WHAT IS REALLY MILITARY ETHICS
(AND WHAT THEY THINK IT IS IN THE WEST)?

ABSTRACT: In this article the author considers a recent proposal to understand “military ethics” as a species of the genus “professional ethics”. This contention is rejected on the grounds that “professional ethics” are not a matter of ethics but policy, and it is argued that “military ethics” properly belongs to applied ethics, as a branch of moral philosophy instead. The article proceeds by offering an account of the notion of “reflexivity in normativity” in order to argue against the practice of using “just war” theory as a moral doctrine. A distinct feature of the current production in military ethics by Western scholars and publicists is their reliance on “just war” theory. Two considerations are offered aimed at ending this practice. First, the author uses Pierre Bourdieu’s distinction between “activism in scholarship” and “activism with scholarship” to demonstrate that the post-Cold War uses of the ‘just war’ theory could amount only to pseudo-scholarship. Second, and most disturbing, the author shows how this practice has two unsettling consequences: regarding the ad bellum (moral) justice, it leads to the decriminalization of aggression, the supreme crime in international law; and regarding the in bello (moral) justice to the decriminalization of actual war crimes committed by the “good guys”.

KEYWORDS: Military ethics, professional ethics, reflexivity in normativity, “just war” theory, activism, pseudo-scholarship

What is military ethics? What areas of scholarly endeavors does it properly belong to, if any? The word “ethics” being part of the phrase indicates that a normative enterprise of sorts is at stake. Normative endeavors, however, involve judgments containing evaluative words like “right,” “wrong,” “just,” “unjust,” “permissible,” “impermissible,” “fair,” “unfair,” and the like. Using the very same words at least three different kinds of normative judgments can be made: moral, legal, or political. Thus a question arises with respect to “military ethics” as to the proper normative domain within which it is situated. Are judgments of “military ethicists” best understood as moral, legal or political? Is military ethics to be understood as a moral, legal, or political endeavor? On the face of it, the obvious choice may be to think of military ethics as a sub-branch of applied ethics, which itself is a branch of moral philosophy that has another two parts: meta-ethics and normative ethics.
Perhaps surprisingly, however, the way military ethics has been practiced in the West, at least since the end of the Cold War, does not correspond to the insight above that may strike many as obvious. Military ethics is not seen as a sub-field of moral philosophy. Instead, we find claims by reputed practitioners that it is a kind of “professional ethics,” and the way the latter term is understood or described makes it clear that military ethics is something incompatible with a kind of applied ethics seen as a component of moral philosophy. Hence another question arises: What is the relationship between applied ethics, which is properly situated within the moral normative domain and any professional ethics? Is professional ethics of any kind (e.g., medical, legal or military) properly situated within the moral, legal or political normative order? Or, more simply put, what exactly could be meant by the claim that “military ethics” is to be understood as a species of the genus “professional ethics”?

Furthermore, what are the real life consequences of the intellectual practice that takes military ethics to be just a kind of professional ethics in the current unipolar world that has been dominated by the United States of America, continuously involved in military operations around the world? In particular, when production in (Western) military ethics is largely constructed in terms of the so-called “just war theory” might the outcome simply be an apologia for the widespread violent adventures (of obviously dubious legal status) by the U.S. military? Is military ethics qua professional ethics, then, just another component of the deployment of the military in support of the U.S. hegemony? Would this not reduce what passes for (Western) scholarship in military ethics to a sort of activism aimed at supplying justifications and rationales for whatever military action, practice, or policy the U.S. decides to implement and pursue anywhere in the world?

In the section of the essay that immediately follows I argue that “military ethics” properly understood is not a kind of professional ethics. Next, I offer that the question of properly situating military ethics is best approached in terms of a specific conception of reflexivity in normativity. I then explore the relationship between morality and the other two normative orders: law and politics. Finally, the essay examines in detail the deployment of “just war” theory in the contemporary Western military ethics, and the relationship between scholarship and activism.

Is Military Ethics a Species of Professional Ethics?

How should we think about military ethics? Recently it has been explicitly suggested that by “military ethics” we should mean a kind of professional ethics.

In their brief note “What Should We Mean by ‘Military Ethics’?” Martin L. Cook and Henrik Syse, editors of the Journal of Military Ethics, assert that military ethics “is analogous to medical ethics or legal ethics in the sense that its core function is to assist those professions to think through the moral challenges and dilemmas inherent in their professional activity and, by helping members of the profession better understand the ethical demands upon them, to enable and motivate them to act appropriately in the discharge of
their professional obligations” (Cook and Syse 2010, 119-120). This approach to military ethics, I shall argue, is misguided as it conflates the nature of the rules resulting from a policy, on the one hand, and ethical (or moral) rules on the other. While the former rules in fact aren’t a matter of ethics but policy, the latter rules are anchored in the process of moral deliberation. Rules that constitute a professional ethics (be it of doctors, lawyers, or military officers) are conventions, a result of someone who counts saying so in the process of their institutionalization. Things are quite different, however, when it comes to the question of what should be meant by “military ethics,” which is not a matter of conventions because moral or ethical rules are not a result of someone who counts saying so.1

The proposed understanding of military ethics as a species of the genius “professional ethics” is claimed to involve the following four tasks: (i) offering critical assessment of the laws of armed conflict (LOAC) as a component of military ethics (understood as professional ethics); (ii) making contribution to critical thinking about war and the military profession made by historians, if they “help to illuminate and guide the on-going development of the military profession”; (iii) striving to study religion to the extend that the focus is on “stands, traditions, or texts within an influential religious tradition” (Cook and Syse, 121); and finally (iv) exploring various tales and examples, if used carefully, about heroic individuals and their actions. All of these activities, according to Cook and Syse, have a role to play in military ethics. Packing myth, religion, history, and interpretation of international law into military ethics is, in my view, seriously misguided.

I shall now turn to the task of showing in what ways the above position on the nature of military ethics is mistaken. I will at the same time argue that military ethics, if it is to be a proper focus of any scholarship or a domain of normative deliberation, can only be a species of the genus “applied ethics,” a sub-discipline of moral philosophy that has two other components, meta-ethics and normative ethics.

Let us start by reflecting about the claim that military ethics is a kind of professional ethics, allegedly just as this is the case with medical ethics and legal ethics. By examining some examples from the lives of medical and legal professionals we can quickly grasp where the mistake lies. Furthermore, we shall realize that if the right way of thinking about “military ethics” were to see it as a kind of professional ethics, then there would be absolutely nothing for moral philosophers or other scholars to contribute on the matter, nor would there be any justification for such things as scholarly journals in medical, legal, or military ethics.

Consider a familiar case of a medical doctor, an oncologist, working in a hospital in the U.S. who has a patient in the final stages of the cancer of the throat. The patient is in terrible pain, and no palliative measures can be of much help to him. He is certain to die within days even if the current treatment is continued, but he does not want to go on living for those days and calls for an end to it all. The family is supportive of the patient’s wish-

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1 This is so because there are good reasons to reject meta-ethical conventionalism, which is an issue beyond the scope of the current article, but two reasons can be mentioned here. In a nutshell, meta-ethical conventionalism gets the nature of moral rules (characterized by an attribute of universality) wrong when presenting them as conventions, and, for this reason, at the same gets the difference between law and morality wrong.
es, and the doctor agrees that no measures could be taken to improve the condition of the patient. What is this American doctor to do facing her patient’s request for euthanasia? It should be clear to anyone that in this scenario no “moral challenge” presents itself for the doctor qua medical professional; she is not going to be helped by engaging in moral deliberations about what might be the (morally) best thing for her to do regarding her patient. Instead, she will have to consult the position of the American Medical Association on euthanasia and act accordingly. The doctor could consult the AMA opinion on euthanasia and find out that it states the following: “Euthanasia is fundamentally incompatible with the physician’s role as healer, would be difficult or impossible to control, and would pose serious societal risks.”\(^2\) She would then have to act accordingly and refrain from administering (active) euthanasia to her patient despite his request for precisely that, and she will have to do this per the requirements of her professional ethics.

It is quite another matter whether in doing so the doctor would in fact be acting in a morally defensible way. Perhaps the best moral argument calls for active euthanasia in this sort of case, as for example James Rachels’ has famously argued in his seminal contribution to applied ethics (Rachels 1975). Furthermore, it may be the case that the requirements professional ethics makes on doctors in other countries is more in line with Rachels’ position rather than that of the AMA’s opinion. For example, that would be the case in the Netherlands. What explains the difference is that the rules practitioners, members of a given profession, from different countries must follow are conventions adopted according to a specific method spelled out in the bylaws of their respective associations to which those practitioners belong. The AMA rule on euthanasia, thus, was adopted by a vote at the annual convention, and, therefore, constitutes an element of AMA policies spelling out professional obligations of its members. Hence, professional ethics (say, for a doctor in the U.S.) is a matter of a policy adopted by the governing body, and valid for all members of the profession in that country.

It is an interesting question to ponder, though it cannot be fully addressed here, why there should be such radical differences regarding the rules that regulate, say, euthanasia across different geographical regions. Why should it be that in the U.S. active euthanasia is absolutely forbidden by the AMA while in the Netherlands it is in some cases tolerated or encouraged? One obvious reason permitting this sort of diversity of professional rules possible is that the content of these rules are a result of procedural decisions within different collectives. These collectives consisting of members of the profession may come up with very different competing rules among which to select the ones that will be applicable to the conduct of all practitioners. Clearly a sociological study would be in order to explain more closely the role of various social forces, such as educational systems, the place of religion, degree of litigiousness in a society and the like that make one or another regulative, professional rule more likely to be adopted by one or the other professional association in one or another country. There are, however, clarifications in this regard that

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moral philosophers can provide, which also have the advantage of shedding light on the relationship between professional ethics and *ethics proper* (that is, moral philosophy). This relationship involves a presupposition (which may not even be explicit) that functions as a meta-rule of sorts guiding the choice of professional rules that can be formulated as follows: *never adopt as your professional rule something that can be shown as inadequate by moral deliberation*. Moral “adequacy” in this context is established by normative ethical considerations. There are, however, different approaches to normative ethics, such as consequentialism or deontology. Thus, for example, if consequentialist thinking such as appeals to the “greatest happiness” dominates normative moral deliberations in the Anglo-American world while deontological values such as respect for persons and their autonomy dominate on the European continent, then the selection of very different rules among respective professional associations could be expected. There will be more on this in the coming section on the reflexivity in normativity.

Let us also briefly consider examples from the legal profession. Suppose a defense lawyer, say a Canadian and a member of the Quebec Bar, hears that someone who lives in her neighborhood has been indicted for a crime. Imagine that she then considers whether to walk over to the neighbor’s house in order to offer her services as defense attorney. The proper thing to do would be for her to consult the rules set by her Bar on soliciting services, and if she did that she would find the following: “The advocate must avoid all methods and attitudes likely to give to his profession a profit-seeking or commercial character.” In light of this she would have to refrain from directly contacting the indicted neighbor *per* the demands of her professional code of conduct. Once again, the rules like this one are conventions, which are a result first of a deliberation at the level of the Bar that adopts them as rules of professional conduct, but they obtain the force of law after they are adopted by a vote in the Quebec National Assembly. Consider another example, also within the domain of legal professional ethics. Imagine a defense attorney, again a Canadian, who is considering calling a press conference because her client and the case she is working on are seriously misrepresented in the media. Unfortunately for her a look at the code of conduct would preclude this course of action. Article 18 reads: “A lawyer must not make public statements or communicate information to the media about a matter pending before a tribunal if the lawyer knows or should know that the information or statements could adversely affect a tribunal’s authority or prejudice a party’s right to a fair trial or hearing.” Lawyers, members of the Quebec Bar do well to interpret very conservatively the phrase “knows or should know” and thus refrain from talking directly to the press about their pending cases.

An American lawyer would be in a much different situation were she to deem that her addressing the media directly would come under the gambit of representing her client zealously. Namely, the Code of Professional Responsibility adopted by the American Bar

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4 Ibid.
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Association (ABA) in 1969 includes as Canon 7 the following: “A Lawyer Should Represent A Client Zealously Within the Bounds of the Law” (Brown 1970, 731). This canon of professional conduct for American lawyers in its various interpretations regarding the appropriateness of making statements to the press about the position of the defense has an interesting history, which spans from a strict prohibition to the construction of a new ABA rule that has a provision allowing lawyers to make public statements where necessary to “mitigate” prejudicial publicity that has been released from another source (see Uelman 1995). As in the case of the medical professional conduct, the rules of legal professional conduct may differ in various geographical locations and over time in the same location. This is so, because these rules are a result of adopted policies, that is, of someone that counts saying so; in other words, these rules are conventions.

What these examples show is that professional obligations, whether we talk of doctors or lawyers or for that matter of military officers and commanders, despite the presence of the word “ethics” in the label “professional ethics” are not a result of ethical rules achieved by thinking “through the moral challenges and dilemmas inherent in their professional activity.” Instead, they are a result of adopted policies by organizations that matter; or, as I stated above, “professional ethics” isn’t a matter of ethics but policy.

An ambiguity clearly emerges here when considering examples like those above with regards to the term “ethics”: in one sense “ethics” refers to a set of rules decided by appropriate bodies in order to regulate practices within a given profession; in the other sense “ethics” refers to judgments and rules, which are a result of moral deliberation. The former rules are conventions while the latter are not.

In order to fully understand this conceptual distinction it must be differentiated from a related issue about the respective meanings of the terms “ethics” and “morality”. These terms are often thought of as synonymous. Some philosophers, however, emphasize the difference between the two terms with respect to their Greek and Latin origin respectively. The key difference is that “the Latin term [moralis] from which “moral” comes emphasizes rather more the sense of social expectation, while the Greek [ethicos] favours that of individual character” (Williams 2006, 7). The Greeks (particularly Aristotle), thus saw ethics as a much broader subject matter that in contrast to morality’s treatment of rules of behavior as the obvious and necessarily central concern of ethics, understood such rules as having only secondary importance, and focused on the subject matter of human flourishing. No matter how broadly we understand “ethics” within the conception of military ethics as a kind of professional ethics, for example as including elements (i) through (iv) above, this effort cannot be helped by invoking the Greek (Aristotelian) conception of ethics, which is conceived as being about general guidance for living one’s life well. Medical ethics is not about how does a doctor or a nurse live her professional life well. Neither are legal or military ethics about some such thing. Much more appropriate for the task of developing professional ethics in any given field of human activity is the understanding of ethics in the sense of modern morality conceived as being about which specific actions are appropriately sanc-
tioned by a particular type of rules of conduct focused on how what we do affects others. In other words, the rule-centered approach rather than the one focused on human flourishing is appropriate here. But these rules can be of two kinds; they can either be conventions as a result of some rule making process within an organized profession or they can be a result of moral deliberation. The former are characteristic of “professional ethics” while the later are characteristic of engagement in moral philosophy. To the extent that “military ethics” is a possible subject for rational discussion, it must not be conceived of in terms of a set of rules that are merely a result of a process that yields conventions regulating behavior for members of a given profession. Hence, military ethics is not a species of professional ethics.

**Reflexivity in Normativity**

Another way to arrive at the conclusion that if we thought of “military ethics” as a kind of professional ethics, then it would not be ethics but policy is to start by considering some basic conceptual distinctions that will illuminate the nature of the entire normative discourse. To begin with, we should keep in mind that there are (at least) three different normative orders—moral, legal, and political—sufficiently different from one another that they amount to three normative fields, with their own “laws”. That is, within each order there are rules that define what a proper question, way of addressing it, and arguing in favor of an answer may be. If the notion of a “paradigm” were not so terribly abused it would have been helpful to say that we could think of each normative domain as having its own paradigm. This generates a requirement for *reflexivity in normativity*, which amounts to a sort of analysis of normative judgments that must focus on the conditions of the production of those normative claims, and therefore on the objective position of the one who is making them within a given normative field, but also, and perhaps more importantly, on the position of the normative field in question *vis-à-vis* other fields.

The consequence of all of this is that any assessment of the merits of a normative statement (perhaps even of acquiring a proper understanding of the judgment in question) must focus on the social conditions of the production of the said normative claim, and, therefore, on the objective position of the judgment-maker in the appropriate order (moral, legal, or political). Also, however, perhaps no less importantly, the assessment must focus on the position of the given normative order (to which the judgment belongs) *vis-à-vis* others, because the normative environment—that is, the applicable rules and context in which a judgment is conceived, asserted or defended—is constituted as a social field endowed with a structure wherein the struggle over the positions that judgment-makers occupy, and their normative dispositions take shape, allow them to evolve as holders of normative beliefs (preferably maintaining coherence among all their normative judgments, different normative orders notwithstanding).

Furthermore, it is important to keep in mind that words with normative meaning such as “right,” “wrong,” “permissible,” “impermissible,” “just,” “unjust,” and others, can be em-
ployed to express different normative judgments: moral, legal, or political. For example, one might assert that infidelity is (morally) wrong, that abortion is (legally) permissible where they live, or that choosing to build a joint tomb for both victims and perpetrators of the WWII massacres is (politically) wrong. Thus, at least three distinct normative orders, moral, legal, and political exist and must be clearly kept apart at all instances when normative words are used. For, often practices that are clearly morally wrong, such as for example slavery, are legal, as was the case with respect to slavery not so long ago in the United States of America; in other cases, what is clearly morally wrong, such as infidelity, is not legally proscribed in many locales; and in yet other cases, politics can lead to disregard of both moral and legal concerns, as is arguably the case with the administration of President George W. Bush regarding its endorsement and practice of torture or President Barak Obama’s “kill list”.

The notion of “reflexivity in normativity” that was introduced above can also be helpful in assessing what could be meant by the claim that some intellectual construct is or is not “professionally relevant” for the concerns in military ethics. If we think of military ethics, or for that matter, medical or legal ethics, as a species of the genus “professional ethics” what could make a claim, argument, or theory relevant for those endeavors? How can scholars, be they philosophers, sociologists, or international relation theorists, make relevant contributions with discernable practical guidance for professional practice or policy in the field of military engagements? We can ask the same question with respect to the cases of medical or legal spheres and corresponding instances of “professional” ethics.

This translates to a preliminary question about what could it mean for ethical considerations, that is deliberations taking place within the moral normative order, to be relevant for making legal or political decisions in general. This is where the notion of reflexivity in normativity can help clarify matters. We simply have to remember that there are three normative domains, and recognize that they are so ordered that we should (ideally) think of the moral domain as having the widest scope, which then includes the legal order, which furthermore contains the political (or policy making) domain. The ideal in question amounts to a simple proposition that whatever laws and policies end up being enacted in any context must enjoy the support of moral arguments, or at least not run against what morality demands, while of course policies that would go contrary to the law must not be implement. We should also recall that each normative domain has its own “laws” (or paradigms) that govern what counts as proper questions, adequate approaches for answering them, or successful arguments within that domain.

One way to conceptualize this ideal, or the notion of the moral normative order “having the widest scope” is to explicate (in the first instance) the relationship between morality and law using the dominant normative discourse of “rights”. What is then the relationship between moral and legal rights that would illustrate why morality ought to reign over the other normative orders? Setting aside, for a moment, skepticism about the very existence of moral rights, arguably the most compelling account of this notion is one by Joel Feinberg according to which rights are valid claims to something against someone.5

5 Feinberg, of course, has his detractors when it comes to his account of moral rights. See, for in-
The validation he has in mind is a kind of justification; mere claims are not enough for having rights. Thus, one can be said to have a moral right when one has a claim “the recognition of which is called for … by moral principles, or the principles of an enlightened conscience” (Feinberg 1970, 255). Legal rights are different in that they are claims the validation of which “is called for by the governing rules” (Feinberg 1970, 255). According to Feinberg, then, a right can be moral, legal or, indeed, both. Where we come to the point that moral rights possess a wider scope involves the realization that rights conferred by “universal true morality,” in Feinberg’s formulation, could also be recognized by conventional morality of a society or conferred by a given system of positive law, or both. But in case that a moral right isn’t so recognized by either a conventional morality of a society or a system of positive law, Feinberg avers, “it remains a true moral right anyway” (Feinberg 1992, 152). In other words, for something to be a moral right it does not have to be recognized by conventional morality or positive law, but surely we would view negatively official or conventional “rights” that go against universal morality.

Interestingly, the outcome about the priority, or wider scope of the moral normative order is also confirmed even when we look at things from the perspective of those who are questioning the very coherence of the idea of moral rights. On this view rights are institutional creations and exist only when appropriate public norms are in place and operative; every right depends entirely on collective recognition in either law or mores. Hence, there are only conventional and legal rights, but no moral rights. How then should we understand the discourse of moral rights? Moral rights may be seen to represent independent and individual moral judgments rather than mutually recognized standards of conduct; they are morally justified claims on others that are characterized by their universality and overriding moral weight. These may be claims about fundamental values, such as human dignity, equality, wellbeing or autonomy that represent “rights” in Feinberg’s “manifesto” sense (Feinberg 1970, 255). That is, the rights of the “manifesto” type are not actually rights, but as Feinberg puts it, they are “a valid exercise of rhetorical licence” (Feinberg 1970, 255), in that they represent “a powerful way of expressing the conviction that they ought to be recognized by states here and now as potential rights and consequently as determinants of present aspirations and guides to present policies” (Feinberg 1970, 255). Hence, moral rights in their “manifesto” sense are a kind of legal-rights-in-waiting, elements of policies that ought to be adopted and collectively recognized. This suggests, again, the primacy of the moral normative order with respect to the legal and political normative orders.

Since, according to those who defend the claim that military ethics is a kind of professional ethic, we ought to think of “military ethics” as “analogous to medical ethics” let us return to the issue of euthanasia that we have already discussed in order to show what is wrong in this conception of what constitutes a relevant contribution to military ethics properly conceived. With the above distinctions in mind we can recognize that the social conditions of production of the American Medical Association’s normative “doctrine” on euthanasia does not constitute a moral position, but instead is a result of a convention, stance, (Darby 2003), and (Campbell 2006).
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someone saying so (in fact a result of a vote of AMA members), and thus this doctrine is just an element of professional ethics, which despite the presence of the word “ethics” is not situated in the moral order, but it is a policy applicable to members of a certain profession. That is, normative contents of a professional ethics, in this case “medical ethics” pertaining to euthanasia, however, must not be confused with judgments about the *moral permissibility* of euthanasia. This is because professional ethics (of doctors, lawyers, or anyone else) is not properly situated in the moral normative “field,” which has its own rules that are not a result of someone saying so (i.e., they are not conventions, but a result of deliberation of a different kind developed in moral philosophy). Instead, professional ethics, like legal rules, are a matter of decision-making (or, put differently, they are conventions). Yet, as we saw Rachels (and other moral philosophers) may want to be able to assess the professional ethics of medical professionals with respect to euthanasia from a moral perspective. This raises the questions of the relationship of the moral normative order to the other two normative orders, namely the legal and political normative orders. The latter both have rules which are conventions, they are a result of institutional creation (according to some institutionalized procedure, say a vote by empowered members, be they doctors, lawyers or what have you). This is the way various professional ethics are generated, or similarly how the citizens of a state by way of their actions generate legislative will of some “we” on some territory, i.e., laws of the land.

The question this account of different normative orders raises is what relevance a moral assessment of a professional rule, a law, or a policy can have, particularly if it is negative, since moral deliberation is not governed by conventions and is not part of either the legal or political order, but belongs to a separate, wider normative sphere (encompassing the other two, as we have seen in discussing the ideal structure of the three normative orders). Yet, it is natural to think that morality is relevant to the question of what kind of laws we should have or what kind of policies we should decide to pursue or institute. It is plausible to think that morally bad laws should be stricken from the books and morally bad policies changed or abandoned. This is exactly how things play out in real life. For example, once we recognize that enslaving people is morally repugnant this should constitute a reason (perhaps a sufficient reason) to amend legal codes that permit slavery. Similarly, once it is recognized that the policy of promoting child labor is morally abhorrent this should be seen as a reason to abandon this practice. To give an example, one may puzzle over the fact that since October 1, 2015 when Somalia ratified the *Convention on the Rights of the Child* the United States of America is currently the only country in the world that has failed to ratify this treaty. Justifying the U.S. position on children’s rights in terms of any policy (even legislative policy regarding death penalty for minors as in this case) would be a significant normative breakdown in terms of the concept of reflexivity in normativity that (ideally) situates the political order inside the moral normative order, meaning that policies no matter how dear they may be to whatever segment of a society are unjustifiable if they are in conflict with best moral reasoning.
What seems natural, unfortunately, is not easy to capture in a theoretical way. However, reflexivity in normativity along with the idea that we must take the moral order as encompassing the other two, and conceiving of the legal order as wider than the political one offers the conceptual tools to account for the apparent relevance of the results of moral deliberations for both the legal and political domains. The way this would work is to recognize that moral arguments are not directly relevant for legal or policy decisions, so that for example even the best moral justification for engaging in an act that happens to be against the law cannot constitute a defense in a court of law. Still, laws that are on the books ought to enjoy support of moral arguments, and conversely laws that are morally offensive ought not be on the books. The same holds for policies at all levels, be those rules of professional ethics, governmental procedures or legislative decisions.

The proposed reflexivity in normativity along with a conception of normative orders where morality is taken to have the widest scope, encompassing the legal normative order inside which is the political order can accomplish the following two goals: (a) it would explain the relevance of morality (as a separate normative domain) for both law and politics; and (b) give us a way to not only assess which laws or policies are (morally) permissible, but also offer reasons for legal and policy change, reform, or amendment (as in the above considered cases of slavery or euthanasia).

**Military Ethics and “Just War” Theory**

In the post-Cold War period much of what passes for scholarship in “military ethics” as it is practiced in the West, primarily in the U.S. and other members of the North Atlantic Treaty Organization (NATO), is conducted in terms of the so-called “just war” theory (which has a much longer history, as we shall revisit shortly). An example that illustrates well this point is that (arguably) the flagship scholarly publication in the field, the *Journal of Military Ethics*, expresses the stated “scope and aims” of the journal exclusively in terms of this “theory”: “The journal publishes articles discussing justifications for the resort to military force

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6 The claim here is not that scholarship in “military ethics” when conducted in terms of “just war” theory is practiced only within NATO countries, nor that no other approach is ever present there. A cursory review of what is out there can reveal that countries like Sweden and Israel have academic centers and scholars that produce work in “military ethics” and in terms of “just war” theory yet those countries are not NATO members. While this is true, I don’t find this a compelling way to challenge the claim that in the West, and in particular NATO countries we find “just war” theory as the dominant paradigm in practicing “military ethics”. Sweden, while not a NATO member has for the longest time been on a cusp of joining, while Swedish forces are deployed in Afghanistan with the NATO-led “Resolute Support Mission” and have been there previously as part of the “International Security Assistance Force (2002-2014). Swedish forces have also joined NATO operations elsewhere, such as for example currently in the province of Serbia, Kosovo. As for Israel, it is the closest U.S. ally in the Middle East benefiting from enormous U.S. arms deliveries, and Israel in 2016 has opened an office at NATO headquarters. In fact, both countries are among of more than a dozen nations designated by the U.S. as a major non-NATO ally. That countries so closely allied with the U.S. and NATO should also have writers whose research agenda closely mirrors the dominant ways of practicing “military ethics” within NATO countries isn’t surprising, and only corroborates the claim made here.
(jus ad bellum) and/or what may justifiably be done in the use of such force (jus in bello)."

The focus is clearly and explicitly on the justification for the resort to military power, and this is supposed to be accomplished by using the conceptual tools of the “just war” theory.

“Justification” is a normative term, however, and per requirements of reflexivity in normativity we would have to first situate the use of the term in the proper normative order. Since in this essay we are critically considering the proposal (Cook and Syse 2010) that “military ethics” ought to be understood as kind of professional ethics, while the argument I have presented has established that professional ethics of any sort isn’t a matter of ethics (i.e., morality) but policy, we would have to classify the use of the term “justification” in this context as belonging to the political normative order. In other words, those who see military ethics as a kind of professional ethics are constrained to focus only on claims that can be justified by reference to conventional rules adopted according to proper procedures of some professional body whose saying so (i.e., declaring something as a rule) matters. In this case the most plausible such body would be NATO itself. For, as we have seen professional ethics can differ from country to country as examples from legal and medical ethics demonstrated. But what gives unity to the Western production in “military ethics” is that it is conducted as it were under the auspices of NATO (pace note 6). This would be fine if “military ethics” as such meant “professional ethics for military officers and other personnel of the militaries that belong to NATO”.

This, however, is not what “military ethics” means, which raises the question about the idea that “just war” theory should play such significant place within military ethics; seen as having the central role in prominent publications in this field).7 In line of the argument defended here that rejects the claim that military ethics is a species of the genus professional ethics but instead a sub-filed of applied ethics, which is itself a part of moral philosophy, the relevant question becomes the following: Is there a role that “just war” theory could properly play within the moral normative order? I shall argue that the answer to this question must be given in the negative.

In order to argue that the “just war” theory, whatever form it takes, is suitable only for the legal normative order, and must play absolutely no role in the moral normative order I will rely on my earlier work (Jokic 2013). First, we should realize that the history of the “just war” theory (or the ideas assembled under this label) presents a history of movement from one normative order to the next. Initially developed in the context of Catholic theology, the theory was also taken to have moral implications, thus transitioning into the secular domain, which at least by the 19th century and certainly by mid-20th century emerged as having exclusively a legal interpretation. This prolonged transition from the theological context with moral implications into a purely secular domain with legal interpretation within positive

7 It may be objected that it is an exaggeration to claim that “just war” theory plays “a central role within military ethics” as we can also find some other approaches to military ethics, e.g. political realism is invoked from time to time, and just war theorists always argue with realism. The point here is not that nothing else exists as approach in (Western) “military ethics” but that “just war” theory approaches dominate, and as far as the focus here on the Journal of Military Ethics, as arguably the leading journal in the field all we have to do is recall the editorial statement about the “scope” of the journal.
international law took up most of the history of the “just war” theory. Eventually, however, in the 1970s, in particular with the effort of Michael Walzer, the doctrine was presented as reintegrated within the moral domain in political theory and moral theorizing.8

Taken as a contemporary legal theory it consists of two components: the *jus ad bellum* is that part of international law governing resort to international armed conflicts. The *jus in bello* is the law of war properly so formulated, namely, the body of rules governing the conduct of parties engaged in international armed conflict.

The initial application of the theory as theologico-moral doctrine had very tragic consequences in the medieval period. During a time of bitter struggle between Catholicism and Protestantism a component of *jus ad bellum* was added: war for the cause of religion. The violent clashes were deplorably without restraints. The trouble was that the just war doctrine had relatively little to say about conduct in warfare (*jus in bello*) beyond condemning perfidy (breach of promises) and the slaughter of women and children because war against them was “unjust”. The lack of restraint was compounded by the 14th and 15th-century ideas that the victorious Prince was waging a just war and, as the agent of God, punishing the defeated, just like the devil in hell would punish them in the next world. The victory was the judgment of God as to the justness of the cause of the victor. No injustice could be done to the vanquished since they were seen as having fought against God himself. The war could not be considered just on both sides because God’s will was not divisible. These were the components that made up the content of the classic just war doctrine of the late medieval period, a period of untold brutality justified through the conceptual tools that the theory made available. The role of the “just war” theory may appear to have facilitated atrocities of the medieval period, something that will return as its primary role in the late 20th century as we shall see.

In the 16th and 17th century a number of scholars and thinkers of various profiles contributed to removing just war doctrine from any religious and moral content, thus further integrating it into the overtly secular and legalist doctrine of the modern international law of war. Consequently, from the mid-seventeenth century until the mid-twentieth, the idea of just war largely disappeared as a conscious source of moral reflection about war and its restraint. Hugo Grotius, and Emerich de Vattel removed the last lingering vestiges of the medieval “just war” theory which led to the modern doctrine entirely based on agreements among states, with no backwards glances seeking divine approval. This trend was applauded by the foremost thinker of the Enlightenment period, Immanuel Kant. For anyone inclined to follow a version of Kant’s moral philosophy, war is beyond the (moral) rules of good and evil, just and unjust, and it falls in the realm of pure necessity. Kantians cannot approve of the efforts of the “just war” theorist as they, in the apt words of Judith Shklar, view him as “encouraging people to enter upon wars recklessly and then baptizing his own side with the holy water of justice. Every enemy can easily be made to look the aggressor” (Shklar 1979, 20).

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8 One might have thought that anyone even remotely familiar with the history “just war” theory would have been sufficiently repulsed by John Locke’s use of “just war” theory to justify slavery in order to even consider reintroducing it to the moral normative order at the height of Cold War. As we shall soon see what Locke’s use of “just war” had done for slavery, Walzer’s use of it has done for aggression, the supreme crime in international law. For Locke, who was personally involved in the deepest way with African slavery, and his search for legitimate slavery in Carolina see (Hinshelwood 2013).
Kant’s point is that no (moral) rules are possible that would confer moral-theoretic imprimatur on some wars characterized by specific attributes. Any violent conflict could be claimed to satisfy such characterizations whether it did or not. Hence, the entire project of “just war” theory as situated within the moral normative domain should be rejected. Kant is opposed to the idea of constructing “theories” in the moral normative domain that would render specific wars “just” or “unjust,” for an endeavor of this sort could easily be used to rhetorically turn even an obvious aggression into a (morally) “good war”. This is something to keep in mind when we come to discuss the current uses of the theory as deployed by the Western partakers in the discourse about war. How correct Kant was in this regard we shall see in a moment, but for now let us keep in mind that the actual developments, particularly during the 19th century and certainly by mid-20th century, have seen “just war” theory emerge as a purely secular doctrine in positive international law. And this is exactly how Kant would have recommended things ought to stay; he saw war as belonging to the domain of necessity with the only imperative that it be ended as soon as possible. War is still, for Kant, a practice that can be governed by rules, legal rules. In terms of the ideas of reflexivity in normativity during this period the “just war” theory found its proper normative place: exclusively within the legal normative order of the positive international law anchored in the notion of state sovereignty.

The long history of the “just war” theory was to undergo one last shift of normative orders, however. In the second half of the 20th century a surprising revival of the medieval version of the doctrine as a moral one was enacted. This was largely the result of the publication of Michael Walzer’s *Just and Unjust Wars: Moral Argument with Historical Illustrations*. Of course, Walzer did not achieve this shift by meeting Kant’s challenge of developing a normative ethical theory that would confer moral-theoretic imprimatur on some wars characterized by precise attributes rendering specific wars “just” or “unjust”. That remains as impossible as ever, and an endeavor of Walzer’s sort remains, as Kant wisely cautioned, as easily rhetorically and practically exploited as ever to turn even an obvious aggression into a “good war”. Instead, Walzer deployed within his “moral theorist” task of writing about war yet another Catholic device: casuistry (Walzer 1977, 45). What could the consequences of such a move be? Richard Falk in his aptly titled early review, “Moral Argument as Apologia,” astutely noted that the only people that could be excited about Walzer’s revival of “just war” theory as a moral doctrine, were “those who most deeply imperil the human prospect” (Falk 1978, 343). Specifically, of grave concern is support for a sort of imperial project that this revivalism would deliver in two ways: on the *ad bellum* (moral) justice side we could expect the decriminalization of aggression (by a side whose war effort is christened as “just”) which is the supreme crime of international law; while on the *in bello* (moral) justice side we could see retroactive decriminalization of real war crimes committed by “good guys” on the way to military victory. I will take the discussion of these two great dangers in turn.

Walzer’s project did not have much traction until after the end of the Cold War, at which point his take on “just war” theory became a key element of something called “in-
ternational justice discourse” that exploded on the scene as a joint enterprise by, on the one hand, public oratory delivered by politicians, journalists, NGO-activists, and even stars from the entertainment world, and on the other the hyper production in what passes for academic endeavors from many disciplines (some old ones and many newly invented, such as for example genocide studies, memory studies or transitional justice studies (Jokic 2016)) on the general theme. This revival of the “just war” theory (facilitating alleged moral judgments about war) went hand in hand with a frontal attack on the notion of state sovereignty as supposedly a relic of a bygone era, which further deemphasized the significance of positive international law on such important matters as war and piece. This is the time when even ostensibly scholarly journals can emerge specifying their “aims and scope” entirely in terms of the “just war” theory understood as an alleged “moral doctrine” just as it was the case in the dark middle ages.

Regarding the *ad bellum* (moral) justice we may wonder how does a “just war” theorist go about making his judgments in the absence of a normative ethical theory that would confer moral properties to specific wars as being “just” or “unjust”. Walzer sees no difficulties here, he “shares the confidence” of many “men and women who are confident that they know which side’s war is ‘legitimate’” (Walzer 2013, 439). No wonder Judith Shklar calls Walzer a “prophetic” theorist (Shklar 1998, 379), but what could “legitimate” mean in this context is anyone’s guess. One thing, however, is clear, namely that “legitimate” at least in part means “illegal”; for if the wars in question were legal there would be no hesitation to emphasize their legality and there would be no necessity to use such an evasive word as “legitimate” that doesn’t clearly express its proper normative import. Just about anything could be claimed to be legitimate; all this does is steer discussion in a desired direction parasitizing on the positive meaning inertia of the word “legitimate”. Is the meaning of this term properly situated in the moral, legal, or political domain? The meaning of the word “legitimate,” which is highly ambiguous from the perspective of reflexivity in normativity, when used in the context of ostensibly assessing wars indicates a course of action that is illegal, but which still ought to be pursued. This sort of recommendation would be extremely odd in any domestic context, but when the matters are international in scope this is exactly the outcome the new application of “just war” theory brings to the front. An example can help illustrate this.

In 1999, under the leadership of Unites States, Yugoslavia was the target of aggression by nineteen most powerful countries, members of NATO, even though Yugoslavia attacked none of them. This was contrary to NATO’s own (defensive) Charter and international law. Yet, with widespread confidence described by Walzer this aggression was quickly christened with the holy water of justice and deemed a “good war”. Walzer was chief among many Western publicists who first urged then cheered the aggression conducted as an intense aerial bombardment for 78 days, but was practically alone in also demanding a ground offensive.10 The illegality of the endeavor did not matter to Western

10 “I was in favor of a ground invasion, because there would have been fewer casualties,” stated Walzer in his speech at the occasion of receiving an honorary doctorate from Belgrade University, quoted in (Jokic and Brdar 2011, 62).
commenters. Thus Judge Antonio Cassese, the first president of the International Criminal Tribunal for Former Yugoslavia, asserted, and he was by no means alone in this, that the NATO’s 1999 aggression against Yugoslavia was “illegal under international law” but he still insisted that in his “ethical viewpoint resort to armed force was justified” (Cassese 1999, 24). Thus, the vocabulary of “illegal but good,” “illegal but justified” or “illegal but legitimate” entered the narratives about international relations with the serious consequence of effectively decriminalizing aggression of powerful Western states and their allies as they engage in wars of choice against the weaker states.

When it comes to the in bello (moral) justice Walzer has added a novel conceptual element to the “just war” theory: the notion of “the good guys”. The idea is that whatever in bello rules are in place they must make it possible for the “good guys” to win. But who are the “good guys”? Well, those who are fighting on the side whose war had been christened as a “just”. If a country is fighting a “just” war, then, writes Walzer, “it can indeed violate the rules of war, and the only limit on the violation is necessity”; thus we get the following principle of sorts: “the greater the danger the just warriors face, the greater their entitlements in battle” (Walzer 2013, 442). But what follows if the win of the “just” side is not a real possibility? What then? Well, the rules, says Walzer, would have to be changed. We would have to reconsider the content of the jus in bello rules if we could not live within jus in bello and still have the just side win on the battlefield. In other words, we would retroactively consider violations of in bello rules by the “just” side as “good,” “justified” or “legitimate” so that they would not constitute crimes.

Keeping in mind Kant’s warning that those who would use the moral version of “just war” theory could simply baptize their own side with the holy water of justice, thus effectively decriminalizing aggressions (in this case by the United States and its allies or vassals), Walzer now gives his side another gift—the decriminalization of war crimes committed by American troops and their allies during the U.S.-led wars of aggression. For “[t]he process of adaptation is historical and circumstantial, and circumstances may arise sometime in the future that will require changes in the rules of war” (Walzer 2013, 442). If we should have wondered with respect to the decriminalization of aggression as the outcome of the efforts by “just war theorists” whether this might have constituted a criminal act of incitement to international violence—an act of aiding and abetting aggression, the supreme crime in international law—then we must now wonder whether this announced possibility of ex post facto “revision of jus in bello” in fact amounts to incitement to commit war crimes by the troops of one’s country, or whomever might be declared or prophesised to be “the good guys”. In the current geopolitical moment isn’t the message to American troops who are continuously engaged in wars around the world that they need not be concerned about “fighting justly” (i.e., according to the existing legal rules of war) since, if necessary, in bello rules will be revised to fit what they do and find convenient in order to win? The rules will be tweaked to fit the American conduct in war rather than other way round: demanding that they behave according to existing legal rules!¹¹

¹¹ Not all “just war” theorists follow Walzer in this pair of dangerous moves, some, like for example Jeff McMahan, would even agree with me about the risks they represent. However, once the door is ajar
International Justice Discourse and Activism

Our discussion so far points to the real dangers of relying on the alleged moral version of the “just war” theory within the so-called “international justice” discourse. It constitutes a way of encouraging people to enter upon wars recklessly and disregard laws of war when “necessary”. Deploying such “theory” can only constitute pseudo-scholarship, however.

One way to realize this is to recall the distinction developed by the French sociologist Pierre Bourdieu between “activism in scholarship” and “activism with scholarship”. Bourdieu rejects the former as heteronomous and irresponsible, in his conception of a “committed scientist” or “public intellectual”. In order to count as intellectuals “cultural producers,” seen by Bourdieu as “bi-dimensional beings,” must satisfy two conditions. First, they “must belong to an intellectually autonomous field, one independent of religious, political, economic or other powers, and they must respect that field’s particular laws,” which means that the questions they ask, problems they formulate, and methods they use seeking answers must be de facto recognized as belonging to the field by its practitioners. Second, “they must deploy their specific expertise and authority in their particular intellectual domain in a political activity outside it” (Bourdieu 2003, 11).

In other words, for Bourdieu, the proper engagement of a scholar or intellectual is outside academia but relying on the tools of her specialization to accomplish the political interventions. The former condition spells out the existence of autonomous fields as the foundation of symbolic authority, which when exercised outside scholarship or academia, as interventions in politics, per the later condition, represents the proper domain of civil engagements for intellectuals equipped with scientifically-obtained knowledge. Thus, Bourdieu endeavored to keep scholarly methodology rigorous and free from all external interests be they economic or political.

At the same time Bourdieu rejected “activism in scholarship” as a threat to autonomy, for its presence in any field signals dependence with regard to external economic, political or religious powers, which erodes any symbolic authority necessary for proper civic engagement by an intellectual. As such it also represents a kind of incompetence as a violation of the basic value of all authentic scholarship, its “interest in disinterestedness”. Thus, when Bourdieu calls for full adherence to scholarship of “the collective intellectual” he is envisioning “an improbable but indispensible combination: scholarship with commitment, that is a collective politics of intervention in the political field that follows, as much as possible, the rules that govern the scientific field” (Bourdieu 2003, 23-24).

This Bourdieusian account gives us clear sense of the dual failure of “activism in scholarship” that amounts to pseudo-scholarship (because it lacks autonomy) and fake activism (as it is neither collective nor universal). From this brief description of the distinction between “activism in scholarship” and “activism with scholarship” we can clearly see that those who use the “just war” theory as a “moral doctrine” are in fact practicing “activ-
ism *in scholarship*. As such they engage in pseudo-scholarship both because no properly constituted field can recognize the employed “methodology” (such as Walzer’s casuistry, for example) and, even more so, because this production is lacking in independence as no research practiced largely under the auspices of NATO could count as such. Thus, journals that have all the trappings of scholarship (editorial boards, alleged peer refereeing process etc.) may not in fact amount to scholarship, but to “activism *in scholarship*” that repackages propaganda as academic production or in old fashioned terminology may be just elements of “special warfare”.

With these considerations in mind my answer to the question “What’s a just war theorist?” was as follows: “Consequently, whether we see just war theorists as some sort of scholars or simply as activists in the end their contributions seem to teeter dangerously towards that of being just war criminals, both on the count of aiding and abetting aggression and on the count of inciting troops to commit war crimes” (Jokic 2013, 110).

**Conclusion**

The outcomes of our discussion focusing on the merits of the proposal that we ought to think of “military ethics” as a species of the genus “professional ethics” are seriously disconcerting. Not only that contributions to military ethics so understood can only amount to pseudo-scholarship, but those in the West who practice it cannot be seen in much different light than how I answered the question about what a contemporary “just war” theorist is. By contrast, those who endeavor to be serious about “military ethics” must see it as a branch of moral philosophy: applied ethics.

Aleksandar Jokić
Portland State University

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Code of Ethics of Advocates, R.R.Q. (1981), c. B-1, r. 1, s. 3.08.03, available at https://tinyurl.com/yb7bmvto
Šta je stavrno vojna etika (A šta na zapadu misle kako je treba shvatiti)?

(Apstrakt)

uz učenost“, da bi pokazao da upotreba teorije o „pravednom ratu“ posle Hladnog rata odgovara isključivo pseudoučenosti. Drugo, što još više uznemiruje, autor pokazuje da ta praksa ima dve neplanirane posledice: u vezi sa *ad bellum* (moralnom) pravdom vodi dekriminalizaciji agresije, što je najveći zločim u međunarodnom pravu; i s obzirom na *in bello* (moralnu) pravdu, u slučaju „dobrih momaka“ kao počinilaca vodi dekriminalizovanju aktuelnih ratnih zločina.

Ključne reči: Vojna etika, profesionalna etika, refleksivnost u normativnosti, teorija o „pravednom ratu“, aktivizam, pseudoučenost.