

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 Gamal 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 minds⁶ 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.

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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).