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REFLECTIONS ON THE RELATIONSHIP BETWEEN LAW AND ETHICS

I Introduction

Law and ethics share important characteristics. They are both *normative* — that is, they specify how things *ought to be*. They both provide rules and principles that are intended to guide action. In the military context, they set the boundaries of acceptable and unacceptable action. Law involves reasoning with reference to general principles and by analogy to prior judgments regarding the legality of particular acts. So do many schools of ethical theory, most notably Kantian/deontological and utilitarian schools of thought. But, of course, law differs from ethics in one obvious respect: it is enforceable using well-understood procedures, while ethics is not, unless it becomes codified as law as well.

Nevertheless, law and ethics are so similar that, perhaps inevitably, many military members tend to think that ethics can be completely reduced to legal questions. When I first arrived as the professor of ethics at the United States Army War College, a crusty old Judge Advocate General ('JAG') from the Vietnam era said 'why do we need you? I write rules of engagement. What else does the Army need?'

At least in the US military, recent decades have witnessed a proliferation of JAGs (military lawyers) at all levels of the organisation, including embedded JAGs with special knowledge of operational law at the level of operational military planning. Since part of the function of JAGs at that level is to assist commanders in formulating rules of engagement for their specific tactical and operational context, one might reasonably assume that operational law is the de facto exclusive normative guide for military operations.

The conflation of law and ethics is further reinforced, at least in the US military, by the fact that all Department of Defense employees, civilian and military, receive an annual 'ethics brief'. This brief is presented by the JAGs, and concerns rules regarding things like receiving gifts, proper use of government rental cars and credit cards, and booking hotels and transportation in accordance with the Joint Ethics Regulation.

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So in both the operational military context, and in the day to day business of a Department of Defense employee, one is continually being reminded to conduct oneself in conformity with those relevant bodies of law. Little wonder, therefore, that many think that ethics can be reduced wholly to legal guidance.

This paper will attempt to demonstrate that in both the operational military context (or Law of Armed Conflict ('LOAC')) and in conduct by military members and units, there are important issues and questions of ethics that are not reducible to legal questions.

II LAW OF ARMED CONFLICT AND THE INTERNATIONAL ORDER

LOAC is a body of law governing military operations. It derives from a wide number of sources — treaty law such as the *Hague* and *Geneva Conventions*, customary international law, and law manuals promulgated by national militaries. Of course, national military manuals may differ on some points insofar as they reflect unique national understandings of the shared body of international law. Law provides the normative structure which operational law experts use as the basis for advising commanders regarding lawful and unlawful military operations. Because military lawyers are ready at hand to military commanders, it is inevitable that they are the first recourse for normative guidance regarding military operations.

Granting all that, however, does not entail the reducibility of ethics to law. For one thing, the tradition of just war in the Western intellectual tradition goes back thousands of years before even a portion of it was codified as law. Consequently, there are aspects and elements of the ethical tradition that were never captured in that legal codification.

For another, as technology, international relations and operational concepts change and evolve, the law requires time and formal processes to gel in ways that fully accommodate those changes. Most obviously, this is the case when new formal international agreements and treaties are required to address those changing circumstances. But even if the processes are less formal, any emerging consensus regarding what the law permits and prohibits will require time and some mechanism for reaching that consensus. An excellent contemporary example of that process is the *Tallinn Manual*'s proposed norms in cyberwar.[1] At present, of course, the *Tallinn Manual* is only the product of discussion among a segment of international lawyers (about 20 in number) from NATO countries. As a consequence, the norms it articulates are at best an initial attempt to state some agreed norms. Whether those norms will, indeed, emerge as something like customary international law — let alone eventual treaty law — will take considerable time and effort to determine.

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[1]   Michael N Schmitt (ed), *The Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press, 2nd ed, 2017).

Consequently, one might suggest that international law at any given moment is metaphorically a 'stop motion' photograph of an older, deeper and ever-fluid ethical tradition. Indeed, when attempts must be made to expand the law to cope with novel circumstances, to what can we turn for guidance? Obviously we may turn to the existing principles of LOAC, which can be extended by analogy and derivation to deal with the new. But since those principles themselves emerge from the millennia-old just war tradition, it may be helpful to bring to that discussion a deeper historical grasp of the origins and sources of that older philosophical and theological ethical tradition.

Another limitation of the law is, of course, that it specifies only a lower limit to the permissible. A moment's reflection makes it apparent that it is often important and necessary to observe in a specific case that, 'yes, that would be legal. But is it ethically the best course of action?' Indeed, it is an understandable tendency for military personnel to prefer the straightforward and unambiguous answer even to a complex question. Encouragement of the reduction of complex ethical issues to questions of black letter law may militate against the development of appropriate ethical sensitivity and moral reasoning skills in our military personnel. Obviously, if immediate and decisive action is required, one would be reluctant to encourage dangerous hesitation. But when confronted with an ethically complex situation, we would be remiss to fail to do what we can to give personnel independent ethical reasoning skills and resources and to discourage outsourcing such reasoning to their JAGs.

Another example where we need to think long and hard about the limits of law to solve all of our questions is the contemporary heated debate about lethal autonomous weapons systems.[2] Clearly, at first blush the central ethical and legal issues concern the principles of discrimination/distinction and proportionality. Indeed, viewing the question solely through the legal lens generates an argument that, if lethal autonomous weapons can satisfy those requirements to a degree at least equal to those of human beings, there is really no further issue to discuss.[3] That may in the end be the right answer. But it is important to note that many voices in the debate feel strongly that there is something fundamentally ethically wrong with allowing machines to kill human beings without a human being bearing direct ethical responsibility for the act and meaningfully participating in the decision.[4] The reasons given for that intuition are indeed various, and those who see the issue entirely in terms of discrimination and proportionality as a full and adequate framework may be inclined to dismiss

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[2]   See, eg, Linda Johansson, 'Ethical Aspects of Military Maritime and Aerial Autonomous Systems' (2018) 17(2–3) *Journal of Military Ethics* 140; Ingvild Bode and Hendrik Huelss, 'Autonomous Weapons Systems and Changing Norms in International Relations' (2018) 44(3) *Review of International Studies* 393.

[3]   See, eg, Michael N Schmitt and Jeffrey S Thurnher, '"Out of the Loop": Autonomous Weapons Systems and the Law of Armed Conflict' (2013) 4(2) *Harvard National Security Journal* 231, 251–7.

[4]   See, eg, Heather Roff, 'The Strategic Robot Problem: Lethal Autonomous Weapons in War' (2014) 13(3) *Journal of Military Ethics* 211.

such hesitations as irrational or emotional. Perhaps they are. But *whether* they are is not a question to be settled only by citing a narrow conception of law. It is, indeed, a philosophical and ethical question that asks precisely whether the legal framework is a full and sufficient framework for assessing the issue.[5]

III The Historical and Cultural Location of Law of Armed Conflict

In addition to all I have said so far, there is a deeper cultural and historical question to raise about the adequacy of the LOAC tradition to deal with future challenges. That has to do with the 'stop motion' framework not only of LOAC, but of the entire international system that gave rise to it; of the international institutions that are its custodians, and indeed of the future of global cooperation and governance.

Although we often think that the international system of sovereign states, international treaties such as the *Hague* and *Geneva Conventions* and the system of international organisations such as the United Nations and the International Criminal Court are global and universal, a little historical reflection will give us pause regarding those assumptions.

We begin with the most important example: the Westphalian state system. It is, of course, a human creation from a particular point in time in response to a local (from a global perspective) set of challenges. Specifically, it was an attempt to put an end to the Post-Reformation wars of religion in Europe as each of the major Christian groups of Europe attempted by force of arms to restore a unitary Christendom. The fact of those wars, indeed, proves that the 'solution' of Westphalia was perceived as sub-optimal. The ideal was restoration of a unitary Christendom — an idea as old as Constantine's aspiration to 'one god, one church, one emperor'.[6] Only the real-isation that none of the players were strong enough to bring about that restoration caused the powers of Europe to accept the permanent religious division of Europe into sovereign states with territorial integrity. That compromise, it was hoped, would bring peace to Europe (in vain as it turned out).

Some reflection on deeper human history will reveal how historically abnormal this European 'solution' was. As we have already seen, for most of Christian history, the ideal was a unified Christendom.[7] For the Islamic world, it was an ever-expanding

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[5] It is important to note that even legal voices who question the legality of lethal autonomous weapons systems can be found. But my point here is that there is also a meta-legal discussion going on regarding the question.

[6] On the history of the Westphalian state system, see Daniel Philpott, 'Sovereignty', *Stanford Encyclopedia of Philosophy* (Web Page, 25 March 2016) <https://plato. stanford.edu/entries/sovereignty/>.

[7] See generally Michael David Knowles et al, 'Roman Catholicism: The Concept of Christendom' *Encyclopædia Britannica* (Web Page, 9 January 2019) <https://www. britannica.com/topic/Roman-Catholicism#ref931853>; Sarah Morice-Brubaker, 'The Idea of Christendom' [2014] (108) *Christian History* 19.

dar al Islam, eventually extending globally.[8] For China, it was China as the Middle Kingdom, governed under the Mandate of Heaven, receiving respect and tribute from rightfully subordinate states in deference to its superior status.[9]

After Westphalia, as Europe created colonial empires and rose in global dominance, it 'stamped' the semblance of the Westphalian state system around the globe. As the colonial empires retreated, they left in their wake nominal Westphalian states with borders, capitals and central governments. In many of the conflicts ongoing throughout the world, of course, the artificiality and imposed nature of those borders and states continues to feed strife, conflict, and civil war.[10]

Needless to say, later international legal and institutional structures built on the West-phalian foundation and attempting to further restrain conflict are equally products of the parochial issues of the West. The *Hague* and *Geneva Conventions* are attempts to restrain the violence of European wars.[11] The League of Nations and the United Nations, while ostensibly universal, clearly arose from the attempts of the West to end major war after the World Wars.

One can make the legalistic case that these legal and institutional structures are universal in the sense that almost all nations have signed the relevant treaties, joined the organisation, and 'on paper' pledged commitment to their founding ideals. Still, as I indicated above, the historical and cultural reality is that the roots for those ideals, institutions and legal frameworks are, in many nations and cultures, shallow or non-existent. Now, as the global dominance of the West continues to erode, there is good historical reason to suspect that other competing cultural traditions may reassert themselves to challenge or undermine what seemed to be a pretty well-established Post-World War II set of international norms.

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[8]   See, eg, John Kelsey, *Arguing the Just War in Islam* (Harvard University Press, 2007); James Turner Johnson, *The Holy War Idea in Western and Islamic Traditions* (Penn State University Press, 1997).

[9]   See, eg, Martin Cook, 'Expanding the Global Conversation About War: Three Chinese Perspectives' (2012) 11(2) *Journal of Military Ethics* 79; Sumner B Twiss and Jonathan Chan, 'Classical Confucianism, Punitive Expeditions, and Human-itarian Intervention' (2012) 11(2) *Journal of Military Ethics* 81; Aaron Stalnaker, 'Xunzi's Moral Analysis of War and Some of its Contemporary Implications' (2012) 11(2) *Journal of Military Ethics* 97; Ping-cheung Lo, 'Warfare Ethics in Sunzi's *Art of War*? Historical Controversies and Contemporary Perspectives' (2012) 11(2) *Journal of Military Ethics* 114.

[10] See, eg, Charles Glass, *Tribes With Flags: A Dangerous Passage Through the Chaos of the Middle East* (Atlantic Monthly Press, 1990); Robert McCorquodale and Raul Pangalangan, 'Pushing Back the Limitations of Territorial Boundaries' (2001) 12(5) *European Journal of International Law* 867.

[11] See generally Nobuo Hayashi, *The Role and Importance of the Hague Conferences: A Historical Perspective* (UNIDIR Resource, 2017) <http://www.unidir.org/files/publications/pdfs/the-role-and-importance-of-the-hague-conferences-a-historical-perspective-en-672.pdf>.

Indeed, we can see precisely such challenges evolving as we speak. The very idea that a European state would be invaded and its territory annexed to another state seemed unthinkable a decade ago — yet that is precisely what Russia has done to Crimea and Eastern Ukraine.[12] The idea that a signatory state to the *Law of the Sea Convention* would flagrantly violate the terms of the Convention by building submerged rocks up by dredging, placing military equipment and structures, and claiming national territorial waters based on features that, in their natural state, are underwater at high tide, would have seemed unimaginable. Yet of course, this is precisely what China has done, and continues to do, as this is being written.[13]

In both the Russian and Chinese cases, there is a sense in which they see themselves as restoring their appropriate place in the world order — places lost during periods of historic weakness which, now that their power is resurgent, they are positioned to restore.[14]

Added to these trends, of course, is the retreat of the US and other core members of the Post-World War II community that created those institutions from many of the institutions and structures of international cooperation.

The recently published book *The Internationalists: How a Radical Plan to Outlaw War Remade the World* provides a very useful and stimulating arc of these historical trends.[15] Contrary to many scholars in international relations, they argue that in fact the 1928 Kellogg-Briand Pact, which made aggressive war illegal, did indeed modify the behaviour of states more fundamentally than is generally believed. In particular, they argue that it fundamentally shifted the international order from one in which acquisition of territory by conquest was not only common but legal, to one in which conquest was no longer legal, acceptable or, more interestingly, successful.[16]

But the book ends on the sombre note that this order may have been a period piece, now showing signs of erosion both by the behaviour of states such as China and Russia, described above, but also by the loss of leadership and energy to sustain the international institutions that shored up that structure.[17]

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[12] See, eg, Julius Bodie, 'Modern Imperialism in Crimea and the Donbas' (2017) 40(2) *Loyola of Los Angeles International and Comparative Law Review* 267.

[13] See *The Republic of the Philippines v The People's Republic of China* (*Award*) (Permanent Court of Arbitration, Case No 2013-19, 12 July 2016).

[14] See, eg, Ryan Hass, 'The Trajectory of Chinese Foreign Policy: From Reactive Assertiveness to Opportunistic Activism' *ASAN Forum* (Web Page, 4 November 2017) <http://www.theasanforum.org/the-trajectory-of-chinese-foreign-policy-from-reactive-assertiveness-to-opportunistic-activism/>; Mark Galeotti and Andrew S Bowen, 'Putin's Empire of the Mind' [2014] (206) *Foreign Policy* 16.

[15] Oona A Hathaway and Scott J Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon & Shuster, 2017).

[16] Ibid 329–35.

[17] Ibid 415–23.

The implication of these trends is that the system of law, LOAC, and the international order, the stability of which we have assumed, may now be fundamentally contested in ways it has not been for centuries. If that is correct, then the global dialogue about what replaces that order will in some senses have to start over. We may well have to engage in a far more complex and cross-cultural ethical dialogue if we are to establish a commonly agreed international order to succeed the one we have taken for granted for so long. It will probably no longer be possible to assume that the ethical, historical, and religious traditions that framed the formation of the Westphalian system and all the subsequent additions and supplementations to it are universal.

IV Law, Ethics and Military Training and Organisational Behaviour

We turn now from the international system and LOAC to questions of the guidance and regulation of the behaviour of military personnel and military organisations. Most Western militaries devote a good deal of time to speaking of ethics, attempting to inculcate values, and generating laws, policies and regulations intended to ensure proper behaviour of military individuals and organisations. Despite those efforts, however, examples of ethical failure within those organisations occur with depressing regularity. Furthermore, often the failures are those of relatively senior members of the profession — precisely those who, if all the rhetoric and education were effective, would presumably be as thoroughly trained and educated on the standards as one could hope. To cite only one example, the massive scandals the US Navy is now experiencing with the 'Fat Leonard' cases in Pacific Command were actions mostly committed by relatively senior officers.[18] How do we explain such failures and, more importantly, is there anything to be learned about how to minimise the probability of future failures?

Possible explanations are the following. First, there are always a few 'bad apples' in any organisation, and these individuals were bad apples all along who finally got caught. Second, there is a widespread and systematic deterioration of ethical standards in the military — or perhaps in society at large. Third, behaviours that were in earlier times tolerated (or even encouraged) no longer are, perhaps due to increased media scrutiny, social media, and so on.[19] But the fourth possibility is the

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[18] See generally Craig Whitlock and Kevin Urmacher, 'Prostitutes, Vacations, and Cash: The Navy Officials "Fat Leonard" Took Down', *Washington Post* (online, 20 September 2018) <https://www.washingtonpost.com/graphics/investigations/seducing-the-seventh-fleet/>; Mark D Faram, 'Navy's "Fat Leonard" Case Implodes', *Navy Times* (online, 1 September 2018) <https://www.navytimes.com/news/your-navy/2018/09/01/navys-fat-leonard-case-implodes/>.

[19] As an aside, there is certainly some truth in this claim. If one listens to stories of acceptable behaviour decades ago in most military services, it is absolutely true that behaviours unthinkable today were indeed routine. Usually when an individual makes this observation, it is almost an appeal to how unfair this is. But in fact, it seems to me the right response is 'true, but irrelevant. The standards have in fact changed!'

most intriguing — that individuals who have been ethically 'squared away' for years or even decades rise to ranks and positions where they then lose their way or are put in unfamiliar environments where their moral armour fails.

Years of observation and reflection have led me to believe that the assumptions that guide ethical education and training in the military are only partially true and that the elements not considered have strong effects that go a long way toward explaining ethical failure. If that is correct, then supplementing standard military education with neglected elements may help us to improve our thinking in ways that go further in the direction of preventing ethical lapses.

V The Limits of 'Character' and 'Integrity'

If one listens to military people talk about ethics, one quickly notes that their favourite words are 'character', 'integrity', and 'professional'. Further, the way they talk about those terms suggests that they provide a full and sufficient defence against ethical failure — that, for example, if one has integrity they can be counted on to act properly under all circumstances.

If one examines the philosophical root of these ways of speaking, it quickly becomes apparent that, whether the speaker knows it or not, they are presuming a broadly Aristotelian framework. Aristotle taught that we come into the world as a bundle of capacities, and that some of these capacities are developed through repetitive practice into habits — ideally, good habits (but potentially bad ones as well).[20] Once those good habits are formed, that way of performing the activity becomes 'second nature' and the subject performs those activities spontaneously, unreflectively and with accompanying pleasure. It becomes, to use the athletic term, 'muscle memory'.

Much of military training is based on precisely these assumptions and, for training skills such as dismantling and reassembling a rifle, it works quite well. Similarly, there are military virtues such as courage which are essential if military personnel are to function effectively in highly dangerous situations. Military training deliberately ratchets up danger over the course of training to instil the virtue of courage through the formation of habit.

Things can be somewhat misleading, over-optimistic and dangerous in setting individuals up for moral failure when the 'character assumption' is uncritically applied to ethical behaviour. It can create the belief in both individuals and in military organisations that because individuals have been properly trained and educated by their organisation, they can be relied upon to function ethically in all circumstances. Indeed, the suggestion that this may not be true would often be seen as insulting by military members. 'Are you questioning my integrity?' he or she might exclaim.

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20 See generally Richard Kraut, 'Aristotle's Ethics', *Stanford Encyclopedia of Philosophy* (Web Page, 15 June 2018) <https://plato.stanford.edu/entries/aristotle-ethics/>.

Philosopher John Doris summarises 'the character assumption' as follows:

> It's commonly presumed that good character inoculates against shifting fortune …
> the person of good character will do well, even under substantial pressure to
> moral failure, while the person of bad character is someone on whom it would be
> foolish to rely. In this view, it's character, more than circumstance, that decides
> the moral texture of a life; as the old saw has it, character is destiny.[21]

Despite the millennia-long reputation Aristotle's theory has enjoyed, its embrace by
Thomistic Roman Catholic theology, and the grounding of so much military ethical
rhetoric in it, what if it turns out the character assumption is much less reliable than the
tradition would have us believe? If that were the case, and there were other important
aspects to the determination of individual behaviour not captured or neglected in
the Aristotelian frame, military training only on those assumptions might be setting
itself up for risk of failure. Indeed, the fact that we see serious ethical and legal
lapses in military personnel who have served honourably and well for decades, only
to fail in often nearly unbelievable ways, would suggest that perhaps something else
is going on. What might that be?

Two empirical fields have developed tremendously in recent decades that begin to
shed light on precisely these phenomena: moral psychology and the closely related
field of behavioural economics.[22] In general, what this research indicates is that the
idea of fixed and reliable individual character is far less reliable than the Aristotelian
view, and the military's rhetorical version of it, would suggest.[23] In particular, often
to a truly shocking degree, it shows that small variations in the context and situation
of individual behaviour can have dramatic and wildly counterintuitive effects on how
people actually behave.[24] Individuals in fact behave differently — often startlingly
differently — in different contexts.[25] That fact shows that what John Doris called
'the character assumption' is dangerously unreliable and that, if we wish to ensure
ethical behaviour, we should attend as much to the situation and environment of that
behaviour as we do to the individual's character and moral virtues. This research
seems especially important and promising if we are to explain the patterns of moral

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21   John M Doris, *Lack of Character: Personality and Moral Behavior* (Cambridge
      University Press, 2002) 1.

22   See, eg, Dan Ariely, *The Honest Truth about Dishonesty: How We Lie to Everyone —
      Especially Ourselves* (Harper, 2012) ('*The Honest Truth*'); Jonathan Haight, *The
      Righteous Mind: Why Good People are Divided by Politics and Religion* (Pantheon
      Books, 2012).

23   See, eg, 'Integrity, Service, Excellence', *United States Air Force Academy* (Web
      Page, 2019) <https://www.usafa.edu/character/>; 'National Character and Leadership
      Symposium', *United States Air Force Academy* (Web Page, 2019) <https://www.usafa.
      edu/character/national-character-leadership-symposium-ncls/>; 'Development and
      Integration Division', *United States Air Force Academy* (Web Page, 2019) <https://
      www.usafa.edu/character/cadet-development/>.

24   See, eg, Dan Ariely, *The Upside of Irrationality* (Harper, 2010).

25   See, eg, Dan Ariely, *Predictably Irrational* (Harper, 2008).

failure among long-serving military members — failure that would seem almost inexplicable if the character assumption were in fact unqualifiedly true.

Among the famous 'situational' experiments conducted many years ago now and therefore fairly commonly known is the Milgram Experiment, in which subjects were willing to administer what appeared to be ever-more painful electrical shocks to an actor merely because the experimenter in a lab coat calmly instructed them that 'the experiment must continue'. The Milgram experiment is commonly thought to show that most individuals are willing to act in ways they would not otherwise think possible if an apparent authority figure orders them to do so.[26] More recent research has advanced our understanding of the impact of situations and environment on behaviour considerably.[27]

The work of behavioural economist Dan Ariely is especially engaging and, in many cases, highly relevant to describing, explaining and predicting ethical behaviour in military individuals and organisations. For example, Ariely conducted research on cheating among students at Carnegie Mellon University in Pittsburgh.[28] In his study, students enter a classroom and sit at desks on each of which is a set of maths problems and an envelope containing cash. In the default condition, they are asked to solve as many problems as they can in a fixed amount of time, tear up their answers (so that it appears they can cheat with impunity) and then to pay themselves out of the envelope for each correctly solved problem. In that default condition, most students cheat a little, paying themselves for a couple of problems more than they actually solved. Interestingly, however, none of them takes all the money. Ariely's explanation for this is that each of us has what he calls a personal 'fudge factor'.[29] We are willing to cheat a little, but not too much, because we want to feel okay about ourselves and not too immoral.

Then Ariely changes the experimental conditions. He introduces an actor who appears to be a student into the group. As soon as the experiment is explained, the experimenter leaves the room. The actor promptly announces, 'I've solved them all', takes the entire envelope of cash from his desk and walks out of the classroom. The experimental question is whether the presence of the actor will increase or decrease cheating in the rest of the students.

Surprisingly, the answer depends on what clothing the actor wears. If the actor appeared to be a student at Carnegie Mellon (the school where the experiment was

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26   Stanley Milgram, 'Behavioral Study of Obedience' (1963) 67(4) *The Journal of Abnormal and Social Psychology* 371. See also some recent commentary in Cari Room, 'Rethinking One of Psychology's Most Infamous Experiments', *The Atlantic* (online, 28 January 2015) <https://www.theatlantic.com/health/archive/2015/01/rethinking-one-of-psychologys-most-infamous-experiments/384913/>.

27   See Doris (n 21) for a fairly exhaustive review of the literature as of 2002.

28   This is a summary of an experiment described in Ariely, *The Honest Truth* (n 22) 197–206.

29   Ibid 26–9.

conducted) they continued to cheat a little bit, but when the actor wore clothing that indicated he was a student at the University of Pittsburgh (the other major school in Pittsburgh), the cheating went down among the others. The best explanation, Ariely reasons, has to do with whether the cheating behaviour is seen as being done by a member of one's own group (and therefore somehow tolerated or accepted by 'one of us'), or whether it was by an outsider from a group with whom the subjects felt some rivalry and wanted to feel 'better than'.[30]

This is only one of many fascinating experiments from Ariely's work, but it is highly relevant to explaining and predicting behaviour in military organisations. More than most human groups, military units develop strong bonds of group loyalty and identity. Indeed, one of the goals of military training and indoctrination is to develop such bonds.[31]

But one consequence of that fact about military units is that, regardless of the officially espoused values and expected behaviours of the large organisation, individual military units will develop their own local versions of actual behavioural expectations. So to return to the Fat Leonard scandal in the US Navy, it has long been known throughout the Navy that the Pacific Navy had a different culture in many respects from the rest of the fleet. Although obviously there were some 'bad apples' in the US Pacific Command, it seems likely that some pretty 'good apples' got corrupted by being placed in a 'bad barrel', long corrupted by general acceptance of Fat Leonard's corrupting influence.

VI Implications of Empirical Studies of Ethics and Situationism

One need not merely speculate and extrapolate from psychological research that, for military organisations, features of the environment and situation can have decisive effects on behaviour. A study conducted by Leonard Wong and Stephen Gerras of the Strategic Studies Institute at the United States Army War College conclusively demonstrated the point in the US Army.[32] The resulting report, entitled *Lying to Ourselves: Dishonesty in the Army Profession* ('*Lying to Ourselves*') showed that there is so much mandatory training required of Army personnel that it results in routine lying in official reports. The combined effects of trying to ensure that Army personnel are trained on so many subjects and requiring units to certify that all the required training has been accomplished (often, more training than there is time to

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30   Ibid 204–7.

31   See, eg, Garrett Ralston, 'Teamwork, Cohesion Keys to Two-Time Award Winning Unit', *US Army* (Web Page, 21 January 2012) <https://www.army.mil/article/71854/teamwork_cohesion_keys_to_two_time_award_winning_unit>.

32   Leonard Wong and Stephen J Gerras, *Lying to Ourselves: Dishonesty in the Army Profession*, (Report, United States Army War College, Feburary 2015) <https://ssi.armywarcollege.edu/pdffiles/pub1250.pdf>.

accomplish it) means that units routinely lie and say it has been completed when it has not.[33]

In other words, when training requirements are levied over and over, regardless of realistic time requirements needed to accomplish them, leaders feel forced to lie and find ways to use their time for purposes they view as more vital to unit training and mission accomplishment. Further, since those receiving the reports were once in the position of those unit leaders, Wong and Gerras further documented that nobody believes the reports regarding training either.[34] In other words, in attempting to achieve the perfectly reasonable goal of guaranteeing training, the Army has managed to create an entire Potemkin Village of artificial compliance certification of training completion.

An even more horrific example of situational factors exacerbating the potential for truly awful behaviour is found in the book *Black Hearts: One Platoon's Descent into Madness in Iraq's Triangle of Death*.[35] The book documents how a platoon of the 101st Airborne Division in Iraq conspired to rape a fourteen year old girl, kill her family, burn down the family home and attempt to cover up their crimes. While there were definitely 'bad apples' in this platoon, the whole platoon was placed for an extended period of time in a very precarious place, subject to constant attack. Furthermore, although leaders at various levels were aware both of the platoon's exposed location and of the presence of psychologically disturbed individuals in the unit, no effective measures were taken to reduce their stress or to ensure that the potential for misconduct was restrained.

The individuals involved were, of course, court-martialled for their individual actions. But what the book clearly shows is that situational factors were a significant component of what led to this atrocity. Clearly, the illegality of their actions was not a deterrent to their misbehaviour, nor could legal punishment redress the wrong.

The point of this section is this: it is clear from both social science and observing actual cases of military conduct that neither clearly articulated legal standards nor the individual character of military members are sufficient to regulate military ethical conduct in practice. The evidence clearly indicates that continually monitoring the environment and situational factors within which military personnel operate is a vital aspect of military ethics. In particular, two features stand out from these reflections: first, the incredibly counterintuitive but demonstrably strong effects of situational factors on actual behaviour and second, the often completely unintended effects of policies and actions initiated for the best of motives in bringing about ethically unwelcome results (as in the *Lying to Ourselves* study). These two considerations together highlight the extremely circumscribed effectiveness of an approach to ethics that emphasises only 'character' and 'integrity'. They clearly indicate that, regardless

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[33] Ibid 4–8.

[34] Ibid 12.

[35] Jim Frederick, *Black Hearts: One Platoon's Descent into Madness in Iraq's Triangle of Death* (Crown, 2010).

of individual character, virtually anyone placed in inauspicious circumstances is likely to behave in surprising and unanticipated ways — even to themselves. These considerations strongly indicate that, insofar as we wish to maximise the probability of ethical behaviour, situational factors should receive at least equal consideration as encouraging individual character.

In fact, military organisations already know this. They simply fail to connect the two areas of reflection they are already engaged in articulating. On the one hand, when asked to speak about ethics, the language is almost entirely Aristotelian character language.[36] On the other hand, when speaking of leadership in military organisations, the importance of good unit climate, discipline, and unit cohesion predominates.[37] It is ironic that these two areas are rarely explicitly connected, even though it is common knowledge that unit cohesion, discipline, and leadership are very strong predictors of ethical behaviour and are among the strongest protections against unethical or illegal conduct.[38] Recognising the connections between these two aspects of military organisations allows a more rounded and adequate account, giving equal attention to development of 'good apples', while also doing everything possible to ensure 'good barrels'.

VII THE LIMITATIONS OF LAW AND REGULATION IN ENSURING ETHICAL BEHAVIOUR

In this section of the article, we turn to the questions of the limits of ensuring ethical behaviour by means of law and regulation, to important reasons to be cautious about excessive efforts to do so, and to some suggestions of alternative methods of attempting to improve ethical behaviour.

If one studies the ways military organisations deal with major ethical lapses and scandals, a remarkably consistent pattern of response is apparent. I have come to call it the 'holy trinity' fix, because it always involves three responses. First, the organisation fires the leadership. Then, it issues a new policy in an attempt to impose new training, or to regulate how the problem area will be dealt with in the future. And lastly, it mandates additional mandatory training to ensure that everyone in the organisation clearly understands the organisation's expectations.

There are a number of problems with the 'holy trinity' fix, both in adequately dealing with specific cases of failure, and even more so when it is repetitively applied to an organisation.

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36 See 'Integrity, Service, Excellence' (n 23).

37 See Rita Mcintosh, 'Leadership, Integrity Motivates Team', *US Army* (Web Page, 16 December 2015) <https://www.army.mil/article/160028/leadership_integrity_motivates_team>.

38 See generally Charles D Allen, 'Ethics and Army Leadership: Climate Matters' (2015) 45(1) *Parameters* 69.

On the first point, there are many situations in which one might reasonably doubt that the 'holy trinity' fix is actually getting to the root of the problem. For example, take Wong and Gerras' *Lying to Ourselves* findings. One could, correctly, accuse individual unit leaders of lying. In falsifying their training records, they are in fact deliberately and intentionally stating something to be true which they know is not true. If that is not a lie, what is? If one chose to frame the situation in that way, one could imagine the organisation firing the individual leader (after all, they lied, didn't they?). You could issue a new policy that emphasised the wrongness of lying regarding training status of units. And you could require some form of mandatory training be added that explicitly reminds everyone that lying regarding training status reports is wrong. Problem solved!

But of course the 'holy trinity' fix will not fix the *Lying to Ourselves* problem at all. No one part of the fix, nor all three together, even approaches the true cause of the lying. As long as the training requirements exceed feasibility, and as long as reporting less than 100% completion is not culturally acceptable, the lying will continue. This pattern is repeated all over the military in various ways, and is common knowledge.[39]

In both cases, clearly a 'holy trinity' fix will not begin to get at the real issue driving the behaviour. The issue is systemic, and the system drives the behaviour. No individual leader or unit can ever truly fix it unless someone with real authority changes the system in some fundamental way by reducing training requirements and/or making less than 100% reporting acceptable. It would be boneheaded in the extreme to blame individuals or units for these practices. They cannot fix the behaviours because the behaviours are embedded in a system that requires them!

The first point, therefore, is that for many apparent ethical failures, the 'holy trinity' fix will fail to address the problem at all. Further, for such systemic problems, they generate an additional negative ethical consequence: they lead to widespread cynicism about ethics in general and ethical numbing across the organisation. Individuals become completely numb to the fact that they are making ethical choices about these matters in the first place. For example, the officers interviewed for the *Lying to Ourselves* study were incensed that Wong and Gerras called what they were doing lying. So accustomed were they to their actions and so used to the 'that's just how it really works' view, they had an entirely different way of speaking about and seeing what they were doing and were angry and shocked when Wong and Gerras called it flatfooted lying.[40]

The second, and in some ways even more pernicious negative consequence of applying the 'holy trinity' fix is the consequence for military organisations when it

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39   See George Reed and James Dobbs, 'Military Leadership and Administrative Evil' in Douglas Lindsay and Dave Woycheshin (eds), *Overcoming Leadership Challenges: International Perspectives* (Canadian Defence Academy Press, 2015) 106. See also Leonard Wong, *Stifled Innovation? Developing Tomorrow's Leaders Today* (Report, United States Army War College, April 2002) <https://ssi.armywarcollege.edu/pubs/display.cfm?pubID=279>.

40   See, eg, Wong and Gerras (n 32) 17–18.

is applied in response to virtually every failure iteratively over time. Since failure so frequently results in firing the leadership, leaders may become excessively risk averse. If failures lead to the issuing of new policies, policies may proliferate to the point that no one even knows them all, or feels the need to 'bend' or choose among them in order to get things done. And if most failures result in new mandatory training requirements (coupled with an expectation of 100% training completion), you eventually find yourself in *Lying to Ourselves* territory, where the training requirements begin to crowd out mission accomplishment and true mission accomplishment training, or lead to the kind of downright lying about training we saw above. In other words, iterative application of the 'holy trinity' fix risks creating a risk-averse organisation, micromanaged to the point of leaving little leader discretion, and hamstrung with a vast set of mandatory training requirements.[41]

VIII The Importance of Understanding the Military as a True Profession

These observations cumulatively suggest that any military organisation that wants to remain flexible, creative, innovative and to create bold leaders who exercise judgement and inspire confidence should hesitate and carefully consider whether to apply the 'holy trinity' fix to every, or even most, problems.[42]

If that is true, then it raises the obvious question: if 'holy trinity' fixes are often not real solutions or generate negative consequences, what other approaches might be effective?

In the past 20 or so years, the US military, beginning with the US Army, has tried (in my opinion fairly effectively) to develop a less legal and rule-bound approach to ethics by means of a robust development of the idea of the military as a professional organisation.[43]

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[41]   When I left the Naval War College in 2016, there was an employee whose full-time job was making sure everyone was 100 per cent on their training requirements! I once cancelled an important trip to Norway because, before Travel would approve the trip, I had to complete a day long computer training on how a soldier lost behind enemy lines should attempt to evade capture, call in rescue, and conduct himself if captured. All this so I, a civilian professor, could go to a conference at a luxury hotel in a highly developed country!

[42]   Of course, the political reality is that often the 'holy trinity' fix is applied as much because of the organisation and its leaders to be perceived as 'doing something' by external observers, media, and political leaders. But even though that is true, it still remains the case that the fix may do more damage than good. When that is the case, the challenge to leaders is to be articulate enough to explain why they are *not* going to apply the fix, and why other approaches to the challenge are more appropriate and better ensure the long-term health of the organisation and its leaders.

[43]   See, eg, 'Developing the Character of Trusted Army Professionals: Forging the Way Ahead' (White Paper, Center for the Army Profession and Leadership, 19 April 2016) <http://cape.army.mil/character-development-white-paper/>.

Of course in ordinary speech, 'profession' often means something one does for pay, as opposed to as an amateur (as in 'professional athlete') or it serves as an all-purpose term of praise (as in 'she's a real professional') and is used in military speak along with 'character' and 'integrity' as a somewhat amorphous positive adjective.

But 'professional' as is being used in the military normative discussion has a deeper and more precise meaning, derived from a fairly large and robust literature in sociology. Professions are regarded as a distinctive way of organising work and relating to the ambient society the profession serves.[44] In the early modern period of the West, only three kinds of work were organised as true professions: clergy, medicine and law.

In the robust sociological sense, professions are distinguished from other kinds of labour by the following features (obviously, different scholars give slightly varying lists, but for our purposes those details are not critical):[45]

1.　Professions provide a service deemed essential to the society they serve (in the case of the three original ones, salvation, health and justice).

2.　Professions possess a highly developed technical knowledge and vocabulary.

3.　Professions make discretionary judgment about how to apply their knowledge to the client or the professional problem at hand (in other word, professional behaviour cannot be reduced to standard operating procedures).

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[44]　This discussion began with the work of Don Snider, a retired Army Colonel at West Point. He sensed that the Army was losing its sense of being a profession and convened a group of 54 scholars who studied that issue from a number of perspectives. Their work cumulatively resulted in the publication of a collection of essays: Lloyd J Matthews (ed), *The Future of the Army Profession* (McGraw-Hill, 2005). Army leadership fully embraced the vocabulary and framework of the Army Profession, and created the Center for the Army Profession ('CAPE') to create education and training materials to inculcate that framework across the Army: 'Center for the Army Profession and Leadership', *US Army* (Web Page, 6 May 2019) <cape.army.mil>. The other US services have followed suit (although honestly, none as thoroughly as the Army). But each created its own version of CAPE. The Air Force has Profession of Arms Center of Excellence, the Navy the Navy Leadership and Ethics Center and the Marines the Lejeune Leadership Institute: 'PACE', *Profession of Arms Center of Excellence* (Web Page) <https://www.airman.af.mil>; 'Naval Leadership and Ethics Center', *Naval Leadership and Ethics Center* (Web Page) <https://www.public.navy.mil/netc/centers/nlec/Default.aspx>; 'Lejeune Leadership Institute', *Marine Corps University* (Web Page) <https://www.usmcu.edu/lli/>. Further, the then Secretary of Defense Hagel designated Rear Admiral Margaret 'Peg' Kline as the point person for ethics and leadership in the Department of Defense, and her office provided a mechanism for all the services to coordinate their efforts across service boundaries.

[45]　See, eg, Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labors* (University of Chicago Press, 1988).

4.   Professions have a high degree of autonomy, granted by their society, to manage their own affairs and to discipline their own members.

5.   Professions manage and control their own standards for admission to the profession and promotion according to shared professional standards.

6.   Professions have a high degree of trust from the society they serve and must continually maintain that trust if they are to retain their autonomy and ability to exercise discretionary judgment. Consequently, professions have an interest in maintaining that trust and an ethical requirement to do so lest the society withdraw those permissions.

7.   Professionals are primarily motivated by an ethic of service (as opposed to mere monetary gain) and have a life-long commitment to the profession and an obligation to continually engage with new professional knowledge and skills.

For individuals truly imbued with a sense of professional identity, it remains the bedrock and touchstone of their ethic. A professional doctor, for example, can be relied on to always place the welfare of their patient above all other considerations. They don't need, and indeed would chafe under, a highly regulated regime — as many doctors in the US now do in response to what they perceive as excessive insurance company second-guessing of their clinical judgment.[46] A professional attorney will not violate the rules of discovery even though some of the information he is required to disclose may work against the interest of the client.[47] For a priest in the confessional, while of course there is some shared sense of appropriate penances for various sins, there remains a great deal of discretion in the application of pastorally sensitive penance to the individual penitent.

These early modern models of professionals apply with greatest accuracy to sole practice attorneys, physicians, and clergy. In the modern world, most professionals are embedded in various bureaucratic structures, and bureaucracies in the sociological literature are ways of organising work that contrast sharply with professions. They too may have specialised knowledge, but it is relatively easily trained and in most cases reducible to standard procedures and repetitive and non-discretionary application.

Military organisations are inevitably both bureaucracies and professions, except in the cases where they have been reduced entirely to (in Snider's term) 'little more

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[46]   See, eg, Andis Robeznieks, 'Time to Adopt View of Opioid-Use Disorder as Chronic Disease', *American Medical Association* (Web Page, 9 November 2017) <https://www.ama-assn.org/delivering-care/opioids/time-adopt-view-opioid-use-disorder-chronic-disease>.

[47]   See, eg, the duty of disclosure in the US Context: *Federal Rules of Civil Procedure* r 26; in South Australia: *Supreme Court Civil Rules 2006* (SA) rr 136–46.

than an obedient military bureaucracy'.[48] Every military organisation is engaged in the continual struggle to sustain the best of the professional elements if it is to be effective. But the bureaucratic impulse is strong and is continually making inroads into the profession. Indeed, the attempt to ensure proper behaviour and compliance through law, regulation, and policy is precisely the means of that bureaucratic encroachment. Every application of the 'holy trinity' fix is a further bureaucratic advance.

This is the most significant departure of the most fundamental place of ethics, as distinct from law, in military organisations. To be effective, flexible and creative, it is vitally important that military organisations maintain the appropriate space for unfettered professional judgement and conduct in the face of the bureaucracy that will encroach if leaders don't jealously guard the appropriate balance between the bureaucratic and professional imperative.

There is obviously no formula for getting this balance right. Of course, in peacetime and in garrison, it is perhaps inevitable that the bureaucracy will blossom at the expense of the professional aspects of the military.[49] While it will be difficult, a core function of the stewards of the military profession is to sustain vigilance to prevent letting the bureaucracy stifle the necessary professional aspect of the military.

IX CONCLUSION

The question driving this article was: 'what is the role and importance of ethics over and above law in regulating military organisation and military behaviour?' We have seen that ethics offers a great deal to the military; that it needs to supplement the law. In LOAC, ethical principles must provide enduring guidance as law evolves to help individuals to think above mere legal minimums.

Regarding individual conduct, we have seen that moral psychology and behavioural economics provide vital insights into what drives human behaviour. This helps us to understand ethical failure that would otherwise seem inexplicable if character and knowledge of the requirements of law and policy were a comprehensive and effective set of guides.

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[48]   Don M Snider, 'The US Army as Profession' in Lloyd J Matthews (ed), *The Future of the Army Profession* (McGraw-Hill, 2005) 16.

[49]   See Andrew Gordon, *The Rules of the Game: Jutland and British Naval Command* (Naval Institute Press, 1996) for a fascinating and exhaustive examination of this tendency. Gordon documents the many ways in which the long-unchallenged and successful British Navy lost its warfighting edge during the period between Trafalgar and the World War I Battle of Jutland (which they nearly lost through incompetence). He demonstrates how the shininess of brass and the complexity of signal flag books supplanted naval war fighting skills entirely. Although the tendency is typical of all militaries in times of peace and complacency, Gordon's is a wonderfully detailed and exhaustive illustration of how the slow slide occurs and why the organisation seems incapable of correcting itself until it sees military failure staring it in the face!

Lastly, we examined why it is vital that military personnel and organisations nurture and sustain the professional nature of their identity and work, and continually strive to maintain optimal balance between this and the unavoidably bureaucratic aspects of the military organisation. That will require resisting bureaucratic, legal compliance based, and regulation/training focused responses to every problem. Periodic pruning of the bureaucratic weeds is required if *Lying to Ourselves* consequences are to be kept at bay.