaging in very rare cases of FLIT does indeed produce a slippery slope descent into a settled policy of torture, then it may never be justified, as Brecher and others conclude. In short, the TBS may form part of the discussion about social policy but it certainly does not determine in which direction we should go. That issue is decided by a far more extensive discussion with a battery of arguments that may or may not draw on the TBS itself.

Thirdly the TBS, even if it successfully responded to all the criticisms raised against it, does not justify a social policy of torture or undo a firm legal prohibition against such acts. If an interrogator acts outside the legal framework and uses FLIT he must then face legal charges and justify his actions *ex post*. He will need to convince a judge and jury that the situation was one that allowed for no other reasonable solution and that the torture used was the right course of action given the risks of not so doing. Gross refers to these actions as ‘official disobedience’ which can only be justified *ex post* by demonstrating that it was the only appropriate way to effectively confront an extremely grave national danger or threat.³⁸ This is not an easy argument to make and its aim is to ensure that FLIT is used only when it is really necessary. This stringency is needed to reassure the public in a liberal democracy that the state’s actions are subject to the law even when agents in pursuit of their duty of care to citizens must sometimes break the law. The legal taboo on FLIT must always remain intact even if breaking the law can be retrospectively justified and excused as necessary for public safety. We think that the work of Dershowitz is profoundly mistaken in its call for torture warrants, and his use of the TBS certainly gives no support to his view.

Finally, what of the concern that the TBS is peculiarly open to misuse because of the way it is set up? The solution to this problem is to give an accurate account of what the TBS does as a thought experiment – something we have tried to do here - rather than remain silent about it. A proper understanding of the role of thought experiments in philosophical discourse will, to some degree, serve to prevent their misuse. The TBS is a useful and important thought experiment and,

here as elsewhere, we must not let our fear that an argument will be misused force us to throw the baby out with the bathwater.

7. Concluding comments

Wantchekon and Healy rightly point out that ‘emotions dominate the discussion of torture’.³⁹ Perhaps it is right that high emotion does accompany discussions about practices that undermine our humanity and destroy the dignity and lives of people. But the emotional responses come at considerable cost, as they tend to cloud judgment and skew reasoning. In no discussion or debate is this more prevalent than with the TBS. We have argued that the way the TBS has been used to justify FLIT is based on a profound misunderstanding of the use of thought experiments. Similarly, the strenuous attempts to show that the TBS is unrealistic or leads to terrible social policy are similarly misguided. Both positions fall prey to a misunderstanding of the proper role of a thought experiment in philosophical discourse. The TBS does not lend them the argumentative force they claim for it. But references to the TBS as ‘the most misleading hypothetical of our time’ or ‘a piece of intellectual fraud’⁴⁰, although they may be rhetorically useful, are deeply misleading and place partisan discussions above the search for truth. While it may be inevitable that such discussion takes place in the media and among politicians and commentators, it has no place in careful academic reasoning about moral issues. A careful and proper examination of moral and political theory needs the proper use of thought experiments. They are a valuable part of our study of these disciplines even if

they are mistakenly used by people on all sides of the argument for their own ideological ends.

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ENDNOTES

¹ The use of torture for any other purpose, such as punishment or social control, is always strictly prohibited. We agree with Sussman that there is 'something morally special about torture that distinguishes it from most other kinds of violence, cruelty, or degrading treatment. Torture is all these things, of course, and is morally objectionable simply as such.' Torture involves 'a distinctive kind of wrong that is not characteristically found in other forms of extreme violence or coercion, a special type of wrong that may explain why we find torture to be more morally offensive than other ways of inflicting great physical or psychological harm.' Torture is not morally unique as 'its distinctive wrongs may well also be found in rape and many kinds of spousal and child abuse'. However as Sussman rightly points out, rape and certain forms of abuse are best understood 'as special types of torture'. (Sussman, 2005: 3 fn. 9).

² For a taste of this debate in journals and books see Bowden 2003, Brecher 2007, Bufacchi and Arrigo 2006, Curzer 2006, Dershowitz 2002 and 2004, de Wijze 2006, Greenberg 2006, Kinsley 2005, Krauthammer 2005, Levinson 2004, Luban 2005 and 2006, Lukes 2006, Miller 2006, Posner 2004, and Steinhoff 2006.

³ For example, liberal lawyer Alan Dershowitz and Democratic Senator Charles Schumer accept that under some circumstances FLIT should be used while William Safire (a self confessed conservative) rejects this out of hand. See Luban 2005:1426.

⁴ The TBS, according to Rejali, was first used in Jean Lartéguy's 1960 novel *Les Centurions* which explores the brutal French occupation of Algeria. (Rejali 2007: 545-550.) One indicator of

the intense interest in this argument both within and outside academic discourse, particularly by those who seek to show that FLIT must never be used under any circumstances, is indicated by the plethora of articles on the web, magazines, journals and newspapers around the world.

⁵ If there is a justifiable case for FLIT it might be so under a 'dirty hands' rubric in cases of supreme emergency but even here we are clear that a moral crime has been committed. This crime needs to be acknowledged and the agents of FLIT punished for so acting. See XXXX

⁶ Brecher 2007: 1.

⁷ The TBS can be cast outside of a political context and in terms of the conflict between moral duty and virtue rather than obligations under a role morality. See Curzer 2006. A version of the TBS is also understood in situations of criminal justice. For example, a version of the TBS, sometimes referred to as the 'Dirty Harry scenario' is named after the famous vigilante movie 'Dirty Harry' directed by Don Seigel in 1971. The film primarily recounts the story of a police officer called 'Dirty' Harry Callahan whose nickname is due to his reputation for taking on the 'dirtiest' police cases and resolving them by ignoring the criminals' rights under the law. Posner (2004: 293) refers to such an example in his article defending the use of torture in exceptional and rare situations

⁸ Thomson 1971: 48-49.

⁹ For a detailed discussion on the method of 'Reflective Equilibrium' see Nielsen 1993 and 1994. Also see Rawls 1971: 20-21, 46-53 and Daniels 2011.

¹⁰ Explaining intuitions away may be more difficult than it seems – see Ichikawa 2009.

¹¹ Williams 1973: 98-99

¹² Williams 1973: 117

¹³ For an extended discussion of this point about the purpose of Thomson's thought-experiment see Brown and Fehige, 2011.

¹⁴ Consider Parfit's comments in responding to related criticism of thought-experiments in the personal identity debate: "This criticism (Quine's) might be justified if, when considering such imagined cases, we had no reactions. But these cases arouse in most of us strong beliefs. And these are beliefs not about our words, but about ourselves. By considering these cases, we discover what we believe to be involved in our continued existence, or what it is that makes us now and ourselves next year the same people. We discover our beliefs about the nature of personal identity over time. Though our beliefs are revealed most clearly when we consider imaginary cases, these beliefs also cover actual cases, and our own lives" (Parfit 1986: 200).

¹⁵ David Luban is perhaps the best example of a theorist who elevates the TBS to a position where it becomes the central battleground for arguments for and against FLIT. He insists that TBS 'has become the alpha and omega of our thinking about torture' See Lubin, D 2006: 44

¹⁶ See in particular Brecher 2007 chapter.2, Luban 2005 and 2006, and Spagnoli 2009. Also see the pamphlet 'The Ticking Bomb Scenario: Why we must say No to torture, always', Published by The Association for the Prevention of Torture 2007 Geneva.

http://www.ap.t.ch/index.php?option=com_k2&view=item&id=740%3Athe-ticking-bomb-scenario&lang=en

¹⁷ See Anscombe 1981: 40. CA J (Tony) Coady makes a similar claim in an interview at Philosophy Bites entitled Tony Coady on Dirty hands in Politics.

<http://philosophybites.com/2009/10/tony-coady-on-dirty-hands-in-politics.html>

¹⁸ The Association for the Prevention of Torture make this argument explicitly, in a pamphlet supporting an absolute ban on torture.

¹⁹ See Žižek 2002: 102-104.

²⁰ A typical example would be the portrayal of the TBS in TV shows such as 24 which give an unrealistic portrayal both in terms of the frequency of such situations and the way in which they arise and are resolved. See [http://en.wikipedia.org/wiki/24_\(TV_series\)](http://en.wikipedia.org/wiki/24_(TV_series))

²¹ Brecher 2007: 24-30.

²² Rejali 2007: 459.

²³ See Brecher 2007: chapter 3 and Bufacchi and Arrigo 2006.

²⁴ The standard examples are the French occupation of Algeria and Israeli occupation of the West Bank.

²⁵ Bufacchi and Arrigo 2006: 355. For a response to this claim see Wisniewski 2009.

²⁶ Bufacchi and Arrigo 2006: 355.

²⁷ Walzer 1973: 166-7

²⁸ Walzer 1973: 168.

²⁹ For an extended discussion on these points see XXXX.

³⁰ Brecher 2007: 79

³¹ There is also the practical concern that refusing to engage with the TBS on moral grounds creates a vacuum which is filled with erroneous and self-serving views. We have a duty to carefully engage with possible justifications for FLIT even if it means, perhaps because it means, that we consider the possibility of justifying morally abhorrent actions.

³² Brecher 2007:24-30.

³³ For a good account of these arguments see Rejali 2007: Chapter 21 'Does Torture Work? For a different view which argues that torture can be efficacious see Bowden 2003.

³⁴ As in Dershowitz 2003.

³⁵ There is another concern, not generally raised by critics of the TBS, which would be grist to their mill and we need to briefly highlight and respond to it. There is a growing literature on the relevance of results in social psychology to our moral reasoning. As we have described the use of thought-experiments in the context of moral and political philosophy, they serve to elicit commitments – of both people and theories – rather than the direct revelation of moral truth. But this is where social psychology might be seen to raise new problems. Amongst a great number of results that reflect poorly on our ability to access the workings of our own minds is a striking piece of evidence that we tend to misdiagnose the factors that are or are not operative in our behaviour, including in our responses to fictional scenarios. Nisbett and Ross (1980: 209) outline an experiment in which subjects read a passage and report on the emotional impact it has on them. One group has certain sentences omitted from the passage they read. Both groups report the same emotional impact of the passage, but the subjects with the added sentences insist that those sentences were the ones mainly responsible for the effect the passage had on them. So there is reason to doubt that we know to what features we are responding in a story and we may well claim features to be morally relevant (on the grounds of what we take to be affecting us) which were not the ones that really led to our response. Opponents of the TBS might suggest that this undermines any significance that the thought-experiment could claim to have. While experiments like this are intriguing, we do not believe that they affect thought-experiments in any way that would assist the case against the TBS. It is true that our intuitive responses lack epistemic authority – but thought-experiments cannot sensibly be understood as being in that business. We may not know what causes our responses to a fictional scenario, but it is why *we think* we respond that reveals our relative commitments. The current empirical evidence does not affect thought-experiments as contributors to this enterprise. For more detailed discussion see XXXX.

³⁶ We are not suggesting that *all* deontologists are absolutist.

³⁷ This is the latin legal phrase: *Fiat justitia ruat caelum*

³⁸ Gross 2004: 41.

³⁹ Wantchekon and Healy, 1999: 596.

⁴⁰ These quotes are taken from the endorsements on the back cover of Brecher's book 'Torture and the Ticking Bomb' by Geoffrey Robertson QC and Gabriel Palmer-Fernandez respectively.