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Cassandra Burke Robertson

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ORGANIZATIONAL MANAGEMENT OF CONFLICTING PROFESSIONAL IDENTITIES

*Cassandra Burke Robertson**

In recent years, professionals in the military have suffered criticism for their failure to counter military excess—especially in the area of torture and maltreatment of detainees. Much of the criticism leveled against such professionals has assumed that they were bad actors who were making a conscious choice to avoid the strictures of their code of ethics. This Article counters that narrative by applying identity theory to offer a more situation-ist explanation. It argues that some of these professional failures arise from the cognitive incentives faced by individuals in an organization that rewards organizational deference over independent professional advice. Medical, legal, and other professionals in large organizations must deal with two competing identities—one tied to their membership in a profession, and one tied to their role in supporting the organizational mission. Identity theory predicts that when both identities are activated, individuals are more likely to act in accordance with the more salient identity. The Article recommends that military leaders and other organizational managers create formal mechanisms to recognize and reward professional competence even when professional responsibilities diverge from organizational expediency. Such policies may heighten the salience of the professional identity, thereby reducing the risk that individuals will subordinate their professional responsibilities in favor of deference to organizational aims.

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* Associate Professor, Case Western Reserve University School of Law. Thanks to Peter J. Burke, Tiffani N. Darden, Jacqueline D. Lipton, Laura E. McNally, Thomas Robertson, and Jan E. Stets for valuable input and comments on earlier drafts of this Article. Portions of the Article are derived my earlier work, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1 (2009).

I. INTRODUCTION

In recent years, the United States has called on the professional expertise of psychologists, doctors, lawyers, and other professionals to assist in military operations. In a number of cases, however, a troubling paradox emerged: just when the nation most needed to draw on these professionals' specialized expertise to limit or counterbalance military excess, a significant number of these professionals failed to act in accordance with their professional code of conduct. Indeed, rather than counterbalancing military excess, some of these professionals enhanced and enabled such excesses as part of the so-called war on terror.¹

Critics of the professionals' conduct often attribute their acts to venality, naked self-interest, and pressure from outside sources,² while supporters of the conduct may attribute those same acts to a rational decision-making process that properly subordinates professional codes to more pressing security needs.³ Both of these explanations, however, rely on an assumption that professionals involved in these situations made a conscious decision to put expedience ahead of professional conduct, whether for virtuous or venal reasons.⁴ In a number of cases, however, this assumption may not bear out.

¹ See Jonathan H. Marks, *Doctors As Pawns? Law And Medical Ethics At Guantánamo Bay*, 37 SETON HALL L. REV. 711, 729 (2007) (acknowledging "revelations of health professionals' complicity in detainee abuse"); see also HAROLD H. BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR* 237 (2009) (explaining how the attorneys in the Office of Legal Counsel within the Department of Justice wrote an opinion about interrogation practices to navigate around legal obstacles which it may not have supported); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 81 (2008) ("Both Yoo's memo on permissible interrogation techniques and Goldsmith's Article 49 memo failed to identify or analyze the possibility that interrogation techniques identified as legal would expand into clearly illegal conduct.").

² See, e.g., BRUFF, *supra* note 1, at 239 (arguing that lawyers gave bad advice on interrogation as a result of "great pressure to approve practices already in use and to produce intelligence no matter what the cost."); Professor Donald Langevoort coined the term "venality hypothesis" to describe this perspective, see Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 77-78 (1993) ("To pose the question of attorney motivation is to invite a prompt answer from many people: greed and moral corruption, of course. Lawyers know of their clients' misdeeds, or at best deliberately close their eyes to the evidence, simply to preserve their wealth, status and power.").

³ See, e.g., JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* viii-ix. (2006) (arguing that withdrawal of the infamous torture memo "harmed our ability to prevent future al Qaeda attacks by forcing our agents in the field to operate in a vacuum of generalizations").

⁴ See, e.g., Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 271 (2006) ("Much of this article has proceeded from the presumption that an attorney is capable of recognizing her own moral perspective as it bears on her professional decision-making.").

This Article suggests an alternative explanation—one of situationism rather than dispositionism,⁵ arising from the cognitive incentives faced by competing professional identities in an organization that rewards organizational deference over independent professional advice. This Article argues that professionals involved in the war on terror and its excesses may not have perceived—and may still not perceive—any contradiction between their actions and their professional code of conduct. Professionals asked to provide their expertise to the military were playing two roles; in one role, they were responsible for providing objective legal, medical, or psychological services, and in the other role they were asked to contribute to the success of the military endeavor. Reconciling the two roles is not always easy.

From an outsider's perspective, these roles may at times appear to be in conflict and require the individual to make a choice about which role to serve at a particular time. This conflict may not be apparent to those on the inside, however. Instead, an individual may be significantly invested in the success of both roles, and may have internalized professional identities related both to military success and professional service. Because these dual professionals' sense of self-identity is linked with success in both spheres, they may be unconsciously motivated to try to reconcile the two even in situations where a less invested outsider would see only conflict. Moreover, these individuals may be cognitively motivated to emphasize the role in which their efforts obtain immediate positive feedback—or, in other words, to emphasize their organizational identity over their professional identity.

This Article applies identity theory to help predict when such situations are likely to arise. Awareness of the social and psychological processes at work can help organizational managers understand how best to avoid the risks arising from the presence of conflicting professional identities. Similarly, an awareness of the situational factors influencing behavior can help managers shape the situational setting in ways that encourage activation of the professional identity (thus encouraging independent advice and counsel) over the organizational identity, which is more likely to be deferential to existing practices.

II. IDENTITY THEORY

Identity theory examines the relationship of the individual to society.⁶ It asserts that individuals define themselves in part through the groups they interact with in society, the roles they take on, and the persons they

⁵ See, e.g., Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior are Shaping Legal Policy*, 57 EMORY L.J. 311 (2008).

⁶ See PETER J. BURKE & JAN E. STETS, *IDENTITY THEORY* 6 (2009); Sheldon Stryker & Peter J. Burke, *The Past, Present, and Future of Identity Theory*, 63 SOC. PSYCHOL. Q. 284, 284 n.2 (2000).

claim to be—for example, a person may be, at the same time, “a spouse, a parent, a teacher, a Southerner, a member of the middle class, and a leader.”⁷ Although individuals will have different ideas about what it means to be “middle class” or “a parent,” each of these terms still has certain meanings and expectations that are shared within the larger culture.⁸ When people internalize those cultural meanings and expectations, these roles and group memberships are termed “identities,” and become “a set of standards that guide behavior.”⁹

Everybody has multiple identities, but not all are actively guiding behavior at any one time. Identity theory posits that the identities fit together in a hierarchy of “salience,” which is defined as the likelihood of a particular identity’s activation.¹⁰ Thus, “the higher the salience of an identity relative to other identities incorporated in to the self, the greater the proba-

⁷ Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 13 (2009); see, e.g., Matthew O. Hunt, *Identities and Inequalities: Exploring Links Between Self and Stratification Processes*, in ADVANCES IN IDENTITY THEORY AND RESEARCH 76–77 (2003).

⁸ Robertson, *supra* note 7, at 13. Professor David Wilkins has described the formation of a “lawyer” identity that has both social meanings and internalized meanings:

[T]o be a lawyer in the United States is to become a certain kind of person—one who sees the world and acts according to normative standards that are distinct from those that apply to ordinary citizens. Through a complex system of self-selection, professional education, collegial socialization, and the threat of professional discipline, lawyers are expected to develop and internalize a distinctive professional identity based on the unique norms and practices of their profession. This “role-differentiated morality”—as both supporters and critics of this standard view of lawyering refer to it—is a bedrock principle for all professions but particularly for lawyers.

David B. Wilkins, *The New Social Engineers In The Age of Obama: Black Corporate Lawyers and the Making of the First Black President*, 53 HOW. L.J. 557, 594 (2010); see also Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578 (1993) (“[W]e are reminded at almost every turn of the extent to which our identities are social constructions. Indeed, our psyches can be viewed as arenas of contention among competing institutions for primacy in forming a particular conception of the self.”); Lynn Mather, *Presidential Address: Reflections on the Reach of Law (and Society) Post 9/11: An American Superhero?*, 37 LAW & SOC’Y REV. 263, 276–277 (describing the cultural meanings associated with the role of “lawyer” at different times: “Law works through its cultural practices and images, as well as through its institutional forms and social processes The image of Perry Mason has given way to one of an attorney general filing suit on behalf of an entire state or a wealthy plaintiff lawyer filing a class action . . .”).

⁹ Jan E. Stets and Peter J. Burke, *Identity Theory and Social Identity Theory*, 63 SOCIAL PSYCHOLOGY QUARTERLY 224, 225 (2000) (“In identity theory, the core of an identity is the categorization of the self as an occupant of a role and the incorporation, into the self, of the meanings and expectations associated with that role and its performance.”); see also BURKE & STETS, *supra* note 6, at 32.

¹⁰ *Id.* at 229–30.

bility of behavioral choices in accord with the expectations attached to that identity.”¹¹

Identity formation and salience is influenced by individuals’ relationships with other people. Identity theory uses the term “commitment” to describe “the degree to which persons’ relationships to others in their networks depend on possessing a particular identity and role,” and a higher commitment to an identity increases its salience.¹² Thus, “a person with close family, friends, or other significant relationships in a shared religion is likely to have a more salient religious identity than a person with fewer ties.”¹³ Salience, in turn, predicts behavior—so, a person with a more salient religious identity is likely to spend more time involved in religious activities.¹⁴

Commitment and salience thus reinforce each other. A person with strongly religious friends and family has a more salient religious identity, as it is reinforced through commitment to those personal connections. The salience of the religious identity causes the person to spend more time on religious activities—where the person then develops even more social and personal connections with others similarly inclined, thus reinforcing commitment.

These reinforcements are linked through a process termed “self-verification.”¹⁵ Self-verification helps individuals maintain a stable set of identities.¹⁶ Individuals compare their own self-perceptions, or “identity standards,” to the evaluations of themselves that are made by others. They see themselves reflected in the eyes of others, and they compare this reflected self-assessment to their own ideas of who they are. When the reflected feedback matches their own identity standards, they have obtained “self-verification” and they experience positive emotions.¹⁷ When the reflected feedback does not match their identity standards, negative emotions result.¹⁸

These positive and negative emotions are experienced annually among first-year law students, as law students with a strong “student identity” obtain their first law-school grades.¹⁹ Most law students have achieved strong academic success in the past, and have developed a strong identity tied to academic success. When some law students obtain lower grades than

¹¹ Robertson, *supra* note 7, at 13 (quoting Stryker & Burke, *supra* note 6, at 286).

¹² Stryker & Burke, *supra* note 6, at 286.

¹³ Robertson, *supra* note 7, at 13 (citing Stryker & Burke, *supra* note 6, at 286).

¹⁴ *Id.*

¹⁵ Stets & Burke, *supra* note 9 at 232.

¹⁶ *Id.*; see also Robertson, *supra* note 7, at 16.

¹⁷ Stryker & Burke, *supra* note 6, at 287.

¹⁸ *Id.*

¹⁹ Robertson, *supra* note 7, at 17.

they are used to, their emotional distress results not just from the lower instrumental utility of the grades themselves; instead, it arises from the disconnect between identity and reflected assessment. Thus, when a self-identified “A-level student” receives a B on an exam, the student may experience anger, depression, and general distress.²⁰

When self-verification fails, individuals will try to bridge the gap between their situational perception and their identity standard.²¹ They may do so by changing the situational assessment, such as by “modifying study habits in an effort to improve grades in the future,” thus attempting to bring their external assessment in line with their internal self-perception.²² Alternatively, they may bridge the gap by focusing on different aspects of the identity to satisfy the assessment; that is, “seeking and creating new situations in which perceived self-relevant meanings match those of the identity standard.”²³ Thus, a student disappointed with his or her grades may “redefin[e] academic success to include being at a certain class rank, rather than defining success by letter grades alone,” or may “identify . . . a particular sphere of success, such as moot court or other academic activities.”²⁴

The reconciliation of identity and reflected assessment can occur both consciously and unconsciously. Researchers distinguish between strategies that are “overt/behavioral” and those that are “covert/cognitive.”²⁵ Overt strategies are those that individuals consciously undertake—for example, an attorney with a strong “conservative” identity may choose to attend Federalist Society meetings, or a doctor with a strong “service” identity may choose to volunteer with an organization such as Doctors Without Borders. In both cases, the individuals are intentionally associating with larger groups that reflect and share the individual’s identity, thus increasing the opportunities for self-verification.

Covert strategies, however, operate at an unconscious level. In order to avoid the emotional distress that comes from a lack of self-verification, the individual may engage in selective attention (“self-verifying information is given attention and processed, and information that is not self-confirming is ignored”) and selective interpretation (“endorsing feedback that fits self-views and denying feedback that does not fit self-views”).²⁶ In cases when “self-discrepant feedback is unavoidable,” re-

²⁰ Stryker & Burke, *supra* note 6, at 288.

²¹ Robertson, *supra* note 7, at 17 (citing Stryker & Burke, *supra* note 6, at 288).

²² Robertson, *supra* note 7, at 17.

²³ Stryker & Burke, *supra* note 6, at 288.

²⁴ Robertson, *supra* note 7, at 17 (citing Stryker & Burke, *supra* note 6, at 288).

²⁵ Jan E. Stets & Alicia D. Cast, *Resources and Identity Verification from an Identity Theory Perspective*, 50 SOC. PERSP. 517, 522 (2007).

²⁶ *Id.* at 522.

searchers have found that “people may construct the illusion of self-confirming worlds by ‘seeing’ more support for their self-views than actually exists.”²⁷ Thus, “people with positive self-views will spend more time scrutinizing favorable feedback than unfavorable feedback, and after undergoing an evaluation they will remember more favorable statements than unfavorable statements.”²⁸

III. THE PROBLEM OF DUAL PROFESSIONAL IDENTITIES

Covert/cognitive strategies for self-verification may also provide a way to resolve conflicting professional identities. Conflicting professional identities may arise when the same person plays two different roles within an organization. For example, an attorney who serves as in-house counsel may have an “organizational” professional identity as an employee of the corporation as well as an “advisor” identity as an attorney providing neutral advice to the corporation.²⁹ Likewise, government attorneys may similarly have a “policymaker” identity in addition to the “advisor” identity.³⁰

While everyone has multiple identities that may be activated in different situations (for example a “parent” identity may be activated at different times than a “doctor” identity), some situations will activate more than one identity at a time. When this happens, identity theory predicts that “the identity with the higher level of prominence or the identity with the higher level of commitment will guide behavior more than an identity with a lower level of prominence or commitment.”³¹

The same situation arises when an individual possesses two or more professional identities that are likely to be activated at the same time. A

²⁷ William B. Swann, Jr., *The Trouble With Change: Self-Verification and Allegiance to the Self*, 8 PSYCH. SCI. 177, 178 (1997).

²⁸ Robertson, *supra* note 7, at 18 (citing William B. Swann, Jr., *The Trouble with Change: Self-Verification and Allegiance to the Self*, 8 PSYCH. SCI. 177, 178 (1997)).

²⁹ Robertson, *supra* note 7, at 14; Hugh Gunz & Sally Gunz, *Hired Professional to Hired Gun: An Identity Theory Approach to Understanding the Ethical Behaviour of Professionals in Non-Professional Organizations*, 60 HUM. REL. 851, 854–59 (2007).

³⁰ See Robertson, *supra* note 7, at 26.

³¹ PETER J. BURKE & JAN E. STETS, IDENTITY THEORY 133 (2009). The problem of conflict between two identities is not a new one. When women first entered the legal profession, some experienced role conflict between their identities as suffragists and as lawyers. See Renee Newman Knake, *The Progress Of Women In The Legal Profession*, 29 PACE L. REV. 293, 300–01 (2009) (“[W]hile women lawyers and suffrage activists were ‘closely connected immediately after the Civil War, they increasingly diverged in the latter decades of the nineteenth century; indeed, it seems that a number of successful women lawyers gradually adopted a professional identity as lawyers, one that increasingly distanced them from other women activists,’ thus establishing a troubling dichotomy for women lawyers that persists today.”) (quoting MARY JANE MOSSMAN, *THE FIRST WOMEN LAWYERS: A COMPARATIVE STUDY OF GENDER, LAW AND THE LEGAL PROFESSIONS* 41 (2006)).

major study of in-house counsel found that the relative salience of the attorney's two identities influenced behavior in responding to dilemmas of professional ethics.³² It also suggested that these attorneys were unaware that identity salience was influencing their choices, thus potentially avoiding the "identity dissonance" that people may experience when there is "conflict between irreconcilable aspects of their self-concepts."³³ In the study, in-house attorneys were asked to respond to a series of ethical vignettes.³⁴ The scenarios presented situations in which compliance with the attorney's professional obligations would require actions that would be inconsistent with corporate managers' preferred course of action: for example, the attorney would have to decide whether to report a CEO's misconduct to the corporation's board of directors.

The relative salience of the conflicting identities affected reported behavior:³⁵ "[a]ttorneys who identified more strongly as employees were statistically more likely to choose the more organizationally deferential options in the vignettes, and those who identified more strongly as 'lawyers with a captive client' were more likely to choose the more professionally oriented option."³⁶ Thus, the researchers concluded that the salience of lawyer identity in fact shapes ethical behavior.³⁷

In turn, the time spent in each role and the connections developed in that role similarly influenced the salience of each of the two identities. The researchers reported a correlation between the amount of time spent on activities, such as business planning, management, and administration, and the salience of the "organizational" or "employee" identity.³⁸

The study suggested that the effects of identity salience on attorney behavior happened at an unconscious level. There was no suggestion that in-house counsel recognized their professional obligations but felt constrained by organizational pressure to avoid them. Indeed, the survey vignettes did not ask what the attorney *would* do, but asked instead what the attorney *should* do.³⁹ When attorneys answered these questions in ways that differed from their professional obligations, they were not making a rational decision to avoid compliance with professional norms; instead, they were failing to recognize that professional norms called for a different answer than the one they provided.

³² Gunz & Gunz, *supra* note 29, at 886.

³³ Carrie Yang Costello, *Changing Clothes: Gender Inequality and Professional Socialization*, 16 NAT'L WOMEN'S STUD. ASSN. J. 138, 140 (2004).

³⁴ Robertson, *supra* note 7, at 14–15 (citing Gunz & Gunz, *supra* note 29, at 861–63).

³⁵ Gunz & Gunz, *supra* note 29, at 871.

³⁶ Robertson, *supra* note 7, at 15 (quoting Gunz & Gunz, *supra* note 29, at 864, 868–71).

³⁷ *Id.*

³⁸ *Id.* (citing Gunz & Gunz, *supra* note 29, at 868–871).

³⁹ *Id.* at 15–16 (citing Gunz & Gunz, *supra* note 29, at 882–86).

The survey results therefore suggest that at least in some cases, the problem is not merely one of moral courage—instead, it appears that at least in certain conditions, professionals may truly fail to recognize the “professionally correct” course of action. The individuals in the study were unconsciously “control[ing] situational meanings to make them more congruent with the meanings held in all of the identity standards.”⁴⁰ By unconsciously engaging in selective perception and selection attention, the attorneys in the study were able to avoid contemplation of the disconnect between their chosen course of conduct and their professional responsibilities—and were thus able to avoid the emotional distress that would accompany the failed self-verification of either of their competing professional identities.

IV. COMPETING PROFESSIONAL IDENTITIES IN ORGANIZATIONAL SETTINGS

Competition between two professional identities leads to a paradox: an individual hired to provide independent expertise within an organization becomes increasingly less able to provide that independent expertise as he or she becomes increasingly more integrated into the organization. As time is spent on organizational activities and relationships are forged with organizational colleagues, the individual’s organizational identity gains salience and becomes more likely to influence behavior and decision-making—sometimes even to the point that the individual loses sight of professional obligations that may conflict with organizational goals. In earlier articles, I have argued that this phenomenon may explain, at least in part, why attorneys involved in the development of the torture memos did not see how those memos conflicted with legal ethics obligations that appeared clear to outsiders.⁴¹

The phenomenon may also be at work in other situations in which professionals participate in larger organizations, including—but not limited to—military operations. As those professionals take on a larger role in the organization, they may be correspondingly less able to provide independent expertise. In some cases, the highest-level individuals empowered to act for the organization may value independent professional judgment, but lower-

⁴⁰ BURKE & STETS, *supra* note 6, at 134.

⁴¹ Robertson, *supra* note 7, at 22–29; see also Cassandra Burke Robertson, *Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity*, 42 CASE W. RES. J. INT’L L. 389 (2009); see also Peter Margulies, *Reforming Lawyers into Irrelevance? Reconciling Crisis and Constraint at the Office of Legal Counsel*, available at <http://ssrn.com/abstract=1788349> (March 20, 2011) (“The [Office of Legal Counsel] lawyer must always consider how other stakeholders, including Congress and the courts, will view executive initiatives. . . . An OLC lawyer who too readily buys into the President’s initiatives will cannibalize her own credibility, and eventually leave the President without the imprimatur that OLC can provide.”).

level managers in the organization may not value such independence. Individuals within the organization may instead merely desire professional cover, as when military officials ask medical professionals to supervise and approve questionable interrogation techniques that may rise to the level of torture.⁴² In other cases, organizational managers may desire independent advice, but the organization itself may be structured in such a way that professional independence is neither encouraged nor rewarded. In either case, the very skills and judgment for which the professional is hired may be subordinated in order to achieve self-verification of the organizational identity—specifically, in the armed forces context, by achieving recognized success in the military endeavor.

Subordinating a conflicting professional identity in military operations may lead to significant problems. These problems are not unique to military operations led by the United States, but are instead an institutional problem among military forces worldwide—and are a subset of organizational challenges more generally. Medical professionals in particular have been involved in a variety of military operations that have led to a significant number of alleged conflicts between professional obligations and operational expediency. Scholars have found instances of such conflicts among “South African military medical personnel [who] develop[ed] chemical and biological weapons against opponents of the apartheid regime,” “military doctors stationed in Namibia during the apartheid era . . . [who] limited care to local civilian populations in the occupied territory,” Russian physicians “working under the supervision of military officials to help secure the required quota of draftees [who] subordinated their medical judgment by neglecting to register severe illnesses in conscripts they examined, resulting in numerous fatalities among the soldiers,” “Dutch military doctors in the former Yugoslavia [who] did not provide critical medical care for civilians under siege in Srebrenica in 1995,” and “American military physicians [who] were alleged to have failed to maintain adequate medical records to protect detainees’ health or ensure their access to medical care at the Abu Ghraib prison in Iraq.”⁴³

Other professional failures—especially those related to the so-called “War on Terror”—have been well documented.⁴⁴ The problem is heightened when multiple professionals from multiple disciplines fail to check military

⁴² See Kevin Michael Bond, *Physician as Military Officer: Conflicts in Professional Duties* (Aug. 2009) (unpublished Ph.D. dissertation, University of Tennessee), available at http://trace.tennessee.edu/cgi/viewcontent.cgi?article=1042&context=utk_graddiss.

⁴³ Leslie London et al., *Dual Loyalty among Military Health Professionals: Human Rights and Ethics in Times of Armed Conflict*, 15 *CAMBRIDGE Q. HEALTHCARE ETHICS* 381, 383 (2006) (citing Steven H. Miles, *Abu Ghraib: Its Legacy for Military Medicine*, 364 *LANCET* 725, 728 (2004)).

⁴⁴ See, e.g., Marks, *supra* note 1; BRUFF, *supra* note 1; Margulies, *supra* note 1.

excess, as happened in the case of the tortured detainees, where doctors, psychologists, and lawyers all failed in some respect. Medical doctors watched interrogations behind glass, offering assessments of whether detainees were “fit” for interrogation; because they believed they were not acting in the role of a treating physician while offering this advice, they considered themselves not to be bound by patient-centered medical ethics.⁴⁵ Psychologists also assisted in interrogation; complaints have been lodged against some mental-health professionals who are accused of developing the “enhanced interrogation” programs that included sexual humiliation and other psychological stressors.⁴⁶

The medical and mental health professionals were not alone in falling short in this area. Government lawyers failed to caution against the illegality of proposed interrogation methods.⁴⁷ Onlookers noted that some of the lawyers involved interrogation activities at Guantánamo seemed to have been “immersed” in operational policy and “drank the Kool-Aid.”⁴⁸ One of those lawyers, Lieutenant Colonel Diane Beaver, refused to admit her legal advice in authorizing waterboarding ran contrary to established law—but she nonetheless defended her actions by relying on the importance of the operational mission:

If my legal opinion was wrong, then I regret the error very much. I am a proud professional. I feel very keenly any failure on my part to be precise and accurate in the advice I render. I freely accept sincere dissent and criticism. But there is something very important I will never have to regret. At

⁴⁵ M. Gregg Bloche & Jonathan H. Marks, *When Doctors Go to War*, 352 *NEW ENG. J. MED.* 3 (2006).

⁴⁶ Morgan Smith, *Psychologist in Terror War Is Subject of Complaint*, *N.Y. TIMES*, Nov. 13, 2010, available at <http://www.nytimes.com/2010/11/14/us/14tllawsuit.html>.

A complaint against Dr. James E. Mitchell is now before the Texas State Board of Psychologists, alleging that he violated the profession’s rules of practice in helping the C.I.A. develop ‘enhanced interrogation techniques’ for use in its so-called black prison sites . . . Dr. Mitchell . . . parlayed his experience in training American soldiers to survive as prisoners of war into a lucrative consulting business with the C.I.A. He orchestrated – and, according to the complaint, participated in – the harsh interrogation of terror suspects using sexual humiliation and the drowning technique called waterboarding.

⁴⁷ JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 165 (2007) (“How could OLC have written opinions that, when revealed to the world weeks after the Abu Ghraib scandal broke, made it seem as though the administration was giving official sanction to torture . . . How could its opinions reflect such bad judgment, be so poorly reasoned, and have such terrible tone?”).

⁴⁸ *See, e.g.*, PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES* 126 (2008) (describing Michael Gelles’s view of Diane Beaver’s role in authorizing waterboarding and other acts at Guantánamo).

a time of great stress and danger, I tried to do everything in my lawful power to protect the American people.⁴⁹

Even military chaplains were subject to competing demands in their roles as both military officers and religious leaders. At Guantánamo, Muslim chaplains provided religious assistance to detainees.⁵⁰ Unlike the medical and legal professionals who were too deferential to military expediency, the chaplains appeared to maintain their independence and comply with their professional obligations. But they suffered for this independence within the organization; from the beginning, some military members were suspicious of the Muslim chaplains who “were fervent in their beliefs and encouraged other Muslims to participate in their religious activities,” especially as military personnel noticed that “[a] lot of their religious beliefs mirrored those of the detainees.”⁵¹ As a result, accusations were frequently leveled against the chaplains. Brigadier General Rick Baccus stated that “[e]very one of the chaplains was accused of something while I was there.”⁵² He noted that the chaplains “were always under suspicion by the interrogators, because they were interacting with the detainees and giving them Korans . . . [The Military Police] just didn’t like the chaplains going around talking to the detainees.”⁵³

The provision of these religious services was criticized by some in the military who argued that detainees should be expected to freely exercise their religions on their own—without religious support from military chaplains.⁵⁴ One military report argued not only that chaplain services were not needed for the detainees, but that military operations needed to rely more on chaplaincy services to promote U.S. servicemember morale—and, tellingly,

⁴⁹ *Hearing Before the S. Armed Servs. Comm.*, 110th Cong. 55 (2008), available at http://www.fas.org/irp/congress/2008_hr/061708beaver.pdf (statement of Diane E. Beaver, Lieutenant Colonel (ret.), U.S. Army; Former Staff Judge Advocate, Guantánamo Bay).

⁵⁰ James Yee, the most well-known Muslim chaplain who served at Guantánamo, was at one point himself arrested on suspicion of aiding terrorist activity. All charges were later dropped. Dave Mazza, *James Yee: An Unlikely Enemy of the State*, PORTLAND ALLIANCE, Jan. 8, 2006.

⁵¹ Tim Golden, *How Dubious Evidence Spurred Relentless Guantánamo Spy Hunt*, N.Y. TIMES, Dec. 19, 2004, at 28.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See ROBERT T. WILLIAMS, THE COMMANDER’S RESPONSIBILITY FOR THE DELIVERY OF RELIGIOUS SUPPORT TO THE DETAINEES IN THE JOA: ACCOMMODATION OF RELIGIOUS NEEDS BALANCED WITH NECESSARY SECURITY CONCERNS 17 (Naval War College 2006) available at <http://www.dtic.mil/cgibin/GetTRDoc?AD=ADA463665&Location=U2&doc=GetTRDoc.pdf> (recommending various policies for chaplain services, and arguing that “[r]eligious support to detainees is best defined as complete latitude in the exercise of religious duties consistent with the requirements of detention,” and that “[t]he role of the chaplain is to provide religious support to authorized personnel”).

to report instances of low morale among U.S. troops to military commanders.⁵⁵ These pressures create a classic conflict in professional roles. In the role of religious leader, the chaplain would provide advice and counsel to those who seek it. In the role of military officer, however, they would provide advice to military commanders about how best to manage and promote troop morale.

The fact that the chaplains were able to maintain their professional commitments in the face of such criticism suggests that they obtained support in their professional role that the other professionals did not. In part, this may be due to the shared religious identity that was joined with the military-chaplain identity. And, while there is no current allegation that the chaplains breached their obligations to the military, the number of accusations of such misconduct—including the arrest and subsequent release of Chaplain James Yee⁵⁶—suggests that the chaplains did not find it comfortable to balance professional obligations with military responsibility, and that the organization did not make it easy for them to do so.

Some scholars have criticized viewing such conflicts in terms of “dual loyalties.”⁵⁷ And certainly, when professionals have consciously chosen to set aside professional ethics in favor of organizational expedience, this view has merit. The military does not require—and should not require—abandonment of professional codes of ethics. The more difficult situation, however, is when medical, legal, or other professionals do not consciously set aside their ethical obligations but rather unconsciously avoid or overlook them. In many of the conflict scenarios outlined above, it is unlikely that the professionals were consciously aware of the conflict in their behavior. Instead, it is more likely that they were cognitively motivated to pay attention only to the facts and circumstances related to their most salient professional identity—here, their organizational/military identity.

While it may seem unlikely that a professional could simply not “see” the conflict with professional values in the situations above, cognitive motivations are strong forces. All human beings filter information, and must do so in order to distinguish between relevant and irrelevant information—without such filtering, people would hear “background noise as loudly as voice or music” and would be unable to enjoy a symphony or to focus on

⁵⁵ *Id.* at 16 (“The chaplain’s active involvement in advising the commander on the performance, morale, and status of the troops might have made the difference [to the events of Abu Ghraib].”)

⁵⁶ *See supra* note 51.

⁵⁷ *See, e.g.,* George J. Annas, *Military Medical Ethics—Physician First, Last, Always*, 359 N. ENGLAND J. MED. 1087 (2008) (“[T]hese conflicts are not captured by oversimplified expressions such as “mixed agency” or “dual loyalty.” . . . The “physician first” guidance is only half the story; the other half should be “last and always.”).

partners in a conversation.⁵⁸ At an unconscious level, the human brain therefore devotes more attention to information deemed “relevant.”⁵⁹ A crime witness, therefore, may recall more about the weapon used than about the perpetrator’s physical characteristics—in the heat of the event, the victim’s mind has picked the weapon out as the most immediately relevant threat.⁶⁰

But filtering is not without inherent bias; the same cognitive processes that define “relevance” will draw on the individual’s preexisting beliefs or desires in order to make that calculation.⁶¹ As a result, people’s attention is drawn to events that mesh with their expectations and beliefs—and information that counters those beliefs may be unconsciously disregarded. This process was first documented years ago in a study of football.⁶² Researchers showed a film of a rowdy Princeton/Dartmouth game to students and alumni of both schools, and they asked the viewers to count the number of rule infractions by each team, to rate those infractions as “flagrant” or “mild,” and to determine which team started the “rough play.”⁶³

As might be expected, Princeton supporters perceived different events than did the Dartmouth supporters. Each group viewed the “facts” of the game differently, paying selective attention to the facts favorable to their team. The Princeton group recorded twice as many Dartmouth rule infractions as Princeton ones and judged the Dartmouth rule infractions to be more often flagrant than Princeton’s infractions.⁶⁴ Eighty-six percent of the Princeton group believed that the Dartmouth team started the rough play.⁶⁵ By contrast, the Dartmouth group recorded nearly equal numbers of rule infractions between the two teams and believed that fewer of their team’s infractions were “flagrant.”⁶⁶ Nor did they agree that their team had started

⁵⁸ William H. Starbuck & Frances J. Milliken, *Executives’ Perceptual Filters: What They Notice and How They Make Sense*, in *THE EXECUTIVE EFFECT* 35, 40 (Donald C. Hambrick ed., 1988); see also SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 21 (1993) (“Perceptions are, by their very nature, selective.”).

⁵⁹ Starbuck & Milliken, *supra* note 57.

⁶⁰ Fredrik H. Leinfelt, *Descriptive Eyewitness Testimony: The Influence of Emotionality, Racial Identification, Question Style, and Selective Perception*, 29 *CRIM. JUST. REV.* 317, 322 (2004).

⁶¹ Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 *J. ABNORMAL & SOC. PSYCHOL.* 129 (1954); see also Starbuck & Milliken, *supra* note 58, at 40.

⁶² Hastorf & Cantril, *supra* note 60, at 130.

⁶³ *Id.*

⁶⁴ *Id.* at 131–32.

⁶⁵ *Id.* at 131.

⁶⁶ *Id.*

the rough play—a majority (fifty-three percent) of the Dartmouth group stated that “both teams” started the rough play.⁶⁷

The results suggested that the different perceptions occurred at an unconscious level—neither group of participants was aware that they were missing their own team’s infractions. In fact, one Dartmouth fan, having heard of his team’s numerous infractions from a Princeton friend, thought that he must be missing the part of the film containing these offenses. He sent a telegram to the researchers: “Preview of Princeton movies indicates considerable cutting of important part please wire explanation and possibly air mail missing part before showing scheduled for January 25 we have splicing equipment.”⁶⁸ Even though they watched the same film, study participants saw two very different games. Researchers concluded from the study that “[t]here is no such ‘thing’ as a ‘game’ existing ‘out there’ in its own right which people merely ‘observe.’ The game “‘exists’ for a person and is experienced by him only in so far as certain happenings have significances in terms of his purpose.”⁶⁹

Military operations are not a football game. But they lend themselves, perhaps even more than a game, to selective perception.⁷⁰ The fast pace of action, the stress and fear inherent in the operation, and the importance of the stakes mean that there are many demands for the attention of participants. Just as the crime victim is likely to best perceive the most immediate threat—the weapon—so too are professionals in the military likely to focus their attention on the threats perceived to be the most relevant. Under these conditions, it may not be surprising that they do not recognize conflicts that appear obvious to the outsider evaluating military conduct from a safe distance of time and space.

V. IMPLICATIONS FOR ORGANIZATIONAL MANAGEMENT

Organizational managers responsible for securing independent professional advice for the larger organization face a significant challenge. They cannot rely on traditional carrot-and-stick incentives to ensure compliance with professional norms. The threat of professional sanctions or

⁶⁷ *Id.* By way of comparison, “[t]he official statistics of the game, which Princeton won, showed that Dartmouth was penalized 70 yards, Princeton 25, not counting more than a few plays in which both sides were penalized.” *Id.* at 129.

⁶⁸ *Id.* at 132.

⁶⁹ *Id.*

⁷⁰ Indeed, similar effects of selective perception and selective interpretation have been replicated in a number of modern studies since the original Princeton/Dartmouth study. *See, e.g.,* Dan M. Kahan et al., *They Saw a Protest’: Cognitive Illiberalism and the Speech-Conduct Distinction*, (Cultural Cognition Project Working Paper No. 63), available at <http://ssrn.com/abstract=1755706> (February 5, 2011); Leigh Thompson, “*They Saw a Negotiation*”: *Partisanship and Involvement*, 68 *J. PERSONALITY & SOC. PSYCHOL.* 839 (1995).

even criminal prosecution cannot influence the behavior of an individual who simply fails to see that his or her behavior fails to comport with professional obligations. And at least in some cases, it appears that individuals with dual professional identities may unconsciously subordinate the responsibilities of their independent professional identity in favor of the organizational identity, as the organizational identity is more strongly supported in the workplace and therefore gains salience over the less-supported professional identity.

This is not to suggest that professional sanctions are inappropriate in such instances. When professional duties are breached, the profession's licensing body should and must take disciplinary action. Such action is not merely retributive or coercive, but instead defines the standards of the profession and sets a baseline of expectation for individuals to follow.⁷¹ Such sanctions make a very public statement that certain conduct is inconsistent with professional duties.⁷²

Nonetheless, sanctions alone are insufficient. The lessons to be learned from identity theory's application to dual professionals in an organizational setting suggest that, by themselves, the threat of such sanctions cannot ensure compliance with professional standards. By their nature, sanctions allow only post-hoc identification of misconduct. Organizational managers, however, must try to ensure compliance ex ante.⁷³ And because of the cognitive incentives at work, professionals may unconsciously overlook professional responsibilities in favor of adopting positions more deferential to short-term organizational goals.

Recognizing the unconscious situational incentives affecting dual professionals does not excuse the failure to comply with professional standards. But such recognition can help managers move forward in searching for strategies to minimize and prevent both the likelihood and the impact of such failures in the future.⁷⁴

⁷¹ See Mark S. Frankel, *Professional Codes: Why, How, And With What Impact?*, 8 J. BUS. ETHICS 109, 110 (1989) ("A profession's code of ethics is perhaps its most visible and explicit enunciation of its professional norms. A code embodies the collective conscience of a profession and is testimony to the groups recognition of its moral dimension.").

⁷² *Id.* at 111 ("As a visible pronouncement of a profession's self-proclaimed role and values, a code can function as a basis for the public's expectations and evaluation of professional performance . . .").

⁷³ See, e.g., Barbara H. Fried, *Ex Ante/Ex Post*, 13 J. CONTEMP. LEGAL ISSUES 123, 123 (2003).

⁷⁴ Scholars looking at other organizational contexts have noted that the organizational setting can either promote or discourage professional independence. See, e.g., Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 446 (2011) (advocating "reforms that would provide structural support for the lawyer's prohibition when political accountability cannot effectively check an administration's extralegal action," such as transparency, a move away from "partisanship for those

Specifically, managers can do two things to reduce the likelihood of such failures. First, they can structure situational influences in ways that provide support for—and thereby increase the salience of—individuals' professional identity in relation to their organizational identity. Second, managers can create situational opportunities for individuals to obtain self-verification of their professional identity without sacrificing organizational status.

As noted above, the more salient an identity is within the hierarchy of personal identities, the more likely it is that that identity will guide individual behavior. Thus, if the situation can be structured to increase the salience of the individual's professional identity, then the individual will be more likely to perceive—and to pay attention to—professional obligations that may conflict with short-term organizational goals. And, indeed, there is evidence of situational influence in this area; research suggests that “the identity hierarchy gets slightly re-ordered within a situation as the situation triggers the salience of some identities over others.”⁷⁵ In a similar vein, other research suggests that an identity can be “primed” through reflection to achieve increased salience in a given situation, making it more likely that the identity will be activated.⁷⁶ For example, writing and describing the words “caring,” “compassionate,” “kind” and related terms worked to prime a moral identity.⁷⁷ Study participants in the primed condition were more likely to report negative emotions after reading a news story about the mistreatment of Iraqi prisoners and were less likely to express moral disengagement.⁷⁸

Professionals in organizational settings can adopt—and managers can encourage the organization itself to adopt—strategies that will reinforce the professional identity.⁷⁹ Interacting with others in a professional capacity may have such an effect, as professionals share expectations and discuss the medical, legal, or other ramifications of a particular issue. Such conversa-

providing secret advice,” “strategically decentralized sources of advice for controversial, covert actions, and prompt professional investigation and sanction (or reduced barriers to civil liability).”).

⁷⁵ Jan E. Stets, Michael J. Carter & Jesse Fletcher, *Moral Agency and Emotions: A Control Systems Approach* (unpublished manuscript on file with the author) at 32–33.

⁷⁶ Karl Aquino, Americus Reed, Stefan Thauc, and Dan Freeman, *A Grottesque and Dark Beauty: How Moral Identity And Mechanisms Of Moral Disengagement Influence Cognitive And Emotional Reactions To War*, 43 J. EXPERIMENTAL SOC. PSYCH. 385 (2007).

⁷⁷ *Id.* at 390.

⁷⁸ *Id.*

⁷⁹ See also Peter Margulies, *Lawyers' Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 RUTGERS L. REV. 939, 941 (2006) (noting that lawyers' “distinctive professional identit[ies]”—or “brands”—can serve a valid role in the pursuit of their clients' goals, but can also conflict with lawyers' gatekeeping role, and arguing that lawyers “must balance branding with gatekeeping”).

tions may increase the salience of the professional identity relative to the organizational identity.

Organizational managers should make sure that professionals have the opportunity to communicate and network with other professionals—both in and out of the organizational context. Thus, it would be helpful to schedule regular meetings for groups of attorneys, doctors, psychologists, or religious leaders. At these meetings, professionals could discuss questions and issues as they arise. Given their common background of expertise, professionals in the same area are likely to be able to offer helpful advice regarding thorny issues.

The main benefit of such meetings may not be the professional discussion, however, but may rather be the professional socialization.⁸⁰ Simply meeting in a group of others with a shared profession—even in the absence of “shop talk”—may be sufficient to prime the group members’ professional identity. In identity theory terms, spending time with others in the profession may increase commitment to that professional identity—thereby raising its salience in the identity hierarchy, and making it more likely that the professional identity will guide behavior in situations where both the professional identity and the organizational identity may both be activated.

Other strategies would focus not just on re-ordering the situational salience of professional identity, but would increase opportunities for self-verification of the professional identity. Increasing such verification opportunities would reduce the risk that individuals will fall prey to cognitive pressure to remain blind to conflicts between professional values and organizational expediency. If the organization appears to reward and value only actions that meet short-term goals, then individuals will be more likely to selectively focus on the most immediately compelling organizational needs—and, like the study participants who watched the football game, or like the crime victim facing a weapon, they may be blind to the facts and circumstances outside of this short-term perspective. By contrast, if the organization is structured to reward long-term professional values in addition to short-term expediency, the individual will be more likely to focus on professional responsibilities as well as organizational aims.

Opportunities for verification of professional identity should be ongoing; it is not enough to integrate the professional into a larger organizational group. If the professional is to maintain a “professional” identity that is distinct from the “organizational” identity, there must be group members who can provide opportunities for self-verification of that identity. As one researcher has noted, “[w]hen groups were not available to reaffirm old

⁸⁰ See also M. Gregg Bloche, *Caretakers and Collaborators*, 10 CAMBRIDGE Q. HEALTHCARE ETHICS 275, 278 (2001) (explaining the need for professional autonomy).

role-identities, those identities withered and decreased in salience.”⁸¹ By contrast, when the organization provides opportunities for individuals to verify multiple identities, both personal well-being and organizational effectiveness are enhanced: the organization is better able to adapt to changing conditions, and the individual finds support for “fulfilling the expectations” of both identities.⁸²

Creating opportunities for self-verification of the professional identity requires that the organization openly encourage and reward behavior consistent with professional norms—even when that behavior might not be in the interest of organizational expediency. Thus, lawyers who advise the organization that desired actions do not comply with the law, physicians who insist on proper medical care for prisoners, and chaplains who provide religious support for detainees should be recognized for their professional success—not merely tolerated, and certainly not discouraged. Such encouragement need not take the form of financial or material incentive; what is most needed in this context is simply affirmation. Professionals who do their jobs—and do them well, even when the requirements of those jobs may not comport with organizational expediency—should be openly acknowledged.

Moreover, organizational leaders should make it clear that such professional conduct is not at odds with military service. As noted earlier, persons with dual identities are put in a difficult situation if they can verify only one of two competing identities. However, when the same action is able to verify both identities together, this harmonization makes it more likely that the individual will act in accordance with both identities, rather than sublimating the less salient identity. Military leaders should make it clear, then, that good legal advice—even if not organizationally expedient—is part of being both a good professional and a good military officer.

Finally, professional organizations themselves can play a role in enhancing the professional identity of dual-professionals in organizational settings. Specifically, such organizations should reach out to their military members, making an effort to include them in the profession more broadly. This action could have two effects. First, as noted above, it would increase the individuals’ connection to their professional community, thus reinforcing the salience of the professional identity. Second, however, it may also guard against the negative effects that would ensue if military professionals felt rejected by their larger communities; recent research has suggested that

⁸¹ Lynn Smith-Lovin, *The Strength of Weak Identities: Social Structural Sources of Self-Situation and Emotional Experience*, 70 *SOC. PSYCHOL. Q.* 106, 108 (2007).

⁸² Amara T. Brook, Julie Garcia, and Monique Fleming, *The Effects of Multiple Identities on Psychological Well-Being*, 34 *PERSONALITY & SOC. PSYCHOL. BULL.* 1588, 1598 (2008).

professional identity could be diminished if professional organizations are viewed as rejecting these individuals from inclusion in the group.⁸³

Thus, professional groups should tread extremely carefully in situations that could be seen as marginalizing those with dual identities. When the American Psychological Association considered a resolution that would have prohibited psychologists from participating in interrogations entirely, Colonel Larry James cautioned that this action could discourage military psychologists, arguing that “those young psychologists are going to feel as though we’ve abandoned them, and they need our support right now.”⁸⁴ Similar reactions can also occur when military professionals face sanctions by outside professional entities.⁸⁵ While there may be valid reasons to take such actions, professional licensing bodies should be careful in doing so, minimizing rhetoric of marginalization or unwelcomeness; the organizations should clarify that while certain actions may be incompatible with professional duties, military service in and of itself is in no way inconsistent with professional norms.

VI. CONCLUSION

In recent years, professionals in the military have suffered criticism for their failure to counter military excess—especially in the area of torture and maltreatment of detainees. While much of the criticism leveled against such professionals has assumed that these professionals were making a conscious choice to avoid the strictures of their code of ethics, this Article offers a different view.

This Article applies identity theory to offer a situationist explanation. It argues that some of the professional failures arise from the cognitive incentives faced by competing professional identities in an organization that rewards organizational deference over independent professional advice. Medical, legal, and other professionals in large organizations must deal with two competing identities—one tied to their profession, and one tied to the

⁸³ See, e.g., Constantina Bedea, et al., *Negotiating Dual Identities: The Impact of Group-Based Rejection on Identification and Acculturation*, EUR. J. SOC. PSYCHOL. (2011), available at <http://onlinelibrary.wiley.com/doi/10.1002/ejsp.786/full> (finding that for immigrants, “perceived rejection from the country of origin [can be] more important than the rejection by the new country into which one has moved”; rejection from the origin group lessens motivation to maintain the original ethnic identity). This conclusion is “[i]n line with identity change research,” and therefore may carry over to identity formation and retention generally. *Id.* at 9.

⁸⁴ *Military Psychologists Face Complaints with Licensing Boards over Roles at Guantánamo*, DEMOCRACY NOW, http://www.democracynow.org/2010/7/8/military_psychologists_face_complaints_with_licensing (July 8, 2010).

⁸⁵ See *id.* (noting that professional complaints have been filed against two psychologists who participated in interrogations).

organization. Identity theory predicts that when both identities are activated, individuals are more likely to act in accordance with the more salient identity. For professionals involved in military operations, this has led to a recent spate of professional failures—professionals gave advice and counsel that subordinated their professional role to their organizational role, and failed to check military excess.

The situation can be managed in ways that are likely to increase the salience of individuals' professional identity, making it more likely that the professional identity will guide behavior. Organizational managers can do two things to reduce the likelihood of such failures. First, they can structure situational influences in ways that increase the salience of individuals' professional identity in relation to their organizational identity. Second, managers can create situational opportunities for individuals to obtain self-verification of their professional identity without sacrificing organizational status. Finally, professional organizations themselves can reach out to these dual professionals, avoiding rhetoric of marginalization or rejection and affirming their importance to the profession as a whole.