metadata, citation and similar papers at core.ac.uk
brought to you by CORE
provided by

Putting the War Back in Just War Theory: A Critique of Examples

Mark Rigstad
Oakland University, USA

ABSTRACT. Analytic just war theorists often attempt to construct ideal theories of military justice on the basis of intuitions about imaginary and sometimes outlandish examples, often taken from non-military contexts. This article argues for a sharp curtailment of this method and defends, instead, an empirically and historically informed approach to the ethical scrutiny of armed conflicts. After critically reviewing general philosophical reasons for being sceptical of the moral-theoretic value of imaginary hypotheticals, the article turns to some of the special problems that this method raises for appraisals of warfare. It examines some of the hypothetical examples employed in the construction of Jeff McMahan's revisionist just war theory, and finds that they sometimes stipulate incomprehensible conditions, lead to argumentative impasses of diverging yet uncertain intuitions, and distract attention away from the real problems of war as we empirically know it. In contrast, empirical and historical studies of warfare reinforce the deep connections between facts and values, and compel theorists to face uncomfortable moral ambiguities. Perhaps most importantly, the analytic method of focusing on imaginary hypothetical examples can not only be distracting, but it can also be genuinely dangerous. Hence, the article pays special attention to the way in which a seemingly innocuous fiction like the famous Ticking Time Bomb scenario can come to frame a new paradigm of inhumanity in the treatment of prisoners of war.

KEYWORDS. Just War Theory, Analytic Philosophy, Hypothetical Examples, Child Soldiers, Torture, Michael Walzer, Jeff McMahan

I. INTRODUCTION

In the Postscript to the 5th edition of *Just and Unjust Wars*, Michael Walzer casts doubt on the notion that issues of just war theory can be adequately addressed "by the familiar methods of analytic philosophy" (2015, 335). Here he has in mind the practice among academic philosophers,

ETHICAL PERSPECTIVES 24, no. 1(2017): 123-144.
© 2017 by Centre for Ethics, KU Leuven. All rights reserved.
doi: 10.2143/EP.24.1.3200597

writing in the Anglo-American analytic tradition, to construct ideal moral theories of military practice on the basis of intuitions about imaginary and sometimes outlandish examples, often taken from non-military contexts of human action. As Walzer suggests, a quick examination of bibliographies reveals that this kind of analytic just war theory tends to be more about moral philosophy than it is about war. Whereas his own seminal work on the subject of war was informed by voluminous reading in military history and biography, the work of many of his recent philosophical critics does not appear to be nearly as empirically grounded. Accordingly, his postscript is a call to put the war back in just war theory. Being of like mind, my purpose here is to present a complementary critique of the analytic philosophical method. Accordingly, I shall critically examine the use of imaginary and non-military examples, and advocate for the virtues of a more empirical and historicized approach to the study of the ethics of war.

Since I shall be arguing for the sharp curtailment of imaginary examples in just war theory, but not for their complete abandonment, I shall start by describing in section II what may sometimes be legitimate uses of imaginary hypothetical examples. A recitation of some general sceptical arguments against this analytic philosophical method will then show its limitations as a supplement to empirical understanding. Sections III and IV draw upon these sceptical philosophical insights to demonstrate the shortcomings of this methodology as an approach to the ethics of war as it concerns (III) the killing of non-responsible combatants, including child warriors, and (IV) the treatment of detainees and the question of torture.

II. Aims and Limits of Imaginary Examples

There may sometimes be a legitimate probative use of imaginary hypotheticals as counterexamples to test absolutist deontic claims. Thought experiments are frequently and typically used to test modal claims, which are claims about what is necessary or possible in science and metaphysics, or what is universally obligatory, forbidden, or permissible in ethics and

politics. Think of Judith Jarvis Thomson's use of the now famous (enough to require no explanation here) case of the 'unconscious violinist' to defeat the claim that there is an absolute right to life, as has sometimes been supposed in arguments against the possibility of permissible abortion (Jarvis Thomson 1971). For someone who struggles to empathize with the analogous case of a woman who is pregnant as a result of rape, this example might serve to awaken a salient dimension of moral imagination. Moving in the dialectically opposite direction, there may also be intellectual gains that come not from acquiescing to the intended probative force of an imaginary counterexample, but from the philosophical need to discover and articulate adequate reasons for resisting it. Cora Diamond (2002) finds such a 'fruitful' case in Plato's systematic response to the tale of the Ring of Gyges in the *Republic*. According to Diamond's modest defence of the analytic method, this and other such imaginary examples may be useful precisely because "[…] it is only through an understanding that departs from what is generally available or generally accepted" that we can gain new exploratory philosophical insights into human morality (2002, 233).

Some philosophers, such as Alan Sidelle, go so far as to suppose that, besides the employment of imaginary hypotheticals, "we have no alternative way to support or test modal claims." In his view, to abandon this methodology would be "tantamount to just abandoning philosophy" (1996, 480). Again, although I am not calling for the abandonment of all imaginary examples in philosophy, but merely urging that they be dramatically circumscribed when it comes to just war theory, it is worth noting that Sidelle's worry is demonstrably unfounded in this field. The arguments concerning conditions of 'supreme emergency' set forth in Walzer's *Just and Unjust Wars* show how empirical examples can exert probative force against absolutist deontic modal claims. We do not need to make things up in order to find an example in which a military and political threat is grave and inhumane enough, and the means of resistance limited enough, that a putatively absolute moral prohibition against

aerial bombing of cities containing large civilian populations might reasonably be shown to be defeasible. Walzer presents a credible argument that this was the case in the British campaign against Nazi Germany from May 1940 until perhaps as late as June 1942 (2015, 254-261). Nor do we need Jarvis Thomson's medically implausible case of the unconscious violinist, in order to elicit the intuition that there is no absolute moral obligation to bring to term a pregnancy that results from rape. We can instead consider especially powerful and outlandish, yet actual cases combining genocidal hostility, torture, rape, and forced pregnancy, given that we are also unfortunately in possession of a horrifying accumulation of relevant and compelling testimony.[1] If the point of argument here is to enliven empathy for victims of rape, the empirical cases have far greater probative force than science fiction.

In addition to their probative use, carefully crafted imaginary examples may also serve a legitimate heuristic purpose in the inductive construction of a cogent just war theory. Actual historical examples are complex, often exhibiting a plurality of features that engage different and potentially competing dimensions of intuitive moral judgment. The method of employing hypothetical examples can cut through this complexity by isolating specific features of possible circumstances that may help to bring out analytically simple moral intuitions. As Michael Davis acknowledges in his critique of imaginary hypotheticals in ethics, it is a common and legitimate heuristic practice in legal education to move from actual case law to hypothetical variations that have not yet occurred and may never occur. Such examples "[…] can be used to sharpen insight, to help us see distinctions we might otherwise have overlooked (because the distinctions are both clever and new to us)" (2012, 9). It is in this vein that Francis Kamm defends the use of imaginary examples as part of a "technique of equalizing cases." Only when two cases are alike in all respects other than in the distinguishing features that mark a normative distinction – such as between harming and not-aiding – can we be reasonably certain of the intuitive importance of that distinction (2007, 427-428). Nenad

Miscevic similarly argues that imaginary hypothetical cases are "essential given the complexity of social life" because they help us to separate in our minds "[…] the morally relevant from irrelevant aspects that cannot be so clearly separated in empirical research bogged down in actual contingent details of historically given political arrangements" (2013, 61-62).

Arrayed against this imaginative hypothetical method we find the sceptical arguments of such philosophers as Jonathan Dancy, Kathleen V. Wilkes, John D. Norton, Jakob Elster, and Michael Davis. It will be helpful for present purposes to recite their more comprehensive philosophical concerns before turning to some specific problems that this method presents in the just war literature.

One of the common concerns of these sceptics focuses on the fact that imaginary examples are generally under-described or indeterminate in comparison with the fullness of factual reality; and this is typically especially true of outlandish examples. Wilkes (1988) and Elster (2011) note that presentations of outlandish cases tend to focus almost entirely on those stipulated conditions that differ from the real world, leaving out examination of how those imaginary conditions might change other morally relevant conditions. This is what leads to those familiar classroom discussions in which students want to know more about the case than is explicitly stipulated. Instructor's question: "Would you hook up to Robert Nozick's Experience Machine (1974, 42-45)?" Legitimate student response: "I don't know. What are other people doing? Am I to imagine that I'm the first adopter? Or am I the last agent standing?" And so on. As Elster avers, the problem here is that "[…] in order for us to apply our moral competence to a given case, we need to fully understand the case, so that we can identify all the morally relevant factors involved." And yet, in "outlandish cases" we often "fail to fully understand the situation described" (2011, 250).

In addition to the worry about the indeterminacy of imaginary hypotheticals, Dancy offers a further epistemological critique of the analogical reasoning process involved in their employment. As he observes, the basic assumption of this analytic method is that we can gain insight into

difficult actual cases from the intuitions that we form in response to putatively easier imaginary ones. The imaginary cases are designed to be easier than the actual ones by virtue of being less complicated. Given this essential difference, the cogency of analogical arguments from easy imaginary cases to difficult actual ones must hinge upon "relevant similarity" (1985, 146). Yet the philosophical judgment about relevant similarity *presupposes* the kind of moral understanding of the actual cases that the imaginary ones are supposed to provide.

> Even if we do learn from the imaginary case the importance that a property has there, this will only help us to reach a decision here if we decide that the actual case has no further morally relevant properties. The imaginary case cannot help us in *this* decision at all. Essentially we have to make up our minds about the moral make-up of the actual case *before* we can come to a view about whether the imaginary case is after all a reliable guide (Dancy 1985, 149).

This epistemological argument suggests that imaginary hypotheticals do not deliver any moral understanding that is not already available from real world experience and empirical knowledge. In this respect, Dancy's epistemological critique of imaginary examples in ethics mirrors Norton's critique of the use of thought experiments in the natural sciences, a practice which he compares to "[…] an oracle that claims mysterious powers but never delivers predictions that could not be learned by simple inferences from ordinary experience" (1985, 142).

There is also a further legitimate worry about the way in which dilemmatic imaginary examples are often structured in terms of stipulations that (i) assume perfect knowledge and (ii) artificially restrict the range of options available to moral intuition. The general problem with such idealized and restrictive stipulations stems from the way in which they model the moral rationalist's assumption that, in principle, there is a right answer to every situation of choice. This assumption tends to reinforce misplaced confidence in intuitions and undermine reflective moral humility. The standard professional response of the trained analytic philosopher is to

accept such idealized stipulations. Alternatively, however, as Cora Diamond recognizes, it may be as reasonable, and perhaps more reasonable, to assume that "[…] a morally troubling situation is usually one which needs exploration" such that "no 'canned' description in terms of the protagonist's having just this or that pair of alternatives with such-and-such probable outcomes is realistic in relation to what moral life is really like" (2002, 243).

To my mind, these sceptical arguments are powerful enough to chasten the analytic method of employing imaginary examples, but not powerful enough to thoroughly discredit it. They show that the method can at best serve as a supplement to, but never as a substitute for the lessons of moral experience and empirical understanding. Accordingly, my thesis is not that imaginary hypotheticals are worthless and should be eschewed at all costs in just war theory; rather, it is that such examples should not predominate in theorizing the ethics of war. Making such examples the bread and butter of ethical engagement with war, as too often happens in the analytic philosophical literature, leads to the impoverishment of theoretical sensitivity to prevailing patterns of empirical reality. Hence, in my criticisms of certain imaginary examples in just war theory below, I shall be concerned to curtail their use only in order to avoid (i) stipulating incomprehensible or unreasonable conditions of choice, (ii) arguing from controversial or uncertain intuitions, (iii) building the core of a theory of just warfare from intuitions of questionable or marginal relevance, and (iv) distracting attention away from the real problems that dominate the world of war as we empirically know it.

III. McMahan's Problematic Examples

Notwithstanding the rigour and importance of Jeff McMahan's revisionist just war theory, his case of the 'Implacable Pursuer' presents a useful focal point for our present purposes because it is emblematic of failures (i) through (iv).

> A person is drugged and kidnapped while sleeping by a villain who then implants a device in her brain that irresistibly directs her will to the task of killing you. As a result, she will implacably pursue your death until she kills you, at which time the device will automatically deactivate itself.
>
> Let us stipulate that the original person will continue to exist throughout the period in which her will is controlled by the device. Indeed it seems coherent to suppose that, while she pursues you, a part of her conscious mind could observe her own behavior with horror but be powerless to exert control over the movements of her body.
>
> I claim that the Pursuer, who is what I call a Non-Responsible Threat, has done nothing to lose any rights or to make herself morally liable to attack. Although she is causally implicated in the threat to you, that is a wholly external fact about her position in the local causal architecture. It has no more moral significance than the fact that an innocent bystander might, through no fault of her own, occupy a position in the causal architecture that makes your killing her the only means by which you could save your own life. If you would not be permitted to kill the innocent bystander as a means of self-preservation, you are also not permitted to kill the Non-Responsible Threat in self-defense. For a Non-Responsible Threat is morally indistinguishable from an innocent bystander (2004, 719-720).[2]

The first problem with this case is that, to my mind, (i) it does not make sense. Taken as a whole, either the Implacable Pursuer is a threat, or she is morally indistinguishable from a bystander, but not both. Perhaps we are supposed to take her in parts, with her mind and body considered as separate entities, such that her body presents an objective material threat, while her recoiling mind functions subjectively like an oddly phenomenologically involved kind of innocent bystander. Yet, separation between the mind and body of the Implacable Pursuer cannot be complete if her will has been captured by the stipulated technological device; and if her will has been completely captured, it is not clear how much of her 'conscious mind' can remain opposed to her wilful conduct. In the closest familiar examples, such as addictive behaviour, the will may vacillate before settling on a course of action; and consciousness, though it may be similarly divided, is never entirely uninvolved in intentional agency. One may wish

to know how much of her conscious mind recoils before deciding whether or not she is liable to defensive action. If she is of 'half a mind' to stop, despite continuing her pursuit, is this phenomenological fact, plus the background story about how her will was coercively and technologically captured, enough to make her a Non-Responsible Threat?

In the above passage, McMahan's answer to this question is affirmative; but in his more recent work, his answer to the most relevantly similar case is negative. His updated example of a Non-Responsible Threat is the case of the Cell Phone Operator, which stipulates the following: "A man's cell phone has, without his knowledge, been reprogrammed so that when he next presses the 'send' button, the phone will send a signal that will detonate a bomb that will then kill an innocent person" (2009, 165). Unlike the Implacable Pursuer, the Cell Phone Operator has no conscious knowledge of the objective material threat that his intended bodily movements present, such that no part of his mind recoils. In McMahan's revised analysis, the closest analogue to the Implacable Pursuer appears to be his case of the Conscientious Driver:

> […] a person who always keeps her car well maintained and always drives carefully and alertly decides to drive to the cinema. On the way, a freak event that she could not have anticipated occurs that causes her to veer out of control in the direction of a pedestrian.
>
> I will assume that on an objective account of permissibility, this conscientious driver is acting impermissibly. It is impermissible to drive, or to continue to drive, when one will lose control of the car and threaten the life of an innocent person. But of course she cannot know that these are the conditions in which she is driving. So while on an objective account of permissibility, she is an Excused Threat, on a subjective account, she is an Innocent Threat (2009, 165).
>
> If she has bad luck and will now accidentally kill an innocent person unless defensive action is taken against her, she seems liable to necessary and proportionate defensive action (2009, 176).

I can only imagine that the mind of the Conscientious Driver recoils at the threat that her hurtling automobile presents to an innocent pedestrian

in much the same way as the mind of the Implacable Pursuer recoils at the similar threat that her bodily conduct presents. Yet, if the analogy holds, we are now invited to see this kind of case as including liability to defensive killing. (It is not clear how shooting her, say, with a crack shot to the head will stop the threat, since she is no longer in control of the vehicle. So we have to imagine that one is in a position to stop the vehicle, and kill her in the process, by means of something more powerful, like a rocket propelled grenade, which ordinary pedestrians rarely possess.) In order to see McMahan's diverging judgments in the cases of the Implacable Pursuer and the Conscientious Driver as consistent, it must be supposed that the metaphysical distance between consciousness and conduct in the first case is more responsibility-defeating than is the non-blameworthy epistemic deficit (the inability to predict an unpredictable even) in the second case. It is not clear, however, why this should be so. Nor, more importantly, does it seem necessary to resolve such an issue in order to reflect upon the ethics of war. The epistemic advantage of analytic just war theory is supposed to consist in the light that clear intuitions about imaginary cases casts upon the complexity and confusion of empirical reality. Yet, here we find ourselves instead (ii) reasoning from an uncertain tangle of hypotheticals.

Returning to McMahan's case of the Implacable Pursuer, we can now see how it also (iv) distracts attention from the most salient analogous real world phenomena. We do not need to construct such an outlandish case in order to elicit intuitions about whether it is justifiable to kill someone who poses a lethal threat without being morally responsible for it, because we arguably already have ample real world examples of Non-Responsible Threats embodied in the form of child warriors who have been coerced into military service (Singer 2005). Nor do we need to rely entirely on our own ivory tower intuitions, untutored by experience of war or military discipline, when we can also draw upon the testimony of soldiers who know what it is like to encounter child soldiers on the battlefield. Consider the following account from a US Special Forces

officer and Vietnam veteran: "And I froze, 'cos it was a boy, I would say between the ages of twelve and fourteen. When he turned at me and looked, all of a sudden he turned his whole body and pointed his automatic weapon at me, I just opened up, fired the whole twenty rounds right at the kid, and he just laid there. I dropped my weapon and cried" (Grossman 2015, 87). This example typifies the general pattern of response among soldiers. When faced with Non-Responsible Threats, in the form of child soldiers, they shoot to kill. Yet they subsequently suffer a lifetime of remorse after the fact. Why? What accounts for the divergence between such real world responses to this kind of situation and McMahan's more clear-cut intuition about the Implacable Pursuer? And what lesson should just war theorists draw from these diverging responses?

One difference between McMahan's response to the Implacable Pursuer and the normal soldier's response to the child combatant may reside in the fact that the former, like so much of recent analytic just war theory, is about the question of justifiable killing in self-defence.[3] In contrast (iii), soldiers are systematically and intensively trained not only, nor even chiefly, to protect themselves, but also, and chiefly, to protect the other members of their combat units, as well as their nation as a whole. Hence, the analytic moral philosopher's idea of individualized and reflectively deliberate acts of killing in self-defence contrasts sharply with the reality of killing in war as it exists in reality as a product of military training. For an empirically informed understanding of soldiering, it is worth attending to the findings of military psychologists. Lt. Col. Dave Grossman characterizes warfare as '*Lord of the Flies* with guns' because the transition from normal civilian teenager to trained soldier involves producing a new "personality structure" that makes "reflexive killing" possible (2009, 267). In untrained individuals there is a deep reluctance to kill other human beings, as evidenced in US Army Brigadier General S. L. A. Marshall's finding that only 15% to 20% of US soldiers in World War II who were in the line of fire when encountering the enemy actually discharged their weapons (Grossman 2009, 3). Subsequently, through systematic development

of intensive military 'programming' or 'conditioning' procedures employed during basic training, the US military managed to increase that firing rate to 55% by the time of the Korean War, and 90% to 95% by the time of the Vietnam War (Grossman 2009, 36). Much of this 'success', if we may call it that, is a result of the fact that soldiers are trained in disciplinary institutions designed to cultivate martial virtue, which involves learning to discount considerations of self-preservation, and embracing the value of self-sacrifice for one's combat unit and one's nation. Whether this military altruism should ultimately be deemed pathological or virtuous is an important question, albeit too demanding for present purposes. Regardless, the chief point here is to draw attention to the striking fact that warfare is often a scene of distinctly altruistic violence. This fact is (iii) too often left out in the construction of imaginary hypotheticals in the analytic philosophical literature.

So if the question is whether one does, as a trained combatant, kill the child warrior who arguably poses a Non-Responsible Threat, the institutional military answer is affirmative, with the caveat that one is also entitled (and inclined) to feel wretched about it after the fact. Viewed in this light, from the standpoint of the trained soldier, empirical examples of killing child soldiers are more troubling than the imaginary notion of killing a technologically programed Implacable Pursuer in self-defence. In the case of the child soldier, the tragic elements are dynamically linked in our moral psychology in a way that may be lost on us when we pull them apart analytically. This is just one example of the distance between an academic philosopher and a combatant conditioned for battle: one is trained to render highly reflective judgments about when it is acceptable to kill, while the other is trained to kill reflexively without the luxury of thorough deliberation. One therefore has to wonder about the purpose of writing books on how to kill reflectively, and upon due deliberation, for a society that trains its soldiers to kill automatically, without a moment's hesitation. It could be in order to call such military conditioning into question, though I have never seen this practical implication explicitly

articulated in the analytic just war literature. When we consider child combatants as a class of real world phenomena, we know from empirical studies of military conditioning that if we train soldiers to kill reflexively in the face of all kinds of lethal threats to themselves, and more importantly to their immediate comrades and more remote compatriots, then the outcome in most cases will be that children will die and soldiers will be emotionally maimed. The question then becomes whether we should train our troops in this way, designing an army that predictably kills child combatants, or whether we should train the army for reflective restraint in such cases, and consequently lose the lives of a greater number of soldiers to a predictable increase in the frequency of child soldier attacks. This is a much harder question than the case of the Implacable Pursuer, because it is difficult to answer by way of a simple deontological moral intuition about a singular decontextualized act.

It is worth noting here that when McMahan provides an analysis of child soldiers in *Killing in War* (2009), after leaving behind the case of the Implacable Pursuer that was central to his analysis of Non-Responsible Threats for more than a decade, he argues that "[…] we should resist the suggestion that it is a reasonable presumption that child soldiers are Non-responsible Threats" (2009, 200). This claim may seem surprising, given the relevant similarities between the Implacable Pursuer and the child soldier. But his updated example of a Non-Responsible Threat, the Cell Phone Operator, is not so relevantly similar. In the latter case, the agent in question is completely oblivious to the threat that his actions present. Hence, McMahan's reasons for excluding child soldiers from this revised class of Non-Responsible threats is that, despite sometimes being as young as eight years old (if not younger), child soldiers "[…] have also been forced to adapt to their circumstances and usually, as a consequence, have become precociously mature in various ways," and that "[…] no one really supposes that a child of 10, even one who has been subjected to terrible abuse, is wholly lacking in moral responsibility for his action" (2009, 200). Instead of seeing them as Non-Responsible threats, as the

Case of the Implacable Pursuer arguably suggests, he now includes them in a broader class of "Partially Excused Threats" that includes most "adult unjust combatants" (2009, 201). According to this updated analysis, child soldiers are not different in kind from most adult unjust combatants, though their excuses may be stronger by degrees. Accordingly, "[…] when just combatants could use lesser force against child soldiers without seriously compromising their ability to achieve their just aims, they may be morally required to fight with restraint, even at greater risk to themselves" (2009, 201). The rationale for exercising somewhat greater military restraint in response to the threats that child soldiers present has to do not only with "the child soldier's excuses," but also with the important fact that "[…] these soldiers are *children* – that is, individuals who have hardly had a chance at life and have already been terribly victimized" (2009, 201)[4]. There is good reason, however, for harbouring serious reservations with this analysis, not least because child soldiers, far from being morally precocious, are typically morally stunted by the traumas that they endure.

Returning to McMahan's case of the Implacable Pursuer, it is worth examining the range of intuitive options. One might endorse or reject his initial intuition that it is unjust to kill her in defence of one's own life, or one might elect to suspend judgment. In my experience in the classroom, students are often divided between these three forms of response. Some hold, contrary to McMahan's stated intuition, that killing the Implacable Pursuer is permissible. Others do not know either way. In his response to the example, Walzer states, "I don't have any clear intuition about the case of the Implacable Pursuer (except for the intuition that it isn't a likely case in the world that I know)" (2006, 43). So the first problem this example raises is that, (ii) when there is room for reasonable philosophical disagreement about how best to respond, or deep uncertainty about how best to respond, the intuition-driven methodology of analytic just war theory is at an impasse. There is no higher court of appeal, nor any command hierarchy among philosophers. Nor is there any institutional

imperative of unit cohesion. Consequently, philosophers are free to cling to diverging intuitions, and to agree to disagree. This academic privilege of proffering independent intuitions is worlds apart from the exigencies of military decision-making within combat zones. The latter decisions are subject to command hierarchies and intensive training. This stark contrast raises an important question about how and how much just war theorists should accommodate their thinking to the realities of military service. It would, of course, be appalling to suggest that philosophers should be similarly subjected to a centralized command and control bureaucracy in order to resolve methodological stalemates arising from the free interplay of moral intuitions. And it would be a mistake to suppose that philosophers must entirely sacrifice critical distance from the patterns of judgment to which soldiers are habituated through military discipline. Yet, some accommodation must be made to empirical reality in order for just war theorists to engage directly with systematic institutional responses to dilemmas of this sort. Otherwise, we run the risk of (iii) using such examples to elicit intuitions of questionable practical relevance. Since it is impracticable to train soldiers to render subtle metaphysical analyses of the threats that they face in the heat of battle, as the isolated and decontextualized case of the Implacable Pursuer demands, it seems more reasonable instead for just war theorists to engage with the practice of killing in war on an empirical and institutional level.

The philosopher's sense of what he or she would do in response to the Implacable Pursuer will invariably reflect his or her habits of mind and the background experiences that have shaped those habits. For this reason, it is natural that many of us may struggle to find firm intuitive footing when faced with such a case. As Michael Davis notes, "If we have little or no experience of anything similar, our response to the imaginary case – what we judge, believe, think, or feel we would do – is unlikely to be a reliable guide to what we actually would do" (2012, 11).[5] For this reason, heavy reliance on imaginary cases is not likely to help us to map our ethical commitments. The ethical commitments we know best are the

ones we have experience putting into practice. Consequently, as Davis notes, "[…] the less familiar the imaginary case, the less reliable our [intuited] response" (2012, 11). For this reason, it is not enough for philosophers to rely on their intuitions alone. They must exercise their moral imaginations not only to think up hypothetical counterexamples, but also to empathize with soldiers and victims of war who inhabit very different contexts of human action.

Sam Black and Jon Tweedale make a related yet contrasting point in discussing the use of imaginary hypotheticals in theories of moral responsibility. They argue that, "The subjects of these examples must also be relevantly similar to ordinary human beings" (2002, 281). Yet their worry is not that our intuitions about such cases will be too weak in the sense of being unconfident. Instead, their worry is that, "[…] if the examples are too farfetched, they risk deceiving us into thinking we hold firm views on topics when, in fact, we have no idea what we believe" (2002, 295-296). Typically, as in McMahan's case of the Implacable Pursuer, the analytic philosophical method employs imaginary hypotheticals that stipulate epistemic conditions of perfect knowledge. In this respect, the method belongs to an ideal moral rationalism, which assumes that there must be a right or wrong answer to every moral dilemma from the standpoint of an omniscient judge. Insofar as philosophers assume this standpoint, from which they are asked to choose one side or the other of thorny dilemmas, they are methodologically encouraged to render decisive judgments on the basis of what may often be only weak intuitions or slight moral preferences. If one assumes that the standard of rational certainty about right or wrong is always achievable in principle, then one will expect oneself to render precisely this kind of judgment. Consequently, this method too often leads analytic philosophers to commit what we might call the *fallacy of overconfident intuitions*.

In contrast, examination of historical cases is often a stark reminder of the messiness, complexity, uncertainty, and moral ambiguity of human affairs. As such, a historicist approach to just war theory naturally calls for

humility, moderation, nuance, and sometimes explicit uneasiness in ethical judgment. Moreover, when we disagree about how to judge historical cases, we are rarely at a methodological impasse. Instead of agreeing to disagree, we can argue about the case on the basis of historical evidence. If I disagree with Walzer's justification of Israel's preventive military operations in the Six-Day War, I can cite evidence of the lack of a credible threat. Consider the fact – later publicly acknowledged by such Israeli leaders as Mattiyahu Peled, Ariel Sharon, and Menachem Begin – that Israel's forces outnumbered those of the Arab states 2.4 to 1, and that Gamer Abdel Nasser evidently had no intention of initiating an assault (Quigley 2013). Walzer and other supporters of the Six-Day War could respond in part by recounting the legitimate fears of the Israeli people, informed by memories of the Holocaust, as they huddled together in shelters night after night in the late spring and early summer of 1967. In response I may concede that Israel's objectively unjustifiable offensive was subjectively excusable among the populace, if not among their leaders. One of the methodological advantages of this kind of historicist engagement is the way in which it moderates ethical judgment through dialectical engagement. And another is the way in which it brings home in the practice of argument the moral realism that (as Walzer has argued) is an essential element of the meta-ethics of just war theory. It shows that we cannot readily pull apart the facts of the case from our ethical evaluation of it.

IV. A Truly Dangerous Example

The worst imaginary example in philosophical analyses of political violence is by far the most successful: the Ticking Time Bomb scenario. This case applies to the treatment of prisoners of war in the context of international armed conflicts, as well as the treatment of detainees in non-international conflicts (civil wars), and in both domestic and international counterterrorism warfare. According to the customary stipulation, the only way to save a great number of potential innocent victims of a terrorist

bombing is to torture a known terrorist who will assuredly tell you how to defuse the threat. Here the deontic modality in question is the moral permissibility or impermissibility of torture, understood as the deliberate infliction of severe physical and/or mental pain and suffering on a restrained and helpless captive. The scenario suggests to (ii) a slight majority of minds[6] that torture is not necessarily wrong, and may sometimes be practically necessary. Consequently, those who would intuitively embrace torture in this case conclude that there is no absolute prohibition against the practice of inflicting acute pain and suffering on vulnerable captives for the purpose of gathering intelligence to enhance security.

There are serious issues, however, concerning how much importance, if any, to place on this overworked imaginary example. Like many imaginary examples structured by dilemmatic stipulations, we must ask ourselves (i) how reasonable it is to accept its terms. The ticking bomb scenario stipulates that we must choose between allowing a time bomb to kill some large number of people or torturing someone whom we know will provide information that will enable us to defuse the bomb in time to save those people. We are told to imagine that there are no other options. There are abundant reasons, however, for rejecting the stipulated terms of the ticking time bomb scenario. It is not a situation that is likely ever to occur. Indeed there have been no publicly demonstrated cases of the sort. Yet, by virtue of occupying centre stage during ethical discussions, the case has long been an academic institution unto itself. Since the analytic method that employs it aims to reason by analogy from the imaginary case to 'relevantly similar' cases in real life, it tends *by design* to facilitate ramification. Once torture is permitted in one extreme case, it will seem incrementally more reasonable to extend the same permission to cases that differ only by degrees, such as numbers of victims and probabilities of success. Thus, (iii) there is a limited but very real slippery slope problem that leads from the imaginary hypothetical example of the ticking bomb to a living security paradigm that shapes institutionalized practice and political culture.

To see how an ivory tower notion can infect the political culture of a militarized society, it is enough to consider how this kind of purely imaginary scenario was presented as the daily reality of Jack Bauer, the fictional hero in the popular television series '24'. The show was exceedingly popular with cadets at West Point, as well as soldiers on duty during the occupation of Iraq. Soldiers emulating Jack Bauer were inspired to see their daily operational situations in similar terms, imagining that every detainee is a potential terrorist who might reveal deadly plot lines if subjected to so-called 'enhanced interrogation'. By 2006, top military brass, including US Army Brigadier General Patrick Finnegan, then Dean of West Point, became convinced that the show was effectively undermining US military training in the laws of war by turning an academic hypothetical scenario into the central imaginary paradigm (the 'meat and potatoes') of American security operations. Thus, a seemingly idle philosophical fiction gave rise to a cruel and inhumane operational fiction.

As top military interrogators overwhelmingly attest, inflicting pain and suffering on detainees is *not* an effective intelligence gathering method in comparison with many other, more humane tricks of the trade (Mayer 2007). Hence the US Army's *Field Manual 34-52 on Intelligence Interrogation* (1992) avers that torture is a "[…] poor technique that yields unreliable results," that "may damage subsequent collection efforts", and that "will bring discredit upon the US and its armed forces while undermining domestic and international support for the war effort" (Department of the Army 1992, 1-8). After a systematic review of the George W. Bush administration's post-9/11 experiment with so-called 'enhanced interrogation', *FM 34-52* was replaced by *Field Manual on Human Intelligence Collector Operations 2-22.3* (Department of the Army 2006), which reaffirmed every word of the earlier finding. In short, (i) the immediate problem with the stipulated dilemma of this imaginary example is that in reality there are always better options available.[7]

Moreover, this shortcoming of the ticking time bomb scenario has broader adverse intellectual ramifications. The inordinate attention that

the example receives is (iv) a distraction from the real considerations of consequence that undergird the convention of benevolent quarantine. It is common knowledge that the practice of torturing prisoners of war, including detainees of counterinsurgency or counterterrorism operations, undermines incentives to surrender, and inflames resentments in affiliated populations, both of which tend to harden resistance and forestall peace settlements. For this reason, in addition to the inherent moral ghastliness of the practice, the international community has banned torture again and again. In light of everything that can be said against the actual practice of torture, it is morally irresponsible to allow an imaginary example, with no basis in reality, to erode the military's legitimate time-honoured commitment to the legal and ethical obligations of benevolent quarantine. Therefore, in order to avoid complicity in the erosion of military conscience that leads, for example, to the kinds of barbarity witnessed at Abu Ghraib, academic theorists should reject the stipulated terms of the ticking time bomb example, and refuse to anthologize and teach it except as an object lesson in how not to theorize the ethics of war.

Works Cited

Black, Sam and Jon Tweedale. 2002. "Responsibility and Alternative Possibilities: The Use and Abuse of Examples." *The Journal of Ethics* 6/1: 281-303.

Dancy, Jonathan. 1985. "The Role of Imaginary Cases in Ethics." *Pacific Philosophical Quarterly* 66/1-2: 141-153.

Davis, Michael. 2012. "Imaginary Cases in Ethics: A Critique." *The International Journal of Applied Philosophy* 26/1: 1-17.

Department of the Army. 1992. *Field Manual 34-52 on Intelligence Interrogation*. Washington D.C. https://fas.org/irp/doddir/army/fm34-52.pdf.

Department of the Army. 2006. *Field Manual on Human Intelligence Collector Operations 2-22.3*. https://fas.org/irp/doddir/army/fm2-22-3.pdf.

Diamond, Cora. 2002. "What if X Isn't the Number of Sheep? Wittgenstein and Thought-Experiments in Ethics." *Philosophical Papers* 31/3: 227-250.

Elster, Jakob. 2011. "How Outlandish Can Imaginary Cases Be?" *Journal of Applied Philosophy* 28/3: 241-258.

Grossman, Dave. 2015. *On Killing: The Psychological Cost of Learning to Kill in War and Society*, New York: Back Bay.

Jamieson, Dale. 2001. "Method and Moral Theory." In *A Companion to Ethics*. Edited by Peter Singer, 476-486. Oxford: Blackwell.

Jarvis Thomson, Judith. 1971. "A Defense of Abortion." *Philosophy & Public Affairs* 1/1: 47-66.

Kamm, Frances Myrna. 2007. *Intricate Ethics: Rights, Responsibilities, and Permissible Harm*. Oxford: Oxford University Press.

Lackey, Douglas P. 1989. *The Ethics of War and Peace*. Englewood Cliffs, NJ: Prentice Hall.

Luban, David J. 2008. "Unthinking the Ticking Bomb." *Georgetown Law Faculty Working Papers* 68. http://scholarship.law.georgetown.edu/fwps_ papers/68 [accessed November 30, 2016].

Mayer, Jane. 2007. "Whatever It Takes: The Politics of the Man Behind '24'." *The New Yorker,* February 19.

McMahan Jeff. 1994. "Innocence, Self-Defense and Killing in War." *The Journal of Political Philosophy* 2/3: 193-221.

McMahan, Jeff. 2004. "The Ethics of Killing in War." *Ethics* 114/4: 693-733; reprinted in *Philosophia* 34/1: 23-41.

McMahan, Jeff. 2009. *Killing in War*. Oxford: Oxford University Press.

Miscevic, Nenad. 2013. "A Hierarchy of Armchairs: Gerald Gaus on Political Thought Experiments." *European Journal of Analytic Philosophy* 9/1: 52-63.

Nagel, Thomas. 1979. "War and Massacre." In *Mortal Questions*, 53-74. Cambridge: Cambridge University Press.

Norton John D. 2004. "On Thought Experiments: Is There More to the Argument?" *Proceedings of the 2002 Biennial Meeting of the Philosophy of Science Association Philosophy of Science* 71: 1139-1151.

Nozick, Robert. 1974. *Anarchy, State, and Utopia. New York: Basic.*

Otsuka, Michael. 1994. "Killing the Innocent in Self-Defense." *Philosophy and Public Affairs* 23/1: 74-94.

Plato. *Republic*, Book II. Translated by Benjamin Jowett. http://classics.mit.edu/Plato/republic.3.ii.html [accessed November 30, 2016].

Quigley, John. 2013. *The Six-Day War and Israeli Self-Defense: Questioning the Legal Basis for Preventive War*. New York: Cambridge University Press.

Rittner, Carol and John K. Roth, (eds.). 2012. *Rape: Weapon of War and Genocide*. St. Paul, MN: Paragon House.

Rodin, David. 2005. *War and Self-Defense*. Oxford: Clarendon.

Sidelle, Alan. 1998. Review of *Thought Experiments in Philosophy* by Soren Haggqvist. *The Philosophical Review* 107/3: 480-483.

Singer, Peter W. 2005. *Children at War*. New York: Vintage.

Walzer, Michael. 2015. *Just and Unjust Wars*. New York: Basic.

Walzer, Michael. 2006. "Response to McMahan's Paper." *Philosophia* 34/1: 43-45.

Wilkes, Kathleen Vaughan. 1988. *Real People: Personal Identity without Thought Experiments*. Oxford: Oxford University Press.

NOTES

1. Rittner and Roth (2012).

2. A slightly different version of the case also appeared in McMahan (1994).

3. For accounts that see the personal right of self-defence as central to just war theory, see Nagel (1979, 53-74); Lackey (1989, 18); Otsuka (1994, 74-94). For a systematic critique of the idea that warfare can be grounded in the right of self-defence, see Rodin (2005).

4. McMahan does not address the possibility that child soldiers may be 'just combatants', presumably because just combatants do not deploy children in war.

5. See also Jamieson (2001, 476-486).

6. As Davis (2012, 12) notes, surveys that Fritz Allhoff conducted to assess student approval rates of torture in ticking time bomb scenarios are on average much closer to neutral ('not sure') than approval ('strong agreement').

7. For a thorough dismantling of the ticking time bomb scenario, see Luban (2008).