

PRISONER OF WAR PAROLE: ANCIENT CONCEPT, MODERN UTILITY

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I. Introduction

Parole has a long and storied history in international law. The word conjures up a variety of thoughts but generally early release from civilian prison. Here, parole is used in the international law sense of releasing a prisoner of war (PW) in return for a pledge not to bear arms.² This article presents a historical analysis of parole and challenges the United States prohibition of service members accepting parole.

Parole is “[t]he agreement of persons who have been taken prisoner by an enemy that they will not again take up arms against those who captured them, either for a limited time or during the continuance of the war.”³ The U.S. Department of Defense (DOD) defines parole more broadly, however: “Parole agreements are promises given the captor by a POW to fulfill stated conditions, such as not to bear arms or not to escape, in consideration of special privileges, such as release from captivity or lessened restraint.”⁴

The acceptance of parole is said to be a personal matter.⁵ However, parole is not solely a personal pledge but also a reflection on national trustworthiness.⁶ Paroles are “sacred obligations, and the national faith is

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2. Definitions of parole cover a large range of possible promises in return for a release from captivity; for example, a promise not to escape, not to leave a certain geographic area or not to engage in future hostilities against the releasing power.

3. 2 *BOUVIER'S LAW DICTIONARY* 2459 (1914).

4. U.S. DEP'T OF DEFENSE, DIR. 1300.7, TRAINING AND EDUCATION MEASURES NECESSARY TO SUPPORT THE CODE OF CONDUCT, encl. 2, para. B(3)(a)(5) (23 Dec. 1988) [hereinafter DOD DIR. 1300.7].

pledged for their fulfillment.”⁷ Even the U.S. Supreme Court concluded that a country's faith is pledged to fulfill the promise of a paroled PW, and that the national character is dishonored by a parole violator.⁸

II. History

Although it is unclear exactly when parole originated, it developed along the general historical pattern of improving the fortunes of those unlucky enough to become PWs. In the earliest times, there were no prisoners of war; captured enemies were simply killed.⁹ Later, capturing nations began to use PWs as a source of slave labor.¹⁰

During feudal wars in medieval days, at least partly as a result of the spread of Christianity, there began a system that saw some prisoners ransomed.¹¹ The ransom provided a lucrative source of revenue for the detaining authority.¹² Ransom amounts ranged from the reasonable to the very expensive. The difficulty of structuring accurate currency conversions complicates meaningful analysis, but the average ransom equaled the annual pay of the ransomed PW.¹³ In what must therefore have been considered a great bargain, 1700 Samnites captured at Perugia around 300 B.C. were released in return for 310 asses.¹⁴ Ransoming became much

5. U.S. DEP'T OF AIR FORCE, PAM. 110-31, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 13-2 (19 Nov. 1976) (“Parolees are bound on their personal honor to fulfill the terms and conditions of their parole.”) [hereinafter AFP 110-31].

6. See R.C. HINGORANI, PRISONERS OF WAR 177 (1982) (“[h]aving once accepted the parole, prisoners are under a sacred obligation which should not be violated by the given individual *or his State*.”) (emphasis added).

7. Herbert C. Fooks, Prisoners of War 299 (1924).

8. U.S. *ex rel.* Henderson v. Wright, Case No. 16,777, 28 Fed. Cas. 796, 798 (1863).

9. MICHAEL A. LEWIS, NAPOLEON AND HIS BRITISH CAPTIVES 39 (1962). As late as the Middle Ages, the slaughter of enemy prisoners, and the rape and pillage of cities taken by siege, were not just unlucky occurrences, but were considered a fringe benefit of being a soldier for the victor. HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 9-10 (1992).

10. LEWIS, *supra* note 9, at 40; Victor H. Matthews, Legal Aspects of Military Service in Ancient Mesopotamia, 94 MIL. L. REV. 135, 146 (1981); MAURICE H. KEEN, THE LAW OF WAR IN THE LATE MIDDLE AGES 156 (1965).

11. HINGORANI, *supra* note 6, at 179; George B. Davis, *The Prisoner of War*, 7 AM. J. INT'L L. 521, 524 (1913). Suarez, presenting the Catholic position, argued that the victors could slay only those of the defeated who bore some of the guilt for the aggression. FRANCISCO SUAREZ, DE TRIPLICI VIRTUTE THEOLOGICA, FIDE, SPE, ET CHARITATE (1621), *reprinted in* 2 CLASSICS OF INTERNATIONAL LAW 847 (J. Scott ed., 1944).

less common after the end of the Thirty Years' War, but continued until the eighteenth century.¹⁵

Prisoner exchanges were another improvement in the treatment of PWs. They allowed all PWs to go free, as long as the flow of PWs to each belligerent was reasonably balanced. Parole, in one sense, was merely an improved form of exchange which allowed detaining powers to send prisoners home in anticipation of a later exchange that would free them for combat duties again.¹⁶

The Carthaginians were noted for their use of parole.¹⁷ For example, Hamilcar, the great Carthaginian general, released his Numidian captives on the condition that none would again bear arms against Carthage.¹⁸ By the time the Carthaginians paroled Roman General Marcus Atilius Regulus in 250 B.C., parole was already well established in international warfare.¹⁹

Regulus was taken captive during a Roman foray into Africa. Legend has it that the Carthaginians paroled him so that he could return with a Carthaginian embassy to Rome to negotiate a compromise peace. He accepted the parole, promising to return to Carthage if the embassy failed, but when Regulus arrived in Rome he argued in the Senate against any end to the war. Regulus insisted that prisoners like himself who surrendered

12. Matthews, *supra* note 10, at 147. In the Middle Ages, at least, it was also an important source of income for the individual captor, who kept any ransom income. The courts dealt with so many ransom disputes that they laid out strict rules:

The first man to receive the faith of a prisoner . . . was in law his captor, but on two conditions. Firstly . . . he should be the first man to seize the prisoner's right gauntlet, and to put his right hand in his. Thereafter, the gauntlet served as a token of his right. Secondly, he must have made some attempt to fulfill his contract to his prisoner, to protect his life. If he simply abandoned him on the field, he lost his right to him.

KEEN, *supra* note 10, at 165-66.

13. Davis, *supra* note 11, at 540. The ancient Greeks set the price of ransom at a pound of gold. ALBERICO GENTILI, *DE JURE BELLI LIBRI TRES* (1612), *reprinted in 2 CLASSICS OF INTERNATIONAL LAW* 206 (J. Scott ed., 1933).

14. Davis, *supra* note 11, at 540.

15. HINGORANI, *supra* note 6, at 179; Davis, *supra* note 11, at 540.

16. LEWIS, *supra* note 9, at 44; KEEN, *supra* note 10, at 169.

17. The Carthaginian civilization flourished from about 500 B.C. to about 200 B.C.

18. FOOKS, *supra* note 7, at 297. Hamilcar Barca (d. 228 B.C.) stood for a time against the might of Rome, and was the father of Hannibal, the hero of Cannae.

19. HOWARD S. LEVIE, 59 PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT, *NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES* 398 n.17 (1977).

rather than dying in battle were not worth saving. Ignoring the advice of his family and friends, Regulus then returned to Carthage as he had promised where he was tortured to death by the angry Carthaginians.²⁰

Medieval knights were also bound by rules of parole. "A knight who escapes although he had given his word to remain in captivity offends God and man."²¹ This was true as long as his captors treated him humanely; escape from a captor who killed or caused the death of prisoners by poor treatment was permissible.²² Through the ensuing years, belligerents continued to employ parole but it was sometimes supplanted by the more lucrative option of ransom; however, parole was always available if the belligerents agreed.

During the American Revolution, officers on both sides generally expected and received paroles.²³ One British commander even paroled American enlisted troops.²⁴ The terms and application of the paroles were not always the same, however. American officers who were paroled by the British were committed to three essential pledges. They agreed to abstain from military activity, to refrain from correspondence with the enemy or criticism of the British and to present themselves if summoned. The last pledge was always included, but the British considered the other two binding customary law.²⁵ It was also not unknown for the British to parole officers, but then retain them in close confinement.²⁶ This is less generous than the traditional parole, but certainly preferable to actual imprisonment.

Congress took a more fixed approach to the parole issue. In February of 1776, it set out a specific formula for the granting of parole to enemy officers.²⁷ The American parole required that British officers go to and stay within six miles of a place of their choosing, that they refrain from

20. PIERINO BELLI, *DE RE MILITARI ET BELLO TRACTATUS* (1563), reprinted in 2 CLASSICS OF INTERNATIONAL LAW 126 (J. Scott ed., 1936); ISAAC ASIMOV, *THE ROMAN REPUBLIC* 80 (1966).

21. THEODOR MERON, *HENRY'S WARS AND SHAKESPEARE'S LAWS* 167 (1993).

22. *Id.* If a knight violated his parole, his captor could either bring suit in a court of chivalry or formally dishonor the defaulter's arms. The captor would do this by suspending them publicly from a horse's tail or hanging them upside down at a tournament or court. Until the reproach was removed, the disgraced knight was banned from participation in any knightly endeavor. *THE LAWS OF WAR* 37 (Michael Howard ed., 1994).

23. George L. Coil, *War Crimes of the American Revolution*, 82 MIL. L. REV. 171, 187 (1978); DANSKE DANDRIDGE, *AMERICAN PRISONERS OF THE REVOLUTION* (1967).

24. Coil, *supra* note 23, at 186.

25. CHARLES H. METZGER, *THE PRISONER IN THE AMERICAN REVOLUTION* 193 (1971).

26. DANDRIDGE, *supra* note 23, at 51.

passing intelligence to the British and that they not criticize the actions of Congress. Although in at least one case Congress ordered that a guard be assigned to an officer they deemed less than trustworthy, it is fair to say that the Americans were generally more liberal in the area of parole than the British.²⁸

American liberality was stretched beyond the limit when Congress discovered that British General John Burgoyne, who was free in England on parole, was participating in sessions of the House of Lords. Congress considered this an affront, and ordered that all British and German officers who were absent from America on parole were to return. The harsh effect of this edict was reduced when many of the parolees, including Lieutenant General Burgoyne, were exchanged.²⁹

Although many parole pledges were broken, the parole system continued to operate throughout the war.³⁰ Taking into particular consideration the horrible conditions aboard the British prison ships, the system must be termed a success in that it avoided much unnecessary suffering by PWs.³¹

During the Napoleonic Wars, Napoleon's situational ethics placed great strain on the parole regime that was in effect.³² French abuses of the system were particularly egregious.³³ Nonetheless, France and Britain retained a parole system throughout the conflicts. In stark contrast to the

27. The congressionally mandated oath was as follows:

I _____ being made a prisoner of war, by the army of the Thirteen United Colonies in North America, do promise and engage, on my word and honor, and on the faith of a gentleman, to depart from hence immediately to _____, in the province of _____, being the place of my election; and there, or within six miles thereof, to remain during the present war between Great Britain and the said United Colonies, or until the Congress of the said United Colonies shall order otherwise; and that I will not directly or indirectly, give any intelligence whatsoever to the enemies of the United Colonies, and do or say anything in opposition to, or in prejudice of, the measures and proceedings of any Congress for the said Colonies, during the present trouble, or until I am duly exchanged or discharged.

Id. at 192.

28. *Id.* at 193.

29. *Id.* at 197.

30. *Id.* at 192, 195.

31. See generally, DANDRIDGE, *supra* note 23.

32. "Treaties are observed as long as they are in harmony with interests." Napoleon, *quoted in* A DICTIONARY OF MILITARY QUOTATIONS 46 (T. Royle ed., 1990).

French attitude, British officers viewed the parole pledge as a serious matter, and even considered accepting parole a military duty as it enabled them to return to work and resume earning their pay.³⁴

Both sides recognized and used parole in the War of 1812.³⁵ Neither side in the conflict had an interest in holding large numbers of prisoners, but limiting the number was generally accomplished through prisoner exchanges.³⁶ Many privateers at sea simply released prisoners, even without a parole agreement, as the prisoners took up valuable space on their ships and consumed the limited stocks of food and water.³⁷

Parole was generally employed for officers, but some difficulties were encountered. The British wanted to limit the parole of naval officers to those captured from larger ships; this was to avoid granting parole to bothersome privateers.³⁸ Generally, however, parole for officers was the rule.³⁹

Later in the nineteenth century, the Dix-Hill Cartel, negotiated between the two sides in the United States Civil War, employed paroles in the larger context of a prisoner exchange system. The Confederacy was

33. This was perhaps a consequence of the French Revolution. The revolution was at its heart class warfare, and it resulted in a mix of classes and education levels in the French officer ranks. This, the theory goes, removed the “gentlemen” from the “officers and gentlemen” equation, and eroded the strong sense of honor that ordinarily bound officers to keep their word. It is also noteworthy that Napoleon made no attempt to enforce paroles granted Frenchmen. LEWIS, *supra* note 9, at 45, 63. Although he did nothing to prevent his officers from breaking their paroles, Napoleon apparently recognized the importance of the “gentlemen” issue. He restored the rank distinctions in parole that had been abolished by the revolutionary government of France at the end of the 18th Century. Burrus M. Carnahan, *Reason, Retaliation, and Rhetoric: Jefferson and the Quest for Humanity in War*, 139 MIL. L. REV. 83, n.38 (1993).

34. LEWIS, *supra* note 9, at 64.

35. JONATHAN FRANKLIN WILLIAM VANCE, OBJECTS OF CONCERN 9 (1994); LEVIE, *supra* note 19, at 399.

36. See Anthony George Dietz, *The Prisoner of War in the United States During the War of 1812* (1964) (unpublished Ph.D. dissertation, The American University) (available at the Air Force Academy Library). Some enlisted prisoners were paroled while awaiting exchange, but this practice became less common as the war wore on. *Id.* at 242. Exchange values were generally the same as those negotiated under the Dix-Hill Cartel. See *infra* notes 40-45 and accompanying text.

37. Dietz, *supra* note 36, at 350.

38. *Id.* at 33.

39. The United States original intent was to offer parole only to field grade officers, but through a misunderstanding and a subsequent re-examination of the issue, all officers were offered parole. *Id.* at 287.

particularly interested in avoiding the burden of feeding PWs, and pressed for a formal exchange agreement.⁴⁰ Unwilling to recognize the Confederacy but wanting to improve conditions for Union soldiers held captive, the Lincoln Administration finally negotiated an exchange system with the Confederate Army. The Dix-Hill Cartel was formally established in July 1862.⁴¹

Dix-Hill called for each side to exchange or parole all prisoners of war “in ten days from the time of their capture, if it be practicable to transfer them to their own lines in that time; if not, as soon thereafter as practicable.”⁴² Paroled PWs could not serve in the armed forces again until they were formally exchanged; in other words until a PW belonging to the detaining power was also released, and both PWs could again actively engage in the hostilities.⁴³ Paroled prisoners were held in camps located in friendly territory until they were exchanged.⁴⁴ Of course, the relative station of the prisoners was taken into account. Dix-Hill specified that a noncommissioned officer would be exchanged for two privates, a lieutenant for four and the exchange values worked their way up to a commanding general, who was worth sixty privates in exchange.⁴⁵

The cartel lasted for ten months, but eventually failed. There were several reasons for this, centering around politics and failures to adhere to the terms of the cartel. Neither side was particularly faithful in exchanging the prisoners “as soon as practicable.” The speed of the exchange tended to vary with the flow of the war; the side getting the best of the war at the time was reluctant to give up large numbers of prisoners. Further, both bel-

40. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* 791 (1988).

41. *Id.*

42. WAR OF THE REBELLION: OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, SERIES II VOL. IV, *Prisoners of War, etc.* 267 (1899) [hereinafter OFFICIAL RECORDS].

43. LEVIE, *supra* note 19, at 399. Dix-Hill also answered in advance some of the thorny questions that can arise regarding military service by parolees. “[P]arole forbids the performance of field, garrison, police, or guard, or constabulary duty.” OFFICIAL RECORDS, *supra* note 42, at 267.

44. JAMES GARFIELD RANDALL & DAVID HERBERT DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 334 (1969).

45. MCPHERSON, *supra* note 40, at 791. During the American Revolution, the British and Continental armies also negotiated a value in privates for soldiers of each rank. A 1780 tariff, as such agreements were called, seems to have been the most definitive. It valued a sergeant at two privates, a major at 28 and a lieutenant general, the highest ranking military officer at the time, at 1044. METZGER, *supra* note 25, at 222; GEORGE G. LEWIS & JOHN MEWHA, *HISTORY OF PRISONER OF WAR UTILIZATION BY THE UNITED STATES ARMY 1776-1945*, at 6 (1955). It is unclear whether, between the wars, privates got better or generals got worse!

ligerents were at times angry over the treatment of their PWs.⁴⁶ The last straw from the North's perspective was when some of the 37,000 Confederate soldiers who were granted paroles by Union generals after the battles at Vicksburg and Port Hudson were found to have returned to combat.⁴⁷ Afterward, there was little Union support for the parole arrangement.

In the political arena, the South was angry over the execution of a Southern citizen who tore down a United States flag in occupied Louisiana. In response, Confederate President Davis ordered that the responsible general immediately be hung if captured.⁴⁸ On the other hand, the Confederacy's refusal to grant PW status to Black PWs and their officers angered the North.⁴⁹ All these factors combined to spell the end of the formal exchange-parole cartel, but informal arrangements did continue until the end of the war.⁵⁰

Boer guerrillas regularly paroled British PWs in the Boer War, which lasted from 1899 to 1902.⁵¹ Upon release, PWs were frequently required to take an oath, promising to keep any information secret from their commanders upon their return. They were also required to take the traditional parolee's oath: not to take up arms again against their captors.⁵² Apparently, British soldiers did not take their parole oaths seriously, and the paroles were regularly broken.⁵³

The British offered a form of parole to ordinary citizens in the Orange Free State, promising that those who would agree to refrain from participating in the war against Britain would be allowed to return to their homes without loss of property or privilege.⁵⁴ In the end this was not considered a true parole by either side, however, as those offering the pledge were not considered prisoners of war at the time.⁵⁵

The Boer War was unique for its time in that the Boers acted as guerrillas during part of the conflict. During this time they were unable to

46. LEWIS & MEWHA, *supra* note 45, at 30.

47. MCPHERSON, *supra* note 40, at 792.

48. RANDALL & DONALD, *supra* note 44, at 335.

49. *Id.*; MCPHERSON, *supra* note 40, at 792.

50. RANDALL & DONALD, *supra* note 44, at 335.

51. VANCE, *supra* note 35, at 18.

52. *Id.* at 18 n.29.

53. *Id.*

54. PERCY BORDWELL, *THE LAW OF WAR BETWEEN BELLIGERENTS* 146 (1908).

55. *Id.* at 147.

detain PWs, but they did strip them of badly needed arms, equipment and sometimes even clothing.⁵⁶ Circumstances were different during the first World War where both sides had the resources to hold PWs.

World War I saw very limited use of parole. The French released German officers on parole in France.⁵⁷ The Germans were allowed to circulate freely, without surveillance, near their place of internment.⁵⁸ Although there is no formal requirement of reciprocity in the area of parole, the French discontinued the paroles when Germany failed to extend the same privilege to captured French officers.⁵⁹

III. Parole in International Law

Parole has been a common practice for hundreds of years,⁶⁰ and it is fully supported in the international community. Scholars reason that parole is morally and logically consistent with international law. Hugo Grotius supported the concept of parole in war on practical grounds:

[I]t is not contrary to duty to obtain liberty for oneself by promising what is already in the hands of the enemy. The cause of one's country is, in fact, none the worse thereby, since he who has been captured must be considered as having already perished, unless he is set free.⁶¹

Other international legal scholars have been just as accepting of the concept of parole. Vattel asserted that parole of prisoners of war was a given.⁶² Pufendorf endorsed a broader view of parole. He echoed Grotius' sentiments, but thought that the parole pledge extended only to offensive actions against the captor.⁶³

Ayala's view of parole differed somewhat from that of other international lawyers. He asserted that parole was proper, and that breaking the

56. VANCE, *supra* note 35, at 18.

57. HINGORANI, *supra* note 6, at 187 n.23.

58. FOOKS, *supra* note 7, at 301.

59. *Id.*

60. *See supra* notes 9-59 and accompanying text.

61. HUGO GROTIUS, *DE JURE BELLI AC PACIS* (1625), *reprinted in* 2 *CLASSICS OF INTERNATIONAL LAW* 853-54 (J. Scott ed., 1925).

62. E. DE VATTEL, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉ À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* (1758), *reprinted in* 3 *CLASSICS OF INTERNATIONAL LAW* 284 (J. Scott ed., 1916).

parole oath was a violation of a sacred trust.⁶⁴ Ayala also proposed that a released prisoner was not obligated to keep his word if the captor was not a “just and lawful enemy.”⁶⁵

Lieber’s Code, which articulated the rules of warfare for Union troops in the Civil War, extensively addressed parole.⁶⁶ Articles 119-134 of the code permitted parole and set out the rules to follow when granting or receiving it. Under Lieber’s Code, PWs could only accept parole through one of their commissioned officers, the most senior one available.⁶⁷ As parole was an individual act, both offering and accepting it were totally voluntary. There was no obligation on the part of the detaining power to offer parole to certain individuals, or to anyone.⁶⁸ By the same token, any PW could refuse to accept parole.⁶⁹ Parole also required the approval of the PW’s country.⁷⁰

The Code specified that the parole promise not to serve again referred only to active service in the same war against the detaining power or its allies.⁷¹ An individual who broke his parole and was then recaptured could be punished with death.⁷² Lieber’s concepts in the area of parole were

63. See SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* (1688), reprinted in 2 *CLASSICS OF INTERNATIONAL LAW* 1150 (J. Scott ed., 1934):

[S]ince it is absurd for me to be a citizen and yet be under an obligation which also renders me of no service to the state in its extreme necessity, no less absurd is it for me to be able to be obligated by a simple pact so that I may not resist the unjust force of one who is intent upon the destruction of me and mine; and that for this reason such a pact of a prisoner is to be understood as only for an offensive, not a defensive war, especially if my safety will also be imperiled together with that of the state.

64. BALTHAZAR AYALA, *DE JURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARI LIBRI* (1582) reprinted in 2 *CLASSICS OF INTERNATIONAL LAW* 58 (J. Scott ed., 1912).

65. *Id.* at 59. This proposition was not echoed by others in his field, and is not recommended here. Although a sound thought, it places each parolee in the position of judging whether his captor has behaved honorably, and creates more difficulties than it solves.

66. U.S. Army General Order No. 100 (24 Apr. 1863), reprinted in R.S. HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* 45-71 (1983) [hereinafter Lieber’s Code].

67. *Id.* art. 127.

68. *Id.* art. 133.

69. *Id.*

70. *Id.* art. 132.

71. *Id.* art. 130. The term “active service” is ambiguous, but was clarified in the Dix-Hill Cartel. See *supra* note 43.

incorporated, though with less detail, in the Declaration of Brussels of 1874, and later in the Hague Convention as follows:⁷³

Prisoners of war may be set at liberty on parole if the laws of their country allow, and, in such cases, they are bound, on their personal honor, scrupulously to fulfill, both towards their own Government and the Government by whom they were made prisoners, the engagements they have contracted.⁷⁴

Later parole made its way into the Geneva Convention Relative to the Treatment of Prisoners of War. “Prisoners of war may be partially or wholly released on parole or promise, in so far as is allowed by the laws of the Power on which they depend.”⁷⁵

At first glance it seems ridiculous to expect a nation at war to release PWs with little to keep them from returning to the battlefield but their honor. Yet the system obviously worked to some extent or it never would have endured. The next question to answer, therefore, is why it worked.

IV. Parole’s Effectiveness: Honor and Fear

Generally, parole was offered only to officers, those “gentle” members of the educated and upper class.⁷⁶ To gentlemen, honor meant a great deal, and parole was a matter of honor. Francis Lieber codified the custom. “Commissioned officers only are allowed to give their parole, and they can

72. Lieber’s Code, *supra* note 66, art. 124. *But see Carnahan, supra* note 33, at 116 (Thomas Jefferson argued, without citing any precedent, that “the law of nations authorized only close confinement, not death, for a violation of parole.”).

73. Lieber’s inclusion of parole in his code was merely a recognition that PW parole was a valid option for nations at war. PW parole was so widely recognized, there being nothing to recommend against it, that its inclusion in the later conventions was accompanied by no discussion at the conferences. Although parole was not mentioned in the 1929 Geneva PW convention, it was still applicable through the Hague rules or customary international law through that period. LEVIE, *supra* note 19, at 399.

74. ANNEX TO HAGUE CONVENTION IV RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND, art. 10 (1907), *reprinted in* DOCUMENTS ON THE LAWS OF WAR 48 (A. Roberts & R. Guelff ed., 1982) [hereinafter HAGUE CONVENTION IV].

75. GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, art. 21 (1949), *reprinted in* DOCUMENTS ON THE LAWS OF WAR 216 (A. Roberts & R. Guelff ed., 1982) [hereinafter GENEVA CONVENTION III].

76. FOOKS, *supra* note 7, at 298.

give it only with the permission of their superior, as long as a superior rank is within reach.”⁷⁷

If honor and fear of recapture by the enemy were not enough to hold a gentleman to his promise, society also helped stiffen his resolve. A parole breaker could face severe sanctions from his own country. During the Napoleonic Wars, British officers who broke parole were subject to being stripped of their commission and sent to prison, or even back to France. Escaped prisoners were required to report to a military board and answer, among other questions, the all-important query of whether they were on parole at the moment of escape.⁷⁸ This board, called the Board of Transportation, was in charge of all British prisoner of war affairs.⁷⁹ To avoid being expelled from their unit or service, disowned by their friends or being sent back to France, escapees must not have been on parole at the time of escape.⁸⁰

It may seem unusual that Britain was so hard on its own military members who violated parole, but the British seem to have believed that an officer who would not keep his word to the enemy was of little value to the sovereign. There is also the issue of maintaining military discipline:

It is, therefore, the height of impiety to swear falsely and, considered closely, such conduct is unprofitable and hurtful in the extreme to a general or leader of an army, for the sacredness of the oath is the bond of military discipline and if the general sets the example of lightly esteeming it as regards both enemy and his own men, everything must fall into muddle and confusion, for he will not be able to rely on the word of his enemy or on the fidelity of his own men.⁸¹

Although a strict code of honor and possible sanctions by the PW's own country can decrease the number of parole breakers, there is always the possibility that some parolees will break their pledge. In that event, a

77. Lieber's Code, *supra* note 66, art. 126.

78. A. J. BARKER, PRISONERS OF WAR 10 (1975).

79. *Id.*

80. LEWIS, *supra* note 9, at 46.

81. AYALA, *supra* note 64, at 57.

detaining power who recaptures a former PW who has broken parole has extensive options in dealing with the miscreant.

Arguably, the death penalty is one possible punishment for those breaking parole.⁸² Opinion is divided on this issue, however. Thomas Jefferson asserted that international law permitted only close confinement in the case of a recaptured parolee.⁸³ He did, however, threaten retaliation if the British carried out the penalty of death against parole violators in the Revolutionary War.⁸⁴

More recently, the Hague Convention specified that parole breakers would forfeit their right to be treated as prisoners of war if recaptured.⁸⁵ The 1949 Geneva Convention is less direct on the issue. A recaptured parole violator under the Convention would be afforded the opportunity to defend himself against charges of parole breaking. In the interim, the accused violator would be entitled to PW status.⁸⁶

If parole were permitted by the United States, the punishment for convicted parole violators would have to be set, as the Uniform Code of Military Justice does not address the issue.⁸⁷ That the United States does not

82. See, e.g., FOOKS, *supra* note 7, at 300; Lieber's Code, *supra* note 66, art. 130. In the early part of the twentieth century customary international law permitted the death penalty for those who violated parole. L. OPPENHEIM, 2 INTERNATIONAL LAW 170 (1912).

83. Carnahan, *supra* note 33, at 116.

84. Jefferson's position may have been at least partly the result of a bizarre scheme the British had of requiring paroles of all able bodied Virginia men aged 16-50 in lieu of becoming PWs. The British justification was that all men in that category were by Virginia law in the militia, despite the fact that many had never been trained or served on active duty. *Id.* at 115.

85. HAGUE CONVENTION IV, *supra* note 74, Article 12.

86. III INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 181 (Pictet ed., 1960) [GENEVA CONVENTION COMMENTARY].

87. Parole is not an enumerated offense in the UCMJ. In the 1969 revised edition of the *Manual for Courts-Martial* it was referred to as an Article 134 offense, but the reference there was not to prisoner of war parole. MANUAL FOR COURTS-MARTIAL, UNITED STATES, at 25-16, A6-25 (1969). Article 134, known as the General Article, covers those offenses not specifically addressed in the Uniform Code of Military Justice. UCMJ art. 134 (1983). The closest offense currently in the UCMJ is article 105, Misconduct as a Prisoner. That provision provides for punishment for PWs who violate law or custom to obtain favorable treatment for themselves, but only if the violation also causes other PWs to be more harshly treated, such as by physical punishment or closer confinement. UCMJ art. 105 (1994). A military member convicted under that article could receive any punishment other than death, up to and including life imprisonment.

have a fixed punishment is not unusual. "It is difficult to conceive that any State has laws punishing members of its own armed forces for the violation of a parole given as a prisoner of war."⁸⁸ Nonetheless, it would be better to have a fixed policy.

Although parole violations could be treated as war crimes, it would be more realistic to treat them as violations of the General Article, subject to a maximum punishment of six months in confinement.⁸⁹ If punished as war criminals, parole violators could be subject to severe punishment.⁹⁰ Consequently, the military would look for excuses to avoid prosecution rather than subject its own members to severe sentences. Placing the maximum sentence at a reasonable level would make it more likely that the

88. LEVIE, *supra* note 19, at 402. Thus, the traditional British attitude toward parole violations (*see supra* note 81 and accompanying text) is the exception rather than the rule. This statement also ignores the adverse effect parole violations have on military discipline.

89. Professor Levie believes that the United States Army, at least, already has decided that an analogy to a UCMJ parole violation would be the most appropriate approach to any violations of PW parole. LEVIE, *supra* note 19, at 402 n.43.

90. The death penalty is unlikely as "[t]he punishment imposed for a violation of the law of war must be proportionate to the gravity of the offense." U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 508 (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10]. Parole is not a grave breach, so the death penalty is not an available punishment. Further, as cited above, an accused would be entitled to protection as a PW; this includes procedures for imposing the death penalty. Geneva Convention III requires the notification "of the offenses which are punishable by the death sentence under the laws of the Detaining Power." GENEVA CONVENTION III, *supra* note 75, art. 100. This provision further protects PWs from capital punishment.

United States would fulfill its obligation to take action against parole violators.⁹¹

V. Parole Policy of the United States

The United States has, at times in its history, granted parole to enemy prisoners of war (EPWs) and allowed, either explicitly or implicitly, its own troops to accept parole.

General Winfield Scott paroled EPWs during the Mexican-American War.⁹² As discussed earlier, prisoners on both sides were paroled in the Revolutionary War, the War of 1812 and the American Civil War.⁹³

After Italy's capitulation in 1943 it declared war on Germany and was granted co-belligerent status with the Allies. Some captured Italian troops were granted limited parole and were allowed to work for the Allies.⁹⁴ Also during World War II, the Japanese "paroled" certain members of the U.S. armed forces in the Philippines, as they did with some other Allied prisoners throughout the theater.⁹⁵ Japanese actions tended not to be true paroles, however, as they provided no benefit in return for the prisoner's promise.⁹⁶

Current U.S. policy prohibits prisoners of war from accepting parole.⁹⁷ The Code of Conduct for the Armed Forces states: "I will accept

91. Such a policy would mean that any enemy parole violators who came into United States custody would be treated the same. It does not provide protection for American service members who might violate parole and then fall again into enemy hands.

92. George S. Prugh Jr., *The Code of Conduct for the Armed Forces*, 56 COL. L. REV. 678, 691 n.54 (1956). Paroled Mexican officers so commonly violated their oaths that General Scott publicly threatened them with hanging. Several Mexican officers were tried and sentenced to death for violating their parole. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 795 (1920).

93. See *supra* notes 23-50 and accompanying text.

94. LEWIS & MEWHA, *supra* note 45, at 93-95; LEVIE, *supra* note 19, at 400.

95. Prugh, *supra* note 92, at 683; LEVIE, *supra* note 19, at 399.

96. BARKER, *supra* note 78, at 118. Thousands of Allied prisoners captured after Japanese victories at both Hong Kong and Singapore were forced to sign pledges not to escape. These "paroles" merely enabled PWs to avoid beatings in return for their signature. *Id.* The Judge Advocate General of the U.S. Army did, however, find paroles given by U.S. service members after the surrender of the Philippines to be valid, as long as they were uncoerced. 5 J.A.G. Bull. 325 (1946).

97. The Departments of the Army and Air Force authorize parole exceptions that are not provided for in national policy as reflected in Department of Defense publications. See *infra* notes 101-105 and accompanying text.

neither parole nor special favors from the enemy.”⁹⁸ Acceptance of parole, which is broadly defined,⁹⁹ is also circumscribed by DOD guidance. “The United States does not authorize any Military Service member to sign or enter into any such parole agreement.”¹⁰⁰

However, not all U.S. military publications are so clear. *Air Force Pamphlet 110-31* asserts that the general rule contained in the Code of Conduct prohibiting U.S. personnel from accepting parole may be subject to relaxation by national authorities in particular conflicts, and cites examples of when it has been relaxed.¹⁰¹ It appears to have been relaxed during the Vietnam conflict, when, in response to the unacceptable treatment of American PWs by the North Vietnamese, the Department of Defense issued a letter on 3 July 1970 that included the language, “The U.S. approves any honorable release and prefers sick and wounded and long term prisoners first.”¹⁰²

Under the Air Force policy, limited parole in the form of a promise not to escape is also permitted for specific, limited purposes if authorized by the senior ranking officer exercising command authority.¹⁰³ Subject to one exception, Army members are prohibited by *U.S. Army Field Manual 27-10* from accepting parole.¹⁰⁴ The exception echoes the position of *Air Force Pamphlet 110-31*. An Army member,

may be authorized to give his parole to the enemy that he will not attempt to escape, if such parole is authorized for the specific purpose of permitting him to perform certain acts materially contributing to the welfare of himself or of his fellow prisoners . . . when specifically authorized to do so by the senior officer or noncommissioned officer exercising command authority.¹⁰⁵

98. Code of Conduct for Members of the Armed Forces of the United States, Exec. Order No. 10,631, 20 Fed. Reg. 6,057 (1955), *as amended by* Exec. Order No. 12,017, 42 Fed. Reg. 57941 (1977); and Exec. Order No. 12,633, 53 Fed. Reg. 10,355 (1988) [hereinafter Code of Conduct].

99. DOD DIR. 1300.7, *supra* note 4, at encl. 2, para. B3a(5).

100. *Id.*

101. AFP 110-31, *supra* note 5, at 13-2.

102. *Id.* at 13-7 n.12 (emphasis added). One can debate the meaning of “honorable,” but it is certainly arguable that a release in return for a promise not to fight again would be honorable. In any event, the letter certainly failed to reflect the apparently intractable position of article 3 of the Code of Conduct.

103. *Id.* This would include a PW’s visit to a medical facility for treatment, or a temporary parole of a chaplain to perform his normal duties.

104. FM 27-10, *supra* note 90, para. 187.

Examples of the “certain acts” given in the manual are seeking medical treatment or carrying out duties as a medical officer or chaplain.¹⁰⁶

Both the Air Force and the Army rules leave room to maneuver in the area of parole.¹⁰⁷ Both are significantly more flexible than the Department of Defense guidance, which clearly specifies that U.S. PWs will never accept parole.¹⁰⁸ The changing nature of warfare, however, might suggest a more flexible approach to this issue. Perhaps the proscription against parole should be reexamined.

VI. The Case for Parole

Although international conflict is broadly defined, non-international disputes have become the more frequent occurrence. “Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2.”¹⁰⁹ This definition still leaves out the more frequent occurrences in which elements of a nation, or former nation, become involved in hostilities and forces of another nation (e.g., the U.S.) are deployed in support of one side. Even in non-international conflicts, however, U.S. and U.N. policies dictate the application of Geneva Convention principles.¹¹⁰ As much of the law contained in the conventions has become customary, one can only hope that other nations will also apply the principles. However recent events have shown that

105. *Id.*

106. *Id.*

107. The Department of the Navy provides for instruction in the Code of Conduct, but does not supplement the Department of Defense guidance, as do the Departments of the Air Force and Army. U.S. DEP’T OF NAVY, SECRETARY OF THE NAVY INSTR. 1000.9 (4 Oct. 1979). The Air Force is the executive agent for Code of Conduct training. DOD DIR. 1300.7, *supra* note 4, para. D3.

108. Clearly, each branch of the U.S. military should have the same policy toward parole. These distinctions have arisen because of the attempts of the services to inject logic into an illogical system that prohibits parole.

109. I INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (Pictet ed., 1952).

110. See U.S. DEP’T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979); Umesh Palwankar, *Applicability of International Humanitarian Law to United Nations Peacekeeping Forces*, INT’L REV. RED CROSS 232 (May-June 1993).

international norms are frequently disregarded because of the changing nature of warfare.

Most of the conflicts in which the United States now involves itself are operations other than war.¹¹¹ The enemy is frequently under-equipped, and often uses guerrilla tactics. This means there are not likely to be fixed camps for combatants; there certainly will be none for PWs.

Recent conflicts have also involved enemies who are likely to disregard the Geneva Conventions and other rules of armed conflict, perhaps arguing that the Geneva Conventions do not apply in conflicts of a non-international nature. This cavalier attitude toward international norms can create a hazardous situation for U.S. PWs, as was evidenced during the conflicts in Korea and Vietnam.¹¹²

More recently, in Desert Storm, the Iraqis violated international norms. For instance, an Iraqi soldier digitally raped one female PW, and both female PWs held by Iraq in the Persian Gulf Conflict were subjected to sexual threats.¹¹³ Surely the United States would not punish a female combatant who was concerned for her well-being for accepting parole. Parole acceptance could even be encouraged as a relatively proactive method of avoiding sexual assault. Of course, parole should remain an option equally available to male and female PWs.

A further rationale for reinstating a parole regime is that all repatriated PWs are prohibited from again engaging in active military service

111. "It is expected that Armed Forces of the United States will increasingly participate in [military operations other than war]." THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-07, JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN WAR, I-7 (16 June 1995) [hereinafter JOINT PUB. 3-07]. Examples of military operations other than war include combating terrorism, counterdrug operations, humanitarian assistance, peace operations and support to insurgencies. *Id.* at III-1.

112. During the Korean Conflict, U.S. PWs were tortured, beaten, starved and subjected to Communist indoctrination. Over a third of them died in captivity. William P. Lyons, *Prisoners of War and the Code of Conduct*, NAVAL WAR COLLEGE REV., Dec. 1967, at 60, 85; T.R. FEHRENBACH, THIS KIND OF WAR 464, 541 (1963). American PWs were also subject to torture and privation in Vietnam. JIM & SYBIL STOCKDALE, IN LOVE AND WAR: THE STORY OF A FAMILY'S ORDEAL AND SACRIFICE DURING THE VIETNAM YEARS 296 (1984); ROBINSON RISNER, THE PASSING OF THE NIGHT (1973).

113. Rowan Scarborough, *Female POWs Abused; Pentagon Accused of Hiding Incidents*, WASH. TIMES, June 12, 1992, at A1; *U.S. Says All POWs in Iraq Were Abused*, ORLANDO SENTINEL TRIB., Aug. 2, 1991, at A11; RHONDA CORNUM, SHE WENT TO WAR 49 (1992).

under Geneva Convention III, regardless of how the repatriation occurred.¹¹⁴ Prisoners of war who agree not to fight again in return for their release are merely promising to fulfill a preexisting treaty obligation.

Parolees can serve in other capacities for their militaries; they just cannot again engage in combat against their captors or their captors' allies. "The usual pledge given in the parole is not to serve during the existing war unless exchanged. This pledge refers only to active service in the field against the paroling belligerent or his allies actively engaged in the same war."¹¹⁵ Article 117 of the Geneva Convention III "forbids any repatriated person to serve in units which form part of the armed forces but does not prevent their enrollment in unarmed military units engaged solely in auxiliary, complementary or similar work."¹¹⁶ In addition, returning PWs are potentially a good intelligence source, and would be in a position to provide excellent training to friendly combatants.

For these reasons, an amendment to the Code of Conduct is in order. The last sentence of Part 3 of the Code of Conduct should be replaced by a sentence reading: "If offered, and approved by my senior officer in command, I may accept a simple parole, the terms of which may only be a pledge not to engage in combat against my captors or their allies again in return for my release to friendly forces."¹¹⁷

The parole should not be confined to the officer ranks, but should be available to enlisted PWs, as well. The historical rationale of confining parole to officers, that only officers can be trusted to comply with their word, has outlived its usefulness.¹¹⁸ The traditional requirement that the senior ranking officer approve the parole is still a useful check on a parole system, however.

In addition to preventing needless suffering by U.S. PWs, there are other advantages to permitting them to return from captivity on parole. Adopting a parole policy would end the U.S. military's duplicitous practice of ignoring violations of the Code of Conduct. According to Admiral

114. GENEVA CONVENTION III, *supra* note 75, art. 117.

115. Lieber's Code, *supra* note 66, art. 130.

116. GENEVA CONVENTION COMMENTARY, *supra* note 86, at 539.

117. It is important to remember that permitting U.S. forces to accept parole would impose no reciprocal obligation on the United States to grant parole to EPWs. Because the United States has the resources and the will to treat EPWs properly, a policy of granting parole to EPWs may offer little advantage to the United States.

118. BORDWELL, *supra* note 54, at 243-44.

Stockdale, "For a military man to accept parole and come home early was forbidden by the Code of Conduct. Yet our government encouraged and condoned this sort of release."¹¹⁹ Rather than punishing those who accepted early release from the North Vietnamese, the DOD allowed PWs to follow their consciences.¹²⁰ Despite issuing guidance to the contrary, the United States has demonstrated through its deeds that it will not make its PWs suffer just to fulfill the Code of Conduct. Unfortunately, espousing policy on the one hand and violating it on the other leaves the question open, to no benefit. An unclear signal in any area of the Code of Conduct creates enormous problems for PWs, who rely on the Code as a major source of discipline and unity.¹²¹

There are perhaps some disadvantages to removing the proscription against parole from the Code of Conduct. There is certainly the concern that the permission to accept parole could migrate into something more in the minds of PWs. The great advantage of the Code of Conduct is clarity; PWs are not asked to make fine distinctions. The main purpose for designing the Code of Conduct was to "provide members of the Armed Forces with a simple, easily understood code to govern their conduct as American fighting men."¹²²

As demonstrated above, however, even the Code of Conduct is subject to various interpretations from the services. Prugh casts further doubt: "The Code [of Conduct] is probably not designed to prohibit acceptance of special benefits unless the prisoner is somehow compromised by that acceptance."¹²³ Even when the Code of Conduct and DOD guidance prohibit parole, commentators still argue it is legal.¹²⁴ When logic is lacking,

119. STOCKDALE, *supra* note 112, at 296.

120. See Holman J. Barnes, Jr., A New Look at the Code of Conduct 49 (April 1974) (unpublished thesis available in the Air University Library, Maxwell Air Force Base, Ala.). The failure of military authorities to take action against most returning PWs became an issue in *U.S. v. Garwood*, 20 M.J. 148, 152 (C.M.A. 1985), *cert. denied*, 474 U.S. 1005 (1985), wherein Garwood asserted that he was being punished in contravention of Naval directives and statements. Garwood's failure to prevail on the issue was due to his failure successfully to establish a defense of selective prosecution; the court did not dispute that there was a policy of non-prosecution for certain PW offenses.

121. See Barnes, *supra* note 120, at 49. See also, RISNER, *supra* note 112, on the importance of PW unity and discipline.

122. William P. Lyons, *supra* note 112, at 60, 66.

123. Prugh, *supra* note 92, at 691.

124. See *supra* notes 101-107 and accompanying text.

so is clarity. Incentive to follow the code strictly must also be reduced by the knowledge that the consequence for violating it appears to be naught.

The United States trusts its combatants to operate complex equipment in the fog of war. Certainly it can rely on them to understand the concept of a simple parole.

Another potential disadvantage of permitting parole is that PWs who accept parole when offered could be seen as breaking faith with fellow PWs. For example, Vice Admiral Stockdale¹²⁵ opposed the acceptance of parole. It is not clear, however, whether he was totally opposed to the concept of parole or merely opposed to those who accepted parole when it was a clear violation of the Code of Conduct and a compromising of the prisoner.

Herbert Fooks is another example of a military man who believed that parole was a bad idea. He cited three main objections to continuing the custom of parole.¹²⁶ It is instructive to examine his objections, which were the product of that particular moment in history when the United States decided to end any observance of the custom of parole.

The first objection was that observance of the custom may not be practical. This objection collapses of its own weight. Frequently, observance of the Geneva Conventions is not “practical,” yet countries are obliged by such agreements to make every effort to limit suffering in war. Further, just because some countries may not observe the custom should not preclude offering parole as an option to nations engaged in armed conflict.

Fooks’ second objection was that the nature of warfare had changed so that he believed that the nation with the strongest material, not the greatest personnel, had the advantage. He thought, in other words, that PWs would essentially become irrelevant. This belief is untenable. A military’s greatest resource is its people. “People are the decisive factor in war.”¹²⁷ In modern warfare, people are the most important element.¹²⁸ To maintain

125. Vice Admiral James Bond Stockdale, USN (ret.) was a PW in North Vietnam from 1965-73. He was the senior Naval Service PW.

126. Fooks, *supra* note 7, at 301.

127. U.S. DEP’T OF AIR FORCE, AIR FORCE MANUAL 1-1, BASIC AEROSPACE DOCTRINE OF THE UNITED STATES 18 (Mar. 1992).

128. THE JOINT CHIEFS OF STAFF, JOINT PUB. 1, JOINT WARFARE OF THE U.S. ARMED FORCES, 2-3 (11 Nov. 1991).

the effectiveness of the people who fight wars, it is vital to maintain morale. Parole is an extraordinary morale program; a chance for PWs to return home safely and with honor.

The final objection to the custom of parole that Fooks expressed was that “modern” war caused the mobilization of nearly the entire nation; thus, farmers, factory workers and everyone involved with production is indirectly connected with the war. His argument was that permitting paroled combatants to engage in even these innocuous tasks could lead to objections by the paroling power. In fact, Fooks’ “modern war” is a thing of the past. Now the most common conflict, the type the U.S. military prepares for, is the operation other than war. An operation other than war may be a peace keeping or humanitarian mission.¹²⁹ For this type of conflict, frequently only a small military unit mobilizes. The sponsoring nation may barely know the operation is ongoing. Further, even if a nation fully mobilizes, the paroling power has no valid objection to production related, or even military training, activities. Parolees can legally engage in any activity that is not combat against the paroling country or its allies.¹³⁰

Fooks’ concerns are not the only ones, of course. More recently, there have been two additional ones that have come to the forefront. The major reasons parole has been prohibited are that “the enemy never offers parole unless it is to his advantage. Secondly, the POW who enters into a parole agreement with the enemy cannot be trusted by his fellow prisoners.”¹³¹

It is true that the enemy may try to use the granting of paroles to some advantage. There are two considerations here, however. First, is there any advantage to be gained? Granting parole may garner some international acclaim, but the long-term effect of that praise on a nation’s war effort is bound to be minimal. While the importance of national and international support for a war effort should not be minimized, these issues are no different than any compliance with international law. Compliance may bring political support; noncompliance may bring opprobrium. This in no way mandates against including parole as one of the legitimate components of

129. JOINT PUB. 3-07, *supra* note 111, at III-1.

130. *See supra* notes 114-116 and accompanying text.

131. Lyons, *supra* note 112, at 70.

international law. Further, this issue only goes to whether a power might choose to offer parole, and not the propriety of allowing acceptance.

The greatest advantage to the paroling power may be that it can conserve resources that would otherwise be used caring for EPWs. Resources may be so scarce that they are insufficient to properly support EPWs, as was the case at Andersonville, for instance.¹³² In those instances it seems the United States would trade the small advantage to a probably faltering enemy for the proper care and treatment, at home, for its PWs. Any benefit gained by the paroling power must be balanced against the benefit to the paroled PWs. It is an enormous boon to return home rather than waste away in a PW camp. Returning PWs also avoid the morale drag on active troops that can occur when their comrades are detained for a lengthy period and mistreated.

The propaganda concerns arise largely because of events occurring during the Vietnam conflict. North Vietnam's early releases of American PWs were accompanied by anti-U.S. propaganda.¹³³ Even if a future U.S. adversary were able to mount a propaganda machine as successfully as the North Vietnamese, safely returned PWs are worth the price. Allowing parole does not permit PWs to make disloyal statements. Within the law, therefore, damaging statements by American PWs would be no more likely under a parole system than under the current system. Of course, authorities of the releasing power can say whatever they like, with or without a parole.

Lyons' second concern, that those accepting parole cannot be trusted by their fellow PWs, would not be an issue if parole were explicitly authorized by the Code of Conduct and only allowed under honorable circumstances. Both of these concerns are brought to life by the experiences of Admiral Stockdale who wrote:

[N]o prisoner in North Vietnam was given freedom without "paying them back" with freely given anti-American propaganda. When the announcement was made on the prison loud speakers that three Americans were being given release from prison, we all had the pleasure of hearing a tape recording from

132. The wretched conditions at Andersonville have been well documented. A short description is available in BRUCE CATTON, *A STILLNESS AT APPOMATTOX* 278 (1953); a complete description in ROBERT VAUGHAN, *ANDERSONVILLE* (1996).

133. Barnes, *supra* note 120, at 123 n.166. For example, antiwar activists went to Hanoi to escort many "early release" PWs back to the United States.

each of them urging we who stayed behind to wake up and see the evil of the war and the honor of the Vietnamese People. They urged us to follow in their footsteps. We could tell from the sound of their voices that they had not been physically forced to make those tapes. They were singing like birds and leaving the rest of us to sweat it out. To accept parole in our prisons was to be on the outside of old prisoner friendships for the rest of your life. You were entering the world of an outcast.¹³⁴

VII. Summary

In short, the only valid objection to resurrecting the concept of parole is that an enemy of the United States may ignore the option and choose not to parole U.S. PWs. Still, nothing is lost by offering the option. It is also possible that, in its own selfish interest, a country may offer to parole prisoners of war. After all, use of parole can liberate guards and supplies that would otherwise be used to secure and care for PWs for more proactive warfighting activities.¹³⁵

Although at first the parole proscription seems logical, that impression fails under closer scrutiny. Parole is certainly not the answer to all the problems of PWs. Perhaps no belligerent will ever offer a parole. If even one PW could benefit from the system, however, the United States should offer the option. It could be one small step on the path toward more humane treatment of PWs.

Parole systems have not always been successful, and this one will surely have its problems. There will be those who pledge on their honor not to return to combat who do so anyway. However, while parole is not a perfect solution, it has had enough utility to exist in some form for many hundreds of years. After a brief hiatus of about a century, perhaps it is time to give it another try.

134. Letter from Vice Admiral Stockdale to the author (Feb. 13, 1997). Such disloyal statements were wrong at the time, and would still be wrong if parole were permitted by the United States.

135. BARKER, *supra* note 78, at 183.