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SOMETHING TO BELIEVE IN: ALIGNING THE PRINCIPLE OF
HONOR WITH THE MODERN BATTLEFIELD

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It is a near-guaranteed question faced by judge advocates at any given Law of Armed Conflict briefing: “Why must I adhere to the Principle of Honor when the enemy does not?” Soldiers, Sailors, Airmen, and Marines preparing for asymmetric warfare are often frustrated by the thought of adhering to rigid principles of battlefield conduct in the face of an enemy all too willing to ignore—and exploit—the rules of combat. It is a fair question from servicemembers risking their lives on the modern battlefield, one that demands a comprehensive legal response. Unfortunately, the answer attempted in the Department of Defense’s new Law of War Manual is far from satisfying. Rather than offering an on-target response that focuses on the realities of modern warfare, the manual’s justification for the Principle of

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Honor remains rooted in archaic notions of war often inapplicable to today's battlefield. This Article exposes the paradox of continuing to explain the Principle of Honor solely through the lens of traditional "perfect warfare" doctrine despite the realities of today's "imperfect" battlefield. This Article offers several contemporary ways to redefine this important principle.

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INTRODUCTION

Judge advocates tasked with teaching the Law of Armed Conflict (hereinafter the “LOAC”) to Soldiers, Sailors, Airmen, and Marines are almost certain to see at least one hand rise in the audience by a servicemember with the same vexing question: “Why do I have to abide by the Law of War when the enemy does not?” As members of the Judge Advocate General’s Corps currently teaching at the United States Air Force Academy, both authors have encountered this question countless times throughout their careers from military members and cadets seeking to understand the paradox of yielding to medieval notions of honor in the face of an enemy all too willing to ignore the rules of combat. For members of the armed forces, adherence to the Law of War is not an option. For the U.S. servicemember, decisions on the battlefield—often measured in milliseconds—may stand equal chance of medal or Court-Martial.¹ The enemy in the War on Terror, however, often appears all too willing to ignore the rules of warfare. As a result, one may understand the difficulty some servicemembers have accepting grossly different standards of combat on the modern battlefield.²

This concern is not reserved for the military, but rather, is one expressed by many in society, particularly the families of servicemembers who watch their loved ones depart for combat and yearn for their safe return. Over the past decade, questions surrounding battlefield conduct have reached every aspect of American life—from the recent presidential campaign³ and

¹ The legal implication of a servicemember’s conduct in war was recently depicted in the movie *American Sniper*, when Chris Kyle faced the decision to engage a young boy transporting a grenade toward a military convoy in Iraq. When agonizing over the decision to pull the trigger, the sniper’s spotter stated, “They’ll fry you if you’re wrong. They’ll send you to Leavenworth.” *AMERICAN SNIPER* (Warner Bros. Pictures 2014).

² In the author’s recent deployment to an undisclosed location in the Middle East, fighter pilots engaged in air operations in Raqqa, Syria discussed the same struggle when choosing to engage the enemy below.

³ See generally David Welna, *GOP Presidential Candidates Bring Torture Back Into The Spotlight*, NPR: NATIONAL SECURITY (Feb. 9, 2016, 4:22 PM),

Supreme Court nomination⁴ to the pages of top-selling books and Hollywood productions. As an illustration, the movie *Lone Survivor* highlighted the brutal consequences of maintaining honor on the battlefield when a Navy SEAL team's decision to release several Afghan civilians encountered during a mountain-side mission led to nineteen American deaths.⁵ In the best-selling book that spawned the movie, Marcus Luttrell echoed the frustrations of many who have experienced modern combat: "In the global war on terror, we have rules, and our opponents use them against us. We try to be reasonable; they will stop at nothing."⁶ His frustrations speak for many in society trying to understand honor in the War on Terror.

As the leading authority on this subject, the Department of Defense Law of War Manual (hereinafter the "Manual") ought to provide the official legal response for why servicemembers must abide by the Law of War when the enemy does not.⁷ This 1,204-page product—a multi-year, Herculean effort first introduced in 2015— admirably approaches the broad and often-amorphous concepts surrounding the rules of war in an organized and comprehensive manner.⁸ The Manual is the foundational document for the rules of warfare required by every military member, offering not only the rules but the reasons for their implementation.⁹ Any servicemember seeking to understand the Law of War and the

<http://www.npr.org/2016/02/09/466186345/gop-presidential-candidates-bring-torture-back-into-the-spotlight>.

⁴ See generally Evan Halper, *Sen Feinstein grills Neil Gorsuch on torture and wiretapping work during Bush presidency*, LOS ANGELES TIMES (Mar. 21, 2017, 8:19 AM), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-feinstein-grills-gorsuch-on-torture-and-1490108624-htm1story.html>.

⁵ See Christopher Klein, *The Real-Life Story Behind "Lone Survivor"*, HISTORY.COM (Jan. 6, 2014), <http://www.history.com/news/the-real-life-story-behind-lone-survivor>.

⁶ MARCUS LUTTRELL, *LONE SURVIVOR: THE EYEWITNESS ACCOUNT OF OPERATION REDWING AND THE LOST HEROES OF SEAL TEAM 10*, (Little, Brown and Company, 2013).

⁷ See generally DEPARTMENT OF DEFENSE, *LAW OF WAR MANUAL* (Dec. 2016).

⁸ See *id.*

⁹ See *id.*

justification for expected battlefield conduct need only turn to the pages of this important guide.¹⁰

Despite its comprehensive restatement of the rules of war, the Manual remains incomplete. This Article addresses the Manual's failure to provide a comprehensive explanation for the Principle of Honor based on its dogged reliance on the "perfect war" model (i.e. armed conflicts between nation-states) to fully conceptualize warfare.¹¹ The Manual's discussion of the Principle of Honor entirely fails to account for the "imperfect war" scenario commonly faced by servicemembers in the War on Terror.¹² This is notably peculiar, because the primary war model faced by the United States for nearly two decades now has been an imperfect one. Moreover, perfect war concepts often do not fit the dynamics of imperfect war. By relying entirely on the perfect war model to explain and rationalize the Principle of Honor, the Department of Defense seems to have placed its proverbial head in the sand, thereby failing to adjust to the modern battlefield and provide military servicemembers with a comprehensive explanation for the Principle of Honor.

The Manual must keep pace with the evolution of modern warfare by providing sound rationale for the Principle of Honor against an "imperfect" enemy that fails to adhere to the rules of

¹⁰ *See id.*

¹¹ *See generally* *Bas v. Tingy*, 4 U.S. 37 (1800). The term "perfect war" more commonly refers to armed conflict sustained by a formal declaration of war by Congress. The authors of this Article intentionally use "perfect war" as synonymous with International Armed Conflicts, or "IACs," that are lawfully entered between two nation-states. While not entirely accurate, the authors used this term to reference the more classic understanding of warfare.

¹² The authors use the term "imperfect war" throughout this Article in reference to conflicts between nation-states and non-state actors (generally referred to as Non-International Armed Conflicts, or "NIACs") where the nature of conflict remains somewhat ambiguous. The authors recognize that the terms "perfect war" and "imperfect war" are (ironically) "imperfectly" used (i.e. beyond their legal definitions) throughout this Article. The authors intentionally did so in order to juxtapose both forms of warfare—the classic depiction of warring nation-states versus the ambiguity of contemporary warfare. They request your indulgence in consideration of this Article.

war. Failure to do so will continue to erroneously paint a monochromatic picture of the doctrine and provide an unsatisfying answer for those looking to understand why the Principle of Honor remains equally applicable—and enforceable—in all conflicts facing the United States. In other words, the Department of Defense owes a better, contemporary answer for servicemembers with their hands in the air at the LOAC briefing. This Article attempts to do just that.

I. THE PRINCIPLE OF HONOR

A. *The Origins and Codification of LOAC*

To understand the problem with the current Manual, the reader must understand the evolution of the Law of Armed Conflict and the voluminous amount of materials the Manual attempts to consolidate and clarify. LOAC is not a singular work of art, but rather, a puzzle formed by hundreds of individual pieces of international and domestic law.¹³ LOAC is captured by myriad international treaties, including the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1948, the Additional Protocols of 1977, international judicial decisions, customary international law principles, and works of international scholars.¹⁴ Within the domestic arena, various pieces of legislation, case law, the Uniform Code of Military Justice, and other military documents, such as Army Field Manual 27-10, form the United States' understanding and implementation of LOAC.¹⁵ Until 2015, the Department of Defense had not attempted a cross-service document designed to “put the pieces together.”¹⁶ Today's Manual provides an outstanding step toward consolidating and conceptualizing this

¹³ See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 11-20* (Cambridge Press, 2010).

¹⁴ See *id.*

¹⁵ *Id.*

¹⁶ The Manual was first introduced in June of 2015. U.S. DEPARTMENT OF DEFENSE, *LAW OF WAR MANUAL* ¶ 1.1.1 (2016). After receiving respectful criticism from legal scholars and field experts, the Manual was updated and released in December of 2016. *Id.* Though many aspects of the Manual were updated, the Principle of Honor, as it pertains to this Article, remained unchanged. See *id.* at ¶ 2.6.

immensely important area of law. Despite its successes, there remains one glaring error: the explanation of the Principle of Honor.

B. "Honor" in Warfare

Honor on the battlefield is a concept as old as war itself. In approximately 800 B.C., Homer's "The Iliad" reflected the soldier's duty to honor and country.¹⁷ Thucydides' depictions of the Peloponnesian War around 400 years later illustrated a similar notion of battlefield honor, going so far as to identify honor as one of three driving forces of mankind.¹⁸ In the 5th century B.C., Sun Tzu's masterpiece "The Art of War" discussed, among other things, the importance of maintaining a tempered sense of honor at the upper echelons of the rank structure.¹⁹ These influential works, representing commonly-held beliefs, depicted honor as a manifestation of internal fortitude rather than a principle of reciprocal conduct exchanged between enemies on the battlefield.

The movement toward globalization in the mid-1800s brought this conduct to the pages of domestic and international law. The "Lieber Code" (hereinafter the "Code") represents the first domestic attempt to codify the rules of war.²⁰ Known also as the "Instructions for the Government of Armies of the United States in the Field," or "General Orders No. 100," the Code was an instruction

¹⁷ See HOMER, *THE ILIAD* (Samuel Butler trans., MIT CLASSICS). "My doom has come upon me; let me knot then die and without a struggle, but let me first do some great thing that shall be told among men hereafter." *Id.* "Without a sign, his sword the brave man draws, and asks no omen, but his country's cause." ALEXANDER POPE, *THE ILIAD OF HOMER* (Alexander Pope trans. 1720).

¹⁸ See generally THUCYDIDES, *The Outbreak of the Peloponnesian War*, THE LATIN LIBRARY (available at <http://thelatinlibrary.com/imperialism/readings/thucydides1.html>) ("It was in keeping with the practice of mankind for us to accept an empire that was offered to us, and if we refused to give it up under the pressure of three of the strongest motives, fear, honor, and self-interest.").

¹⁹ See generally SUN TZU, *THE ART OF WAR* (Huang trans. 1993) (Sun Tzu identified five "dangerous faults" that impact the effectiveness of general officers that included "a delicacy of honor which is sensitive to shame.").

²⁰ See GENERAL ORDERS NO. 100: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (24 Apr. 1863) (available at http://avalon.law.yale.edu/19th_century/lieber.asp) [hereinafter Lieber Code].

prepared by German-American jurist and political philosopher Francis Lieber, dictating acceptable conduct for warring soldiers.²¹ The Code was subsequently signed into law by President Lincoln at the height of the Civil War.²² The Lieber Code ensured the humane, ethical treatment of populations in occupied areas.²³ Among other things, the Code expressly forbade giving “no quarter” to the enemy (i.e. killing prisoners of war), the use of poisons, and employing torture to extract confessions.²⁴ It described the rights and duties of prisoners of war and further defined the state of war, status of occupied territories, methods to achieve the ends of war, and permissible and impermissible means to attain those ends.²⁵ As such, it is considered to be the first attempt to codify customary rules of war and serves as the precursor to international humanitarian law through international treaties such as the Hague Regulations of 1907.²⁶

While the Code was being adopted within the United States, a conference met in Geneva, Switzerland to draft a resolution focused on establishing international standards for medical services and treatment of the sick and wounded during times of war.²⁷ This international resolution, spearheaded by a new organization that would later become the International Committee of the Red Cross, brought nations together to eventually secure the 1864 Convention for the Amelioration of the Condition of the Armies in the Field and

²¹ See *id.*

²² See *id.*

²³ See *id.* at art. 67.

²⁴ See *id.* at art. 16 and 60.

²⁵ See generally *id.*

²⁶ See generally Hague Convention (IV) Laws and Customs of War on Land (18 Oct. 1907) (available at <https://ihl-databases.icrc.org/ihl/INTRO/195>).

²⁷ See *History of the ICRC*, ICRC.ORG (available at <https://www.icrc.org/en/who-we-are/history>) (Oct. 29, 2016); see generally *Additional Articles relating to the Condition of the Wounded in War* (Oct. 20, 1868) (available at <http://hrlibrary.umn.edu/instree/1868a.htm>); see generally *Convention for Amelioration of the Condition of the Wounded in Armies in the Field* (Aug. 22, 1864) (available at http://avalon.law.yale.edu/19th_century/geneva04.asp); see generally Daniel Palmieri, *How warfare has evolved—a humanitarian organization’s perception: The case of the ICRC, 1863-1960*, 97 INT’L REV. RED CROSS 985, 987 (2016).

the 1868 Additional Articles Related to the Condition of the Wounded in War.²⁸ Inherent within these international treaties was the understanding that warfighters injured during hostilities should be treated humanely and with dignity, thereby establishing—for the first time in history—international law that secured, among other things, honor on the battlefield.²⁹

The Department of Defense’s inclusion of honor as a distinct principle of warfare in the Manual is a marked change from decades of prior guidance.³⁰ Early efforts to establish principles of LOAC included a Principle of Honor.³¹ The notion of “honor” as a specific principle, however, retreated into the shadows of LOAC doctrine by the mid-twentieth century.³² Instead, LOAC doctrine directly focused on two concepts: chivalry and perfidy.³³ Based on notions of trust, good faith, and professionalism, chivalry refers to battlefield conduct that reflects the distinguished nature of the military profession.³⁴ Perfidy is defined as “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obligated to accord, protection under the rules of international law applicable in armed conflict, with intent to betray

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See generally Sean Watts, *The DOD Law of War Manual’s Return to Principles*, JUST SECURITY (June 20, 2015, 9:12 AM), <https://www.justsecurity.org/24270/dod-law-war-manuals-return-principle>.

³² Sean Watts, *The DOD Law of War Manual’s Return to Principles*, JUST SECURITY (June 20, 2015, 9:12 AM), <https://www.justsecurity.org/24270/dod-law-war-manuals-return-principle>. “Since 1956, the principle of honor or chivalry had largely fallen out of US law of war expressions, leaving the increasingly narrow prohibition of perfidy as one of the only clearly expressed limitations on treacherous or bad faith means and methods of warfare.”

³³ See, e.g., U.S. DEP’T OF ARMY, FM 27-10 THE LAW OF LAND WARFARE (1956) (available at <http://www.aschq.army.mil/gc/files/FM27-10.pdf>). Chapter 1, Basic Rules and Principles “requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry.” *Id.*

³⁴ As noted in the U.S. Army Judge Advocate Operational Law Handbook, “Chivalry . . . demands a degree of fairness between offense and defense and requires mutual respect and trust between opposing forces.” DAVID H. LEE ET AL, OPERATIONAL LAW HANDBOOK, 14-15 (David H. Lee 2015).

that confidence.”³⁵ In essence, perfidy involves injuring the enemy by resorting to means that do not reflect integrity and honor on the battlefield.³⁶ Though remaining an important aspect of U.S. war doctrine through discussion of both chivalry and perfidy, the Principle of Honor remained noticeably absent until now.

Response to the Manual’s restoration of the Principle of Honor has been mixed. One commentator noted a “visceral negative reaction” to the new focus: “the last time I checked, knighthood and the Crusades weren’t shining examples of humanity.”³⁷ The reemergence of the Department of Defense’s interpretation of the Principle of Honor, however, has garnered the support of others, to include former Deputy Judge Advocate General for the United States Air Force, Major General (ret.) Charles J. Dunlap,³⁸ who recognized that “while some elements of chivalry may have indeed drawn from chauvinistic connotations, *modern* concepts of battlefield honor can and do draw from a broader and deeper moral source that underpins the law of war.”³⁹ Whether you agree with either opinion, the Manual clearly reestablishes the Principle of Honor as a core principle of LOAC. It does so, however, using the same conceptual model as when it was first introduced.

³⁵ Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 31¶ 1, June 8, 1977 [hereinafter AP I]. Article 37 makes clear that “it is prohibited to kill, injure, or capture an adversary by resort to perfidy.” Examples of perfidy include feigning surrender in order to draw the enemy closer, feigning wounded status, or misusing protective emblems such as the Red Cross.

³⁶ LEE, *supra* note 34, at 15. The dichotomy of conduct experienced on today’s “imperfect” battlefield is often reflected through perfidy. United States servicemembers are precluded from resorting to acts of perfidy at all times, regardless of the circumstance. Acts of perfidy, however, are commonplace for the enemy and are often used as a means of gaining tactical or strategic advantage. This inequity of conduct commonly generates frustration and confusion among servicemembers, often expressed with great enthusiasm during the typical LOAC briefing.

³⁷ Rachel VanLandingham, *The Law of War is Not About “Chivalry,”* JUST SECURITY (Jul. 20, 2015, 9:13 AM), <https://www.justsecurity.org/24773/laws-war-chivalry>.

³⁸ Charles J. Dunlap, Jr., *Honor, Morality and the DoD Law of War Manual*, JUST SECURITY (Oct. 26, 2015, 11:00 AM), <https://www.justsecurity.org/27094/honor-morality-dod-law-war-manual>.

³⁹ *Id.*

II. THE CURRENT PARADOX

The Manual needs to provide servicemembers with a realistic understanding of why they must adhere to honorable conduct regardless of the enemy's resolve to ignore the Laws of War. By relying on precedent rooted in archaic notions of a "perfect war" model, the Manual has failed to align the Principle of Honor with the realities of modern warfare. This section identifies the existing foundational concepts of the Principle of Honor adopted by the Manual that are inconsistent with the current battlefield.

A. "*Pacta Sunt Servanda*"

The Manual's primary justification for the Principle of Honor seems to rely on the doctrine of *pacta sunt servanda*,⁴⁰ a principle of international and contract law that generally acknowledges the importance of keeping one's promises.⁴¹ In international law, this doctrine is used, among others, as a mechanism to enforce treaty law. Under *pacta sunt servanda*, a nation-state that fails to comply with international treaties risks its ability to enter into future agreements. On a macro scale, an international community that fails to recognize the importance of *pacta sunt servanda* significantly endangers global stability. As a result, nation-states agree that such promises "should be kept" in order to maintain international order.⁴²

From a military perspective, the doctrine of *pacta sunt servanda* stands for the premise that combatants agree to adhere to certain limitations of conduct to best ensure that opposing forces

⁴⁰ U.S. DEP'T OF ARMY, *supra* note 33, ¶ 2.6.2.1. ("Here, honor does not address what those limits are so much as requires that parties accept that there are legal limits that govern their conduct of hostilities. This acceptance is a prerequisite for the existence and operation of the law of war in the way that the principle of *pacta sunt servanda* (treaties are binding on parties and must be performed by them in good faith) provide a necessary foundation for treaties to exist and operate as instruments that are legally binding on States.")

⁴¹ See CHARLES L. KNAPP, ET AL., *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 26 (Aspen Publishers, 5th ed. 2003).

⁴² *Id.*

will do the same. As noted in the Manual, “*honor* may be understood to provide a foundation for obligations that help enforce and implement the law of war or special agreements between belligerents during armed conflict.”⁴³ Failure to adhere to *pacta sunt servanda* risks unnecessary escalation of force and inappropriate battlefield tactics, thus delaying—or outright eliminating—a return to normalcy at the conclusion of hostility. Through *pacta sunt servanda*, opposing military forces understand the importance of maintaining order on the battlefield and are, therefore, willing to operate within the boundaries of LOAC.

The Manual’s use of *pacta sunt servanda* is often inapplicable to the imperfect war model found in the War on Terror. While *pacta sunt servanda* reflects a willingness to limit one’s battlefield conduct as a form of a quid pro quo with the enemy, the reality is terrorist organizations operating within the imperfect warfare model generally do not adhere to modern principles of warfare.⁴⁴ On the contrary, they commonly exploit their enemy’s general reluctance to violate LOAC in order to gain a strategic advantage.⁴⁵ One recent example was during the recapture of Raqqa, where ISIS forces used women and children as human shields to avoid direct targeting.⁴⁶ Such conduct remains common practice for terrorist organizations engaged in the War on Terror. *Pacta sunt servanda* is thus untenable within the imperfect warfare model, requiring a new conceptualization for the Principle of Honor in modern warfare.

B. “Mutual Respect Between Opposing Forces”

The Manual’s substantive discussion of honor is heavily tied to the notion of mutual respect: “Honor demands . . . a certain

⁴³ U.S. DEP’T OF ARMY, *supra* note 33.

⁴⁴ See generally Holly Williams, *ISIS Fighters Holed Up In Raqqa Believed to Have Used Women, Children to Use as Human Shields*, CBSNEWS.COM (Oct. 17, 2017, 7:17 P.M.), <https://www.cbsnews.com/news/isis-fighters-holed-up-in-raqqa-believed-to-have-women-children-to-use-as-human-shields/>.

⁴⁵ *Id.*

⁴⁶ *Id.*

mutual respect between opposing military forces.”⁴⁷ Use of the term “mutual respect” pervades the Manual’s discussion of honor, recurring four separate times in different areas throughout the section.⁴⁸ Yet, by using the antiquated term “mutual respect” as a primary conceptualization of the Principle of Honor, the Manual continues to languish in the past.

The reality is that respect on the modern battlefield is not “mutual.” Despite U.S. efforts, enemy combatants—from Al Qaeda operatives in Iraq, Afghanistan, or Yemen to Islamic State belligerents in Iraq and Syria—do not demonstrate respect for lawful combatants. In early 2015, Jordanian pilot Moaz al-Kasasbeh was burned alive after capture by the Islamic State after crashing in ISIS-controlled territory.⁴⁹ A video of the violent execution was subsequently released worldwide by the terrorist organization for propaganda purposes.⁵⁰ Two Turkish soldiers received the same fate the following year.⁵¹ Fighters captured by the organization are commonly paraded through crowded streets in cages.⁵² Individuals believed to be soldiers or spies are often summarily executed by terrorist organizations after capture. Such engagement of soldiers identified as *hors de combat* by international law highlights the general lack of “mutual respect” for lawful combatants held by

⁴⁷ U.S. DEP’T OF ARMY, *supra* note 33, ¶ 2.6. There are three subparagraphs that make up the Honor section. The first subparagraph provides a quick background of terminology, the second discusses “a certain amount of fairness in offense and defense,” and the third directly references mutual respect. The author elected not to identify the first subparagraph as a key section based on its brevity.

⁴⁸ *See id.* at ¶ 2.6, 2.6.3, 2.6.3.2, and 2.6.3.3. Despite repeatedly using the term, the Manual includes just one sentence to justify its adoption: “[o]pposing military forces should respect one another . . . because they share a profession and they fight one another on behalf of their respective States and not out of personal hostility.” *Id.* at ¶ 2.6.3. (emphasis added).

⁴⁹ *Jordan Pilot Murder: Islamic State Deploys Asymmetry of Fear*, BBC NEWS (Feb. 4, 2015), <http://www.bbc.com/news/world-middle-east-31129416>.

⁵⁰ *See id.*

⁵¹ *IS ‘Burns Turkish Soldiers Alive’ in Syria Execution Video*, BBC NEWS (Dec. 23, 2016), <http://www.bbc.com/news/world-middle-east-38412076>.

⁵² Yousuf Basil & Holly Yan, *New ISIS Video Shows Kurdish Peshmerga Soldiers in Cages in Iraq*, CNN.COM (Feb. 23, 2015, 1:29 A.M.), <http://www.cnn.com/2015/02/22/middleeast/isis-crisis/index.html>.

those operating within the imperfect war model. As a result, a reliance on “mutual respect” is misplaced and inappropriate for the modern battlefield.

C. “A Common Class of Professionals”

Similar to “mutual respect,” the Manual further justifies the Principle of Honor by noting that “*honor* . . . reflects the premise that military forces are a common class of professionals who have undertaken to comport themselves honorably.”⁵³ In other words, the profession of arms demands a certain level of respect on the battlefield based on the enemy’s elevated status as a professional soldier. Inclusion of this passage perpetuates medieval notions of chivalry by demanding a more exacting standard of conduct between “a common class of professionals.”

By singularly identifying the opposition as “a common class of professionals,” the Manual continues to monochromatically rationalize the Principle of Honor through the perfect war model—lawful fighting forces operating under the combatant’s privilege. The Manual fails to provide justification for the extension of honor to unprivileged belligerents operating outside the law on the modern battlefield. Interestingly, the Manual does recognize the existence of unlawful belligerents in combat.⁵⁴ It does so, however, as if in passing, through a single sentence discussing whether to extend certain privileges to captured forces based on their combatant status.⁵⁵

Enemy belligerents within the imperfect war model are not a “common class of professional,” nor have they demonstrated serious intent to “comport themselves honorably” on the battlefield.⁵⁶ This is evidenced by the treatment of captured soldiers, destruction of civilian objects and antiquities, and adoption

⁵³ U.S. DEP’T OF ARMY, *supra* note 33, ¶ 2.6.3.2.

⁵⁴ *Id.* (“On the other hand, private persons are generally denied the privileges of combatant status because they do not belong to this class of combatants.”).

⁵⁵ *Id.*

⁵⁶ *Id.*

of perfidy as a standard battlefield tactic. Terrorist organizations such as the Islamic State commonly rape women,⁵⁷ kill innocent civilians,⁵⁸ and engage in “kidnap for ransom” exploits.⁵⁹ One report indicates that thousands of civilians have been used as human shields throughout Iraq’s recent efforts to recapture the city of Mosul.⁶⁰ To characterize such organizations as a “common class of professional” on par with the lawful combatant is a gross misstatement and highly offensive to the military profession. While the Department of Defense may not intend to place terrorist organizations within this distinguished category, they have not provided any other definition for this group of individuals engaged on the battlefield, nor do they offer any reason for why servicemembers must continue to abide by the Principle of Honor when engaging an unlawful combatant.

D. “Breach of Trust with the Enemy”

The Manual further justifies the Principle of Honor by explaining that “*honor* forbids resort to means, expedients, or conduct that would constitute *a breach of trust with the enemy*.”⁶¹ Perfidy is identified by the Manual as conduct that violates such trust between opposing forces.⁶² The notion of “trust with the enemy” falls underneath the Manual’s larger concern of ensuring “fairness” on the battlefield. The Manual makes the necessity of fairness abundantly clear: “Honor *requires* a certain amount of

⁵⁷ See, e.g., Douglas Ernst, *ISIS Captive Talks Terror Group’s Rape Culture: “This is Normal,”* WASH. TIMES (Feb. 17, 2017), <http://www.washingtontimes.com/news/2017/feb/17/isis-captive-talks-terror-groups-rape-culture-this>.

⁵⁸ See *id.*

⁵⁹ See generally Paul Adams, *Kidnap for Ransom by Extremist Groups Extracts High Price*, BBC NEWS (Dec. 12, 2104), <http://www.bbc.com/news/world-asia-30384160>.

⁶⁰ See Laura Smith-Spark, *ISIS ‘Executes’ 232 near Mosul, Takes Thousands as Human Shields, UN says*, CNN (Oct. 29, 2016), <http://www.cnn.com/2016/10/28/middleeast/iraq-mosul-isis/index.html>.

⁶¹ U.S. DEP’T OF ARMY, *supra* note 33, ¶ 2.6.2. (emphasis added)

⁶² *Id.* at ¶ 2.6.2.2. “In particular, *honor* requires a party to a conflict to refrain from taking advantage of its opponent’s adherence to the law by falsely claiming the law’s protection.” *Id.*

fairness in offense and defense.”⁶³ To ensure fairness on the battlefield, combatants must engage in conduct that reflects a certain degree of trust between forces.

One may again understand the Manual’s inclusion of this ideal in the perfect war scenario. While numerous justifications may be imagined, the Manual specifically provides three helpful concepts: engaging in an unfair manner on the battlefield, and thereby breaching the trust of the enemy, may 1) undermine LOAC protections, 2) impair “non-hostile relations between opposing belligerents,” and 3) hinder any restoration of peace at the conclusion of conduct.⁶⁴ More broadly speaking, failure to adhere to honorable conduct on the battlefield raises the potential for opposing forces to engage in dishonorable conduct, including undermining LOAC protections. Continued behavior of this sort may generate a “race to the bottom” in terms of battlefield conduct, thus promoting an escalation of violence beyond that necessary to accomplish the military objective. Moreover, such dishonorable conduct may delay—or destroy—any chance for a return to peace at the end of hostilities. As a result, for the Principle of Honor to be applicable, opposing forces must enter into a form of “mutual trust” with the enemy that ensures both sides will continue to operate within the law. Given that terrorist organizations generally disregard the Law of War, however, this standard is again unworkable in the imperfect war scenario.

E. “In Good Faith”

Imbedded within the discussion of “mutual trust” is the idea of “good faith” on the battlefield.⁶⁵ Specifically, the Manual provides that “[h]onor may be understood to provide the foundation for the requirement for persons to comply with the law of war in good faith.”⁶⁶ Violations of “good faith” include:

⁶³ *Id.* at ¶ 2.6.2. (emphasis added).

⁶⁴ *Id.* at ¶ 2.6.2.2.

⁶⁵ *Id.* at ¶ 2.6.2.1.

⁶⁶ *Id.*

“(1) killing or wounding enemy persons by resort to perfidy; (2) misusing certain signs; (3) fighting in the enemy’s uniform; (4) feigning non-hostile relations in order to seek a military advantage; and (5) compelling nationals of a hostile party to take part in the operations of war directed against their own country.”⁶⁷

By using the terms “mutual trust with the enemy” and “good faith,” however, the Manual once more demonstrates its problematic reliance on the perfect warfare model to justify the Principle of Honor. Both terms envision an exchange of professional conduct that simply does not exist in the War on Terror. Ruses, exploitations, and generally unfair conduct are daily exerted against the American servicemember. To expect—or hope for—more from the unlawful belligerent class would be foolish considering past experiences, further demonstrating that the current justification for the Principle of Honor identified by the Manual defies the reality of the modern battlefield. A better justification for this principle is therefore necessary.

III. CONTEMPORARY PROPOSALS FOR THE PRINCIPLE OF HONOR

In an age when our enemies will likely not confine themselves to honorable conduct, the Department of Defense must provide warfighters with contemporary rationale for doing so. Because the perfect war model proves insufficient to match the realities of warfare, one may find resolution through concepts rooted in human rights law, contract law, philosophy, and/or economic theory. Though each approach provides novel solutions, all options focus on establishing a construct beyond the archaic and untenable concepts of *quid pro quo* and *pacta sunt servanda*, thereby aligning the Principle of Honor with the modern battlefield.

A. *The Human Rights Law Approach*

The Human Rights Law (hereinafter referred to as “HRL”) Approach answers the question posed at the LOAC briefing by

⁶⁷ *Id.* at ¶ 2.6.2.2.

reminding servicemembers that we abide by certain principles of human dignity in all possible circumstances based on fundamental tenets of law and practice rooted in the Universal Declaration of Human Rights (hereinafter referred to as “UDHR”).⁶⁸ This argument recognizes that, if we apply the higher ideal of human dignity as founded in the UDHR in times of war, we retain a truer and deeper commitment to honor in warfighting.⁶⁹ Applying this overarching principle of HRL to all conflicts would allow the focus to shift from the idea of reciprocal behavior to the unilateral preservation of dignity for all human beings—even when the enemy does not.⁷⁰

Human dignity serves as a foundational principle of the UDHR and may be used to justify the Principle of Honor within the imperfect war model. The UDHR firmly declares, twice within the declaration’s preamble, the dignity of every human being.⁷¹ The term “dignity” is emphasized at various other points throughout the

⁶⁸ See generally, UNIVERSAL DECLARATION OF HUMAN RIGHTS OF 1948 [hereinafter UDHR], (available at <http://www.un.org/en/universal-declaration-human-rights/>). While aspects of human rights law have existed throughout history, this concept did not achieve international recognition until proclaimed by the United Nations General Assembly on 10 December 1948. *Id.* Still reeling at the time from the effects of two world wars in less than four decades, this declaration emphasizes the basic guarantees afforded to every human being. Not only did the United States approve of the UDHR, it played a highly influential role in creating the document and gaining consent of the General Assembly. See generally, Richard Gardner, *Eleanor Roosevelt’s Legacy: Human Rights*, N.Y. TIMES (Dec. 10, 1988), <http://www.nytimes.com/1988/12/10/opinion/eleanor-roosevelt-legacy-human-rights.html>. Eleanor Roosevelt, United States delegate to the United Nations, served as chairwoman of the commission that ultimately developed and gained approval of the UDHR. Though not regarded as international law at the time of proclamation, many legal scholars today believe the declaration has since achieved binding effect as customary international law. See, e.g. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287 (1996). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (AM. LAW INST. 2003).

⁶⁹ *Id.*

⁷⁰ See generally, UDHR.

⁷¹ UDHR, *supra* note 68 at Preamble. The declaration begins by recognizing the “inherent dignity . . . of all members of the human family,” and later emphasized “the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.”

declaration, beginning with Article 1: “All human beings are born free and equal in dignity and rights.”⁷² Out of the 30 total articles that make up the UDHR, two other articles also affirm this point.⁷³ By virtue of this inherent dignity as a member of the human race, the declaration affords all humankind certain rights regardless of circumstance.

To be sure, this approach is not without criticism. Some legal professionals may take issue with the suggested attempt to incorporate HRL into LOAC.⁷⁴ For some, interweaving these two concepts creates something of a non-sequitur. This is primarily because some may be tempted to treat these two legal constructs as a zero-sum game: only one (HRL or LOAC) may operate in a given scenario and identifying which of these different and incompatible concepts applies merely depends on the given situation. This view, however, is mistaken—one does not lose the underlying HRL components when circumstances necessitate application of LOAC.⁷⁵

HRL is already embedded within LOAC. One such example is the minimal standard of “humane treatment” for all captured individuals required by Common Article 3 of the Geneva Conventions.⁷⁶ The necessity for “humane treatment” and

⁷² *Id.* at art. 1.

⁷³ *See id.* at art. 3. (Article 3 specifically affords “the right to life, liberty, and security of person.”). *See also id.* at art. 28. (Article 28 provides that “[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”).

⁷⁴ In preparation for this Article, the authors discussed their theories at length with other military lawyers and field experts. This concern was expressed by a retired Air Force judge advocate, who took significant issue with the idea of interweaving HRL and IHL. This portion of the Article directly addresses his concerns.

⁷⁵ *See generally* Aaron L. Jackson, *ISIS in the United States: Which Legal Regime Applies?*, JUST SECURITY (January 11, 2016), <https://www.justsecurity.org/28745/isis-united-states-legal-regime-applies/>.

⁷⁶ Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea [hereinafter Second Geneva Convention], art. 3, Aug. 12, 1949, 75 U.N.T.S. 85, which provides that “In the case of armed conflict . . . occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: 1) Persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those

protection against “cruel treatment” or “torture”⁷⁷ found within the Geneva Conventions closely follows Article 5 of the UDHR.⁷⁸ Common Article 3 further provides a right to protection against “outrages upon personal dignity”⁷⁹ as well as a right to a “regularly constituted court” prior to the passing of any sentence.⁸⁰ Article 75 of the Additional Protocol provides similar protection,⁸¹ and the right to a regularly constituted court in matters of sentencing within the Geneva Conventions follows Articles 10 and 11 of the UDHR.⁸² Language ensuring protection from discrimination articulated in

placed *hors de combat* . . . shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.”

⁷⁷ Second Geneva Convention, *supra* note 76 at Art. 3(a); *see also* Additional Protocol I, *infra* note 80 at art. 75(2).

⁷⁸ UDHR, *supra* note 68 at art. 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

⁷⁹ Second Geneva Convention, *supra* note 76, at art. 3(1)(c).

⁸⁰ *Id.* at art. 3(1)(d). In addition to Common Article 3 of the original Geneva Conventions, Article 75 of the Additional Protocol (enacted 28 years later), provides similar protection. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 75, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I], which provides that “[P]ersons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.” Article 75, Additional Protocol I (1977).

⁸¹ Second Geneva Convention, *supra* note 76 at art. 3(a); *see also* Additional Protocol I, *supra* note 80.

⁸² UDHR, *supra* note 68, at art.10, which ensures that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” Article 11 provides:

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

both Common Article 3 and Additional Protocol I also mirror Article 2 of the UDHR in remarkable fashion.⁸³

Each of these examples demonstrates that components of HRL are already found within LOAC, yielding the conclusion that combining the two legal regimes in some circumstances is not at all inappropriate or uncommon.⁸⁴ As such, the notion of human dignity articulated within the UDHR may—and should—apply to the Principle of Honor in all scenarios of war, both perfect and imperfect. As the UDHR demonstrates, and LOAC affirms, there are some universal principles of human dignity that transcend one's circumstances. A foundational component of the Principle of Honor is that we are called to treat human beings with a certain level of dignity in war as in peace, regardless of the enemy's actions. Incorporating these HRL principles within the Manual offers a logical—and legal—explanation, without notions of reciprocity, for sustained honor on the modern battlefield.

B. *The Contract Law Approach*

A second way to justify the Principle of Honor in imperfect war is through a Contract Law Approach that focuses on the servicemember's contractual duty to the American people rather than the enemy. As noted earlier, *pacta sunt servanda* provides the primary legal justification for compliance with the Principle of Honor within the perfect war model. While the doctrine is primarily used as a basis for international treaty law, it equally applies to contract

⁸³ *Id.* at art. 2, which states the following: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

⁸⁴ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (AM. LAW INST. 2003) provides that certain fundamental rights fall within the category of Customary International Law and violations occur when a state practices, encourages or condones an exhaustive list of conduct, including the following: . . . torture or other cruel, inhumane, or degrading treatment or punishment; consistent patterns of gross violations of internationally recognized human rights.

law. Just as nation-states that fail to enforce treaty obligations risk their ability to engage in future agreements with other nation-states, a businessperson known for renegeing on contracts will likely soon find himself or herself out of business. The doctrine of *pacta sunt servanda* cannot apply to the imperfect war model, however, as the modern-day enemy fails to acknowledge any duty owed to the other party. In situations where the enemy fails to adhere to general notions of fair play or mutual exchange of civility on the battlefield, one cannot rely on this doctrinal standard.

Expanding the possible parties of the contract to those beyond the battlefield may provide servicemembers with an explanation of the Principle of Honor applicable to the imperfect warfare paradigm. The servicemember's ultimate contractual duty is not to the enemy but the American people and is secured upon entrance into military service by raising his or her right hand and executing a statutory oath directed to the citizenry at large.⁸⁵ It is an exchange between servicemember and citizen, whereby the population agrees to support that military member in exchange for honorable defense of the nation.

One important duty of the servicemember is to "support and defend the Constitution of the United States,"⁸⁶ and aspects of the Principle of Honor may be found directly and indirectly within the Constitution. Directly, Article VI of the Constitution recognizes international law as the "supreme law of the land."⁸⁷ As noted earlier, many aspects of the Principle of Honor have been codified through various treaties and customary international law principles,

⁸⁵ 10 U.S.C. § 502(a) (2012). The enlisted oath identified in 10 U.S.C. § 502(a)) requires servicemembers to swear (or affirm) the following: "I, (state your name), do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the order of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God."

⁸⁶ *Id.*

⁸⁷ U.S. CONST. art. IV, cl. 2. "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land[.]"

thus directly demanding adherence to such principles. Respect for human dignity is also indirectly embedded within the Constitution.⁸⁸ This fundamental principle of American society defines us as a nation. Demonstrating respect for human dignity also advances our position on the global stage, which in turn aids in the defense of the nation, thus indirectly upholding the servicemember's duty to the American people. For these reasons, adherence to such international and domestic principles fulfills the servicemember's contractual obligation to support the Constitution, even in the direst of circumstances.

Offering new contractual parties beyond those comprehended by the Manual may provide sound rationale for the Principle of Honor in imperfect warfare. Just as the businessman can expect future contracts by adhering to the obligations of his current contracts, the military member may expect future support from the American people by respecting his or her contractual duty to uphold constitutional standards of dignity and honor on the battlefield. Not only does the Contract Law Approach remove existing notions of battlefield reciprocity, it emphasizes the servicemembers' obligation to the American people rather than the enemy.

C. The Philosophical Approach

A third potential solution takes a Philosophical Approach, rather than a legal one, by encouraging servicemembers to seek answers from within rather than focusing on external factors. Instead of being concerned about the enemy's conduct, regardless of the perfect or imperfect warfare model, this justification looks to individual behavior. In this case, focusing on oneself leads to an understanding that acting with honor preserves our own humanity. While one may believe that holding all parties of a conflict to the same "honorable" standards will naturally result in all parties acting with honor, this is clearly not the natural—or common—result on today's battlefield. By first recognizing the brutality of war and

⁸⁸ See generally U.S. CONST. amends. I-X.

natural tendencies of mankind, one may truly understand why honor is essential in times of war.

There is a historical basis of “humanity” that helps frame this solution. Early historical references to the natural, brutal tendencies of man, and the need to overcome those tendencies, provide the basis for the argument that honor is essential on today’s battlefield. In the 5th century B.C., military strategist and philosopher Sun Tzu discussed this by recognizing that war is not a campaign directed at the ultimate extermination of the enemy, but rather, there exists a need in war to preserve the “nation” or “enemy.”⁸⁹ He explained that, when “victory can be effectively obtained in other ways, battles should be avoided,” going so far as to recognize that “neutralizing an adversary’s forces without battle is absolute perfection.”⁹⁰ Through this, Sun Tzu recognized that winning a war involved a combination of fighting and other means used to subdue the enemy, including treating the enemy with respect and honor. If one engages in battle without a sense of honor, they will not be able to subdue the enemy without intense bloodshed, thereby restraining one’s desire to execute war in its most base form.⁹¹

Sun Tzu’s call to display honor in combat as a means to restrict man’s natural tendencies was also recognized by the Institute of International Law in its 1880 publication of the Oxford Manual on the Laws of War on Land.⁹² The Oxford Manual identified battlefield honor as the only way to restrict a soldier’s natural tendencies in combat and recognized that “a positive set of rules . . . serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passion and

⁸⁹ SUN TZU, *supra* note 19, at 48.

⁹⁰ *Id.*

⁹¹ *Id.* Although Sun Tzu wrote his seminal work in the 5th century B.C., modern translations of his works on war became popular in the late 18th Century and aided in forming modern notions of warfare. Legend has it that Napoleon read Sun Tzu when the first French edition was published while he was a military student in France. *Id.* at Intro., n. 3.

⁹² THE LAWS OF WAR ON LAND MANUAL, Institute of International Law Oxford Manual (1880), (available at <http://hrlibrary.umn.edu/instree/1880a.htm>).

savage instincts -- which battle always awakens, as much as it awakens courage and manly virtues”⁹³ This document offers an early attempt to merge this important philosophical principle with LOAC.⁹⁴ Its applicability remains equally strong today.

Despite these historical efforts to instill battlefield honor as a way to restrict man’s natural tendencies, others have been reluctant to take this approach, instead embracing—often encouraging—carnal behaviors in times of conflict.⁹⁵ In 1929, for example, Admiral Lord Fisher famously criticized the “humanity of war.”⁹⁶ When asked by journalists of his thoughts regarding several proposed humanitarian changes to the law of war, Admiral Lord Fisher responded:

[T]he humanizing of war! You might as well talk of the humanizing of help. When a silly ass got up at the Hague and talked about the amenities of civilized warfare and putting your prisoners’ feet in hot water and giving them gruel, my reply, I regret to say was considered totally unfit for publication. As if war could be civilized. If I’m in command when war breaks out I shall issue my order – ‘the essence of war’ is violence. Moderation and war is in the facility. Hit first, hit hard, and hit everywhere.⁹⁷

Although a work of fiction, Tolstoy’s “War and Peace” also recognizes the natural tendencies of man during war, famously describing war as “the most horrible thing in life.”⁹⁸ These historical

⁹³ *Id.* at Preface. In its preface, the legal manual provided: “A positive set of rules . . . serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts -- which battle always awakens, as much as it awakens courage and manly virtues, -- it strengthens the discipline which is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity.”

⁹⁴ *Id.*

⁹⁵ See generally ADMIRAL R. H. BACON, THE LIFE OF LORD FISHER OF KILVERSTONE 120-21 (Vol. 1 1922).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ LEO TOLSTOY, WAR AND PEACE 458-60 (Waxkeep Publishing 2013). “[T]hey talk to us of the rules of war, of chivalry, of flags of truce, of mercy to the unfortunate and so

perspectives recognize that war is brutal, and the natural tendencies of man are to engage in whatever means necessary to achieve their interests in battle.

Adherence to the Principle of Honor in combat is worth striving for. It serves as a check of one's natural tendencies, thus preserving our own humanity, regardless of an enemy's response or whether one operates within the perfect or imperfect warfare paradigm. As the vile behavior of terrorist organizations engaged in imperfect war encourages an even darker response, the emphasis on the Principle of Honor becomes even more important. Through this, the Department of Defense may find a third possible method for applying the Principle of Honor to the modern battlefield.

D. The Economic Approach

A fourth approach comes through the employment of economic principles to support the application of the Principle of Honor on today's battlefield. Specifically, the Economic Approach focuses on two economic theories to shape warfighters' honorable behavior: rational self-interest, incorporating the concept of psychic income, and the notion of long-term externalities. To begin with, the theory of rational self-interest explains that individuals generally operate from a self-interested perspective and will, therefore, attempt to make choices that maximize their own position as related to others.⁹⁹ Under a pure rational self-interest approach, the warfighter would not act with a sense of honor—or otherwise obey the law—based on a sense of duty or respect in the face of difficult circumstances, but would rather approach the battlefield

on. It's all rubbish! If there was none of this magnanimity in war, we should go to war only when it was worthwhile going to certain death. War is not a courtesy but the most horrible thing in life, and we ought to understand that and not play at war. We ought to accept this terrible necessity sternly and seriously. It all lies in that . . . let war be war and not a game. As it is now, war is a favourite pastime of the idle and frivolous."

⁹⁹ JEFFREY HARRISON AND JULES THEEUWES, *LAW AND ECONOMICS* 514 (2008). Individuals make choices that maximize those things that cause them the greatest pleasure and provide the greatest utility while also minimizing those things that cause displeasure. *Id.* at 515.

with an interest in sustaining their own life at all costs. Individuals that go against their rational self-interest for loftier purposes may be rare.¹⁰⁰ One may argue that servicemembers have an inherent sense of duty or obedience to the law that overcomes their natural desire to achieve pure rational self-interest.¹⁰¹ The questions received at the typical LOAC briefing, however, provide evidence to the contrary and demonstrate that appealing to a servicemember's sense of duty does not satisfy all concerns. Further, while many servicemembers may feel a natural pull toward duty and respect, some may fall away in the face of significant—if not mortal—danger on the battlefield. As a result, emphasizing other interests through a “psychic income” analysis may be more effective to addressing servicemembers' concerns.

Commanders may find success in emphasizing the value of “psychic income” to satisfy a servicemember's rational self-interest. “Psychic income” is a residual benefit to society that also satisfies rational self-interest.¹⁰² Rather than focusing on obedience to orders, the modern commander must characterize the Principle of Honor as a reflection of the servicemember's individual value and their recognized place in civilized society. If the warfighter was only acting from a self-serving perspective, or only responding through

¹⁰⁰ In purely economic terms, the “mere existence of an obligation or issuance of a legal command” may prove an insufficient incentive. Robert Cooter, *Prices and Sanctions*, 84 COLUMBIA L. REV. 1523, 1524 (1984).

¹⁰¹ Commanders may attempt to impose sanctions on the warfighter through use of other legal constructs such as the Uniform Code of Military Justice. These external inducements, however, are not always effective. Commanders must offer the warfighter more than mere reminders of the legal implications of dishonorable conduct to explain and justify honorable conduct in all circumstances of war.

¹⁰² See HARRISON AND THEEUWES, *supra* note 99, at 514. While individuals may operate under pure self-interest in most circumstances, there are other instances when one acts outside of individual self-interest, such as by giving charitable donations or offering unconditional love. These altruistic behaviors allude to a more complex decision-making process and explains that individuals may make certain choices based on an increase in some other type of utility—or psychic income—that is difficult to quantify. Essentially, we sometimes act against our own perceived rational self-interest because we derive an alternative type of utility from our behavior. Although these actions may appear to be purely altruistic, in reality, they satisfy an alternate self-interest—a psychic income.

obedience to the law, it may be difficult to induce a sense of honor in their behavior. If we include psychic income into the calculation, however, the warfighter may enjoy an alternate utility that encourages altruistic behaviors. Focusing on honor in terms of “psychic income” may encourage members to avoid pure rational self-interest and operate from a higher philosophical perspective that supports the Principle of Honor in imperfect warfare scenarios.

A second economic theory applicable in this case is that of economic externalities.¹⁰³ Externalities arise when one individual, or a group of individuals, are affected by the decisions of other individuals or groups.¹⁰⁴ These effects, called externalities, can be positive or negative.¹⁰⁵ In society, we generally attempt to limit negative externalities and encourage positive ones.

Applying the concept of externalities to combat, engaging the enemy with a sense of honor encourages positive—and reduces negative—externalities. Specifically, individuals may be positively impacted by the reality that American warfighters respect human dignity, hold themselves to higher moral standards, and protect fundamental human rights. These positive externalities may be enjoyed by military members engaged in conflict as well as civilians in the nation experiencing conflict. Any of these may elevate the United States’ global reputation, garner local support, enhance coalition partnerships, and reduce terrorist recruitment and/or retention.

Another positive externality that can arise when warfighters display honor on the battlefield is the long-term, residual effects of the Principle of Honor on the civilian population of the nation where

¹⁰³ *Id.* at 59.

¹⁰⁴ *Id.* Typically, externalities arise as a result of two parties engaging in a mutually beneficial transaction. Although the two parties agree to engage in a transaction, such as a contract or property matter, other parties may be affected outside of the agreement. Single actors may also engage in activities that impact others.

¹⁰⁵ Although courts typically only address situations where the externalities are negative, such as pollution or noise, positive externalities can also arise, such as a neighbor who decides to maintain a beautiful rose garden that enhances neighbors’ enjoyment of outside space or improves property values.

the conflict takes place. War often impacts the civilian population long after a conflict has subsided, to include the formation of new laws, tribunals, and generally accepted practices that may transcend the conflict and imprint themselves on the civilian population. This possibility is supported by the current U.S. Army Rule of Law Handbook:

Irrespective of the specific legal context, rule of law operations should be guided and informed by human rights law purely as a matter of efficiency. US forces should model behavior for, and encourage actions by, the host national government that will encourage the host nation to adopt and practice strong human rights norms.¹⁰⁶

Adding to the Manual discussion of economic principles, specifically the importance of satisfying rational self-interest through psychic income and securing long-term positive externalities, offers a contemporary approach to the Principle of Honor. Appealing to these more sensible concepts will offer the modern warfighter with a more tangible reason to apply the Principle of Honor to the battlefield, regardless of the perfect or imperfect warfare scenario.

IV. WHY THIS MATTERS

This Article begins—and ends—in the LOAC briefing room and the young servicemember with his or her hand in the air. More often than not, servicemembers see through the thin veil of logic currently used to explain the Principle of Honor. The Manual's answer simply does not apply, and it only takes a matter of seconds for many servicemembers to reach this conclusion. Some in the briefing room respond to this realization with a smirk, an eye-roll, and general acceptance of another task ordered without explanation. For others, the response is more animated, particularly as servicemembers move closer to the battlefield. Regardless of the response, the current approach to the Principle of

¹⁰⁶ U.S. ARMY RULE OF LAW HANDBOOK, U.S. Army JAG School Center for Law and Military Operations 24 (2011).

Honor is far from adequate. For our military members and our nation, we must do better.¹⁰⁷ For purposes of this Article, change is necessary to provide clarity, reduce frustration, and enhance compliance.

First, the Manual must change to provide clear instruction to our servicemembers. Relying on perfect warfare notions of *pacta sunt servanda* to describe the Principle of Honor leads some servicemembers to conclude that the Principle of Honor does not apply to the imperfect war scenario, especially when the enemy does not reciprocate honorable conduct. While servicemembers may continue to question whether this principle applies to an enemy that defies the rules on war, it is important to remember that the Principle of Honor applies in every circumstance faced in war. It is a part of who we are as a professional fighting force, regardless of enemy conduct, and it is what our nation requires. As military professionals, we must ensure our troops fully understand all rules of warfare by providing clear and rational instruction applicable to every circumstance. The Manual must modify its definition of the Principle of Honor to incorporate the modern realities of the battlefield, for both coherency of the principle and for the safety of servicemembers.

Second, providing applicable rationale for the Principle of Honor in imperfect warfare scenarios alleviates significant frustration, which tends to negatively affect a servicemember's morale. Servicemembers and civilians alike are commonly frustrated at the thought of losing American lives to an enemy who does not adhere to the rules of war.¹⁰⁸ Compiling this frustration with the lack-luster justification for the Principle of Honor currently offered by the Manual tends to further amplify resentment, leaving servicemembers to risk their life for a principle they do not

¹⁰⁷ The authors do not offer this Article for pure academic purposes, but rather, to demand needed change to the Manual and our collective understanding of the Principle of Honor. There are tangible effects to maintaining the status quo that must be eliminated.

¹⁰⁸ This statement comes from the authors' experiences teaching the Law of War and engaging servicemembers and civilians on the topic.

understand or believe no longer applies. Though morale may seem a trivial matter, for a commander with troops engaged in lengthy combat operations, morale is vital to mission success. Providing a comprehensive answer for the Principle of Honor within the imperfect war paradigm would minimize this frustration and enhance morale, thus elevating our servicemembers' preparedness for war.

Third, providing sound rationale for the Principle of Honor also enhances compliance. Servicemembers must not only know—but believe in—their cause and purpose of conduct. Embracing the reason for honorable conduct in every scenario leads to reduced cynicism, enhanced motivation, and an elevated warrior ethos.¹⁰⁹ On the contrary, servicemembers who do not believe in the basis for the Principle of Honor may be reluctant to obey, particularly in the heat of battle or long days of combat.¹¹⁰ This result has been tragically observed at times within the War on Terror.¹¹¹ Aligning the Principle of Honor with the modern battlefield provides an answer that individuals can believe in, thus increasing “buy-in” and reducing the risk of future LOAC violations.

CONCLUSION

Military servicemembers are called to perform the extraordinary—to rise above human instinct and obey the Laws of Armed Conflict at all times, often at great risk to personal safety. This may be evidenced by the decision not to pull the trigger or press the button if doing so would violate LOAC, even when facing situations of mortal danger. It is a monumental order for a young man or woman, especially knowing the enemy who seeks to kill them will eagerly defy the rules of combat servicemembers are called to obey. We must provide Soldiers, Sailors, Airmen, and Marines a comprehensive reason for doing so.

¹⁰⁹ *See id.*

¹¹⁰ *Id.*

¹¹¹ *See generally* Thom Shanker and Graham Bowley, *Images of G.I.'s and Remains Fuel Fears of Ebbing Discipline*, N.Y. TIMES (Apr. 18, 2012), <http://www.nytimes.com/2012/04/19/world/asia/us-condemns-photo-of-soldiers-posing-with-body-parts.html>.

The authors of this Article do not seek to redefine the Principle of Honor. Hands do not rise at the LOAC briefing because servicemembers do not understand what the Principle of Honor is. Many simply do not understand why it continues to apply in the War on Terror. There is no “*mutual* respect between opposing forces,” and terrorist groups do not rise to the “common class of [military] professional.” There is no “trust with the enemy,” nor is there “good faith” between opposing forces within the imperfect war dynamic. This realization by servicemembers often results in confusion and frustration in the classroom, which often leads to cynicism, loss of morale, and potential non-compliance on the battlefield. To avoid this, the Department of Defense must complete the circle currently left open by the Manual’s lackluster description of the Principle of Honor by providing sound rationale for why the principle continues to apply in all scenarios of war—perfect and imperfect.

This Article provides several novel ways to align the Principle of Honor with the imperfect warfare paradigm. By applying this concept to human rights law, contract law, philosophy, and/or economics, the authors have attempted to provide contemporary explanations for why the Principle of Honor equally applies to the modern battlefield. It is important to note that the authors do not intend—nor wish—to advocate for a single proposed approach. All offer unique and independent solutions. The more complete answer, however, is likely found through a combination of these proposals or by identifying those ideals that transcend each approach. Regardless, we hope this Article encourages our nation’s military and legal experts to reconsider this important principle and provide a more complete rationale for the Principle of Honor within the Manual. Doing so will undoubtedly provide a more satisfying experience for Soldiers, Sailors, Airmen, and Marines attending the LOAC briefing—and the judge advocates leading them.

