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Counter-insurgency in the Grey: The Ethical Challenge for Military Conduct

JONATHAN DOWDALL AND M.L.R. SMITH

While much commentary on military affairs has focused in recent years around the issue of counter-insurgency (COIN), relatively little attention has been given to the ethical implications of this profound shift in the doctrinal emphasis within the armed forces of leading Western nations. The evolution of this shift requires no recapitulation here, except to state that the reorientation towards a greater appreciation of counter-insurgency followed the failure of the Coalition’s occupation policy in the aftermath of the invasion of Iraq in 2003. The eventual recognition that the United States and its coalition partners were facing a protracted insurgency led to what many analysts regard as an impressive learning process within the American armed forces. Moving away from a primary obsession with ‘major battle’ and kinetic operations, the gradual comprehension of the complexities associated with combating insurgent campaigns culminated in the publication of the joint US Army and Marines FM 3-24, the Counterinsurgency Field Manual, in late 2006.

Perhaps the most comprehensive and sophisticated doctrinal statement yet produced on the subject, the Field Manual recognized the ‘prominent’ ‘ethical imperatives’ that are ‘unique to counterinsurgency’. Notably, it perceived the ‘environment that fosters insurgency is one characterized by violence, immorality, distrust, and deceit’ which called upon the modern soldier to observe the highest standards of professionalism. Being a guide to modern soldiering rather than an academic treatise, the few pages that the manual devoted to ethical considerations were situated primarily within the context of providing company-level leadership, offering brief discussions of such issues as the necessity of maintaining proportionality, an understanding of the non-military nature of much counter-insurgency practice, along with exhortations to observe various degrees of restraint. For understandable reasons, it did not elaborate the moral and ethical ambiguities of the counter-insurgency environment and its more subtle implications for military conduct. Furthermore, even though the manual drew attention to the ethical environment, academic thought has so far not attended to this dimension in any systematic way. More scholarly work has, so far, advanced understandings of contemporary COIN thinking in many other directions, most obviously that of operational techniques, but consideration of the actual nature of the ethical challenges that present themselves in an insurgency environment has yet to be fully investigated.

The aim of this study, therefore, is to build upon the initial identification of the complex ethical environment to which FM3-24 alludes, by examining contemporary counter-insurgency warfare in terms of military ethics. It is the intention of this investigation to provide reflections upon the changing face of COIN conduct in the light of...
The Relevance of the Just War Tradition for Counter-insurgency

The Just War tradition has historically provided a framework for controlling the application of violence in warfare along ethical lines. This study intends to discuss the ethics of military conduct, and thus shall focus upon the *jus in bello* side of the tradition. Whilst the importance of the *jus ad bellum* in counter-insurgency cannot be easily disregarded, especially when considering the role of perception in securing support from the population, this study shall set aside such considerations entirely in the mould of ‘Invincible Ignorance’. Bearing this in mind, it will be useful to briefly summarize the implications of the Just War tradition’s *jus in bello* principles for counter-insurgency conduct.

Two principles govern the Just War ethics of military conduct, the Principle of Discrimination and the Principle of Proportionality. COIN conduct has always been seen as a more difficult case study for the Just War tradition because of the inherent problems of abiding by these principles when the armed opponent is serious ethical challenges resulting from modern trends affecting combatant status and the deployment of military force in a multi-purpose framework. In particular, it shall engage with what a number of commentators have termed the ‘grey area’ of the Just War tradition: the ambiguous and challenging interim zone that lies in and between the more clearly defined forms of COIN conduct. The resultant analysis shall suggest the need for a more nuanced form of ethical conduct, orientated around restraint, more flexible discriminatory principles and a proportionality framework closer to domestic policing than formal warfare. It will argue that just action in counter-insurgency can be operationalized through the concept of the continuum of force, which aims at controlling the escalation of violence through a range of graduated responses. In this manner, a hybrid model of ethical conduct will be advocated that seeks to combine the principles of restraint in civil policing with the discretionary powers embodied in the notion of the so-called ‘strategic corporal’. By embracing these concepts, military practitioners may overcome ambiguous and sometimes unhelpful moral guidance inherent in the Just War canon, enabling them to tailor their conduct more closely to the challenges of the contemporary COIN environment. Such actions will assure they act as justly as possible in the face of ‘grey area’ ethics.

To carry out this examination, it is necessary first to discuss the core principles of the Just War tradition in order to outline the utility and applicability of this ethical framework as it stands. The role of these principles in providing a proportionate approach to conduct shall then be examined through the so-called Internal War and Criminal Justice models of COIN. The study shall then proceed to the challenges that are rendering these traditional frameworks ethically unhelpful. With these understandings in place an alternative model for COIN conduct tailored for this ‘grey area’ shall be proposed by engaging with current debate and outlining three core guidelines for just conduct in such conditions. Counter-arguments will then briefly be examined before the study is concluded. With this structure in mind, it is time to begin with an analysis of the Just War tradition.
concealed amongst the civilian population. 10 These principles provide two particular challenges that are of significance for COIN conduct.

The Principle of Discrimination codifies the idea of non-combatant immunity, centred on the protected status of those uninvolved in direct military confrontation, and the requirement for belligerents to limit the likelihood of harming them. 11 The Principle of Proportionality, in asserting that ‘the destructive effects of an act of war must not be out of proportion with the object sought’, articulates the need to consider the correct degree of interference amongst the non-combatant community that the COIN effort requires. 12 In short, the Just War tradition’s ethical demands on the conduct of counter-insurgency are twofold:

1. that non-combatant status be honoured;
2. that all military acts are assessed to ensure that the degree of interference inflicted upon the population is proportionate to the ends sought.

Whilst both are equally pertinent, it should also be noted that in many respects, the discrimination principle can be said to be subordinate to the overarching importance of the proportionality principle. This is because the issue of proportionality stands as the measure for the deployment of force. As certain types of force (such as heavy firepower) are more likely to cause a breach of the Principle of Discrimination, the observance of both can in fact best be assured by controlling the proportionate level of force deployed in the first place.

Whilst cynics may dispute the importance of the Just War principles, there is a great deal of military utility in correlating COIN conduct with this ethical tradition. The development of customary international law has gone a long way towards integrating these principles into the norms of war. 13 Counter-insurgency theorists have, notably, asserted that perception of one’s actions as an important element in the evaluation of just conduct. 14 Contemporary COIN doctrine openly embraces the need to appear just in the eyes of the population. The Counterinsurgency Field Manual emphasizes that ‘COIN forces aim to mobilize the good will of the people against the insurgents’. 15 Justness of conduct is thus a vital part of this aim. The importance of moral actions in helping ‘follow international law, gain worldwide political support . . . and reduce internal resistance’ is of particular significance in today’s multilateral, interventionist conflicts. 16 Therefore the question for contemporary COIN operations is not whether it is necessary to follow the Just War principles, but how to do so.

The Ethical Environment

The debate over how to avoid ethically disproportionate or indiscriminate acts whilst dealing with the significant threat of an insurgency is not a new one. 17 It is understood that military actors may inadvertently apply an inappropriate amount of force whilst attempting to locate the correct proportionate level of violence, or unintentionally harm innocent bystanders in the process of fighting a campaign. Anthony Hartle points out that ‘the environment in which members of the military must operate...
poses a severe threat to consistent moral behaviour. To counteract these problems, a proportionate understanding about the application of force within a counter-insurgency context has traditionally been articulated through two distinct models for counter-insurgency conduct, the Internal War and Criminal Justice models. What is important for this analysis is that each model represents a different form of what this study shall term an ‘ethical environment’.

For this study an ethical environment shall be taken to mean the articulation of proportionality and discrimination with their requisite obligations and requirements in a given COIN situation. The concept requires a military commander to understand that the individuals targeted by force, and the level of interference amongst the civilian populace, will alter depending on the degree of threat posed by the insurgency. The Internal War ethical environment prioritizes military necessity in its ethical principles, whilst the Criminal Justice environment prioritizes law and order. The higher the threat of violence and instability, the greater the need to implement ethical codes similar to war, whereas lower threats will demand ethical codes more similar to domestic peace. In terms of conduct, this is important because ‘what is necessary in war can be excessive in peace’. Equally, military necessity often requires just the opposite, which is to say that what is necessary in peace can be dangerous and inappropriate in war. The ethical environment concept thus represents an articulation of the proportionality principle by acknowledging that the overall threat of the insurgency must define the level of force used. The Internal War and Criminal Justice models represent a divide upon which COIN practitioners may draw in order to place restrictions on their use of force. Each ethical environment deals with the requirements of discrimination and proportionality differently, and provides a framework for honouring its principles in different contexts.

For the Principle of Discrimination, the central feature of differentiation between these ethical environments is the role of status. It is understood that the Internal War ethical environment operates on the traditional military ethos of ‘enemies’ and ‘civilians’, whereby enemies may be killed and civilians must not. ‘Enemies’ may be killed under any circumstances, providing customary international law, based upon the idea of the ‘status based engagement’, is not broken (when ‘enemies’ are incapacitated or surrendered, for example). In contrast, the Criminal Justice ethical environment operates on the domestic imperative of engaging with ‘suspects’, who are innocent until proven guilty. ‘Suspects’ may never be killed purely based upon their status, with the priority being to apprehend and process them through the legal system, though extreme circumstances may occasionally legitimize lethal action. Thus, ‘buttressed by the notion of “the enemy” that underpins military doctrine’, the Internal War and Criminal Justice ethical environments approach status in distinctly different ways. By implementing one of these ethical environments, a COIN commander sets up a framework for the discrimination principle based on either ‘suspect’ or ‘enemy’, with direct ramifications for conduct. By utilizing the model which best matches the threat of the insurgency this divide ensures that the Principle of Discrimination is appropriately honoured in line with the level of threat.

For the Principle of Proportionality, the central feature is the level of force appropriate to each ethical environment. Under the Internal War ethical environment, the
The relationship between the ‘functional imperatives of the military profession’ and international law creates a balance whereby lethal force is legitimate as long as it is targeted to a suitable degree. In the Criminal Justice ethical environment, however, a ‘minimum force’ maxim is applied. This is because in domestic policing lethal force is only permissible in extreme cases, such as self-defence or when ‘significant values are being challenged’. A line is thus drawn between when the use of force is anticipated, and when it is merely permissible under certain circumstances. Indeed, Criminal Justice operations would ideally not feature any lethal force at all so as to limit the likelihood of harming the innocent population. When a COIN commander decides which of these models they are utilizing, s/he chooses to abide by a proportionate level of force to ensure that the ‘degree of interference’ principle is honoured.

Therefore, these two models represent an acknowledgement of a proportional approach to counter-insurgency by offering differing models of conduct. The degree of interference outlined by the proportionality principle can be set in relation to the threat posed by the insurgency, and who it may be used against under the principle of discrimination can be varied according to the ethical environment in which operations are enacted. By choosing the appropriate ethical environments, a COIN commander fulfils his/her obligation to be proportionate and discriminate during a campaign. In summary of these features, Table 1 represents the two conduct ethics, their approach to the notions of discrimination and proportionality, and their overall priority within a counter-insurgency war.

### The Actualization of Just Counter-insurgency Warfare

In line with this concept of ethical environments, both counter-insurgency theory and doctrine have conceptualized just forms of COIN conduct based on these models, which shall now be discussed. An example of the ideal theoretical COIN war that would follow this proportionate trend can be found in John McCuen’s ‘four phase’ theory. Within this theory McCuen identifies four broad phases that capture an escalatory cycle in insurgent warfare, these being ‘organization’, ‘terrorism’, ‘guerrilla warfare’, and finally ‘mobile warfare’. Once the insurgent’s current phase is ascertained, the counter-insurgent should ‘then drive them back through the preceding phases’, lowering the level of force deployed as it progresses in a mirroring fashion. Indeed, one can see a clear divide between the Internal War requirements of the mobile warfare and guerrilla warfare phases contrasted against the Criminal
Justice requirements of dealing with the terrorism and organization phases through law enforcement. This theoretical approach captures the role of the proportionality principle in providing an ethical framework for limiting the degree of interference caused by a COIN campaign. When the correct phase is implemented, the correct ethical environment can be applied and just conduct ensured.

This ideal divide along proportional lines can also be identified in contemporary counter-insurgency doctrine. A typical example can be found in the US Counterinsurgency Field Manual. The presence of a phase orientated approach to proportionality in this manual can be discerned in the ‘Out-Patient’ doctrine, which consists of a full Internal War model operation evolving into peace-keeping and domestic stability operations over a series of phases. Further articulation of the principle is provided by the operational imperative to recognize the distinction between ‘Lethal’ and ‘Non-lethal’ tactical deployments. It is stated openly that this conceptual shift ‘imposes a very different calculus for the use of force’. This appears to represent a sophisticated, albeit implicit, understanding about the need to define the appropriate level and targets of force in relation to the extant ethical environment.

In short, the jus in bello principles of proportionality and discrimination have been codified into COIN theory and contemporary military doctrine by observing an ethical divide between domestic and military ethics. A shift between the Internal War and Criminal Justice ethical environments has conceptually been drawn as a dividing line to enforce a controlling influence upon the degree of interference counter-insurgency actions will inflict on the population. This divide is understood to inform when and where it is ethically acceptable to deploy military force during a campaign, and when a police orientated approach is more suitable.

The Ambiguities of Just War for COIN Conduct

However, there is growing evidence that this neat dividing line is increasingly unclear within contemporary counter-insurgency warfare. There is of course nothing new about debating where precisely the line between the Internal War and Criminal Justice ethical environment lies, with numerous practical instances of insurgencies providing a challenging degree of crossover between the two. Even McCuen’s phased approach incorporates the fact that some phases may co-exist at the theatre level. Indeed, counter-insurgency operations in Afghanistan and Iraq evince that the amount of time spent in the ‘grey area’ between the two models is raising fundamental questions about the ethics and doctrine of COIN based upon these traditionally defined divisions.

Two key issues indicate how the ethical conduct ‘switchover’ can be rendered increasingly indistinct. These are the increased complexity of combatant status in contemporary interventions and the proportionality issues raised by the multiplicity of roles being undertaken by the military. An examination of these factors leads to the conclusion that ethical conduct in contemporary counter-insurgency does not easily fit either of the existing conduct models, but in fact constitutes an interim ethical environment that lies in the ‘grey area’ between the two.
The Complexity of Combat Status

Non-combatant immunity lies, as we have already discussed, at the heart of the proportionality principle and customary international law. However, a notable shift has been taking place in the post-Cold War security environment which many commentators claim challenge the traditional understanding of combatant status. The problem stems from the theoretical and legal ramifications of the increased international focus on human security and humanitarian intervention.41 The rise of an increasingly ‘internationalized’ sovereign system, where human security is prioritized over national security, is altering the traditional legal and ethical understandings of who may be legitimately engaged in wartime.42 As intervention within a state by military force becomes the de facto form of international war, it is increasingly common for military practitioners to spend the majority of their time operating amongst the civilian population.43 Whether this is the ‘War Amongst the People’ as enunciated by Rupert Smith44 or the doctrine of Operations Other Than War (OOTW), contemporary counter-insurgent practice is increasingly characterized by a ‘growing porousness of the international–domestic divide’.45

The challenge for counter-insurgency conduct is that the ethical domain of contemporary interventionism does not fit straightforwardly into either of the traditional ethical environments. Almost all counter-insurgency action occurs within state boundaries and involves fighting amongst the population, but contemporary COIN conducted in the light of this growing porosity is faced with complex challenges to the Principle of Discrimination.46 There is an increased degree of uncertainty over how to define a combatant in such wars. For instance, some legal commentators have concluded that the US had no actual military foe in Iraq, but rather ended up fighting ‘an enemy force made up entirely of what Albert Janin calls “civilian belligerents”’.47 A clear illustration of the challenge to the discrimination principle can be seen in American experiences of house arrest operations in Iraq. Reports indicate that brigades undertaking such operations in 2005 sometimes held as many as 1,300 detainees at any one time, yet ‘US officers admitted . . . that 70–90 per cent of these prisoners were being held “by mistake”’, or could not be prosecuted.48 Such issues are only compounded by the difficulty of ascertaining exactly which cause an insurgent is fighting for in an internationalized insurgency such as Afghanistan, where, as Sean Maloney observed, Taliban combatants can vary from professional killers to farmers, with numerous layers in-between.49 The theoretical concept of the ‘dual use civilian’ advanced by authors like Hugo Slim conceptualizes the ethical incoherence that can arise when one attempts to attribute non-combatant immunity to individuals simply because they do not wear uniforms.50

Moreover, insurgents in this security environment are willing and capable of prosecuting a deadly war from behind the ambiguity of their status.51 In 2003 security forces around Kandahar, for instance, reported that Taliban ‘[o]peratives would pay citizens to lay mines on well-traveled OEF [Operation Enduring Freedom] and AMP [Afghan Militia Forces] routes’, leading to a phenomena one commentator has dubbed the ‘non-insurgent insurgent’.52 Such individuals clearly constitute a military threat but, equally, they are not easily comparable to an armed enemy. As
suggested, ideally, a COIN commander would like to deal with insurgents as either ‘suspects’ or ‘enemies’, depending on the appreciation of the ethical environment. Given these ambiguities, a clear distinction is almost impossible to make, and discriminatory failings are increasingly likely. The delicacy of ethical situations in counter-insurgency efforts such as those currently pursued by NATO countries in Afghanistan are therefore acute because COIN forces cannot simply revert to straightforward military solutions whenever violence escalates in a region. The maintenance of security and civilian development agendas are integral to any sophisticated attempt to combat an insurgency over the long term, and cannot be turned on or off at will. The military and socio-political dimensions of any COIN campaign have to proceed in close coordination. Thus raising the rate of forceful or highly kinetic (and thus less discriminatory) actions in response to the situation on the ground may not exist as a viable ethical option, even if it might make sense in simple military terms. Indeed, despite the discriminatory problems raised by the example of Iraqi house searches, recent reports have indicated that in the continuing Afghan conflict, ‘rules of engagement for NATO troops will focus on house searches’, which demonstrate clearly that these ethical issues present ongoing challenges to COIN forces.

The Difficulty of Proportionality

The second issue concerns the extreme difficulty of proportional calculations resulting from the increased multiplicity of counter-insurgency roles undertaken by armed forces. Whilst counter-insurgency operations have always involved a high degree of crossover between military and policing roles, contemporary commentators are observing a ‘shifting focus of military planners to internal security problems’ that straddles the Internal War and Criminal Justice divide. The non-existence of an effective domestic police force in the wake of regime change in Afghanistan and Iraq, combined with the need to battle an active insurgent threat, has drawn the armed forces of western states into an immensely complex range of tasks. Cecilia Bailliet has observed that the propensity of United States military forces to undertake house raids means that “war amongst the people” becomes even more intimately “war in the home”. Yet despite the focus of operations shifting to the micro-level, the scale of violence in Afghanistan continues to rise, posing a serious macro-level military challenge. The ramifications for conduct ethics raised by this shift in focus requires an ‘increasingly multi-purpose’ approach to military force.

An account of a single day’s operations for a Macedonian infantry unit working at the International Security Assistance Forces (ISAF) headquarters in Kabul aptly summarizes the practicalities of this shift for military conduct.

The soldiers conduct mechanized and foot patrols around the city of Kabul. They also provide a quick reaction force, a general security platoon, and security to the front and back gates of Camp ISAF.

The roles undertaken here include what military practitioners would term kinetic and non-kinetic operations, contrasting the deployment of mechanized hardware with the execution of domestic security tasks such as checking IDs at the back gate. Such a deployment has been conceptualized by General Charles Krulak as the ‘Three
Block War’ phenomenon (an analogy whereby a number of differing functions, from aid distribution to open combat, are conducted by a single US Marine unit over just three city blocks). This analogy encapsulates the problem for the proportional level of force counter-insurgency commanders seek to enforce. When the same military task-force must carry out active fire missions one day, foot patrols the second and man a road block on the third, it is clear that declaring at any one moment which ethical environment is best applied is no easy task. That such ‘crossover’ roles are increasingly common is self-evident, with American forces reportedly carrying out up to 12,000 inner-city foot patrols and vehicle checkpoints a week during COIN operations in Iraq. Military practitioners would preferably like to implement a ‘maximum’ or ‘minimum’ force doctrine for such operations in line with the correct situation, but in contemporary counter-insurgency conflicts such clear lines do not exist.

The difficulty of having to shift multiple tactical roles has led to some of the most troubling tendencies of contemporary counter-insurgency in Iraq and Afghanistan, involving the over-deployment of force amongst the population. Early in the Iraq war the widespread killing and wounding of civilians during foot patrols put the ratio of civilian to insurgent casualties around 10:1. In Afghanistan, the sheer size of force movement (in the US case sometimes at battalion level) raises questions about proportionality of deployments considering the physical damage – aside from the social, economic and political damage – such forces can do to infrastructure like buildings and farmland. Lessons have of course been learnt from such mistakes, and the US Army/Marines doctrine embodied in FM3-24 Counterinsurgency Field Manual has evolved in part as a way to control such actions. Yet ‘civilian deaths in Afghanistan from American and NATO air strikes nearly tripled’ in 2008, indicating that the challenges of proportionality remain severe. Such figures clearly illustrate the potentially disastrous consequences when COIN forces are left to judge for themselves what will be proportionate without a coherent overarching framework to guide them.

Clearly, in contemporary counter-insurgencies the role of military force has diversified to encompass every facet of both the Internal War and Criminal Justice models. A Dutch officer in Afghanistan summed up the position:

Depending on the situation, you may be more involved with security at one time and then, immediately afterwards in supporting aid organizations, governmental or nongovernmental, national and international. You can’t separate security from reconstruction or reconstruction from security.

Combat forces in such scenarios are expected to pursue a fully fledged military doctrine one moment and a more nuanced, internal security doctrine the next. They must engage belligerents who may not necessarily neatly fit either a combatant or non-combatant role. Simultaneously, they must balance the proportionate need to end the insurgency with assuring that the degree of interference inflicted on the population is not too great. ‘Multi-purpose forces’ represent only the tip of the iceberg. What is occurring is a fundamental challenge to the morality of COIN conduct in the interim ethical environment. The existence of this ethically ambiguous ‘grey
area’ has led Tony Pfaff to term contemporary COIN a ‘complex contingency’, in which the role of military force is difficult and ethically controversial.\textsuperscript{68} In failing to engage with these issues ethicists and military practitioners alike are failing to provide soldiers with an adequate degree of preparation for such morally ambiguous roles.\textsuperscript{69}

### An Interim Conduct Ethic

The challenge then is to provide a series of ethically practical guidelines for operating within the interim ethical environment, so as to safeguard the justice of contemporary counter-insurgency conduct. It is important to note that numerous military and academic thinkers have indeed been attempting to engage with these issues since the Iraq occupation forced them into the mainstream of military thought.\textsuperscript{70} This ‘new school’ even includes high-ranking US military figures such as General David Petraeus.\textsuperscript{71} Such processes have had a transformative effect on COIN conduct since 2004. In fact, reports from the current conflict in Afghanistan point to rapid adjustment of military rules of engagement (ROE) and doctrine designed to cope with the trends outlined above.\textsuperscript{72} However, such developments are currently being driven by the military necessity of ongoing war. Meanwhile, the processes at work and the new phenomena identified have yet to be examined in a coherent manner from the viewpoint of ethics. Ethicists have been highlighting the subject from numerous angles for some time, but a comprehensive analysis of the entire situation has not been forthcoming.\textsuperscript{73}

Ethical considerations are important because there is more than idle academic curiosity behind a move to ethically with these challenges. As has been outlined already, the construction of ethical calculations along proportional and discriminatory lines in Western fighting forces is vital to how they conduct war. The task, then, is to synthesize the developing trends in ROE and COIN doctrine to provide a coherent ethical framework that adequately contextualizes the challenges faced by COIN forces today. Not every assertion will therefore be entirely new, but, in outlining the entire construction of the interim conduct ethic, this study intends to solidify the ethical tactical lessons of the last decade, with the ultimate goal being a more prescriptive, empirically justified, ethical code of conduct.

Bearing this in mind, what is required is an \textit{interim conduct ethic} with which to bridge the gap between the Internal War and Criminal Justice models. The best method for doing this would seem to be the hybridization of the \textit{restraint} of domestic policing with the military \textit{necessity} of war fighting. By mapping domestic police concepts of restraint and minimal force onto the military’s active requirement to destroy the insurgency, a compromise can be reached which better meets the ethical requirements of ‘grey area’ warfare.

To explore this hybridized ethical concept, it is important to lay out the requirements and obligations that the ethical interim environment should enforce for both the Principle of Discrimination and Principle of Proportionality. In order to construct what this interim conduct ethic might look like, this study shall now examine the problem of the interim ethical environment from the perspective of each of the
Just War principles in turn. By examining the ethical and doctrinal debates that have been raised about conduct in this ‘grey area’, a more practicable and coherent framework for conduct shall be drawn from amidst the ambiguity. Yet, before the discrimination principle and proportionality principle are examined, an overarching concept of restraint must be established to contextualize the necessity of tightly controlling military force in the face of ethical challenges.

The Necessity of Restraint

All conduct within the interim ethical environment should abide by the overarching concept of restraint. The philosophical reasoning behind this assertion can be found in one of Michael Walzer’s commentaries on the doctrine of double-effect. 74 Double-effect is the philosophical tool which ethicists use to morally calculate the good intentions of an act against the likelihood of unintentional negative results, such as discriminatory or proportionality failings. Whilst exploring the necessity for military actors to predict beforehand the possible negative results of their positively intended actions, Walzer makes the astute observation that it is not enough merely to acknowledge a possible evil and act anyway. Rather, for an actor to genuinely claim they have carried out a moral calculation, they must actively attempt to assure that ‘the foreseeable evil [is] reduced as far as possible’. 75 The actor must do so ‘accepting cost to himself’ 76

If this concept is carried along into ‘complex contingencies’, it becomes clear that once military actors have acknowledged that they are operating in an ethical environment of immense uncertainty, they must seek actively to pursue lines of action that pose the least possible harm to the principles of discrimination and proportionality. Tomislav suggests the same idea, pointing out that if a situation is morally ambiguous a ‘constraining doctrine’ is best adopted. 77 This is because the possible ethical cost of a discrimination or proportionality failure when waging a counter-insurgency effort in the interim ethical environment is magnified by its proximity to the people. 78 Therefore, the appropriate double-effect calculation should be that applying excessive restraint is less morally questionable then applying excessive force. 79

This overarching doctrine of restraint should inform all calculations of discrimination and proportionality within the interim conduct ethic. Precisely because the ethical situation is so complex, COIN actors must ‘take even greater steps to ensure the safety of innocents than normal doctrinal practice would demand’. 80 This will invariably involve accepting a great deal of risk on the counter-insurgent’s part, but such is the cost of behaving in a moral fashion. A doctrine of restraint should thus be the cornerstone of COIN conduct in the interim ethical environment, in order to correlate with the military actor’s acceptance of greater risk to fulfil their ethical obligations and requirements.

Of course, commentators will note that a counter-insurgency doctrine based upon restraint already theoretically exists, notably in the tradition of British COIN, which has often been summarized as the ‘Hearts and Minds’ approach. 81 Indeed, some would argue that the British philosophy of restraint is ‘alive and well’ in contemporary COIN conduct, 82 arguing that in Afghanistan the armed forces of the United Kingdom observe differing approaches to the use of air power 83 and engagement
with civilian vehicles during combat, especially in comparison to US forces. To a certain extent this is true, and the interim conduct ethic outlined clearly owes its theoretical emphasis on restraint to traditional British theory and practice in this area, which has sought to grapple with the complexity of ethical problems in counter-insurgency actions from Malaya to Northern Ireland.

However, in attempting to coherently chart a conduct ethic for the contemporary counter-insurgency environment, it can be argued that the British tradition only offers so much guidance. For instance, Paul Dixon raises the issue that ‘Hearts and Minds’ does not in itself offer ‘a realistic guide to operations’, but rather, a ‘highly ambiguous framework, capable of widely different interpretations about the appropriate way of dealing with an insurgency’. Most pertinently, he argues that ‘Hearts and Minds’ may mean different things to different soldiers, some operating under a ‘human rights interpretation’, and another a ‘coercive interpretation’. In short, the British tradition is just that, a tradition, and only adequate, up-to-date analysis can transform that tradition into an applicable form of conduct. What such commentary indicates is that whilst there is a strong case for placing restraint at the head of a conduct ethic, it must go on to outline in detail the consequences for proportionality and discrimination before a comprehensive guideline can be created. With this in mind, the interim implications for the Principle of Discrimination shall be assessed to state a morally coherent conduct ethic for dealing with combatant status.

**Discrimination in the Interim Conduct Ethic**

There have been a number of philosophical attempts to engage with the challenges of handling combatant status in morally ambiguous circumstances. Most, however, have proven inadequate because rather than diminish the ethical confusion, they tend to simply enforce it. It goes without saying that ethicists who call for rigid adherence to non-combatant immunity in the face of the complex combatant status problem merely reassert the very principle that is being proved wanting. Given that in ‘complex contingencies’ it is often hard to define who is a combatant (or even if they should be considered as ‘suspects’ instead), reminding military practitioners that breaches of non-combatant immunity are immoral seems rather irrelevant. Yet most ethicists refuse to engage with this, the result being a series of incoherent and practically unhelpful conclusions about the role of non-combatant immunity in restraining COIN conduct.

A far more applicable assessment on this problem of ‘grey area’ discrimination ethics has been provided by Michael Walzer in his article entitled ‘On Fighting Terrorism Justly’ (2007). Here he engages directly with the problem of contrasting ethical environments, stating that the ethics of ‘the police … derive from the same moral principles that govern jus in bello, but the rules for the police are not the same as the rules for soldiers’. He also admits that a problematic crossover exists in contemporary interventionist warfare, making status an uneasy platform on which to base moral decisions.

Nevertheless, his conclusion on this subject, whilst more philosophically satisfactory than many of his peers, also fails to provide an applicable guideline
for discriminatory conduct. He asserts that military practitioners should try as hard as possible to conduct their operations in one of the existing ethical environments, because if we ‘insist on the rules we know, we know their value’.93 If, though, a military actor has no choice but to act within an ambiguous ‘grey area’ and engage an individual of uncertain status, Walzer essentially falls back onto the concept of ‘no moral pre-absolution’.94 Famously attached to his discussion of ‘Dirty Hands’, it is not that this ethical conclusion is disingenuous.95 It is in fact an immensely sophisticated response to the challenging ambiguity posed by complex contingencies. However, declaring that actions which fall in-between the two ethical environments must be assessed individually after the event is not an applicable guide to just military action. In fact, it represents the absence of guidance for conduct, by calling for accountability without suggesting a framework that could help minimize mistakes in the first place. ‘No pre-moral absolution’ thus represents a poor answer to the challenges of discrimination within the interim ethical environment.

Another answer to the problem of ambiguous status proposed by analysts has been the introduction of a ‘scalar’ form of discriminatory judgement. Such scholars suggest that an ideal way to deal with the growing complexity of combatant status is to move beyond a two-way (combat/non-combatant) ‘sortal’ form of discrimination into a more nuanced, multilayered, ‘scalar’ approach.96 This would have the added benefit of corresponding to the far more flexible Criminal Justice approach of ‘suspects’, as a scalar morality would be capable of appreciating the varied degrees of guilt that can characterize Albert Janin’s ‘civilian belligerent’ or Slim’s ‘dual use civilian’.97 This approach would seem to recommend creating a series of ‘interim statuses’ to handle the degrees of ambiguity present in complex contingencies.

However, once the clear two-way Principle of Discrimination is deviated from, the question immediately raised is how many statuses should be added to the new scalar conduct ethic? Most proponents suggest adding a single additional status, as a form of middle ground between the two clear distinctions of combatant and non-combatant, based around secondary criteria of guilt or threat.98 Yet some suggest far more, with an extreme example of scalar morality being Kellogg’s theory of ‘fractional immunity’, which proposes a completely fluid sliding scale of status based upon individual actions.99

This extreme case illustrates the overall problem with all of the scalar theories, namely, an unhelpful degree of complexity. Scalar formations of the discrimination principle may indeed provide coherent middle grounds for action by military practitioners, but they also require the average soldier to become hopelessly embroiled in calculations of innocence or guilt. Taking, for instance, the practice of house raids, the close proximity to the population and extreme negative result of a possible mis-engagement with a civilian is so high that asking a soldier to simultaneously make police style assessments of guilt would render them essentially powerless to act.100 More forms of status would seem to complicate rather than clarify moral decision-making, and thus is unhelpful. What is needed is a conduct ethic that offers stronger guidance than the ‘no moral pre-absolution’ of Walzer, but less stringent calculation requirements than a scalar form of discrimination.
Bearing these arguments in mind, a model that can be used to fulfil these criteria can be found in Pfaff’s work on the ‘New Demands on the Warrior Ethic’. In this study he engages with the problem of ‘suspects’ and ‘enemies’, and the ongoing battle to decide which model should be applied at any one time. His conclusion is that the reason striking the dividing line is so difficult is because the two forms of status in fact co-exist. ‘Suspects’ and ‘enemies’ do indeed represent different threats and should ideally be engaged with separate ethics, but during a ‘complex contingency’ the co-existence of the two forms of discrimination make clear distinctions all but impossible.

The ramifications of this co-existent understanding is that the discriminatory framework for conduct in the interim ethical environment must embrace the need to operate on the presumption that an individual may be either a ‘suspect’ or an ‘enemy’, but that the two may be also be indistinguishable. This means that COIN actors should accept the fact that what may appear to be an ‘enemy’ could in fact correspond to a ‘suspect’, and vice versa. If this is taken to be the case, the doctrine of restraint outlined above would demand that military actors must actively seek to limit the possibility of engaging the wrong target with the wrong means. Given that lethal means are irreversible, and that ‘suspects’ should not be killed based upon status alone, this demands that the military engages individuals within the interim ethical environment on the lowest possible threshold of force.

To enforce this lowest possible threshold of force, the interim conduct ethic must hybridize the requirement not to kill ‘suspects’ with the military actor’s obligation to end the insurgency. The most coherent way to do this would be to prohibit the military’s right to conduct a ‘status based engagement’ within the Internal War model, as it is impossible to be certain a target is an ‘enemy’ and not a ‘suspect’. To balance this obligation to restraint with military necessity, however, the prohibition on killing ‘suspects’ that underpins the Criminal Justice model should be tempered to allow the termination of targets if certain criteria are not met. These criteria could include defiance of clear commands or threatening behaviour, though the precise formulation would need to be decided by an individual deployment’s rules of engagement. What is important is that by removing the right to kill based upon the assertion that a target is an ‘enemy’ alone, this co-existent discriminatory model assures as high a degree of restraint as possible without precluding the military right to engage with lethal force altogether. This co-existent hybridization thus provides a form of the discrimination principle for the interim ethical environment that is less morally ambiguous, but also restrained so as to avoid possible ethical failings.

Proportionality in the Interim Conduct Ethic

With the overall doctrine of restraint and the acceptance that co-existent ethics should be taken as the basis of discrimination, the final issue to address is how to calculate the proportionate use of force that this model demands. The primary response by counter-insurgency commentators to the issue of proportionate deployment of force has been to highlight the need for a conduct ethic moderated by the intelligent
application of discretion. Simply put, if the proportionate level of force is difficult to ascertain, then what is required are military personnel who have the intellectual ability to rapidly decide the most appropriate military level of force and act accordingly. The ‘strategic corporal’ theory advanced by Krulak represents the typical case. In this theory, Krulak outlines the importance of strong leadership and the training of intelligent, capable officers to observe and dictate the proportionate level of force that is required for any given situation. General David Petraeus highlighted the same requirements, stating that COIN commanders should ‘do everything possible to train [officers] before deployment for the various situations they will face, especially for the most challenging and ambiguous ones’. By employing discretion COIN forces may identify as quickly as possible whether to employ a ‘maximum’ or ‘minimum’ force doctrine, and thus act proportionately.

Whilst discretion is clearly a useful method, the problem with this approach to proportionality is that the form this discretion should take is not always clear. Tomislav points out that general guidelines such as ‘minimize civilian casualties’ are useless as the basis of conduct ethics because they are ‘vague and unmeasurable’. Most discretion orientated frameworks, however, are guilty of precisely this vague and unmeasurable tendency. The US Counterinsurgency Field Manual demonstrates this trend, emphasizing the complexity of decision-making where the complex ‘environment frequently and rapidly shifts from warfighting to policing and back again’. Yet if one wishes to discern exactly how such calculations are to be made, it is not obvious. The terminology is vague, speaking of a commander having to ‘ascertain what has to be done’ and being adept at ‘moving rapidly between one and the other [kinetic/non-kinetic], depending on the circumstances’. How to define these circumstances is not obviously stated. A rudimentary attempt is provided by the ‘Lethal’ and ‘Non-lethal’ operational divide, but this is hopelessly muddled by the inclusion of a ‘Lethal and Non-lethal Mix’ sub-group. The manual is filled with assertions of discretionary protocol, but lacks practicable guidelines on how to structure this discretion, leading some to conclude that ‘very little progress has been made on turning the strategic corporal concept into a reality’.

The notion of discretion is certainly the most coherent concept for asserting the correct proportionate level of force during complex contingencies. What is less clear is how to make that proportionate calculation. What is needed is a framework for discretion that does more than merely assert the ideals of ‘minimum’ and ‘maximum’ force, and which instead offers conduct guidelines on how to reach the correct level when the ethical environment is morally ambiguous. Given the focus thus far on restraint and the need to exercise force at the least possible level to secure required objectives, the ideal way to mould this interim discretionary framework would seem to be a focus upon escalation as a criteria for proportionality. The best model for achieving this focus would seem to be the hybridization of police approaches to force with the military focus on the discretion of the ‘strategic corporal’. Such a hybridized model would provide a more in-depth set of guidelines for the role of force. To this end the policing concept of the ‘continuum of force’ shall now be proposed as a candidate for a hybridized proportionality model.
The Continuum of Force

The concept of the ‘continuum of force’ derives from models aimed at controlling the escalation of violence in conventional policing.\textsuperscript{116} The model ‘establishes an escalatory hierarchy’ by viewing the deployment of force in the context of a range of graduated responses, from lethal to non-lethal.\textsuperscript{117} This corresponds to the police priority to control, rather than tactically resolve, encounters with individuals.\textsuperscript{118} By breaking down the use of force into multiple levels, this model has an inherently proportionate character. The continuum of force approach thus represents a more nuanced take on the utilization of violence. The model contains four levels for graduated force, and can be seen in Figure 1.\textsuperscript{119}

By providing a set of escalatory principles for discretion the policing spectrum suggests an ideal conduct guideline for a counter-insurgency campaign carried out in the interim ethical environment. It matches the overarching doctrine of restraint because ‘the prescriptive nature of the continuum implies that ... [the] use of force is contingent upon the actions of the adversary’.\textsuperscript{120} Thus, the move from non-lethal to lethal force within this discretionary framework becomes responsive to the actions of the insurgent, ensuring that any escalation of violence is moderated by individual circumstances.\textsuperscript{121} Significantly, though, the role of lethal force is still present, meaning that the discretion of the military actor is not restrained to an impracticable degree. Most importantly, because lethal force is placed at the uppermost extremity of the continuum, it enforces the priority that military actors must have actively escalated through the three previous non-lethal conduct guidelines before a lethal force

\begin{figure}
\centering
\includegraphics[width=\textwidth]{continuum_of_force.png}
\caption{THE CONTINUUM OF FORCE ESCALATORY MODEL}
\end{figure}

level is reached. By hybridizing the escalatory ‘continuum of force’ model with the discretionary powers of the ‘strategic corporal’, proportionality in the interim ethical environment is ensured because the responsive nature of the model guarantees that discretionary decisions are contingent upon circumstances.

With this analysis of the principles of discrimination and proportionality complete, it is now possible to summarize the proposed characteristics of the interim conduct ethic:

1. The central priority for operating in the interim ethical environment is restraint, because only by implementing restraint can a military actor fulfil its obligation to decrease the likelihood of ethical failings that the principle of double-effect demands.
2. To ensure this, COIN forces should acknowledge that ‘suspects’ and ‘enemies’ co-exist in ‘complex contingencies’, and thus approach all possible targets with the least possible amount of force, to minimize the risk of ethical failings.
3. To better implement this doctrine of least possible force, proportional discretion should be framed in the model of the police ‘continuum of force’, so that the escalation of violence is contingent upon individual cases, with non-lethal levels also being navigated.

By hybridizing military imperatives with the police priority of restraint, these guidelines provide a less vague and more ethically coherent model for conduct ‘in the grey’. To summarize how the interim conduct ethic acts as a stop-gap model between the Internal War and Criminal Justice frameworks, the following updated table of ethical environments can now be drawn in Table 2.

### A Practical Case Study: The Role of PRTs and NLWs

With the form and theory of the interim ethical environment now clarified, it is necessary to ask, which particular activities does such a theory offer the most practical guidance? Two particular assets for contemporary counter-insurgency practitioners, Provincial Reconstruction Teams (PRTs) and Non-Lethal Weapons (NLWs), represent archetypal interim forms of military force. An assessment of each reveals the relevance and future potential for the thesis outlined in this paper.

First conceived in 2002 during US strategic planning under the banner of Operation Enduring Freedom, Provincial Reconstruction Teams have been applied widely by the International Security Assistance Forces in Afghanistan from 2003
onwards. Though exact structures can vary, a PRT will typically consist of 50–300 personnel, around 90 per cent of whom will be military, the remainder being civilian. This mix of civilian and military elements is the PRT concept’s strongest asset, as the tasks undertaken ideally have a development agenda at its core. Though roles differ, the broad remit of a PRT includes expanding government legitimacy, enhancing security and facilitating reconstruction.

Clearly such roles have an important counter-insurgency application, engaging with the fundamentals of improving the trust of the population and providing basic government services. Yet, simultaneously, the military capacity of the Provincial Reconstruction Teams concept allows such operations to be undertaken in unstable or violent regions. Indeed, ‘the fact that PRTs are military and thus able to function in an insecure environment is a key component of their value to the stabilisation process’. Though not without its critics, this crossover between civilian development and military capacity is clearly an archetypal example of a potentially effective role conducted within the interim ethical environment.

So how could the interim ethical thesis aid the ‘evolving concept’ of Provincial Reconstruction Teams conduct? Its most important contribution would be that it engages with the more controversial elements of PRT conduct in practice, namely that of force protection. Some commentators have damagingly claimed that the military minded tendency of such units to pursue force protection in an aggressive manner undermines the relevance of the approach. Kersti Larsdotter, for example, highlights the use of airpower when ambushed as rendering irrelevant the ‘soft’ approaches of PRTs. These criticisms arise because of some important unanswered questions about the role of PRTs, such as whether they should pursue attackers, and whether they represent a diplomatic or military tool.

Whilst force protection is obviously of fundamental importance, the interim ethical thesis would suggest that the robustness of response needed to see off an attack should be carefully restrained in practice. Some commentators have already suggested that British PRTs have displayed the most admirable form of the concept due to their ‘less threatening stance’. The interim ethical thesis would support this ‘less threatening’ or ‘light footprint’ assertion, by suggesting that engaging potential threats via the continuum of force model would maintain the civilian credibility needed for PRTs to have a positive psychological impact. The flexibility of the interim ethical thesis leaves the door open for robust force, but constrains it beneath the domestic policing imperatives, helping to acknowledge the civilian/military hybrid status of PRTs. In short, the PRT model contains tactical challenges to which the interim ethical environment has highly relevant input.

Another interesting contemporary conduct debate has revolved around non-lethal weapons. Some ethicists have attempted a blanket assertion of their illegitimacy, but the requirements of the interim ethical environment to embrace the domestic policing side of the continuum of force inevitably raises the possibility of their use, and given the co-existent discriminatory principle, non-lethal alternatives seem a positive ethical step. The most important contribution of the interim ethical thesis to this debate is the manner in which technological advancements can be placed into a framework for use that is ethically viable.
Two interesting examples are provided by McNab and Scott’s analysis of incidents of civilian casualties in Iraq, one at a roadblock checkpoint and another during a crowd control situation.\textsuperscript{134} Both of these circumstances are once again archetypal interim environment situations and the errors highlighted are typical examples of the challenging conduct situations this study has highlighted. Their study highlights two newly developed technologies, the ‘Portable Vehicle Arresting Barrier’ (PVAB) (a quick deploying a non-lethal device that can stop a moving vehicle dead in its tracks without destroying it) and the ‘Active Denial System’ (ADS),\textsuperscript{135} an area-effect device that directs high frequency electromagnetic radiation that creates an intense sensation of heat on the skin.\textsuperscript{136} McNab and Scott argue that these systems could provide a technical ‘fix’ to the problem of making cars stop at checkpoints and dispersing a crowd respectively.

What is important about such technologies is that any such ‘fix’, even non-lethal ones, require an ROE principle for their use. Here the interim ethic offers an important framework for the deployment of these new, non-lethal, technologies. In the case of the PVAB, the system’s deployment fits well into the continuum of force dynamic by offering armed forces a coercive step that lies between warning shots and lethal force, as well as a perceptive escalatory dynamic to suggest when its use is necessary.

Similarly, the Active Denial System, in offering a non-lethal step between requests of compliance and impeding a crowd’s progress, could be utilized in the continuum of force dynamic to assure ethical conduct. Both systems would thus assure restraint is duly applied without precluding military deployment altogether. What both systems illustrate is that technological developments can be integrated with the principles of restraint and escalation of the interim environment to overcome the ethical challenges of certain contemporary COIN roles.

A Critical Response

With the formation of the interim conduct ethic now complete, it is time to briefly discuss possible criticisms for this answer to the problem of complex contingencies. The first criticism might be that the high degree of specialist training required to lower the threshold of force and moderate military conduct along responsive, escalatory lines would fundamentally damage core military functions. Greener-Barcham supports this view by pointing out that whilst military forces may ‘respond to similar sounding requirements’ as the domestic police, ‘these are achieved by very different values and tasks’.\textsuperscript{137} Likewise, Egnell cautions that ‘simply focusing on low level combat training will leave soldiers unprepared for other important and inescapable tasks in contemporary operations’.\textsuperscript{138} Such arguments claim that to organize too much for specialist COIN roles along these lines would render the military dangerously unprepared for more robust combat roles. Such fears are legitimate and it is important to remember that ‘the learning capacity of soldiers is not unlimited’.\textsuperscript{139} Only so many tasks can be prepared for and war fighting must always be the underlying priority of military force.

However, all specialist roles in war require a degree of sacrifice by military forces. It is the armed forces’ responsibility as practitioners of legitimately sanctioned
violence to ensure that their use of force meets the requirements of their state.\textsuperscript{140} Thus, if current trends have meant that interventionist COIN warfare is being undertaken on a wider scale, the military must honour its responsibility to the state and prepare its forces as much as possible for this new and difficult role. Ethical requirements are an integral part of such preparation. Hence, the argument that adapting military means to the specialist requirements of the interim conduct ethic is militarily undesirable does not hold up under such scrutiny. It would seem fair to claim, as Egnell eventually concludes, that it is not asking too much for ‘a healthy balance to be struck’ in military training that addresses specialist COIN roles and more general war fighting tasks equally.\textsuperscript{141}

A more robust criticism is that, in practical terms, the degree of integration with police techniques that this model proposes is too unsuitable and dangerous for actual counter-insurgency operations to utilize. Such critics could claim that the doctrine of restraint places soldiers’ lives at excessive risk.\textsuperscript{142} It could also be argued that engaging insurgents at a non-lethal starting level ignores the fundamental dangers of such operations and requires an unrealistic degree of non-lethality in military action.\textsuperscript{143} Moreover, there is obvious room for concern over the ‘continuum of force’ model’s reliance on verbal warnings in security environments where the population and security forces speak different languages, and where cultural practices of domestic policing may differ fundamentally from standards normally found in advanced democratic states.\textsuperscript{144}

Such criticisms are far more problematic for this interim conduct model, and are not easily dismissed, as the model does indeed obligate counter-insurgency forces to undertake a far greater degree of risk than more aggressive, unrestrained, actions would allow. Nonetheless, in line with the ethical nature of these obligations, it can be argued that ‘this may be the short-term price to pay in order to gain the long-term benefit maintaining the moral high-ground brings’.\textsuperscript{145} Accepting greater risk in the interim in fact accelerates the move towards domestic peace, which obviously entails a far lower risk threshold for armed forces in the long run. The issue of the non-lethal starting level is once again fairly accurate, as it is not typical for military forces to be trained and capable of pursuing non-lethal conduct. However, the use of physical restraint and non-lethal weaponry such as Tasers is already widespread in Iraq and Afghanistan, and we have noted above that numerous new technologies are pushing the boundaries of non-lethal force into the military spectrum.\textsuperscript{146} This would seem to imply that the development of non-lethal methods for enforcing control as suggested by this model is simply an extension of existing military practices and Rules of Engagement.\textsuperscript{147} Such trends are ethically necessary, and should be enforced, which is precisely what this study is indicating.

As for the applicability of the ‘continuum of force’, it is important to remember that the desire is not that military forces actually become police forces.\textsuperscript{148} Rather, this nuanced approach to force escalation is designed to provide a guideline along domestic policing lines to ensure moral conduct. Language differences and disparities in practices between the military employment of the continuum of force and domestic policing in the host nation simply serve to highlight the need to enforce restraint at
the tactical level. The ethical failings that would result from less nuanced guidelines have empirically been far more extreme in contemporary COIN, which is precisely what this model aims to address.\(^{149}\) It is thus through the glaring necessity for coherent moral restrictions on force that criticisms of the proposed interim conduct ethic can be disregarded. Armed forces need a workable framework, but such changes cannot be achieved without a degree of sacrifice. Training and doctrine will need to radically alter to achieve this aim, but this is the military’s responsibility as practitioners of violence, so the practical difficulties do not diminish the necessity. With this analysis now complete, it is time to conclude and reflect upon the suggested interim conduct ethic, and outline further points for study in this complex intellectual arena.

** Conclusion **

This study has outlined extensively the differing ethical requirements and obligations of the Internal War and Criminal Justice ethical environments. Through an analysis of contemporary counter-insurgency in Iraq and Afghanistan, it has been shown that what Pfaff characterizes as ‘complex contingencies’ in fact amounts to an interim ethical environment that straddles the ‘grey area’ between these two ideal models. Issues of combatant status and the growing complexity of force deployment have altered traditional approaches to the principles of discrimination and proportionality, and led to ethically challenging combat situations. To provide a stronger set of ethical guidelines for such situations, this study has suggested that an interim conduct ethic should be observed. This model should be based upon:

1. the overarching principle of restraint;
2. a co-existent discriminatory framework; and
3. the use of proportional discretion through a ‘continuum of force’ escalatory dynamic.

The requirements and obligations laid out by these guidelines place a far higher degree of restraint upon the use of force in contemporary counter-insurgency, and also demand that military forces accept a heightened element of risk to themselves during operations. The appropriate double-effect calculation should be that applying excessive restraint is less morally questionable than applying excessive force. Abiding by these principles, military force can be restrained and moderated, assuring just conduct in morally ambiguous circumstances. These conclusions thus represent an ethically necessary and morally coherent response to the problem of ‘complex contingencies’.

This analysis leaves a great deal of scope for further research because it represents just the beginning of a large and complex area of study. The application of these guidelines needs to be discussed because it is important to note that the exact form that the interim conduct ethic should take in military practice may vary greatly from the assertive guidelines of this study. It is always the task of military practitioners to interpret exactly how moral frameworks should be translated into rules.
of engagement and doctrine, and in both these areas the ramifications of the interim ethical environment requires exploration. There is also an extensive amount of police protocol and procedure to be examined to complement the hybridization of the tactical ideas suggested. This could include examining further the role of non-lethal weaponry in military arsenals in order to flesh out the capabilities of the ‘continuum of force’, or the exact procedures for verbally engaging ‘suspects’ across language barriers. Perhaps, most importantly, studies into the role of military education in the interim ethical environment are required because the need to make the ‘strategic corporal’ a reality is a pressing concern if this interim conduct ethic is to ever be enforced.

These tasks are by no means easy, but then neither are the military roles being undertaken on a daily basis by security forces operating ‘in the grey’. Arguably, such forces are owed a more viable and flexible model for conduct in such areas, which goes beyond existing simple two-way distinctions. The ethical environments of contemporary counter-insurgency are immensely complicated. Modern ethicists certainly need to engage with this complexity if the Just War tradition is to maintain relevance. Fundamentally, though, this is a vital current policy concern. By combining the military imperative to resolve incidents through force with the policing priority of restraint this analysis has argued that it is possible to articulate a hybrid model for COIN conduct which offers a clearer, more ethically coherent construct for war in the grey.

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NOTES

8. For a discussion of the intellectual utility of Vitoria and Grotius’ Invincible Ignorance scenario, see *ibid.*, p. 20.
20. See *ibid.*, ‘Ethical environment’ is referenced in passing by Pfaff in relation to the idea of ‘obligations and requirements’.
26. Greener-Barcham ‘Crossing the Green or Blue Line?’ (note 23), p. 94.
28. Pfaff, *Ethics in Complex Contingencies* (note 19). ‘Appropriate degree’ is generally taken to mean when actions are authorized under military authority with a clearly defined military objective.
29. Greener-Barcham, ‘Crossing the Green or Blue Line?’ (note 23), p. 94.
30. Edward A. Malloy, *The Ethics of Law Enforcement and Criminal Punishment* (Washington, DC: University Press of America, 1982), p. 19. ‘Significant values’ may, for example, be taken to be the right to live, meaning that lethal force is permissible to prevent a murder.
35. The point of transition between the two frameworks is explicitly identified in Crelinsten, ‘Analysing Terrorism and Counter-terrorism’ (note 6), p. 84.
36. The three phases are labelled via the medical analogy of treatment for a wound, it progresses from ‘Stop the Bleeding’, through ‘In-Patient Care’ and finally to ‘Out-Patient’. *Counterinsurgency Field Manual* (note 2), pp. 153–4.
38. This statement appears in the final draft (16 June 2006) version of FM3-24, 7-25, 231 which does not appear in the 15 December version of FM3-24 or University of Chicago edition.
39. See Wilkinson, *Terrorism and the Liberal State* (note 17), p. 41 for the question of when to take soldiers off the streets.


43. Greener-Barcham, ‘Crossing the Green or Blue Line?’ (note 23), pp. 94–6.


45. Greener-Barcham, ‘Crossing the Green or Blue Line?’ (note 23), p. 95.


51. See Pfaff, *Ethics in Complex Contingencies* (note 19) and Holliday, ‘Ethics of Intervention’ (note 41), pp. 130.


53. Ibid., p. 39.


59. Greener-Barcham, ‘Crossing the Green or Blue Line?’ (note 23), p. 96.


69. For the moral necessity of preparing troops for ethically ambiguous tasks, see Tomislav, ‘Making Moral Targeting Decisions in War’ (note 16), pp. 26–8.

70. Pfaff, *Ethics in Complex Contingencies* (note 19) illustrates the chain of thought informing this process.

71. See Paul Dixon, ‘“Hearts and Minds”? British Counter-Insurgency from Malaya to Iraq’, *Journal of Strategic Studies*, Vol. 32, No. 3 (2009), p. 375 and Petraeus, ‘Learning Counterinsurgency’ (note 62) for evidence that the kind of considerations outlined in this article have had top-level attention.
72. See Norton-Taylor and Borger, ‘Nato Tightens Rules of Engagement’ (note 54) and Dixon ‘“Hearts and Minds”?’ (note 71), p. 375.
73. The work of the *Journal of Military Ethics* stands as a notable champion of clear ethical thought.
79. For an example see Pfaff, *Ethics in Complex Contingencies* (note 19), who uses the case of an Iraqi man shot in his home by US forces to illustrate the moral necessity of restraint at all times.
94. Refusing to condemn the example of a cross-border airstrike against insurgents fleeing Saudi Arabia into Yemen, he concludes that such actors must be held accountable after the point of contact for actions which seem to have crossed an ethical divide. Walzer, ‘On Fighting Terrorism Justly’ (note 46), p. 484.
102. *Ibid.* Pfaff in fact uses the title ‘criminals’ rather than ‘suspects’, but the theoretical distinction is essentially the same.
103. *Ibid.*, Table 1.
106. It should also be noted that this co-existent model also allows the military forces to act in self-defence without prior warning. See *ibid.*, p. 2 for the argument that the right to self-defence has a ‘baseline’
which cannot be lowered, thus demanding that military actors are permitted to kill when their lives are threatened regardless of the ethical environment.

108. Ibid. ‘Character’ is also prioritized: a constant reminder that US Marines view themselves a cultural as well as a military entity.
112. Ibid., p. 242.
119. Figure 3 in Salt and Smith, ‘Reconciling Policing and Military Objectives’ (note 25), p. 234.
120. Ibid., p. 235.
125. Ibid., p. 441.
126. See Jakobsen, ‘PRT’s in Afghanistan’ (note 123), pp. 29–36.
128. Bollen et al., ‘Are PRTs Supposed to Compete with Terrorists?’ (note 122), p. 446.
129. For a critical study, see Kersti Larsdotter, ‘Exploring the Utility of Armed Force in Peace Operations: German and British Approaches in Northern Afghanistan’, Small Wars and Insurgencies, Vol. 19, No. 3 (2008), pp. 363–7. See also Bollen et al., ‘Are PRTs Supposed to Compete with Terrorists?’ (note 122) for a generally negative assessment of this civilian/military hybrid.
130. Bollen et al., ‘Are PRTs Supposed to Compete with Terrorists?’ (note 122), p. 446.
132. Ibid., pp. 20–3.
133. See, for instance, Mayer, ‘Nonlethal Weapons and Noncombatant Immunity’ (note 90).
136. These technologies are in the development/testing phase, and the ADS in particular has some controversial operational capabilities (the ability to burn skin if over-used) that may preclude its legal use, but as a theoretical concept it is interesting for this study.
139. Ibid., p. 414.
145. Pfaff, Ethics in Complex Contingencies (note 19).
149. Pfaff, Ethics in Complex Contingencies (note 19), Petraeus ‘Learning Counterinsurgency’ (note 62), Perabo, ‘The Proportionate Treatment of Enemy Subjects’ (note 24), and Mayer, ‘Nonlethal Weapons and Noncombatant Immunity’ (note 90) all enforce the fact that the need for stronger moral guidelines legitimizes extensive tactical adaptations.