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The right to life and the Martens Clause

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Summary: I will offer an analysis of the right to life and the Martens Clause, as relevant to the LAWS debate. First, the right to life can be more accurately expressed as the right to human dignity. Critics of LAWS argue that dignity requires accountability, remedy, and respect. To clarify the concept, I will offer two legal cases from Germany, a nation with one of the most developed and thoughtful conceptions of human dignity in law. The Martens Clause also expands our understanding of dignity to include a prohibition on weapons that are *mala in se* or evil in themselves. In the end, these concepts are reasonable but need further elaboration, if they are to support something as serious as banning an important dual-use technology.

Thank you, Mr. Chairman, for inviting me to speak on the right to life and the Martens Clause. Some experts have argued that a prohibition on lethal autonomous weapons systems—or LAWS—can be supported by those principles and others.

The Martens Clause, of course, requires that armed conflicts proceed under “the laws of humanity and the requirements of the public conscience.” It’s an important principle that

dates back to the 1899 Hague Convention and is still invoked in modern debates, such as on nuclear weapons.

In the following, I will offer an analysis of these principles here. I should add that these remarks are mine alone and do not necessarily represent UNIDIR's position.

1. Right to life can be reframed as human dignity

What's objectionable to many about LAWS is that, even if the weapons aim only at lawful targets, they seem to violate a basic right to life—that is, a right not to be killed arbitrarily, unaccountably, or otherwise inhumanely.

This claim may be puzzling at first, since killing is so commonplace and legally permitted in war. To understand it, I want to suggest that the right to life can be more accurately expressed as the right to human dignity. Human dignity is arguably more basic than a right to life, which is more easily forfeited or trumped. For instance, even lawful executions should be humane in civilized society.

Therefore, I will focus on dignity as a way to understand the right to life in this debate, though the two are more distinct in other contexts. Indeed, critics of LAWS also argue that automated killing violates a right to human dignity.

So, what is human dignity? Unfortunately, the concept is vague, since there's not much consensus on an answer. We should note that, in many cases, a lack of human dignity does not make something illegal. People do undignified and shameful things all the time legally, such as lying and adultery. Sometimes, we trade dignity for security, such as allowing airport personnel to search our bodies, as if we were criminal suspects.

As it relates to LAWS specifically, human dignity is said to be about accountability, remedy, and respect. And these are capabilities that mere machines don't seem to have, as critics point out.

These inabilities are related to a lack of meaningful human control. Without that control, it's unclear who or what is responsible for wrongful targeting and errors. Without being able to identify responsible parties, there's no one to demand remedy from or compensation for wrongful injury or death. And making decisions to kill another human being—one of the most profoundly serious decisions we can ever make—demands respect in the form of reflection and meaning that machines cannot give.

But while these claims seem reasonable, they need more explanation. For instance, could the accountability problem be solved by just stipulating or assigning a responsible party? This may ultimately be unfair to that party and give rise to questions about justice; but

accountability at least would be solved, if that's necessary for dignity. With a responsible party assigned, remedy is now possible.

The harder requirement for LAWS to meet is to respect human life, since computers are incapable of understanding or emotions; and that won't change in the foreseeable future. But is respect a real requirement, or is it just a romantic notion that doesn't really exist in modern conflicts?

After all, we don't demand that soldiers consider the gravity of their action each time they pull a trigger. Very few are thinking about the moral worth of their adversaries as human individuals with hopes, dreams, and fears of their own. At most, they consider whether the target is legal or not, if even that. Many soldiers are openly racist and nationalistic, acting out of hate, anger, and other degrading motivations.

Of course, the difference with LAWS is that robots can never be motivated by the right reasons—or wrong reasons or any reasons at all—whereas that possibility at least exists with human soldiers, even if they are not as virtuous as they ought to be. If LAWS lack the capacity for moral respect, it makes little sense to hold them to a human standard based on that capacity.

As an analogy, no one demands that a bullet or guided missile must be considerate and respectful before it agrees to be fired or strikes a target; yet, they are legal weapons in war. We also don't require this of dogs and other animals in war, which have consciousness and come closer to human-like cognition than machines can. This is because those weapons lack the capacity for moral reflection; therefore, we don't insist on it.

Further, if moral reflection is truly required, it could perhaps be located in the design of these weapons, which are programmed and deployed by humans. The responsibility to make thoughtful and ethical decisions arguably falls on their shoulders, as well as the political leaders who authorize military engagement. Of course, this is easier said than put in practice and enforced.

2. Important cases about the legal status of human dignity

To help clarify the notion of human dignity, Germany's Constitution—or Basic Law—is especially illuminating. Germany has one of the most developed and thoughtful legal conceptions of human dignity. The very first article of its Constitution establishes that human dignity is inviolable, even more important than the right to life, which is established in the second article and can be forfeited under some conditions.

I want to offer two specific legal cases to show that it is not absurd to think that dignity and liberty can trump security:

The first case started in 2005, when Germany's Air-Transport Security Act authorized its military to shoot down commercial aircraft that's suspected of being hijacked by terrorists. If an airplane appeared to be on a collision-course with a building, then shooting down the plane and sacrificing the passengers seems to be the lesser evil than allowing the flight to continue and kill thousands of others on the ground. But in 2006, the German courts struck down this law as unconstitutional.

There were many reasons for this decision. One of the most important was that the law violated Article 1 of the nation's constitution: to respect human dignity. The law would have treated people as objects, as if they were part of the aircraft itself and not individuals who each deserve respect and consideration. The law also would have treated people as numbers or statistics, pre-determining their deaths for the possibility of saving a greater number of unidentified lives. And there's something wrong—something disrespectful and dehumanizing—with doing ethics by numbers alone.

The second case started in 1999, when a new anti-crime law allowed broad eavesdropping or acoustic surveillance inside a suspect's home. But in 2004, German federal courts struck down the law, also on the basis that it violated Article 1 of the Constitution about human dignity—that people should be at liberty to have free and open conversations inside their own home, without fear of surveillance.

This idea is reinforced by Article 13 of their Constitution that specifically protects the sanctity of a person's home. Even with probable cause and a court order, German police surveillance now must follow much stricter rules that safeguard privacy as a dimension of human dignity.

Again, the point is that it's not absurd that dignity should be more important than security, and other legal cases exist to support this point. Security without dignity misunderstands the purpose of civil society and the state. But the question today is: do LAWS trigger any of the considerations cited in those legal cases?

The parallels might not be obvious, since LAWS aren't about sacrificing innocent people (as in the case of a hijacked airplane) or about violating protected spaces (as in the case of spying inside a private home).

But similar arguments perhaps could be made that LAWS don't recognize people as people, but merely as objects. To them, some objects are coded as legal targets, and other objects are not. But even that account isn't completely accurate; it may be worse. Computers don't really recognize objects as we do, but all they "understand" are numbers—bits of information in the form of 1s and 0s. And Germany already prohibits treating people as numbers.

Still, a prior question remains: should we be applying human standards to LAWS that don't have the human capacity for moral concern in the first place? If we could establish a

framework for clear accountability, would that help to safeguard human dignity? All these questions require more study.

3. The Martens Clause expands our understanding of dignity

Next, what about the Martens Clause? Unfortunately again, it is also very abstract. The “laws of humanity and the requirements of the public conscience” appear more elusive than the concept of human dignity, though both seem to be related. So the preceding discussion applies equally well to the Martens Clause.

In its broadness, the Martens Clause can expand our understanding of human dignity. It raises complementary concepts, such as prohibiting weapons that are *mala in se* or evil in themselves, such as using poison, exploding bullets, blinding lasers, nuclear weapons, and other such instruments in war.

Critics thus argue that LAWS are *mala in se*. Certainly, it would seem creepy to be hunted by a robot, but the charge that LAWS are evil requires more than an uneasy feeling or quick gestures at human dignity.

What exactly is so evil or undignified about a machine’s automated decision to shoot someone—a machine that could more cleanly hit its target than a human shooter—when it is not undignified to be shot up by another human in a messy way that blows up parts of your body, head, and face? In locating any evil in LAWS, we should be careful to not personify or anthropomorphize them, which risks slipping in a human standard that should not apply to mere tools.

However, a novel argument against LAWS is perhaps that they could be too accurate in their aim, and this can make them *mala in se*. They could more precisely inflict mortal wounds, causing field and hospital mortality to exceed humanitarian guidelines previously established. This is related to the International Committee of the Red Cross’s study on superfluous injury or unnecessary suffering (SIrUS Project).

Further, if wounding a combatant is better than killing him, do LAWS need to be lethal at all, given that they are not alive and don’t have a moral imperative to protect themselves? It may be superfluous and unnecessary that they shoot to kill. More work is needed to develop these arguments properly.

In its broadness, the Martens Clause is also more susceptible to subjective judgment, because different individuals and cultures can have different moral intuitions. One way to take the temperature of the collective public conscience is to simply conduct a survey of public attitudes about a particular issue, such as nuclear weapons or LAWS.

But we need to be careful again, since public attitudes may be uncritical, uninformed, or simply unethical, such as supporting racist and sexist policies. Doing ethics by survey alone seems to be the same mistake as doing ethics by numbers alone. Nonetheless, surveys do provide important data-points in this conversation.

4. Conclusion

The right to life, the right to human dignity, and the Martens Clause are all related. They need to be sharpened, if they are to provide practical guidance. Otherwise, appeals to those principles merely collapse into a “yuck” factor—vague intuitions against something, without much rationale support. And the “yuck” factor is often on the wrong side of history, such as opposition to organ transplants and blood transfusions, as well as ignorant prejudice.

We also need to think about broader implications of invoking those principles here. The debate on LAWS can implicate cyberweapons which also lack meaningful human control, however that’s defined. And there has been nearly no discussion about this link, even though cyberweapons more clearly elude human control: they often attack autonomously, proliferate indiscriminately, can result in physical harm, and cannot be stopped.

Our judgments here may have a spillover effect on civilian society and industry. For instance, autonomous cars are coming to our roads soon, and they may need to make sacrifice decisions—or “crash optimization” decisions—to minimize overall harm. They may be programmed to judge that crashing into object x (such as one person) is better than crashing into object y (such as five other persons). On some accounts, robot cars that can make potentially lethal decisions violate a right to life and human dignity.

I agree that war is terrible, but the grounds for weapons prohibitions must be more than that a weapon is terrible—*they all are*, because war is terrible in the first place. But some weapons are more terrible than others, and we can articulate that difference.

For example, anti-personnel mines are indiscriminate and kill or maim lots of children. And nuclear weapons are not only indiscriminate but also kill in horrific ways. Can we clearly identify the inhumanity of LAWS, as we have for other prohibited weapons?

Fears of a dystopian future could be a legitimate reason for a ban, if those fears can be articulated and defended sufficiently. To fully evaluate whether or not a ban on LAWS is defensible, we need to better clarify the notions of human dignity and the Martens Clause, as well as related concepts of meaningful human control and autonomy.

These concerns are a different kind than technology-based objections to LAWS. Technology limitations are possibly solvable over time. But if LAWS are truly an assault on human dignity

or the laws of humanity, that's a much more persistent and principled challenge—a deeply philosophical one—that will stay with us over time.

So it's important that we press harder on those notions to see if they are truly strong enough to underwrite a prohibition or a moratorium. Beyond this, there are still a wide range of possible abuses to safeguard against, as discussed by others. What's at stake is more than just a new category of weapons; autonomous systems are also an important technology with civilian potential and even humanitarian potential in war.

Thank you.

Speaker's biography

Dr. Patrick Lin is the director of the Ethics + Emerging Sciences Group at California Polytechnic State University, San Luis Obispo, where he is an associate philosophy professor. He is also affiliated with Stanford Law School (Center for Internet and Society), University of Notre Dame (Emerging Technologies of National Security and Intelligence), New America Foundation, and Australia's Centre for Applied Philosophy and Public Ethics. Previously, he held academic appointments at Stanford's School of Engineering, US Naval Academy, and Dartmouth College. Dr. Lin is the lead editor of *Robot Ethics* (MIT Press, 2012) and well published in the ethics of emerging technologies—including robotics, cybersecurity, AI, human enhancements, nanotechnology, and more—especially their national security implications. On AI-related issues, he has provided briefings and counsel to the US Dept. of Defense, CIA, UNIDIR, International Committee of the Red Cross, National Research Council, Google, and many other organizations. He earned his BA in philosophy from UC Berkeley and PhD from UC Santa Barbara.

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