

## REVIEW

### Francis Lieber and the Modern Law of War

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*Lincoln's Code: The Laws of War in American History*  
John Fabian Witt. Free Press, 2012.

Condemnations of war are easy to find. Social critics, politicians, and even generals speak out against it. The philosopher John Stuart Mill noted that it is an “ugly thing.”<sup>1</sup> Georges Clemenceau, who was Prime Minister of France during World War I, believed that war is “too serious a matter to leave to soldiers.”<sup>2</sup> War is a “racket,” according to Marine Corps Major General Smedley D. Butler, who was twice awarded the Congressional Medal of Honor.<sup>3</sup> But war is also fascinating and alluring.

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<sup>1</sup> John Stuart Mill, *The Contest in America* 31 (Little, Brown 1862).

<sup>2</sup> J. Hampden Jackson, *Clemenceau and the Third Republic* 228 (Macmillan 1948). “La guerre! C’est une chose trop grave pour la confier à des militaires . . .” George Suarez, 1 *Soixante Années d’Histoire Française: Clemenceau* 176 (Tallandier 1932). A generation later General Charles de Gaulle, who became president of France, turned the quotation around: “I have come to the conclusion that politics are too serious a matter to be left to the politicians.” Francis Williams, *Twilight of Empire: Memoirs of Prime Minister Clement Attlee* 56 (Barnes 1962).

<sup>3</sup> Smedley D. Butler, *War Is a Racket* 1, 8 (Round Table 1935) (“War is a racket. It always has been.”).

During one battle General Robert E. Lee, remarked: “It is well that war is so terrible, or we would grow too fond of it.”<sup>4</sup>

War is also an integral part of human society and inherently tied to politics. One might teach most of Western history as the preparation for war, the actual war, the recovery from the war, and the preparation for the next war.<sup>5</sup> In addition to the Civil War, the United States has been involved in at least thirteen major foreign wars covering about one-fifth of the nation’s history.<sup>6</sup> This does not include innumerable campaigns, battles, and wars with American Indian nations.<sup>7</sup> To these large-scale military conflicts we must add bellicose moments and events that involved ground and naval conflict and some casualties, but stopped just short of a full-scale war;<sup>8</sup> the use of the national armed forces to suppress domestic insurrections;<sup>9</sup> and numerous

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<sup>4</sup> E.P. Alexander, *Military Memoirs of a Confederate: A Critical Narrative* 302 (Scribner’s Sons 1907).

<sup>5</sup> Obviously few historians approach the past this way, and many “social historians” ignore war, law, politics, and economics altogether. My point here is not that history should be approached as one war after another, but rather that the chronology of Western history would support this.

<sup>6</sup> Barbary Pirates War (1801–1805); War of 1812 (1812–1815); Mexican War (1846–1847); Spanish-American War (1898–1900); Philippine Insurrection (1899–1902); World War I (1917–1918); World War II (1941–1945); Korean War (1949–1953); Vietnam War (1959–1974); Panama Invasion (1989–1990); Gulf War (Operation Desert Storm) (1990–1991); Afghanistan War (2001–present), and Iraq War (2003–2012). See Micheal Clodfelter, *Warfare and Armed Conflicts: A Statistical Reference to Casualty and Other Figures, 1500–2000* 221, 271–96, 435–600, 655, 722–50 (McFarland 2002). See also Eytan Gilboa, *The Panama Invasion Revisited: Lessons for the Use of Force in the Post Cold War Era*, 110 *Polit Sci Q* 539, 539–41 (1995) (outlining the circumstances surrounding the conflict between the United States and Panama). See also Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond*, 35 *Cornell Intl L J* 533, 534–45 (2002) (explaining the circumstances surrounding the military actions in Iraq and Afghanistan).

<sup>7</sup> Most of these conflicts were short-term, rarely lasting more than a year or two, although the Second Seminole War lasted from 1835 to 1842. See Clodfelter, *Warfare and Armed Conflicts* at 296 (cited in note 6).

<sup>8</sup> Such events include the Quasi War with France in 1789–1799, see *id.* at 15 (describing the dates and circumstances surrounding the Quasi War with France), and the armed attack by the British ship *The Leopard* on *The Chesapeake* in 1807, which led to the death of a handful of American sailors and ultimately to reparations from the British, but not full-scale war. See J.C.A. Stagg, et al, eds, 4 *The Papers of James Madison: Presidential Series* 12 (Virginia 1999) (notifying Congress that the “subject of difference, between the two Countries, is terminated by an offer of reparation which has been acceded to”).

<sup>9</sup> For example, the Whiskey Rebellion in Pennsylvania (1793), Bleeding Kansas (1854–1857), the Mormon War (1857–1858), the use of army officers and US Marines to suppress John Brown’s raid on the US Armory at Harpers Ferry, Virginia (1859), the suppression of the Pullman strike in 1893, the assault on World War I veterans in response to the Bonus March (1932), and the use of the US Army and federalized state

military adventures of varying lengths in China, Mexico, Nicaragua, Haiti, the Dominican Republic, the Soviet Union, Lebanon, Grenada, Kosovo, Libya, and elsewhere.<sup>10</sup> With this history in mind, one could argue that years of peace—when no American troops were killed or killed anyone else in combat—are far less common than years in which there was lethal combat involving Americans. The United States has not declared war since World War II ended in 1945,<sup>11</sup> but since then more than 100 thousand US servicemen and servicewomen have died in combat and nearly 300 thousand have been wounded.<sup>12</sup>

The history of European nations is even bloodier, and if the use of European troops outside the continent in worldwide conflicts,<sup>13</sup> colonial wars, insurrections, and rebellions is included, this history is more gruesome still. In just ten years (1914–1919, 1939–1945) of the first half of the twentieth century Europe itself was the scene of the slaughter of about sixty million people.<sup>14</sup> Twenty-first-century Europeans praise themselves for not

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militia during urban riots in Detroit (1967), Washington, DC (1968), and other cities. See Clodfelter, *Warfare and Armed Conflicts* at 15, 280, 285 (cited in note 6). See also Shayna M. Sigman, *Everything Lawyers Know about Polygamy Is Wrong*, 16 Cornell J L & Pub Pol 101, 114–18 (2006); Roy L. Brooks, *Making the Case for Atonement in “Post-racial America”*, 14 J Gender Race & Just 665, 675–77 (2011); Charles R. Murray, *Civil Disturbance, Justifiable Homicide, and Military Law*, 54 Milit L Rev 129, 129–30 (1971). See also generally Edwin Brown Firmage and Richard Collin Mangrum, *Zion in the Courts: A Legal History of The Church of Jesus Christ of Latter-Day Saints, 1830–1900* (Illinois 1988).

<sup>10</sup> For a handy list of many (but not all) US military actions, see Clodfelter, *Warfare and Armed Conflicts* at 261, 278–80, 604–06, 617, 654, 706–10, 713–14 (cited in note 6).

<sup>11</sup> The Authorization for Use of Military Force in 2001 might constitute a post-modern version of a declaration of war. See Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 Georgetown L J 597, 625–30, 640–47 (1993). See also Authorization for Use of Military Force (AUMF), Pub L No 107-40, 115 Stat 224 (2001), codified at 50 USC § 1541.

<sup>12</sup> Anne Leland and Mari-Jana “M-J” Oboroceanu, *American War and Military Operations Casualties: Lists and Statistics* (Congressional Research Service Feb 26, 2010), online at <http://www.fas.org/sgp/crs/natsec/RL32492.pdf> (visited Nov 24, 2013).

<sup>13</sup> These would include the Crusades, the worldwide conflict from 1756 to 1763 known as the French and Indian War in the United States, the War of 1812, the Spanish-American War, the Russo-Japanese War, World War I, and combat in Africa and Asia in World War II. See Clodfelter, *Warfare and Armed Conflicts* at 13–15, 131–34, 272, 285, 414, 435, 581 (cited in note 6).

<sup>14</sup> This figure is for military and civilian deaths in World War I and World War II and the nine million killed during the Russian Revolutions/civil wars of 1917–1919. This does not include the millions of people in the Soviet Union—perhaps twenty million—who died under Stalin, as they were not victims of war. Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* 195 (Viking 2011) (providing a useful table of deaths in warfare, but inexplicably including a number of examples of mass deaths that were not caused by war, and including some “events” that lasted many centuries).

having had a major war for more than a half century.<sup>15</sup> Europe had never achieved this level of peace in the previous millennium.<sup>16</sup> But such self-congratulatory hubris ignores conflicts in Cyprus, Northern Ireland, the former Yugoslavia, Hungary, and Chechnya as well as the use of European troops in Korea, Indochina, Malaysia, Egypt, Algeria, all over sub-Saharan Africa, Kuwait, the Falklands (or Malvinas), Iraq, Afghanistan, Mali, and other places.

Military conflict is a manifestation of politics and public policy. The great military theorist Carl Philipp Gottfried von Clausewitz succinctly made the point: “War is merely the continuation of policy by other means.”<sup>17</sup> Mao Tse-Tung, who understood the power of force as well as anyone, believed that “politics is war without bloodshed while war is politics with bloodshed.”<sup>18</sup>

Whether seen as policy, politics, or both, as General William Tecumseh Sherman reminded the world, “War is hell.”<sup>19</sup> Most modern nations, while maintaining armies and engaging in armed conflict for defense or as a “continuation of policy,” have simultaneously tried to reduce the destruction and human costs of warfare borne by both soldiers and civilians.<sup>20</sup> Leaders,

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<sup>15</sup> See Andrew Higgins, *European Officials Accept Union’s Nobel Peace Prize*, NY Times A14 (Dec 11, 2012) (describing the ceremony and context in which European Union officials received the Nobel Peace Prize for the continued peace in Europe).

<sup>16</sup> Pinker, *The Better Angels of Our Nature* at 231 (cited in note 14) (asserting that there were over 2,300 separate wars in Europe from the year 900 to the present, or about “two new conflicts a year for eleven hundred years”).

<sup>17</sup> Carl von Clausewitz, *On War* 87 (Princeton 1976) (Michael Howard and Peter Paret, eds and trans):

It is clear, consequently, that war is not a mere act of policy but a true political instrument, a continuation of political activity by other means. What remains peculiar to war is simply the peculiar nature of its means. War in general, and the commander in any specific instance, is entitled to require that the trend and designs of policy shall not be inconsistent with these means. That, of course, is no small demand; but however much it may affect political aims in a given case, it will never do more than modify them. The political object is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose.

<sup>18</sup> Mao Tse-Tung, *On Protracted War* 58 (Pacific 2001).

<sup>19</sup> See Lloyd Lewis, *Sherman: Fighting Prophet* 636 (Brace 1932).

<sup>20</sup> Obviously some nations—Germany from 1939 to 1945 is the most obvious example—have used war as a vehicle for mass murder purely for its own sake. It is for this reason Germany’s leaders were tried and punished for war crimes. See Gwynne Skinner, *Nuremberg’s Legacy Continues: The Nuremberg Trials’ Influence on Human Rights Litigation in U.S. Courts under the Alien Tort Statute*, 71 Albany L Rev 321, 339–41 (2008). Similar behavior in the former Yugoslavia in the 1990s also led to war crimes trials. See *id.* The Iran-Iraq War from 1980–1988 is an example of a war in which the leaders on both sides showed little concern for limiting their own casualties or collateral damage

diplomats, generals, and scholars have also tried to develop “rules” for warfare to eliminate unnecessary violence, destruction, and suffering, and to protect, as much as possible, the lives and property of noncombatants.<sup>21</sup> The law of war has also incorporated rules to protect the lives of captured soldiers and regulate their treatment,<sup>22</sup> ban the use of some kinds of weapons (such as poisons, small explosive projectiles, mustard gas, or serrated bayonets),<sup>23</sup> and prohibit certain kinds of behavior (such as shooting at someone under a flag of truce when forces are not engaged in combat, torture, and targeted assassinations).<sup>24</sup>

The law of war was developed to rein in the horror of war—to make it less “hell[ish],” in Sherman’s terms.<sup>25</sup> But ironically these humanitarian restraints have condoned massive destruction of property and the killing of large numbers of human beings. As George C. Scott succinctly put it in his brilliant cinematic portrayal of General George S. Patton, “No bastard ever won a war by dying for his country. He won it by making the other poor dumb bastard die for his country.”<sup>26</sup> War in the end is about making the other “poor bastards” die for their country. The law of war is about regulating the carnage, controlling and reducing the horror, and limiting the destruction. But the law of war neither prevents nor condemns war per se, and thus condones, or at least allows, much of the killing or the devastation that goes with it.

In the rest of this Review I explore the history of the law of war in the context of Professor John Fabian Witt’s recent book, *Lincoln’s Code: The Laws of War in American History*. The heart of this book focuses on the American Civil War, and especially on the first serious attempt to provide a practical code for the

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leading to the deaths of civilians. See Dilip Hiro, *The Longest War: The Iran-Iraq Military Conflict* 137 (Grafton 1989).

<sup>21</sup> See Paul Kennedy and George J. Andreopoulos, *The Laws of War: Some Concluding Reflections*, in Michael Howard, George J. Andreopoulos, and Mark R. Shulman, *The Laws of War: Constraints on Warfare in the Western World* 214, 214 (Yale 1994).

<sup>22</sup> See Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* Art 56 (War Dept 1863) (cited as “Lieber Code”).

<sup>23</sup> See Lieber Code Art 70 (cited in note 22). In the twelfth century there were attempts to ban bows, and particularly crossbows, but this failed. See Robert C. Stacey, *The Age of Chivalry*, in Howard, Andreopoulos, and Shulman, *The Laws of War* 27, 30 (cited in note 21). In the thirteenth century the papacy “hired hundreds of crossbowmen for its wars against the emperor Frederick II.” *Id.*

<sup>24</sup> See Lieber Code Art 56 (cited in note 22). See also Lieber Code Art 148 (cited in note 22).

<sup>25</sup> See Lewis, *Sherman* at 637 (cited in note 19).

<sup>26</sup> *Patton* (20th Century Fox 1970).

law of war—Francis Lieber’s short tract, *Instructions for the Government of Armies of the United States in the Field*,<sup>27</sup> better known as the Lieber Code. Lieber wrote the Lieber Code (he was technically part of the committee but everyone agrees it was his work<sup>28</sup>) at the request of Major General Henry W. Halleck, the general-in-chief of the United States Army. The document was “approved by the President of the United States,”<sup>29</sup> and then issued by the War Department as General Order No. 100.<sup>30</sup> The War Department distributed copies to all officers. While written as a Civil War regulation, the Lieber Code remained in force into the twentieth century and became the basis of future international agreements on the law of war. Thus, while the Lieber Code is at the heart of Professor Witt’s project, his book offers much more, including a serious and significant history of the law of war in the preceding centuries.

Let me start out by noting that this is an elegantly written, engaging book with an enormous amount of terrific information and analysis. I have some major disagreements with Witt on some issues, and as I set out in Part VI of this Review, I believe he misunderstands Lincoln on emancipation and fails to consider the importance of the Constitution in shaping both emancipation and the Lieber Code. Similarly, as I set out in Part VIII, I think Witt incorrectly blames the Lieber Code for the horrendous behavior of the United States Army in the years after the Civil War. But, despite these reservations, I think this is a *must* read for anyone interested in the law of war, the history of warfare, or modern issues of warfare and terrorism. It ought to be required reading in courses dealing with public international law and issues of war and peace.

My goal in the rest of this Review is to explain the significance and the content of the Lieber Code, to place it in the context of both the American Civil War and the development of the modern law of war, and to offer an analysis and critique of Professor Witt’s work. Slavery is central to Witt’s book and to my argument here. Witt argues that slavery was a driving force in

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<sup>27</sup> The most convenient edition of this document is in the Foundations of Law Series published by the Lawbook Exchange. Francis Lieber, *Instructions for the Government of Armies of the United States in the Field; Guerilla Parties Considered with Reference to the Laws and Usages of War* (Lawbook Exchange 2011) (Steve Sheppard, ed).

<sup>28</sup> Jordan J. Paust, *Dr. Francis Lieber and the Lieber Code*, 95 Am Socy Intl L Proc 112, 114 (2001).

<sup>29</sup> Lieber Code at 2 (cited in note 22).

<sup>30</sup> *Id.*

American foreign and military policy from the Revolution to the Civil War (p 77). He further argues that it was a central part of the Lieber Code (p 227). Witt is right on both counts, although he surprisingly never comes to terms with *why* slavery was central to American policy. Nor does he ever grapple with the constitutional issues that limited Lincoln's options on emancipation. In the end, slavery helped shape the Lieber Code, but in ways that are more complicated than Witt describes.

While Witt argued that slavery was the motivation for the Lieber Code, as I note later in this Review, this overstates the case. Those who commissioned the code—most notably General Henry W. Halleck—were concerned with many issues of how to regulate an American army marching across the southern United States. The Lincoln War Department was deeply concerned about the treatment of prisoners of war, the disposition of civilian (nonslave) property, and maintaining discipline in the army. Finally, beyond slavery the administration was deeply concerned about the treatment of captured black soldiers and the behavior of its army—and the Confederate army—towards civilians.

I begin with Lieber himself,<sup>31</sup> who is really at the heart of this book. While Witt makes a claim for his title, based on Lincoln's own wartime goals, it strikes me that this book's title is mostly about marketing and grabbing the attention of readers. Books with "Lincoln" in the title sell better than books named for some long-forgotten legal theorist. But, for scholarship on this issue, the central figure is Francis Lieber, not Abraham Lincoln. As Witt admits, "Abraham Lincoln took no role in commissioning the code, at least not one that we know of" (p 237).

I turn in Part II to a brief history of the law of war before the modern era. The history of the law of war before the late eighteenth century involves the evolution from unrestrained combat, bloodshed, destruction, and confiscation of property to a system of articulated customary rules and published treatises, designed to limit the brutality and destruction caused by warfare. In the ancient world there were generally few constraints on armies or soldiers. Prisoners of war and captured civilians might be executed, tortured, or enslaved, and cities might be plundered and razed. The property of the defeated, as well as many captured soldiers and citizens, was seized as booty by individual soldiers and carried by victorious armies to imperial

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<sup>31</sup> See Part I.

cities like Rome as trophies of conquest. The brutality of ancient war was modified, to some extent, by medieval concepts of a just war, but, even these developments were unsatisfactory, in part because religious justifications for war could be used to legitimize the slaughter of nonbelievers, Jews, Moslems, and others.

In Part III, I turn to the evolution of war theory during and after the Renaissance. Here we see early modern legal theorists such as Hugo Grotius and Emmerich Vattel arguing for humane, gentle, and limited warfare, in response to the brutal and unrestrained warfare of earlier times. Paradoxically, scholars of war and political and legal theorists argued that hard combat was more humane because it led to shorter wars. The most important proponent of this position was Carl Philipp Gottfried von Clausewitz.<sup>32</sup> In Parts IV, V, VI, VII, and VIII, I consider the application of the Lieber Code during the Civil War and its impact on slavery, the treatment of prisoners, the disposition of civilian property, and the behavior of both United States and Confederate troops during the Civil War. In Part IX, I offer a brief discussion of the application of the Lieber Code after the Civil War to wars against Native Americans. This leads to some final considerations of the application of the Lieber Code, or any set of rules and regulations, to actual warfare.

#### I. FRANCIS LIEBER: FROM TEENAGE SOLDIER TO LAW OF WAR THEORIST

The modern history of the law of war begins during the American Civil War, with the work of Francis Lieber, a historian, political scientist, and constitutional theorist who was teaching at Columbia College (which later became Columbia University). Mostly forgotten today, Lieber, a German immigrant and naturalized US citizen, was better known in his own time, but only among an elite class of intellectuals and lawyers.

As a child, Lieber watched in horror as Napoleon's troops marched into Berlin in 1806.<sup>33</sup> As a teenager he joined the Colberg militia<sup>34</sup> and was left for dead on the field in the Waterloo

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<sup>32</sup> See Clausewitz, *On War* at 77 (cited in note 17).

<sup>33</sup> See Peter W. Becker, *Prologue: Lieber's Place in History*, in Charles R. Mack and Henry H. Lesesne, eds, *Francis Lieber and the Culture of the Mind* 1, 1 (South Carolina 2005).

<sup>34</sup> Frank Freidel, *Francis Lieber: Nineteenth Century Liberal* 11 (Louisiana State 1947).



Campaign.<sup>35</sup> He survived and returned to Germany, where he earned a PhD in mathematics and joined various underground groups that opposed the authoritarianism of his native Prussia.<sup>36</sup> He was arrested twice, and in 1826 he prudently left his homeland.<sup>37</sup> Although he was considered a radical in Prussia, by the standards of the United States he was politically and socially moderate or even conservative. For the rest of his life he would be a vocal advocate of the rule of law, an uncompromising nationalist, and a passionate defender of the Union. He had firsthand experience with the horror of war, but he fully understood its necessity in the real world and the need to rein in the violence of armed conflict. He became an advocate of meaningful rules that would constitute a law of war, but emphatically rejected the idea of pacifism (pp 177–79).

Lieber arrived in the United States with a handful of letters of introduction from some of the leading German intellectuals of the age.<sup>38</sup> By this time his intellectual interests had shifted from mathematics to politics, history, and law. In his first years in America, Lieber had some modest successes, but also a major disappointment. He hoped to find a position at a university, but this did not happen in the years after his arrival. He briefly taught gymnastics and swimming,<sup>39</sup> but his Germanic belief in the virtues of exercise and sports gained little traction in the young republic. He hobnobbed with emerging intellectuals and became something of an expert on pedagogy. He served as a research assistant for Alexis de Tocqueville, who had come to America to study its prisons, and he published various pamphlets and essays on politics, philosophy, constitutional law, and criminal justice.<sup>40</sup> His circle of friends and mentors included

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<sup>35</sup> See Becker, *Lieber's Place in History* at 1 (cited in note 33).

<sup>36</sup> See Francis R. Harley, *Francis Lieber: His Life and Political Philosophy* 21 (Columbia 1899).

<sup>37</sup> See Freidel, *Francis Lieber* at 46 (cited in note 34).

<sup>38</sup> His German patrons included the historian Leopold von Ranke and the scientist Alexander von Humboldt. See Becker, *Lieber's Place in History* at 1 (cited in note 33) (stating that he arrived in Boston with the letters of introduction from his "German friends").

<sup>39</sup> *Id.*

<sup>40</sup> See Paul Finkelman, *Lieber, Slavery, and the Problem of Free Thought in Antebellum South Carolina*, in Mack and Lesesne, *Culture of the Mind* 11, 15 (cited in note 33) (stating that Lieber helped Tocqueville and Beaumont on their "study of American prisons"). See also generally G. de Beaumont and A. de Toqueville, *On the Penitentiary System in the United States, and its Application in France* (Carey 1833) (Francis Lieber, trans) (assessing the penal system in the United States).

Justice Joseph Story, Chancellor James Kent, Senator Daniel Webster, the poet Henry Wadsworth Longfellow, and the young reformer and future US Senator Charles Sumner (p 176). He served as an advisor to the founders of New York University and created the *Encyclopedia Americana*<sup>41</sup> by translating an existing German encyclopedia into English and then adding and deleting hundreds of entries to Americanize the project. This work brought Lieber significant fame, which he hoped would lead to a professorship at Harvard, the newly created NYU, or any other college in the northeast.<sup>42</sup> But such plum positions did not materialize for the heavily accented, rather didactic immigrant whose lack of refined social graces reflected his humble origins.

In 1835, Lieber became a professor of history and political economy at South Carolina College, which would eventually be transformed into the University of South Carolina.<sup>43</sup> There he published extensively on political science, criminology, economics, and philosophy. His scholarship on prison reform and penology, which began when he worked for de Tocqueville, enhanced his growing reputation and led his newly adopted state to name its penitentiary for him.<sup>44</sup>

While providing him with a steady income, the move to South Carolina was hardly fulfilling.<sup>45</sup> Lieber was separated from the intellectual centers of the nation in New York, Boston, and Philadelphia and from his friends in those places. He instinctively opposed slavery,<sup>46</sup> but was living in the heart of America's slaveocracy, where he never felt at home.<sup>47</sup> While in South Carolina, Lieber avoided writing on slavery, knowing that anything he wrote would either cause him to lose his job (if he were critical of slavery) or cost him most of his friends and contacts among Northern intellectuals (if he supported the institution).<sup>48</sup>

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<sup>41</sup> While the project was enormously successful, Lieber did not profit from its success because he produced the *Encyclopedia Americana* as a work for hire. Becker, *Lieber's Place in History* at 2 (cited in note 33).

<sup>42</sup> *Id.* at 3.

<sup>43</sup> See *id.*

<sup>44</sup> It is known today as the Lieber Correctional Institution. See Gerhard Weiss, *The Americanization of Franz Lieber and the Encyclopedia Americana*, in Lynne Tatlock and Matt Erlin, eds, *German Culture in Nineteenth-Century America: Reception, Adaption, Transformation* 273, 273 (Camden 2005).

<sup>45</sup> See Finkelman, *Lieber, Slavery, and the Problem of Free Thought* at 11–12 (cited in note 40).

<sup>46</sup> See *id.* at 12.

<sup>47</sup> See *id.*

<sup>48</sup> See *id.* at 12–13.

He initially tried to manage his household with free labor, bringing young relatives from Germany as servants. But South Carolina society could neither comprehend nor countenance young white women working as servants, even when they were the foreign cousins of an eccentric German-born professor. Eventually Lieber purchased a few slaves as house servants,<sup>49</sup> simply because he could not maintain a proper middle-class lifestyle without household help.<sup>50</sup> For more than two decades he lived in South Carolina but always felt he was in exile.

The intellectual straightjacket of slavery ultimately doomed him in South Carolina. His only commercially successful book was *On Civil Liberty and Self-Government*,<sup>51</sup> which was “widely used as a text book in high schools and colleges.”<sup>52</sup> This two-volume explication of American government never mentions slavery, despite its place at the center of all of the important political debates of the age.<sup>53</sup> Lieber undoubtedly hoped that by avoiding a discussion of slavery he could retain his position in South Carolina and maintain his national prestige as an important intellectual. But this was not possible. Northerners might appreciate that he could not discuss slavery while teaching in South Carolina, but leaders of the Palmetto State were not so understanding. By the 1850s it was not enough to abstain from criticizing slavery. A professor at the state’s most important academic institution was expected to openly support slavery. Indeed, the very fact that he refused to discuss slavery in a major work about American politics and government made him suspect in South Carolina. The leaders of the state correctly suspected that Lieber secretly hated slavery.<sup>54</sup>

In 1851, Lieber served as the interim president of the college (his title was “President Pro Tem”), and he fully expected to

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<sup>49</sup> See Hartmut Keil, *Francis Lieber’s Attitudes on Race, Slavery, and Abolition*, 28 *J Am Ethnic Hist* 13, 13 (Fall 2008).

<sup>50</sup> For a discussion of Lieber’s South Carolina career and its relationship to slavery, see Finkelman, *Lieber, Slavery, and the Problem of Free Thought* at 11–22 (cited in note 40).

<sup>51</sup> Francis Lieber, *On Civil Liberty and Self-Government* (Bentley 1853).

<sup>52</sup> See Becker, *Lieber’s Place in History* at 5 (cited in note 33).

<sup>53</sup> *Id.* For a discussion of the centrality of slavery in the political debates of the time, see Paul Finkelman, *The Cost of Compromise and the Covenant with Death*, 38 *Pepperdine L Rev* 845, 856–58 (2011). See generally Paul Finkelman *The Appeasement of 1850*, in Paul Finkelman and Donald R. Kennon, eds, *Congress and the Crisis of the 1850s* 36 (Ohio University 2012).

<sup>54</sup> See Finkelman, *Lieber, Slavery, and the Problem of Free Thought* at 18 (cited in note 40).

be rewarded for his years of service and his scholarly achievements with the permanent presidency. But the trustees rejected Lieber in favor of Reverend James Henley Thornwell,<sup>55</sup> a fanatically proslavery professor of theology, who had just published a pamphlet on the “Rights and Duties of Masters.”<sup>56</sup> Thornwell, whose sermons and essays provided biblical support for slavery, was clearly the safer choice for the college. When the presidency became vacant again in 1855, Lieber assumed it was his turn to run the college.<sup>57</sup> After two decades of service to the institution, Lieber believed he deserved the presidency. He was the college’s most productive scholar, with both a national and an international reputation. His recently published *On Civil Liberty and Self-Government* had brought great prestige to the college. But the leaders of South Carolina did not trust him. It was not that he openly opposed slavery—because he did not—but that he was not openly proslavery. From the perspective of the leaders of South Carolina, Lieber clearly was “soft” on slavery.<sup>58</sup> His annual trips to New York and New England and his seemingly endless correspondence with well-known opponents of slavery led to the logical and correct conclusion that while not an active abolitionist, Lieber was surely a fellow traveler of those who opposed and hated slavery (pp 175–77).

When the presidency went to Charles F. McClay, a mathematics professor, the disappointed Lieber resigned his professorship.<sup>59</sup> In January 1857 he moved to New York, where he became a professor of history and political science at Columbia College.<sup>60</sup> No longer an untested immigrant mathematician, Lieber was now an accomplished scholar with a national and an international reputation, and an elite Northern school was happy to hire him.

Thus, when the Civil War began, the United States—and not the putative Confederate nation—had the advantage of Lieber’s considerable knowledge of political theory and the legal

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<sup>55</sup> See *id.*

<sup>56</sup> See also J.H. Thornwell, *The Rights and Duties of Masters: A Sermon Preached at the Dedication of a Church Erected in Charleston, S.C. for the Benefit and Instruction of the Coloured Population* 31 (Walker 1850).

<sup>57</sup> See Finkelman, *Lieber, Slavery, and the Problem of Free Thought* at 18 (cited in note 40).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 19 (stating that Lieber offered to resign from the college after “losing his bid for the presidency”).

<sup>60</sup> See *id.* at 20.

implications of war. Freed from the straightjacket of South Carolina's proslavery orthodoxy and anti-intellectualism, Lieber was now openly antislavery, strongly nationalistic, and deeply opposed to secession. He enthusiastically worked for Lincoln's election and was deeply devoted to the Union cause.<sup>61</sup> Had he been younger, the veteran of the Napoleonic wars would have made an ideal general to command the many German-speaking soldiers entering the United States Army. But at age sixty-three Lieber was destined for a more important role: providing the administration with a legal code for conducting the war.<sup>62</sup>

Even before Lieber created what we today call the Lieber Code, he helped the administration by providing a theoretical analysis and a practical framework for dealing with Confederate prisoners<sup>63</sup> and for dealing with irregular Confederate combatants—marauders and guerilla fighters.<sup>64</sup> In June 1862—about a month before Lincoln began to draft the Emancipation Proclamation—Lieber provided Attorney General Edward Bates with a memorandum (which was published in newspapers) explaining why it was permissible, under the laws of war, to free slaves who entered US Army lines.<sup>65</sup> Lieber asserted a slave became free when he “present[ed] himself to our troops as coming from the enemy and claiming our protection” (p 228).

Lieber's next contribution to the legal theory of warfare came on the heels of the first significant battle of the war. After what today is called the First Battle of Bull Run on July 21, 1861, the administration was uncertain what to do with captured Confederate prisoners. If secession was illegal, as Lincoln contended, then the captured Confederates were not soldiers but brigands, or perhaps some form of land-based pirates, making war on the general populace. As such they might be imprisoned, sentenced to hard labor, or even summarily executed. While this comported with Lincoln's theory of secession—as an illegal insurrection or rebellion—the application of this theory to

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<sup>61</sup> See Finkelman, *Lieber, Slavery, and the Problem of Free Thought* at 20 (cited in note 40).

<sup>62</sup> *Id.*

<sup>63</sup> See Francis Lieber, *The Disposal of Prisoners*, *NY Times* 5 (Aug 19, 1861).

<sup>64</sup> See generally Francis Lieber, *Guerrilla Parties Considered with Reference to the Laws and Usages of War* (Van Nostrand 1862). This pamphlet is conveniently reprinted along with the Lieber Code itself in Lieber, *Instructions for the Government of Armies of the United States in the Field* (cited in note 27).

<sup>65</sup> See Francis Lieber, *Duty of Provisional Governors: Letter from Professor Lieber to Secretary Bates*, *The Evening Post*, New York City 1 (June 17, 1862).

captured Confederates was fraught with danger. Sending Confederate prisoners of war to hard labor, or summarily executing them, would only lead to retaliation by the Confederacy against captured Union soldiers and encourage barbaric behavior on both sides. Everyone in the administration knew this. But Attorney General Edward Bates worried that treating captured Confederate soldiers as prisoners of war would be a de facto recognition of the Confederacy as a legitimate nation. Lincoln, who was also not an expert on international law or the law of war, feared this as well (p 163).

On August 19, 1861, Lieber helped extricate the administration from its dilemma with an open letter in the *New York Times* on the nature of Confederate prisoners. He noted this question involved “[c]onsiderations of law, authority, humanity, [and] wise foresight.”<sup>66</sup> As Lieber explained, the issue concerned not only the treatment of captured Confederates—whether they were soldiers or pirates—but also how the Confederacy might treat captured Union soldiers. Lieber argued that traditional rules of war should be applied to prisoners and that doing so did not constitute a formal or diplomatic recognition of the Confederacy but was merely “the recognition of reality.”<sup>67</sup> Lieber offered an analogy that set the issue out clearly: “When a highway robber asks my purse, and I, being unarmed, consider it expedient to give it, I certainly recognize the robber, but it is no more than a recognition of a fact.”<sup>68</sup> This analogy must surely have pleased the administration because it compared the Confederates to criminals, while at the same time providing a practical response to the prisoner issue.

For humanitarian reasons, Lieber also acknowledged the importance of treating Confederate prisoners as soldiers fighting for a legitimate belligerent<sup>69</sup> under international law. Lieber assured the administration that treating captured Confederates as prisoners of war would not constitute de facto recognition of the Confederacy as an independent nation.<sup>70</sup> Rather, it would merely be a humanitarian act for the sake of those captured on both sides. He even argued that treating captured Confederates as

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<sup>66</sup> See Lieber, *The Disposal of Prisoners*, NY Times at 5 (cited in note 63).

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> See Hersch Lauterpacht, *Recognition in International Law* 175–76 (Cambridge 1947).

<sup>70</sup> See Lieber, *The Disposal of Prisoners*, NY Times at 5 (cited in note 63).

prisoners of war would not prevent subsequent treason prosecutions, if that was what the government wanted to do. But it would be a practical solution to the immediate problem, since both sides had captured each other's soldiers.

This letter in the *New York Times* was Lieber's first formal step towards developing a humane set of rules for warfare, in the context of the horror and brutality of the expanding war. Eventually Lieber's theory would lead to prisoner exchanges and paroles of captured soldiers.<sup>71</sup> In this letter Lieber observed that it would be possible, and even legal under existing rules of war, to execute captured Confederates. He noted that such a policy would have been legal because the administration *could* treat Confederate prisoners as the equivalent of pirates, but he rejected any thought of this on the ground that it would reduce the United States to the level of the Jacobins during the French Revolution who "guillotined . . . the prisoners they made."<sup>72</sup> Lieber's point was clear: civilized, humane nations did not execute prisoners of war and the United States had to follow such rules. This was the beginning of the development of what would eventually be the Lieber Code.

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<sup>71</sup> When prisoners were exchanged, they resumed their place in the army and could be sent back into combat. When paroled they were sent back to their own lines with the stipulation that they could not return to combat but might serve in the army in a noncombat role, including garrisoning forts away from the front lines. Lieber Code Art 130 (cited in note 22). If a paroled soldier did return to combat, and was subsequently captured, the recaptured soldier could legitimately be executed. Thus Lieber admonished that "[a]ccurate lists, therefore, of the paroled persons must be kept by the belligerents." Lieber Code Art 124 (cited in note 22). The concept of paroling captured soldiers was an important example of moving towards a humane law of war. Under the parole system an enemy might release prisoners of war, sending them home or back to their own lines, for noncombat duty. This was surely preferable, and more humane, than sending them to POW camps. However, the parole system also allowed belligerents to relieve themselves of the duty of caring for, feeding, housing, and guarding enemy prisoners, which all understandings of the law of war required, and which was set out in the Lieber Code. Confederate military leaders frequently paroled captured US soldiers because they had no place to put them. While prisoner exchanges and paroles were more humane for the individual soldiers, the Lieber Code did not require them and allowed belligerents to refuse to accept parolees, or refuse to engage in prisoner exchanges. Toward the end of the war, General Grant opposed all prisoner exchanges in part because Confederates refused to exchange black prisoners of war on racist grounds. Grant refused to allow a differentiation among his soldiers on the basis of race. At the same time, he could afford to do this because he could conduct his military operations without redeeming prisoners and using them in combat again, while the Confederates were desperate for men. This aspect of the Lieber Code illustrates that humane treatment, while possible, was not required in many cases. For those soldiers captured and left in prisoner-of-war camps, the war was its own special hell.

<sup>72</sup> See Lieber, *The Disposal of Prisoners*, NY Times at 5 (cited in note 63).

In a subsequent essay, commissioned by Major General Henry W. Halleck, the general-in-chief of the army, that was published as a pamphlet in August 1862, Lieber set out rules for dealing with guerrilla soldiers and other irregular forces.<sup>73</sup> Here he argued that “guerrilla-men, when captured in fair fight and open warfare, should be treated as the regular partisan is, until special crimes, such as murder, or the killing of prisoners, or the sacking of places, are proved upon them.”<sup>74</sup> Lieber argued that this was the precedent of “the most humane belligerents in recent times.”<sup>75</sup> In December, Halleck commissioned Lieber to write what became the Lieber Code.

In these early works and later in the Lieber Code, Lieber “formulate[d] seminal doctrines on the problems of irregular warfare and the occupation of hostile territories.”<sup>76</sup> Lieber’s work, and the work of those who followed him,<sup>77</sup> fundamentally altered the way the United States—and then most of the rest of the world—viewed the relationship between law and war. Lieber’s life and career prepared him to write the Lieber Code. In the rest of this Review I will explore the nature of the Lieber Code in greater detail as well as its influence on the conduct of the Civil War.

## II. JUST WAR AND THE NEED FOR THE LIEBER CODE

The Lieber Code is at the center of Professor Witt’s fine book (p 237). Professor Witt sets out the history of how the United States, and by extension the world community, have used law—something called the law of war—to limit the horror and destruction of armed conflict. At the same time the law of war was also a tool of statecraft that was useful to help win a war and negotiate a peace. It is a mixed history. The very idea of a law for warfare might seem like an oxymoron. Law is orderly, providing a process for a civil and peaceful resolution of differences. War

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<sup>73</sup> See generally Lieber, *Guerrilla Parties Considered with Reference to the Laws and Usages of War* (cited in note 64).

<sup>74</sup> *Id.* at 20.

<sup>75</sup> *Id.*

<sup>76</sup> James Q. Whitman, *The Verdict of Battle: The Law of Victory and the Making of Modern War* 237 (Harvard 2012).

<sup>77</sup> Whitman argues that these rules were also formulated by Johann Caspar Bluntschli of Switzerland. However, Bluntschli wrote a decade after Lieber. *Id.* at 237, 310 n 80, citing Johann Caspar Bluntschli, *Das Moderne Völkerrecht der Civilisirten Staten* (1872).



is violent and without any calmness or even order. The fog of battle leads to death and mayhem at every turn.

Nevertheless, the modern world has accepted general rules for how armies and nations should behave during wartime. These rules are surely different than they were in the ancient world. Generally, the law of war in the ancient world was one of unrestrained violence and brutality. One minor exception to this was classical Greece, where there were “unwritten conventions governing interstate conflict.”<sup>78</sup> Thus, the ancient Greek states held that “[p]risoners of war should be offered for ransom rather than being summarily executed or mutilated”<sup>79</sup> and “noncombatants should not be primary targets of attack.”<sup>80</sup> However, these and similar rules applied only to “intra-Greek warfare” for the period of 700 to 450 BCE<sup>81</sup> and did not apply to warfare with non-Greeks.

For the Romans, “[t]he best reason for going to war was defence of the frontiers, and, almost as good, pacification of barbarians living beyond the frontiers.”<sup>82</sup> Such reasons allowed for the Roman conquest of much of the known world. Once the wars began, there were virtually no limitations on the behavior of the army. “Prisoners could be enslaved or massacred; plunder was general; and no distinction was recognized between combatants and noncombatants.”<sup>83</sup> Roman warfare was “merciless savagery.”<sup>84</sup>

In the rest of the ancient world it was pretty much the same. Defeated enemies—both civilians and soldiers—were slaughtered and enslaved; women were taken to serve those who captured them; cities were razed and booty was carried off by victorious soldiers. Cities might avoid destruction by paying tribute to their conquerors. Individuals might escape bondage through ransom, but only if their captors did not choose to kill or enslave them. The enslavement, mutilation, torture, and slaughter of those who resisted an invading army served as a powerful message to the next target, and could lead to surrender, negotiations, and the payment of tribute.

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<sup>78</sup> Josiah Ober, *Classical Greek Times*, in Howard, Andreopoulos, and Shulman, *Laws of War* 12, 13 (cited in note 21).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Stacey, *The Age of Chivalry* at 27 (cited in note 23).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

Medieval war theorists accepted the rule of “bellum Romanum” with all its horror of slaughter and enslavement, but thought it should only apply to non-Christians and “pagans, like the Muslims in the Holy Land or, in the sixteenth century, the aboriginal peoples of the New World.”<sup>85</sup> Such wars against pagans were justified by religion—the Christianity of the warriors and the pagan status of the enemy.

In the medieval period scholars asserted that the right to fight a war, “*jus ad bellum*,” required that it be “declared by a competent authority, fought for a just cause, with proper intent and a proportionality between provocation and response, and toward the end of reestablishing peace.”<sup>86</sup> Implicit in this theory was the belief that these rules justified a war and created the theory of just war. But these rules did not regulate combat in any meaningful way. There were some accepted codes of behavior, especially among knights and noblemen, but slaughter of prisoners, other than knights and noblemen, was common. Knights and noblemen were expected to take each other prisoner, treat prisoners humanely, and eventually allow them to be ransomed.<sup>87</sup> Towns might still be pillaged and leveled if they refused to surrender and their inhabitants might be justly slaughtered.<sup>88</sup>

Under the theory of a “just war” (pp 17–19), if God was on their side and their cause was always righteous, soldiers might do anything and cause vast carnage. The danger with such a theory, as Witt notes, is that “just wars risked plunging warfare into uncontrollable cycles of destruction” (p 17). If an army believed its mission was sanctioned by God, and that its adversaries were the enemies of God, then almost any sort of destruction was permissible. Just-war theory might have been workable for wars against heathens, infidels, or other non-Christians, but within Christian Europe it was increasingly difficult to make the claim that God preferred one group of Catholics over another, or after the Protestant Reformation, one group of Christians over another, and that unrestrained slaughter of one side by the

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<sup>85</sup> *Id* at 28.

<sup>86</sup> Stacey, *The Age of Chivalry* at 30 (cited in note 23) (describing the circumstances in which war could be waged in the Middle Ages).

<sup>87</sup> See *id* at 36–38.

<sup>88</sup> See Geoffrey Parker, *Early Modern Europe*, in Howard, Andreopoulos, and Shulman, *Laws of War* 40, 50 (cited in note 21) (describing numerous examples of towns sacked and plundered and civilians slaughtered in seventeenth-century Europe, all “according to the laws of war”).

other was permissible. As Witt demonstrates, the trick for international law theorists such as Francisco de Vitoria, Hugo Grotius, and most of all Emmerich de Vattel, was to set out rules that restrained—even civilized—warfare and limited its destructive nature to encounters between soldiers and armies (p 18).

The accomplishments of these theorists were limited, and most of their successes were probably due to practical considerations and the ever increasing costs of warfare in life and treasure. As armies became professionalized, the cost of training and hiring soldiers became more expensive and rulers had an economic incentive for limiting death in war time. The increasing use of cannons and guns also made the soldiers themselves more concerned about limiting the human costs of warfare. Edged weapons simply had not been as lethal as the newer ones, and professional soldiers had an ongoing interest in the rules of war, in contrast to foot soldiers of the medieval world, who were often conscripted under systems of feudal obligation.

As Witt notes later in his book, even as Western society moved away from reliance on the idea of a just war, appeals to God and righteousness in war time continued. This should not surprise us. In times of crisis people often appeal to the supernatural for aid. War is surely a great crisis. As the saying goes, “there are no atheists in the fox holes.”<sup>89</sup> But, it is important to understand that appeals to God were not the same as claims that a nation’s military activities were endorsed by God and thus, in the medieval sense, anything done in warfare to further God’s will was permissible.

Thus, Americans during the Revolution adopted the slogan “rebellion to tyrants is obedience to God.” Significantly, the most likely author of this phrase was Benjamin Franklin, a deist who rejected traditional Christian faith.<sup>90</sup> Likewise, Jefferson, another deist, appealed to “Nature’s God” in the Declaration of Independence,<sup>91</sup> but not to any serious theological basis for

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<sup>89</sup> This phrase is attributed to various people, most commonly to the World War II correspondent Ernie Pyle. Carlos P. Romulo, *I Saw the Fall of the Philippines* 263 (Doubleday 1942).

<sup>90</sup> The origin of this phrase is contested. The best evidence is that Benjamin Franklin made it up, but attributed it as the epitaph to the regicide judge John Bradshaw. See Monroe E. Deutsch, *E Pluribus Unum*, 18 *Classical J* 387, 403 (1923). See also *Rebellion to Tyrants Is Obedience to God*, 14 *Wm & Mary Q* 37, 37–38 (1905). Curiously, while discussing various versions of this quotation, Professor Witt does not note its origins (pp 41–43).

<sup>91</sup> United States Declaration of Independence ¶ 1 (1776).

independence or the war against Britain. Similarly, during the Civil War, Lincoln referred to God's will to explain the carnage of the Civil War. In his Second Inaugural, Lincoln noted that:

[I]f God wills that [the War] continue, until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord, are true and righteous altogether."<sup>92</sup>

Such language appealed to the overwhelmingly Protestant North, but it was hardly the language of the pious or devout. Lincoln himself had very little use for organized churches or traditional Christianity.<sup>93</sup>

To talk about a war in religious terms during the Revolution or in the nineteenth century was not a reversion to medieval just-war theory. Rather, it was a reflection of what modern scholars call "civil religion."<sup>94</sup> Unfortunately, in this very good book Witt does not explore the religious nature of the Civil War, and the way in which partisans on both sides appealed to God—the same God—to justify their carnage. As Lincoln noted in his Second Inaugural, when the war began:

Each looked for an easier triumph, and a result less fundamental and astounding. Both read the same Bible, and pray to the same God; and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces; but let us judge not that we be not judged. The prayers of both could not be answered; that of neither has been answered fully. The Almighty has His own purposes.<sup>95</sup>

Lincoln's appeals to scripture and his references to "The Almighty" did not turn the Civil War into a holy war or lead to notions of a just-war theory, which permitted slaughter in the

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<sup>92</sup> Abraham Lincoln, *Second Inaugural Address*, in Roy P. Basler, ed, 8 *The Collected Works of Abraham Lincoln* 332, 333 (Rutgers 1953).

<sup>93</sup> See Ward H. Lamon, *The Life of Abraham Lincoln; from His Birth to His Inauguration as President* 494 (Osgood 1872).

<sup>94</sup> Mark Tushnet, *Civil Religion*, in Paul Finkelman, *Religion and American Law: An Encyclopedia* 85–87 (Garland 2000).

<sup>95</sup> Lincoln, *Second Inaugural* at 333 (cited in note 92).

name of God. Rather, we should see that in wartime, Americans, like people from most other nations, seek solace in religion and believe in a moral justification for the wars they fight. Thus, since the mid-nineteenth century the notion of just war or a morally justifiable war for Americans has not been theologically rooted or especially tied to any faith. Rather, such concepts have been tied to notions of morality in the hoped-for outcome (such as removing a brutal Spanish imperial presence in the Spanish-American War), destroying a deeply immoral enemy (such as defeating Nazism, with all of its horrors, in World War II), saving others from Communist tyranny (such as in Korea and Vietnam), protecting a weak nation from the predatory acts of a stronger nation (such as the Gulf War, which is also called Operation Desert Storm), or saving the world from the threat of mass destruction by a brutal dictator (such as President George W. Bush's public justification for the war in Iraq).<sup>96</sup>

The transformation of the Civil War into a "good war" (as opposed to application of medieval just-war theory) helps us better understand the importance and necessity of the Lieber Code. The South seceded to protect slavery,<sup>97</sup> and white Southerners were willing to fight a brutal war to preserve the right to hold other people in bondage.<sup>98</sup> Northerners went to war to preserve the Union, but it soon became a war to end slavery as well. Northerners accepted a modern notion of a just war—or a good war, as I have referred to it—that allowed for the destruction of slavery, but never contemplated the medieval notion that they could destroy the enemy, the slaveowners themselves. At least part of the transformation from a war to preserve the Union to a war to destroy slavery was religious, although not necessarily theological. Similarly, the evolution of the United States Army's marching song from "John Brown's Body" to the language of the

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<sup>96</sup> I do not necessarily believe that all of these claims and justifications were legitimate or based on any sort of empirical evidence. My only point is to note the kinds of justifications used to legitimize various wars.

<sup>97</sup> *Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union* (1861), in John Amasa May and Joan Reynolds Faunt, *South Carolina Secedes* 76, 80 (South Carolina 1960).

<sup>98</sup> As Lincoln observed in his second inaugural address: "It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces, but let us judge not, that we be not judged." Lincoln, *Second Inaugural* at 333 (cited in note 92). See also Paul Finkelman, *States' Rights, Southern Hypocrisy, and the Crisis of the Union*, 45 Akron L Rev 449, 477 (2012).

“Battle Hymn of the Republic”<sup>99</sup> helps us understand the nature of this change.<sup>100</sup>

Since both sides had a “moral” reason for the war—Southerners to preserve slavery and white supremacy<sup>101</sup> and Northerners to save their nation from the lawless destruction of the slaveholding secessionists and end human bondage—the potential for a war of vengeance and wanton destruction was great. Some Southern combatants, such as the Younger-James Gang, Quantrill’s raiders, and troops under the command of Jubal Early behaved this way when they invaded the North and when they conducted guerilla activities in the loyal slave states.<sup>102</sup> In 1863, for example, Quantrill’s terrorist forces murdered over 150 unarmed men in Kansas.<sup>103</sup> Similarly, Confederate troops at Fort Pillow and elsewhere slaughtered surrendering US troops, murdering those who had actually surrendered and been captured, killing wounded soldiers in hospitals, and actually burying alive some wounded soldiers.<sup>104</sup> Some of the soldiers were robbed, with any money and other valuables taken from them, before they were murdered. Most of those murdered at Fort Pillow were black, but some white soldiers and officers

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<sup>99</sup> Julia Ward Howe, *The Battle Hymn of the Republic*, in *Atlantic Monthly* (Oitson 1890).

<sup>100</sup> Thus the marching song has such language as “[m]ine eyes have seen the glory of the coming of the Lord” and “he died to make men holy, let us die to make men free.” The refrain “Glory, Glory, Hallelujah! His truth is marching on” is deeply Protestant. See *id.*

<sup>101</sup> See Part VII.

<sup>102</sup> The activities of Southern irregulars, like the murderous violence of the Quantrill’s Raiders and the Younger-James Gang in Missouri illustrate this. See notes 145–46 (discussing how Southern generals demanded tribute from Northern towns and authorized Southern soldiers to hunt down and enslave Northern citizens). See also Part V; James M. McPherson, *Battle Cry of Freedom: The Civil War Era 757* (Oxford 1988) (describing how Early’s troops burned property of politicians in Maryland, demanded what amounted to “protection money” from towns in Maryland, stole private property, and even drank up the wine cellar of the father of Lincoln’s postmaster general); Everard H. Smith, *Chambersburg: Anatomy of a Confederate Reprisal*, 96 *Am Hist Rev* 432, 435 (1991) (describing troops under Early demanding “protection money” from the town of Chambersburg, Pennsylvania, and when the money was not paid, burning the city to the ground). For a discussion of Younger-James and Quantrill, see McPherson, *Battle Cry of Freedom* at 784–88 (cited in note 102).

<sup>103</sup> Phillip Shaw Paludan, “A People’s Contest”: *The Union and Civil War* 301 (Harper & Row 1988).

<sup>104</sup> See John Cimprich, *Fort Pillow, a Civil War Massacre, and Public Memory* 81–84, 89, 95 (LSU 2011); Dudley Taylor Cornish, *The Sable Arm* 175 (Kansas 1987). For an example of burying captured prisoners alive, or allowing wounded prisoners to die untreated after the battle, see George S. Burkhardt, *Confederate Rage, Yankee Wrath: No Quarter in the Civil War* 114 (Southern Illinois 2007).

were also murdered after they surrendered.<sup>105</sup> One Confederate officer described the events at Fort Pillow as “the most horrible sight that I have ever witnessed.”<sup>106</sup> A Confederate sergeant reported that “[t]he slaughter was awful” and that the captured fort became “a great slaughter pen. Blood, human blood stood about in pools and brains could have been gathered up in any quantity,” as unarmed men with their hands in the air were shot at point-blank range or hacked to death with swords.<sup>107</sup>

Such actions taken against surrendering enemies, hospitalized unarmed soldiers, and those who had already surrendered violated codes of behavior—both written and unwritten—that dated from the medieval period.

That Confederate generals not only approved but encouraged such behavior indicates the potential for the Civil War to have returned to an era of barbarity. The Lieber Code was in part a response to Southern lawlessness, such as Southern troops enslaving Northern free blacks, and enslaving or murdering captured black troops, and also an attempt to prevent lawless pillaging by Northern troops as they invaded the South. Thus, the Lieber Code can be seen as a way of preventing war (the Civil War or any war) from spinning out of control into a holy crusade that devolves into a bloodbath. Clearly, while the medieval notions of just war have disappeared, the tension between a “crusade” and war as policy and politics has never disappeared.<sup>108</sup>

### III. TOWARD A MODERN LAW OF WAR

Beyond this discussion of just war and the medieval period, Witt offers a solid discussion of the application of the law of war in North America, in the context of wars with Indians during the colonial and revolutionary periods, and in the wars against Great Britain (the American Revolution and War of 1812) (pp 15–27, 67–74). He teaches us much about the debates between

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<sup>105</sup> Burkhardt, *Confederate Rage, Yankee Wrath* at 113 (cited in note 104).

<sup>106</sup> *Id.* at 110.

<sup>107</sup> Cimprich, *Fort Pillow, a Civil War Massacre* at 81 (cited in note 104).

<sup>108</sup> Consider the title of the most important officer’s memoir of World War II, Dwight David Eisenhower. Dwight D. Eisenhower, *Crusade in Europe* (Doubleday 1948). During the Iraq War there were numerous comments about it being a “crusade” against the Muslim world. See Jackson Lears, *How a War Became a Crusade*, NY Times A25 (Mar 11, 2003); Washington’s Blog, “*Winning Hearts and Minds*”: *America’s Holy Crusade Continues in Iraq* (Global Research Jan 18, 2010), online at <http://www.globalresearch.ca/winning-hearts-and-minds-america-s-holy-crusade-continues-in-iraq> (visited Nov 24, 2013).

the Americans and British over prisoners of war during the Revolution and more complicated debates about the use of the law of war against Indians (pp 22–27, 335–36). Similarly, conflicts between the United States and Britain over embargoes, the interdiction of ships at sea, and the impressment of sailors in the late eighteenth and early nineteenth centuries all involved arguments and interpretations of the law of war and the accepted concepts of diplomacy. Witt's research demonstrates—although it is not necessarily his thesis—that in the late eighteenth and early nineteenth centuries Americans and Europeans threw theories of international law and war at each other during negotiations over prisoners of war, reparations, and treaties, but claims under these theories of law and war were often mostly tactical. Thus, before the War of 1812 the United States strenuously opposed the maritime policies of both France and Britain that interfered with neutral shipping because the United States was neutral. But in the Civil War the United States reversed course, using its blockade of Southern ports against all shipping (pp 144–57). A nation might denounce blockades in one war and insist on their legitimacy in another.

However, as Witt shows, the struggle to have a rational law of war—the emergence of modern rules—came to the fore in the American Civil War. Under the Lieber Code, as well as modern rules of war, civilian deaths should be avoided where possible (although necessity allows for attacking cities even though civilian deaths might be astronomical);<sup>109</sup> captured civilians may not be killed, tortured, or enslaved;<sup>110</sup> prisoners of war should be treated decently, fed, housed safely, and not tortured;<sup>111</sup> no army may use poison;<sup>112</sup> the assassination of rulers is generally frowned upon;<sup>113</sup> flags of truce are to be recognized;<sup>114</sup> spies may

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<sup>109</sup> See Lieber Code Art 15, 22 (cited in note 22). See also Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art 3, 1955 6 UST 3516, 3521, TIAS No 3365 (1949) (stating that the sick and wounded of the enemy should be cared for with humanity).

<sup>110</sup> See Lieber Code Art 23 (cited in note 22).

<sup>111</sup> See Lieber Code Art 56 (cited in note 22). See also Geneva Convention, Art 3, 1955 6 UST at 3521 (cited in note 109).

<sup>112</sup> See Lieber Code Art 70 (cited in note 22).

<sup>113</sup> Lieber Code Art 148 (cited in note 22). See generally Mark V. Vlasic, *Assassinations and Targeted Killings—A Historical and Post-Bin Laden Legal Analysis*, 43 *Georgetown J Intl L* 259 (2012).

<sup>114</sup> Lieber Code Art 114 (cited in note 22).



be summarily executed;<sup>115</sup> prisoners of war can be exchanged or paroled (but do not have to be);<sup>116</sup> and civilian property and the property of a conquered nation should generally be respected (although an invading force may take or destroy the property of its enemies under a variety of circumstances).<sup>117</sup> Indeed, even the killing of enemy soldiers is subject to the limitation that such killings are necessary to win a battle, protect your own soldiers, or win a war. Thus for example, the allied forces in the Gulf War (Operation Desert Storm) in 1991 abruptly stopped fighting when the Iraqi Army was utterly defenseless and in full retreat.<sup>118</sup> Continued fighting would have led to unnecessary killing that would have served no purpose, since the goals of the war had been achieved, and unilateral cessation of combat could lead to an end to the fighting.

These rules seem logical and are so well accepted in our own times that they seem unremarkable. But as Witt demonstrates, all of this is relatively modern (p 130). For most of human history invading armies enslaved or killed their enemies whether civilians or soldiers, taking or destroying everything in sight, and inflicting enormous cruelty on enemies, merely for the sake of doing so, as revenge, to provide payment for soldiers, to recoup the costs of fighting the war, or to frighten other towns or armies into immediately surrendering.

Modern international law and the law of war, including the rules of the Geneva Conventions,<sup>119</sup> condemn and criminalize such behavior. Some of these kinds of behavior were also criminalized by customary international law before the American Civil War. Modern trials for war crimes, which started after the defeat of Germany and Japan in 1945, in part reflected the collective belief that those countries had egregiously violated accepted rules of warfare.<sup>120</sup> Most of these modern rules began in

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<sup>115</sup> See Lieber Code Art 95 (cited in note 22). See also Geneva Convention, Art 5, 1955 6 UST at 3522 (cited in note 109).

<sup>116</sup> See Lieber Code Art 119 (cited in note 22). See also Geneva Convention, Art 21, 6 UST at 3336 (cited in note 109).

<sup>117</sup> See Lieber Code Art 38 (cited in note 22).

<sup>118</sup> See Andrew Rosenthal, *Military Aims Met*, NY Times A1 (Feb 28, 1991).

<sup>119</sup> Geneva Convention, Art 129, 1955 6 UST at 3570 (cited in note 109).

<sup>120</sup> The earliest war crimes trial may be that of Sir Peter of Hagenbach in 1474. See Georg Schwarzenberger, *A Forerunner of Nuremberg: The Breisach War Crime Trial of 1474*, The Manchester Guardian 4 (Sept 28, 1946). I am indebted to Jonathan Bush for providing me with this source. There were also sporadic war-crimes trials in the nineteenth century. In the aftermath of the Dakota War a military commission sentenced 303 Dakota warriors to death, most for merely participating in the war. President

the American Civil War with the drafting of Lieber's remarkable code.

Witt points out that the project of earlier legal theorists, starting with Vitoria, Grotius, and Vattel, was to place limits on warfare in order to reduce bloodshed and suffering. These writers would have limited the way armies could fight, the tactics they might use, and even the means of warfare. Vattel argued for "the gentlest methods" of warfare in the name of humanity (p 18).

But, as Witt persuasively argues, there is tension between humanitarian limitations on warfare and a humane outcome. Witt demonstrates the irony that a restrained war using "the gentlest methods" may in fact be less humanitarian than a war that unleashes massive power as quickly and as intensely as possible. For more than half a millennium some scholars, philosophers, and theorists of war have argued that virtually unrestrained war would be quicker and in the end more humane. Niccolai Machiavelli "called for wars that were 'short and strong' (*corte e grosse*," he said)," while Frederick the Great argued for wars that were "short and lively" (p 184). Clausewitz, the greatest of all war theorists, argued that the idea of a law of war to restrain nations was inherently absurd: "War is thus an act of force to compel our enemy to do our will."<sup>121</sup> In order to attain this object fully, "we must render the enemy powerless; and that, in theory, is the true aim of warfare."<sup>122</sup> In 1855, just a half decade before the American Civil War would begin, Montague Bernard, the Chichele Professor of International Law and Diplomacy at Oxford, argued that intense warfare would "make the calamity shorter at the cost of making it fiercer and more terrible."<sup>123</sup>

Lieber enthusiastically adopted these ideas in the Lieber Code, but as I note below, with some significant caveats. He

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Lincoln effectively pardoned 265 of these men. The rest were executed because they were believed to have committed crimes during the war—"war crimes"—such as rape, killing civilians, and killing captured prisoners. See Paul Finkelman, "*I Could Not Afford to Hang Men for Votes.*" *Lincoln the Lawyer, Humanitarian Concerns, and the Dakota Pardons*, 39 *Wm Mitchell L Rev* 405, 413 (2013). After the Civil War the United States tried and executed Henry Wirz, the commander of the Andersonville prisoner of war camp, for his savage and sadistic treatment of prisoners of war and his refusal to provide them clean water and even a minimal amount of food necessary to survive (pp 298–301).

<sup>121</sup> Clausewitz, *On War* at 75 (cited in note 17).

<sup>122</sup> *Id.*

<sup>123</sup> See Montague Bernard, *The Growth of Laws and Usages of War*, in *Oxford Essays* 88, 134 (Parker 1856).

declared that “[t]he more vigorously wars are pursued[,] the better it is for humanity. Sharp wars are brief.”<sup>124</sup> This was pure Clausewitz.<sup>125</sup> But while accepting the importance of harsh and vigorous warfare, Lieber also successfully managed to create rules that would simultaneously reduce some of the inherent cruelty of war. Thus, the Lieber Code asserted that nations could ban some weapons or tactics—such as the use of poison,<sup>126</sup> intentionally harming “the inoffensive citizen of the hostile country,”<sup>127</sup> or retaliation for the purpose of revenge.<sup>128</sup>

But, in such modern sharp wars, Lieber defended the proposition that “no conventional restriction of the modes adopted to injure the enemy is any longer admitted.”<sup>129</sup> Outside of the rules Lieber laid down, war could, and should, be prosecuted with the utmost ferocity. “When war is begun,” he told his students at Columbia, “the best and most humane thing is to carry it on as intensely as possible so as to be through with it as soon as possible” (p 235). Here was the argument for “sharp wars.”<sup>130</sup> American military strategists may have invented the term “shock and awe” in the 1990s,<sup>131</sup> and applied it in Iraq in 2003, but the concept dates at least to Clausewitz, if not Machiavelli. The concept was first articulated in the United States not by the second Bush administration, but by the leading legal theorist of the Lincoln administration.

Historically, there were few restraints on war and warriors. Captured soldiers might be killed, tortured, or enslaved, cities might be leveled, and an enemy’s property could be confiscated. The struggle for the modern world, as Witt sets out, has been how to rein in the gods of war, to reduce terror and needless destruction of life and property, while at the same time allowing nations to conduct policy “by other means.”<sup>132</sup>

Not surprisingly, Witt takes us through the law of war in the ancient and medieval periods pretty quickly. His focus is the United States and more recent times. His discussion of attempts

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<sup>124</sup> Lieber Code Art 29 (cited in note 22).

<sup>125</sup> See Clausewitz, *On War* at 77 (cited in note 17) (“[W]ar is an act of force, and there is no logical limit to the application of that force.”).

<sup>126</sup> Lieber Code Art 70 (cited in note 22).

<sup>127</sup> Lieber Code Art 25 (cited in note 22).

<sup>128</sup> Lieber Code Art 28 (cited in note 22).

<sup>129</sup> Lieber Code Art 30 (cited in note 22).

<sup>130</sup> Lieber Code Art 29 (cited in note 22).

<sup>131</sup> Harlan Ullman and James P. Wade Jr, *Shock and Awe: Achieving Rapid Dominance* XX (National Defense, 1996).

<sup>132</sup> Clausewitz, *On War* at 87 (cited in note 17).

to regulate war in the colonial and revolutionary periods is fascinating. Debates over the treatment of prisoners, prisoner exchanges, blockades of ports, the use of privateers, impressment of sailors, and the confiscation or destruction of civilian property swirled around the Revolution and the War of 1812.

Witt argues that the great tension over the law of war is between “humanitarianism and the ideal of justice” (p 7). The first would lead to limited war that tried to minimize civilian death, collateral damage, and even the killing of enemy soldiers. To achieve this goal, Witt argues that for the last two-and-half centuries, “the laws of war have sought to minimize the horrors of war by inviting war’s participants to temporarily set aside the conviction that their cause is right” (p 7). But this comes in tension with the second ideal—“justice”—which allows enemies to destroy each other because each side believes in the righteousness of its cause. Witt wisely does not claim that this tension is “unique to American history” (p 8), but he focuses on the United States because he argues that “particular features of the United States experience,” including the way the United States has fought wars, “have created distinctive patterns in the nation’s history” (p 8).

#### IV. AMERICAN EXCEPTIONALISM AND THE LAW OF WAR

Witt’s argument fits into a long-standing debate among American historians (and other scholars) over what is generally known as “American exceptionalism.” The first wave of “exceptionalists” argued that American development fundamentally differed from the rest of the world because the United States lacks a feudal past, was populated by immigrants, was cut off from Europe and developed more or less in isolation for nearly a century, has always been a liberal democracy, and has enormous natural resources. This sort of argument was dramatically developed by, among others, Louis Hartz and Daniel Boorstin.<sup>133</sup> At its best, this kind of argument points out the real distinctions between the flow of US history and that of many other nations. At its worst, this kind of argument leads to a jingoist hyperpatriotism. Global historians have often taken issue with the claims. Marxists and other scholars on the left are particularly uncomfortable with such claims because American exceptionalism

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<sup>133</sup> See generally Louis Hartz, *The Liberal Tradition in America* (Harcourt 1955); Daniel J. Boorstin, *The Americans: The Democratic Experience* (Random House 1973).

denies the existence of social class, downplays conflict within the nation, often ignores American imperial adventures, and in the hands of some scholars, ignores the huge problem of slavery and race.<sup>134</sup>

Witt's book offers a less self-congratulatory notion of exceptionalism that is worth exploring. Witt's claim for exceptionalism could have been easily rooted in the very fact that the modern law of war began in the United States, with the promulgation of the Lieber Code. Almost every subsequent international agreement on the treatment of prisoners, the prohibition of certain kinds of weapons, the treatment of civilians, and the disposition of civilian property can be traced to the Lieber Code. Lieber did not invent all of these ideas, and indeed much of what he included in the Lieber Code had been part of customary international law or set out in the works of other theorists. But Lieber put all these strands together in one place, added to them, and forcefully indicated that enslavement was no longer acceptable by civilized people. Thus, long before the Hague and Geneva Conventions regulating the use of poison gas and the treatment of prisoners, Lieber set out rules against torture of prisoners,<sup>135</sup> or the intentional mistreatment of prisoners of war, and the use of poison,<sup>136</sup> as well as guidelines for adequately feeding prisoners of war and ensuring that they are "treated with humanity."<sup>137</sup> Indeed, the recent history of the United States bears out the continued validity and intellectual power of the Lieber Code. Part of the justification for the American invasion of Iraq in 2003 could be traced to Lieber's explicit ban on the use of poison: the United States knew that Iraq had used poison gas against Iran and against its own civilians, and the United States believed that Iraq was developing weapons of "mass destruction," which are a modern equivalent of poison.<sup>138</sup>

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<sup>134</sup> For a discussion of race in the context of American exceptionalism, see Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* 113–50 (Norton 1996).

<sup>135</sup> Lieber Code Art 56 (cited in note 22). The Geneva Convention later established protections for prisoners of war in 1949. Geneva Convention, Art 13, 1955 6 UST at 3524 (cited in note 109).

<sup>136</sup> See Lieber Code Art 70 (cited in note 22). The Hague Declaration of 1899 and the Hague Convention of 1907 banned use of poison and asphyxiating gas. James Brown Scott, ed, *The Hague Conventions and Declarations of 1899 and 1907* 225 (Oxford 1918).

<sup>137</sup> Lieber Code Art 76 (cited in note 22).

<sup>138</sup> See George W. Bush, *Operation Iraqi Freedom*, White House Radio Address Archives (Mar 22, 2003), online at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030322.html> (visited Nov 24, 2013). The fact that no such weapons of mass destruction existed is beside the point; the Bush administration justified the war

Thus, President George W. Bush relied on popular opposition to such practices to justify his invasion of Iraq.<sup>139</sup> On the other hand, to the shock of the American people, the Bush administration authorized (and publicly defended) the use of “enhanced interrogation techniques,” which many Americans believed constituted torture.<sup>140</sup> Such behavior, of course, clearly violated the Lieber Code.

But, Witt’s claim is not merely based on the fact that the Lieber Code came from the United States. He stresses the importance of slavery in the development of American attitudes towards the law of war. Before turning to this argument, it is important to emphasize—as Witt does not—that the War Department wanted the code for many reasons. The War Department and especially General Henry W. Halleck, wanted rules to govern civilian property, the treatment of prisoners, and especially the horrible and gory guerilla warfare in places like Missouri, where Halleck had been in command earlier in the War. Indeed, the code must be seen as part of an evolving law of war that Lieber helped create in 1861 and 1862 when he wrote about guerilla warfare and the treatment of captured Confederates.

Slavery is of course an important component of this, because emancipation involved the confiscation of billions of dollars worth of property. While Witt focuses most of his attention on slavery, he seems oddly surprised that slavery affected American foreign policy and the American notion of the law of war in the period before the Civil War. Furthermore, he argues that the Lieber Code should really be “Lincoln’s Code” because of Lincoln’s opposition to slavery (p 8). As I will note below, it should not surprise anyone that slavery was central to American policy making from the Revolution to the Civil War. Similarly, it is clear that a prohibition of slavery was only one component of the Lieber Code and the American development of a law of war. However, given Lieber’s own hostility to slavery—and the fact that Lincoln had nothing to do with the creation of the Lieber Code—the story here is Lieber’s and not Lincoln’s. My point here is not to quibble over the title of the book, but rather to argue

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on their existence, which reflected the ethos of the Lieber Code that poison was unexpected.

<sup>139</sup> *Id.*

<sup>140</sup> US Department of Justice, Office of Legal Counsel, *Memorandum for Alberto R. Gonzales, Counsel to the President: Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A 2-27* (Aug 1, 2002).

that the American code of war, which became the basis of the world's code of war, was not the result of a grand plan by Lincoln. Rather, it was a response to the changing nature of warfare that emerged during the Civil War, and the vision of the author of the code, and not his commander-in-chief.

## V. THE LIEBER CODE

Lieber wrote the Lieber Code at the request of Major General Henry W. Halleck, the general-in-chief of the army in 1862. Halleck needed a field manual to guide officers as his armies marched into the South to defeat the Confederacy. Lieber's response balanced humanitarian concerns (bans on torture, killing captured soldiers, or using poison) with an understanding that wars should be pursued with vigor and intensity.<sup>141</sup> This view of war comported with the notions of Machiavelli, Frederick the Great, and Clausewitz—and as Professor Witt correctly notes, Lincoln. Lieber, like Lincoln, favored a ferocious war in which the ability of the enemy to make war was destroyed. At the same time, his rules prohibited unnecessary destruction of property and required the army to attempt to preserve and never purposefully destroy works of art, libraries, churches, schools, and scientific instruments.<sup>142</sup> Such items might, however, be seized by the army and kept for disposition after the war.<sup>143</sup> The Lieber Code specifically prohibited soldiers from taking public or private property for their personal use as booty or trophies of war. Neither officers nor enlisted men were to profit from the property they might seize on behalf of the government.<sup>144</sup> In these and many other ways, Lieber set out a code that comported with the needs of modern armies to limit collateral damage as much as possible, legitimize damage where it was necessary, allow for the nation-state (as embodied by the United States Army) to take enemy property (such as food) for the use of the army, destroy enemy property used to make war, and prevent the soldiers of the army from becoming a mob of looters and pillagers.

At the same time the Lieber Code also empowered the United States Army to end slavery wherever it found people in bondage. The Lieber Code emphatically declared that slavery could no longer exist and that the army would use its power to end

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<sup>141</sup> See Part III.

<sup>142</sup> Lieber Code Art 34–38, 118 (cited in note 22).

<sup>143</sup> Lieber Code Art 35–36 (cited in note 22).

<sup>144</sup> Lieber Code Art 46 (cited in note 22).

slavery.<sup>145</sup> Thus, the Lieber Code can be seen as the legislation or rules used to implement the Emancipation Proclamation.

But while property could not be taken for private gain, Lieber found nothing wrong with the army taking food and other goods necessary to support itself. Foraging was permissible under the Lieber Code.<sup>146</sup> Significantly, Lieber wrote the Lieber Code before General William Tecumseh Sherman began his famous March to the Sea, where to some extent his troops lived off the land.

Southerners may still rage over Sherman's March. Witt condemns the behavior of the United States Army and (wrongly, I think) blames the Lieber Code for it (p 252). Oddly, as I note below, Witt seems oblivious to much worse behavior by Confederate troops, including the enslavement of free black Northerners.<sup>147</sup> While some behavior by individual US soldiers violated the Lieber Code and military regulations, most of the destruction that came with Sherman's March was consistent with the nature of modern war, which often necessitates the destruction of the ability of the enemy to make war.<sup>148</sup> It was also consistent with the law of war as set out by Lieber. The author of the Lieber Code generally approved of Sherman's March to the Sea, although he was concerned about the level of destruction and individual pillaging (which of course violated the Lieber Code). Significantly, Lieber privately observed that "ruthless burning, killing," and other crimes "demoralize[ ] an army" (p 280). However, this observation may not have been wholly correct. Confederate soldiers gleefully destroyed property in the North, enslaved free blacks, and enthusiastically slaughtered surrendering black soldiers at Fort Pillow (pp 257–58). Similarly, morale was high as Sherman's army smashed its way through Georgia and into the Carolinas, consuming virtually everything in its path. Some of these soldiers egregiously

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<sup>145</sup> Lieber Code Art 32 (cited in note 22).

<sup>146</sup> Lieber Code Art 38 (cited in note 22).

<sup>147</sup> See text accompanying notes 171–72.

<sup>148</sup> When Southern soldiers invaded the North their behavior was similar, in terms of destruction of property, but quite different—and much worse—in their behavior to humans. Lee's troops burned property—most famously an iron forge owned by the abolitionist congressman Thaddeus Stevens. But his troops also seized free blacks to be dragged back to the South as fugitive slaves. This sort of behavior—enslaving the citizens of an enemy nation—had generally not been considered legitimate warfare since before the medieval period, except by colonizing forces, such as the Spanish in the New World. See Scott L. Mingus Sr, *The Louisiana Tigers in the Gettysburg Campaign: June–July 1863* 71–74, 82–97 (Louisiana State 2009).



exceeded the needs of the military by illegally taking such non-necessities as jewelry, silverware, money, or souvenirs.<sup>149</sup> These acts clearly violated the code as well as direct orders by officers and were carried out in opposition to policies set by Sherman, Oliver Otis Howard, and other generals. But, as Witt and other scholars have pointed out, discipline often broke down during the expeditions to forage for food, and officers were unable to effectively supervise all the men in the field collecting goods necessary to feed the army (pp 280–83). Discipline is of course the responsibility of the commanders, and to the extent that Sherman, his corps commanders, and their subordinates failed to maintain discipline, they are to be faulted. But the key point here is that these activities were illegal, in violation of the Lieber Code, and emphatically not the policy of the high command. In that way, the illegal acts of some of Sherman's soldiers stand in sharp contrast to those of Confederate soldiers, who acted under direct orders of their commanders (or as their officers looked on) as they pillaged and robbed Northern whites (and captured US soldiers), enslaved Northern blacks whether free or fugitive, murdered captured white officers from black regiments, and murdered and enslaved captured US soldiers who were black.<sup>150</sup>

The Lieber Code prohibited the acts of theft and private plunder that marred Sherman's destruction of the heart of the Confederacy and his decimation of slavery across the South. However, none of these acts were sanctioned by United States Army commanders, and none were part of US policy toward the South. On the other hand, the Lieber Code explicitly sanctioned the "destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war."<sup>151</sup> The Lieber Code also condoned foraging for food and "the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army."<sup>152</sup> Lieber understood that war involved killing soldiers in battle and destroying the industrial infrastructure that the enemy used to support its war effort. The Lieber Code envisioned a

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<sup>149</sup> On the hunting of souvenirs by both armies, see Joan E. Cashin, *Trophies of War: Material Culture in the Civil War Era*, 1 J Civil War Era 339, 340–41 (2011).

<sup>150</sup> At Fort Pillow, Confederates murdered a "large number of civilians," including children, black and white civilian men, and both white and black women. Burkhardt, *Confederate Rage, Yankee Wrath* at 109–13, 117 (cited in note 104).

<sup>151</sup> Lieber Code Art 15 (cited in note 22).

<sup>152</sup> *Id.*

harsh war, which Lincoln supported, designed to destroy the ability of the enemy to continue the war:

Military necessity . . . allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy.<sup>153</sup>

But for all of this killing, Lieber also wanted American soldiers to behave with restraint and not to take life unnecessarily, rape, pillage, or enslave people. This was because “[m]en who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.”<sup>154</sup>

That some US soldiers harmed civilians and stole from them does not diminish the value of the Lieber Code or its overall goals. Like Clausewitz, Lieber believed “[t]he more earnestly and keenly wars are carried on, the better for humanity, for peace and civilization” (p 184). The Lieber Code did, however, make a distinction between destroying or confiscating civilian property that could be used for the war effort and theft, plunder, needless destruction for its own sake, and harming civilians. Noncombatants were not to be intentionally harmed, arrested, executed, and certainly never enslaved. The occasional illegal acts of some US soldiers simply underscore the horror of war and the difficulty of maintaining discipline in combat.

Significantly, the policy of the United States under the Lieber Code differed dramatically from the explicit policy and actions of the Confederate high command. Obviously the Confederates did not accept the Lieber Code, and certainly did not think it was binding on them. However, when Confederate armies invaded the North they acted in violation of the generally accepted laws of war that Western nations had adhered to for centuries, as well as the rules promulgated by the Confederacy.<sup>155</sup>

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> See, for example, Smith, 96 *Am Hist Rev* at 435 (cited in note 102) (describing troops under Early demanding protection money from the town of Chambersburg, Pennsylvania, and when the money was not paid, burning the city to the ground).

In Pennsylvania, Southern troops, with the full sanction of their officers (including commanding generals), took money, clothing, liquor, wine, cigars, and other nonmilitary items from civilians.<sup>156</sup> Such behavior was not the same as taking food or military stores, which Sherman's army did in the South. Of course some of Sherman's soldiers acted in this manner as well, but there was a significant difference. Sherman's soldiers acted in violation of orders and in violation of the Lieber Code, which they were required to obey. And of course this also ran counter to Sherman's own willingness to "punish looters in his own army."<sup>157</sup> While marching through Georgia, Sherman ordered that wagons with "plunder" in them be burned.<sup>158</sup> While ordering his soldiers to take food and forage, he also ordered them not to enter private homes,<sup>159</sup> which was of course consistent with the Lieber Code. These orders were routinely ignored and the army did a very poor job of enforcing them. But, the important point here is that the army was under orders not to behave in this way, and these orders were supported by the new Lieber Code.

Confederate soldiers, on the other hand, acting under direct supervision of their officers acted differently. Major General Jubal Early ordered Confederate soldiers to go out of their way to destroy property owned by Congressman Thaddeus Stevens because of his famous opposition to slavery.<sup>160</sup> In addition to burning Stevens's iron works, which might have been justified as a way of undermining the war effort of the United States, Early's troops burned civilian housing, smashed the homes of common workers, "confiscated all movable property, and left the place a shambles."<sup>161</sup> This destruction was not based on any necessity of undermining the ability of the United States to make war. Rather, it was an explicit form of retaliation for the congressman's unflinching hostility to slavery. Similarly, in 1864, troops under Brigadier General John McCausland, acting under directions from Jubal Early (who had by this time become a Lt General), burned Chambersburg, Pennsylvania, after residents of the town refused to pay the Confederate army \$600,000, in what can

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<sup>156</sup> See Mingus, *The Louisiana Tigers* at 82–97 (cited in note 148).

<sup>157</sup> See Cashin, 1 *J Civil War Era* at 353 (cited in note 149).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 354.

<sup>160</sup> See Mingus, *The Louisiana Tigers* at 71–74 (cited in note 148). See also McPherson, *Battle Cry of Freedom* at 757 (cited in note 102).

<sup>161</sup> Hans L. Trefousse, *Thaddeus Stevens: Nineteenth-Century Egalitarian* 134 (North Carolina 1997).

only be considered protection money.<sup>162</sup> Chambersburg had absolutely no military value and did not threaten Confederate troops. The raid was purely retaliatory, and General Early justified it because the US had burned crops and barns and other buildings in the Shenandoah Valley.<sup>163</sup> Indeed, it was a form of terrorism that violated customary international law and generally accepted principles of military behavior.

Following the assault on Stevens's property, Early issued orders that were at odds with generally accepted rules of war, and were certainly at odds with Early's West Point education. These acts violated Article 52 of the US Articles of War, first promulgated in 1806, which was in force when the Civil War began.<sup>164</sup> The Confederacy adopted these rules "verbatim" in the Regulations for the Army of the Confederate States.<sup>165</sup> Thus when General Early insisted that the town of Gettysburg pay "tribute" to the Confederate army or face having the town burned,<sup>166</sup> he was violating Confederate regulations. At York he demanded the city pay him \$100,000 as tribute, as well as provide food, clothing, and other goods.<sup>167</sup> This was not the action of undisciplined troops, as happened when some of Sherman's soldiers, in violation of orders, stole from civilians. Rather this was the action of a West Point-trained major general (who in civilian life had been a lawyer), behaving as though he were commanding Caesar's legions in ancient Rome. Early, the other Southern generals who acted in the same fashion, and General Robert E. Lee, who countenanced this behavior, fully understood the accepted rules of warfare. At West Point these generals would have studied international law and the laws of war, including the work of Vattel and Chancellor James Kent (pp 85–86). In the service they had been under the *General Regulations for the Army*<sup>168</sup> promulgated by Secretary of War John C. Calhoun in 1821, which obligated officers to act with "the dictates of humanity"<sup>169</sup> when conducting sieges (p 86). The *General Regulations* "repeatedly

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<sup>162</sup> Smith, 96 Am Hist Rev at 435 (cited in note 102).

<sup>163</sup> Id at 438.

<sup>164</sup> Act of Apr 10, 1806, ch 20, 2 Stat 359.

<sup>165</sup> Cashin, 1 J Civil War Era at 341 (cited in note 149). See also *Articles of War Art 52*, in *Regulations for the Army of the Confederate States* 417–18 (Randolph 1864).

<sup>166</sup> See Mingus, *The Louisiana Tigers* at 76 (cited in note 148).

<sup>167</sup> Id at 84–85.

<sup>168</sup> J.C. Calhoun, *General Regulations for the Army; or Military Institutes* (Carey and Sons 1821).

<sup>169</sup> Id at 147.

relied on and incorporated the ‘usages of war’ as they had developed since the eighteenth century” (p 86). Lee, Early, and other senior Confederate officers knew that these usages of war prohibited needless destruction of private property, requiring tribute from civilians, or taking nonmilitary property from civilians. They simply refused to follow them.

It is worth noting in passing that many of these illegal acts by Confederates took place after the promulgation of the Lieber Code, which indicated what the United States expected of its soldiers. In other words, the United States was on record that its soldiers should live up to a code that prohibited theft from civilians and absolutely opposed requiring tribute from towns and cities. The Confederates, however, were not willing to accept such constraints. It is also important to recall that the Confederate invasions of Maryland<sup>170</sup> and Pennsylvania took place well before Sherman’s March.

More important than the taking of property or the attempts to levy tribute from captured cities are the instances of Confederate troops kidnapping Northern whites to hold as hostages or for retaliation and the enslavement of free blacks in the North.<sup>171</sup> Such behavior violated all notions of usages of war as understood at the time. In 1862, and later in the Gettysburg campaign, Southern troops kidnapped free blacks and dragged them to the South as slaves.<sup>172</sup> As one historian has recently noted, “Some of the enemy soldiers who came north in June 1863 hunted down people of color to send south into slavery.”<sup>173</sup> Blacks throughout southeastern Pennsylvania fled from Confederate soldiers who hunted them down to enslave them. This contrasts sharply with the Lieber Code and with the behavior of US troops

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<sup>170</sup> “During the 1862 Maryland campaign, Stonewall Jackson captured Harpers Ferry, where hundreds of contrabands had gathered after escaping from their owners. Many Confederates noted approvingly that Jackson’s force had recovered escaped slaves as well as capturing thousands of Union soldiers.” Gary W. Gallagher, “*The Progress of Our Arms*”: *Whither Civil War Military History?* 40–41 (44th Annual Robert Fortenbaugh Memorial Lecture, Gettysburg College 2005).

<sup>171</sup> Ted Alexander, “*A Regular Slave Hunt*”: *The Army of Northern Virginia and Black Civilians in the Gettysburg Campaign*, 4 *North & South* 82, 84 (2001).

<sup>172</sup> *Id.* at 84–89. See also Gallagher, “*The Progress of Our Arms*” at 40–41 (cited in note 170). See generally David G. Smith, *Race and Retaliation: The Capture of African Americans during the Gettysburg Campaign*, in Peter Wallenstein and Bertram Wyatt-Brown, eds, *Virginia’s Civil War* 137 (Virginia 2005).

<sup>173</sup> Margaret S. Creighton, *The Colors of Courage: Gettysburg’s Forgotten History, Immigrants, Women, and African Americans in the Civil War’s Defining Battle* viii (Basic Books 2005).

and all other armies in the Western world at that time. Rather, it is reminiscent of the practices of the armies of the ancient world.<sup>174</sup> It is also worth noting that despite Confederate complaints about Lincoln starting a servile war, when roaming in the North Confederate troops were busy rounding up free people. Furthermore, many of the first blacks to fight for the United States were not recently emancipated slaves but free men from the North and from Louisiana.<sup>175</sup>

The behavior of the Confederates in trying to enslave free blacks illustrates the striking contrast between the United States, and the Lieber Code under which it operated, and the Confederates, who denounced the code. This history is important for better understanding the value of the Lieber Code and also puts some of Witt's critiques of the Lieber Code in greater perspective. Witt notes that the Lieber Code failed to prevent acts of plunder by Sherman's troops. He further claims that the Lieber Code set the stage for the horrible behavior of the army that led to devastations of Indians during and after the Civil War and atrocities during the Philippine insurrection in the early twentieth century (pp 355–56). But, when compared to the actions of the Confederate officers in demanding tribute, kidnapping and enslaving civilians, and egregiously destroying property for political, rather than military, purposes, the value of the Lieber Code in humanizing war and moderating the conflict becomes clearer. Under generally accepted rules of war that most Confederate officers would have learned at West Point, the taking of civilian property, or its destruction, could only be justified by military necessity, and not as an act of vengeance, political retaliation, or for personal profit or greed. Thus, while the Confederates could have justified destroying the iron foundry owned by Thaddeus Stevens as necessary to prevent the production of military goods from iron, the Confederates could not justify burning the foundry merely because Stevens was an anti-slavery Congressman, which was their stated reason for doing this. Nor did any military code justify the burning of Chambersburg in 1864, merely as revenge for actions by the US Army in Virginia.

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<sup>174</sup> Although such practices would be revived by Germany in World War II, who enslaved millions of Europeans, and the Soviets, who held untold numbers of German prisoners of war in slave-like conditions in the Gulag.

<sup>175</sup> See Paludan, "A People's Contest" at 211–12 (cited in note 103).

More important for understanding the value of the Lieber Code and the behavior of the Confederates is the kidnapping and enslavement of Northern citizens by the Confederate armies. The Confederates seceded to protect slavery,<sup>176</sup> and thus when given the opportunity, they used their armies to enslave people. The Lieber Code specifically declared that slavery was forbidden, and that “[p]rivate citizens are no longer murdered, enslaved, or carried off.”<sup>177</sup> Thus, under the Lieber Code the US Army destroyed slavery in much of the South. Sherman’s March to the Sea in 1864–1865 constituted the greatest liberation of human beings in the history of the world until the allied armies marched on Berlin in 1944–1945.

As I have noted, Professor Witt condemns the behavior of Sherman’s troops in Georgia but oddly does not consider the actions of Confederate generals who collected tribute and protection money from Northern towns or more strikingly ordered the enslavement of Northerners. War is indeed hell, but in this war only one side believed it was permissible to kidnap and enslave the civilians of the other side. Witt claims that Lincoln was reluctant to move against slavery or enlist black troops because of the fear of it would lead to barbaric warfare or “servile” war (p 199). But the reality is that the Confederates were practicing barbaric warfare by enslaving Northerners *before* the Emancipation Proclamation and expanded these policies, along with the mistreatment of captured US soldiers, after the Emancipation Proclamation. The Lieber Code was a major step forward in making war less hellish, with its specific provisions banning any kind of slavery, insisting on equal treatment for all soldiers without regard to their race, prohibiting the destruction of cultural properties (like libraries), proscribing the needless taking or destruction of private property, and providing specific provisions for the humane treatment of prisoners. At the same time, the Lieber Code allowed and even anticipated the harsh war of Clausewitz and Machiavelli.

## VI. LINCOLN, EMANCIPATION, AND THE CONSTITUTION

The kidnapping and enslavement of free blacks in the North by Confederate troops lead to a better understanding of Lieber’s work, its connection to slavery, and one of the major arguments

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<sup>176</sup> See Finkelman, 45 Akron L Rev at 477–78 (cited in note 98).

<sup>177</sup> Lieber Code Art 23 (cited in note 22).

of Professor Witt. It also leads to a major weakness of Witt's book. Witt argues, correctly, that American foreign and military policy before the Civil War was almost always designed to protect slavery. But he fails to recognize that in both the Revolution and the War of 1812 the United States had enlisted thousands of blacks, many of whom were manumitted by their masters just so they could serve in the army.<sup>178</sup> Furthermore, he fails to recognize that free blacks served in the United States Navy from the Revolution to the Civil War, and from the beginning of the Civil War free blacks and fugitive slaves served in the US Navy.

Witt further never recognizes or acknowledges why American foreign policy was so proslavery—because from 1789 until 1861 Southerners and their proslavery, Northern doughface allies,<sup>179</sup> controlled the presidency, the Congress, and the Supreme Court. The United States was a slaveholders' republic, supported by a proslavery constitution.<sup>180</sup> Witt's failure to understand this issue undermines his discussion of emancipation.

Witt correctly understands that slavery is a central aspect of the war, but his history of Lincoln and slavery is ultimately flawed. This is because he fails to confront the reality of the American Constitution and its relationship to slavery. Witt argues, for example, that "Lincoln tried his best to avoid the question of whether he could free the South's slaves" (p 197). And he then concludes that "when the war forced his hand, the first answer Lincoln gave was that he could not" (p 197).

Witt's history here is inaccurate and his analysis is simply wrong.

Before the war began Lincoln asserted in his first inaugural address that as president he had no power to interfere with

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<sup>178</sup> See Benjamin Quarles, *The Negro in the American Revolution* 8–9 (North Carolina 1961).

<sup>179</sup> A "doughface" was a Northern politician, such as Presidents James Buchanan, Franklin Pierce, and Millard Fillmore, who supported the South to protect slavery. The common definition was a "northern man with southern principles." The term implied that these Northerners had faces made of bread dough, and Southerners could shape them into anything they wanted. See Paul Finkelman, *Story Telling on the Supreme Court: Prigg v Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 S Ct Rev 247, 249 n 14.

<sup>180</sup> See Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* 3–6 (Sharpe 2001). See generally Paul Finkelman, *The Root of the Problem: How the Proslavery Constitution Shaped American Race Relations*, 4 Barry L Rev 1 (2003).



slavery in the states where it existed.<sup>181</sup> This was a perfectly correct analysis of the US Constitution, which protected slavery at almost every turn and limited the power of the national government to regulate the domestic institutions of the states.<sup>182</sup> From the Constitutional Convention until the Civil War almost all lawyers and politicians agreed that Congress simply had no power to touch slavery in the states where it existed.<sup>183</sup> Lincoln fully understood these constitutional limitations. This did not mean that Lincoln did not want to end slavery. On the contrary, his entire career showed his hatred of the institution. He personally despised slavery, as illustrated by his “oft-expressed *personal* wish that all men every where could be free.”<sup>184</sup> He was “naturally anti-slavery” and could “not remember when [he] did not so think, and feel.”<sup>185</sup> He believed that “[i]f slavery is not wrong, nothing is wrong.”<sup>186</sup> But his personal views did not comport with the constitutional limitations on the national government. When the war began he had no constitutional power to end slavery, and so he took no steps against slavery.<sup>187</sup>

Witt confuses Lincoln’s understanding of the limits of the Constitution with a reluctance to challenge slavery. This is in part because Witt never comes to terms with the proslavery Constitution, even as he sets out how slavery dominated a number of aspects of American foreign policy and war policy. He compounds this error by focusing on John C. Frémont’s vainglorious attempt to end slavery in Missouri in 1861, while (as I note below) ignoring earlier actions by the Lincoln administration supporting the emancipation of slaves used by Confederate forces and slaves who escaped from the Confederacy to Union lines. On August 30, 1861, Frémont declared martial law in Missouri and ordered the confiscation of the property of anyone taking up

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<sup>181</sup> See Abraham Lincoln, *First Inaugural Address—Final Text*, in Roy P. Basler, ed, 4 *The Collected Works of Abraham Lincoln* 262, 263 (Rutgers 1953) (“I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.”).

<sup>182</sup> See Finkelman, *Slavery and the Founders* at 3–6 (cited in note 180).

<sup>183</sup> *Id.*

<sup>184</sup> Letter from Abraham Lincoln to Horace Greeley (Aug 22, 1862), in Roy P. Basler, ed, 5 *The Collected Works of Abraham Lincoln* 388, 389 (Rutgers 1953) (containing a transcript of the letter).

<sup>185</sup> Letter from Abraham Lincoln to Albert G. Hodges (Apr 4, 1864), in Roy P. Basler, ed, 7 *The Collected Works of Abraham Lincoln* 281, 281 (Rutgers 1953).

<sup>186</sup> *Id.*

<sup>187</sup> See Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 S Ct Rev 349, 355.

arms against the United States (p 198). He declared that any slaves they owned would be free.

This proclamation was unprecedented and clearly violated the Constitution.<sup>188</sup> Lincoln asked Frémont to withdraw the proclamation, and when he did not, Lincoln countermanded it. Witt correctly notes that this decision was in part based on the need to prevent Kentucky from seceding (p 198). Lincoln feared—almost certainly correctly—that ending slavery in Missouri would push Kentucky into the Confederacy, and that, as Witt acknowledges, might have cost Lincoln the war.<sup>189</sup> A Confederate army on the southern bank of the Ohio River would almost certainly have doomed the war effort, while the state's white population of over 900,000 could have provided the Confederacy with more than 50,000 soldiers.<sup>190</sup>

After acknowledging and accepting the strategic issues, Witt goes on to assert that Lincoln countermanded Frémont's order because the President believed that "the customs and usages of warfare prevented him from doing so" (p 198). He provides no evidence for this contention, because there is no record of Lincoln discussing this. Significantly, Witt makes this argument in context of a chapter that begins with the assertion, as I noted above, that "Lincoln tried his best to avoid the question of whether he could free the South's slaves" (p 197).

The problem, which Witt does not recognize, is that Missouri was not in the South, at least if we see the South at this point as being the Confederacy. Missouri had remained in the Union, as had Kentucky, Maryland, and Delaware.<sup>191</sup> Furthermore, strategically it was critical for Lincoln to keep these states in the Union.

Equally important, Witt fails to note or discuss the constitutional issues at stake. Because Missouri was *not* a Confederate state, but had remained in the United States, the Constitution fully applied there. Witt does not seem to understand this issue. Freeing slaves in Missouri by executive order or military action would have violated the Constitution and constituted a taking

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<sup>188</sup> It would have constituted a taking—without due process—under the Fifth Amendment. See *Dred Scott v Sandford*, 60 US (19 How) 393, 408, 450 (1857). It might also have violated the Treason Clause of Article III of the Constitution, since the implication was that this property was being confiscated for treasonous activity. See US Const Art III, § 3, cl 1.

<sup>189</sup> See Finkelman, 2008 S Ct Rev at 361 (cited in note 187).

<sup>190</sup> See *id* at 384.

<sup>191</sup> See *id* at 361–62.

under the Fifth Amendment.<sup>192</sup> Lincoln fully understood that the president, even in his capacity as commander-in-chief of the army, had no power to take property away from American citizens *within* the United States, unless it was done with due process and just compensation. Indeed, Lincoln maintained this position—which was constitutionally correct—throughout the war.<sup>193</sup> The Emancipation Proclamation did not—indeed could not—apply to the loyal slave states. Because it was a war measure, it could only apply to those places making war on the United States. Thus, Witt is emphatically wrong in his analysis that “[i]n overruling Frémont” Lincoln was following an American policy, “that the laws of war protected slavery from war’s ravages. Civilized warfare, the United States had insisted, prohibited acts that might incite slaves into a war of servile insurrection and indiscriminate violence” (p 199). Rather, Lincoln was merely following the Constitution, which protected slavery *within* the United States,<sup>194</sup> while also understanding the political reality that freeing slaves in Missouri might cost him Kentucky and the war.

In addition to ignoring the centrally important constitutional issues, Witt also ignores the fact that Lincoln and the Congress had already taken steps to emancipate slaves well before Frémont’s proclamation. As early as May of 1861 the United States Army had been harboring slaves who ran away from their Confederate masters. Nearly a month before Frémont’s proclamation, Secretary of War Simon Cameron had spelled out that while US troops could not free slaves in the loyal slave states (Maryland, Delaware, Missouri, and Kentucky), President Lincoln understood that “in States wholly or partially under insurrectionary control” it was “equally obvious that rights dependent on the laws of the States within which military operations are

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<sup>192</sup> See *id.* at 373–74.

<sup>193</sup> Witt similarly misunderstands General Butler’s willingness to suppress a slave insurrection in Maryland and his refusal to accept runaway slaves who entered Union lines in New Orleans (pp 202–03). In both cases, Butler’s actions were consistent with federal law and US policy. Maryland, like Missouri, never seceded and thus the US government had a constitutional responsibility to offer its aid to suppress insurrections and rebellions, as set out in Art I, § 8, cl 15 of the Constitution. Once New Orleans was under US control (which took place early in the war) Butler felt he was obligated to treat the city as if it were back in the Union and therefore not to accept fugitive slaves that were not running from Confederate masters. As Witt notes, Congress then clarified the matter (pp 202–03). Similarly, when Lincoln issued the Emancipation Proclamation he exempted those places, such as New Orleans, that were under US control.

<sup>194</sup> See *Dred Scott*, 60 US (19 How) at 450.

conducted must be necessarily subordinated to the military exigencies created by the insurrection if not wholly forfeited by the treasonable conduct of the parties claiming them.”<sup>195</sup> Most importantly, “rights to services” could “form no exception” to “this general rule.”<sup>196</sup> Secretary Cameron made it clear that this policy came directly from the White House.<sup>197</sup> On May 30 and again on August 8, the War Department issued instructions to commanders in the field that effectively freed slaves escaping from the Confederacy to US Army lines.<sup>198</sup> Thus, well before Lincoln countermanded Frémont’s politically foolish, militarily dangerous, and clearly unconstitutional order, Lincoln had authorized his troops to liberate slaves in the South. Once liberated many of these former slaves were provided with blue uniforms and hired by the army as civilian employees. As such they built fortifications, tended to wounded, cooked for the army, took care of horses, drove wagons, and even brought ammunition to the front.

Witt also fails to discuss the First Confiscation Act,<sup>199</sup> which Lincoln signed into law in August 1861, before Frémont acted. The First Confiscation Act allowed for the seizure of any slaves used for military purposes by the Confederacy.<sup>200</sup> This was not a general emancipation act and was narrowly written to allow the seizure of slaves only in actual use by Confederate forces. Such confiscations required a judicial hearing and provided for due process of law.<sup>201</sup> Freeing slaves held in the Confederacy was a legitimate military measure—the kind that Lieber would later endorse in the Lieber Code.<sup>202</sup> Indeed, when Lincoln countermanded Frémont’s order he specifically referred to the newly adopted Confiscation Act as a model for dealing with slavery.<sup>203</sup> Under this advice, Frémont could have freed slaves actually used to further the Confederate war effort (even if owned by

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<sup>195</sup> Letter from Simon Cameron to Major General B.F. Butler (Aug 8, 1861), in George B. Davis, Leslie J. Perry, and Joseph W. Kirkley, 1 *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* 761, 762 (GPO 1894).

<sup>196</sup> See *id.*

<sup>197</sup> See *id.* at 761.

<sup>198</sup> This is discussed in James Oakes, *Freedom National: The Destruction of Slavery in the United States, 1861-1865* 142–34 (Norton 2013).

<sup>199</sup> Act of Aug 6, 1861, ch 60, 12 Stat 319.

<sup>200</sup> Act of Aug 6, 1861, ch 60, 12 Stat at 319.

<sup>201</sup> Act of Aug 6, 1861, ch 60, 12 Stat at 319.

<sup>202</sup> See Lieber Code Art 15 (cited in note 22).

<sup>203</sup> Letter from Abraham Lincoln to John C. Frémont (Sept 2, 1861), in Basler, ed, 4 *Collected Works* at 506 (cited in note 181).

Missouri masters), but could not have emancipated slaves of men in Missouri who took arms against the United States but did not use their slaves as “tools” for their military activities.<sup>204</sup>

Witt’s analysis of Lincoln misunderstands the constitutional limitations of the war. Thus, Witt asserts that Lincoln “had reversed Frémont’s order on the ground that neither he nor Frémont could free slaves under the law of war” (p 208). But this is simply not true. Lincoln countermanded Frémont’s order because it was bad policy that would jeopardize Unionist support in loyal slave states, especially Kentucky,<sup>205</sup> and because the order was flagrantly unconstitutional. The US government had absolutely no constitutional power to interfere with slavery within the loyal states. Well before the events in Missouri, the United States was emancipating slaves under the laws of war in Virginia and elsewhere *inside* the Confederacy. Moreover, as I discuss below, only a few months before countermanding Frémont’s order Lincoln had signed the First Confiscation Act, which specifically authorized the emancipation of slaves used by the Confederate army.<sup>206</sup>

This issue is critical to understanding the Lieber Code and its goals. From the very beginning of the war, slaves ran to US Army lines, and Lincoln, the Secretary of War, and Congress all supported protecting them in their newfound freedom. Furthermore, starting in the spring of 1861 the army began to employ former slaves. In March 1862, Congress, with Lincoln’s approval, forbade any army officer from participating in the return of any fugitive slaves, even those owned by loyal masters within the United States.<sup>207</sup> In August 1862—before Lincoln issued the preliminary Emancipation Proclamation—Congress, with

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<sup>204</sup> Oakes, *Freedom National* at 156–57 (cited in note 198).

<sup>205</sup> Oddly, Witt acknowledges this issue, but seems unable to make sense of it because it does not appear to fit his thesis (p 198).

<sup>206</sup> Act of Aug 6, 1861, ch 60, 12 Stat at 319 (providing a procedure by which slaves could be captured from Confederate lands).

<sup>207</sup> Act of Mar 13, 1862, ch 40, 12 Stat 354. This law effectively amended the Fugitive Slave Law of 1850, which provided that the state militias and the army could be used to help return fugitive slaves. See Act of Sept 18, 1850, ch 60, 9 Stat 462. The law and the policies associated with it are not inconsistent with Lincoln’s constitutional view at the beginning of his administration that he had no power to end slavery in the states where it existed. He also said that he was obligated to enforce the Fugitive Slave Law of 1850, but that did not mean that Congress was obligated to keep the law in force and not amend it. The 1862 law operated as a *de facto* amendment of the 1850 law by removing military enforcement for the law. In addition, of course, by this time Lincoln accepted General Butler’s concept that the US Army could not return slaves to Confederates in a time of actual rebellion.

Lincoln's support, approved the enlistment of black troops, and later that month the War Department authorized the enlistment of black troops including recently liberated slaves.<sup>208</sup> Thus, to understand the Lieber Code, we must understand that emancipation and the use of black troops was an evolving issue for Lincoln, Congress, the cabinet, and the military. Rather than trying to "avoid the question of whether he could free the South's slaves," as Witt incorrectly asserts, (p 197), Lincoln and his army, in conjunction with Congress, focused enormous energy on how to end slavery under a constitution that in the antebellum years the great abolitionist William Lloyd Garrison had correctly characterized as "a proslavery compact," and a "covenant with death and an agreement in Hell."<sup>209</sup>

In this context, the Lieber Code comported with an evolving policy on slavery and the use of black troops that began with General Butler's refusal to return fugitive slaves to a Confederate master in 1861<sup>210</sup> and culminated with congressional passage of the Thirteenth Amendment in January 1865.<sup>211</sup> A key piece of this process was Lieber's legal opinion in April 1862, written nearly a year before the promulgation of the code, asserting that the United States, consistent with the laws of war, could free all slaves entering US Army lines.

## VII. SLAVERY, THE LIEBER CODE, AND THE AMERICAN CIVIL WAR

The Civil War was ultimately about slavery and the Southern desire to create a nation, in the words of Confederate Vice President Alexander Stephens, based "upon the great truth, that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition."<sup>212</sup> There are some people who still believe that secession was about "states' rights" or that it was caused by an

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<sup>208</sup> Act of July 17, 1862, ch 201, 12 Stat 597, 599.

<sup>209</sup> See Archibald H. Grimke, *William Lloyd Garrison: The Abolitionist* 309 (Wagnalls 1891). See also Finkelman, 4 Barry L Rev at 3 (cited in note 180).

<sup>210</sup> See notes 195–98 and accompanying text. See also Letter from Cameron to Butler at 761–62 (cited in note 195).

<sup>211</sup> James Oakes argues that Lieber also simply incorporated traditional notions of natural law in the code to allow for emancipation. Oakes, *Freedom National* at 350–52 (cited in note 198).

<sup>212</sup> Alexander H. Stephens, *Speech Delivered on the 21st March, 1861, in Savannah, Known as "The Corner Stone Speech," Reported in the Savannah Republican*, in Henry Cleveland, *Alexander H. Stephens, in Public and Private, with Letters and Speeches, before, during and since the War* 717, 721 (National 1866).

economic conflict between Northern industrialists and Southern agrarians. But this sort of explanation for secession and the war ignores the claims made by the secessionists at the time.<sup>213</sup> Indeed, many secessionists asserted they were leaving the Union not because states' rights had been violated but because the Northern states insisted on using *their* states' rights to oppose slavery and to allow abolitionists to openly condemn slavery. If anything, the claims of secessionists were that the Union had to be dissolved because the national government had failed to suppress Northern states' rights.<sup>214</sup>

When we examine the explanations for secession offered by Southern disunion conventions, it is clear that slavery was at the root of secession. South Carolina explained it was leaving the Union because:

A geographical line has been drawn across the Union, and all the States north of that line have united in the election of a man to the high office of President of the United States, whose opinions and purposes are hostile to slavery. He is to be entrusted with the administration of the common Government, because he has declared that that "Government cannot endure permanently half slave, half free," and that the public mind must rest in the belief that slavery is in the course of ultimate extinction.<sup>215</sup>

The Texas secession convention asserted that Texas had entered in the American Union "maintaining and protecting the institution known as negro slavery—the servitude of the African to the white race within her limits—a relation that had existed from the first settlement of her wilderness by the white race, and which her people intended should exist in all future time."<sup>216</sup> However, the state no longer believed slavery was safe and secure in the Union, and that forming a new nation with other

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<sup>213</sup> See Finkelman, 45 Akron L Rev at 476 (cited in note 98) (stating Texas cited the lack of enforcement of federal laws regarding fugitive slaves in several Northern states as a justification for secession).

<sup>214</sup> *Id.*

<sup>215</sup> *Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union* (1861), in May and Faunt, *South Carolina Secedes* 80 (cited in note 97) (describing the reasons for which South Carolina seceded from the Union).

<sup>216</sup> *A Declaration of the Causes Which Impel the State of Texas to Secede from the Federal Union* (Feb 2, 1861), in Ernest William Winkler, ed, *Journal of the Secession Convention of Texas* 61, 62 (Austin 1912) (tracing the history of slavery to beginning of the "white race").

slaveholding states was the only solution. Thus Texas was leaving the Union because the Texas secessionists believed that

in this free government [of Texas] *all white men are and of right ought to be entitled to equal civil and political rights*; that the servitude of the African race, as existing in these States, is mutually beneficial to both bond and free, and is abundantly authorized and justified by the experience of mankind, and the revealed will of the Almighty Creator, as recognized by all Christian nations; while the destruction of the existing relations between the two races, as advocated by our sectional enemies, would bring inevitable calamities upon both and desolation upon the fifteen slave-holding States.<sup>217</sup>

The vice president of the Confederacy, Alexander Stephens, denounced Northern claims that the “enslavement of the African was in violation of the laws of nature; that it was wrong in *principle*, socially, morally, and politically.”<sup>218</sup> Stephens noted that the Northern states believed in racial equality,<sup>219</sup> but he explained,

Our new government is founded upon exactly the opposite idea; its foundations are laid, its corner-stone rests upon the great truth, that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition. This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth.<sup>220</sup>

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<sup>217</sup> Id at 64.

<sup>218</sup> Stephens, *The Corner Stone Speech* at 721 (cited in note 212) (explaining why the South seceded, including arguments that because the North did not support slavery the South had to leave the Union).

<sup>219</sup> Id at 721–22. This was of course something of an exaggeration. Throughout the North there was vast social discrimination against blacks, and probably a majority of whites did not believe blacks were their equal. For a classic study of social discrimination in the antebellum North, see generally Leon Litwack, *North of Slavery: The Negro in the Free States* (Chicago 1965). In most of the Northern states blacks had some rights, but not all the same rights as whites. However, compared to the treatment of free blacks in the South, the North offered substantial legal equality for African Americans. For a breakdown of black rights in the North, state-by-state, see Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 Rutgers L J 415, 421–30 (1986).

<sup>220</sup> Stevens, *The Corner Stone Speech* at 721 (cited in note 212) (stressing that the foundation of the Confederacy was a belief in the inferiority of African Americans).



Rejecting equality and antislavery, Stephens unabashedly argued that it was “insanity” to believe “that the negro is equal” or that slavery was wrong.<sup>221</sup> He proudly predicted that the Confederate Constitution “has put at rest, *forever*, all the agitating questions relating to our peculiar institution—African slavery as it exists amongst us—the proper *status* of the negro in our form of civilization.”<sup>222</sup>

Mississippi emphatically made the same point: “Our position is thoroughly identified with the institution of slavery—the greatest material interest of the world.”<sup>223</sup>

Northerners fully understood that slavery was the cause of secession and the war. As Lincoln reflected in his second inaugural address, noting that four years earlier, on the eve of the Civil War:

One-eighth of the whole population were colored slaves, not distributed generally over the Union, but localized in the southern part of it. These slaves constituted a peculiar and powerful interest. All knew that this interest was, somehow, the cause of the war. To strengthen, perpetuate, and extend this interest was the object for which the insurgents would rend the Union, even by war; while the government claimed no right to do more than to restrict the territorial enlargement of it.<sup>224</sup>

From the beginning of the war, as slaves escaped to US Army lines, the war was about slavery. Well before Lincoln issued the preliminary Emancipation Proclamation, the status of Confederate slaves was on the table. In May 1861, General Benjamin F. Butler refused to return three slaves who had escaped from a Confederate colonel on the ground that they were “contrabands of war.”<sup>225</sup> Instead, Butler gave protection to these three fugitive slaves, gave them army uniforms to wear, and

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<sup>221</sup> Id at 721–22.

<sup>222</sup> Id at 721.

<sup>223</sup> *An Address Setting Forth the Declaration of the Immediate Causes Which Induce and Justify the Secession of Mississippi from the Federal Union and the Ordinance of Secession* 3 (Jackson 1861).

<sup>224</sup> Lincoln, *Second Inaugural* at 332 (cited in note 92) (addressing the role that slavery had in the Civil War).

<sup>225</sup> See Letter from Major General B.F. Butler to Lieutenant General Winfield Scott (May 24, 1861), in Davis, 1 *The War of the Rebellion* 752, 752 (cited in note 195).

hired them as civilian employees of the army.<sup>226</sup> By August, the War Department had endorsed Butler's solution to the problem of runaways.<sup>227</sup> By this time Congress had passed the First Confiscation Act, which provided a process, although a cumbersome one, for emancipating slaves owned by Confederates.<sup>228</sup> In the spring of 1862, Congress prohibited the army from participating in the return of fugitive slaves, whether from enemy masters, loyal masters in the Confederacy, or masters in the border states. Any officers returning fugitive slaves could be court-martialed and, if convicted, dismissed from military service.<sup>229</sup> That spring Congress also abolished slavery in the District of Columbia<sup>230</sup> and, disregarding Chief Justice Taney's assertions in *Dred Scott v Sandford*,<sup>231</sup> abolished slavery in the federal territories.<sup>232</sup> That summer Congress passed the Second Confiscation Act to make it easier to free slaves owned by Confederates<sup>233</sup> and passed a new militia act that allowed for the enlistment of black troops.<sup>234</sup> A week later, Secretary of War Edwin M. Stanton authorized General Rufus Saxton, who was based at Hilton Head, South Carolina, to begin to enlist black troops.<sup>235</sup> On September 22, 1862, Abraham Lincoln issued the preliminary Emancipation Proclamation,<sup>236</sup> indicating that on January 1, 1863, he would issue the final proclamation, unless the seceding states returned to the Union.<sup>237</sup> It was in this period, between the

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<sup>226</sup> *Id.* See also Finkelman, 2008 S Ct Rev at 365–66 (cited in note 187). For a good account of these events, see Louis P. Masur, *Lincoln's Hundred Days: The Emancipation Proclamation and the War for the Union* 16–18 (Harvard 2012).

<sup>227</sup> See Letter from Cameron to Butler at 761–62 (cited in note 195).

<sup>228</sup> Act of Aug 6, 1861, ch 60, 12 Stat at 319.

<sup>229</sup> Act of Mar 13, 1862, ch 40, 12 Stat at 354 (modifying an important part of the fugitive slave law of 1850, which had authorized the use of the military or the militia to return fugitive slaves).

<sup>230</sup> Act of Apr 16, 1862, ch 54, 12 Stat 376.

<sup>231</sup> 60 US (19 How) 393, 408, 450 (1857).

<sup>232</sup> Act of June 10, 1862, ch 111, 12 Stat 432.

<sup>233</sup> Act of July 17, 1862, ch 195, 12 Stat 589. This act was still cumbersome and it is not clear that any slaves ever gained their freedom under it.

<sup>234</sup> Act of July 17, 1862, ch 201, 12 Stat at 599.

<sup>235</sup> Letter from Edwin M. Stanton to Brigadier-General Saxton (Aug 25, 1862), in George B. Davis, Leslie J. Perry, and Joseph W. Kirkley, 14 *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* 377, 377–78 (GPO 1894).

<sup>236</sup> Abraham Lincoln, *Preliminary Emancipation Proclamation*, in Basler, ed, 5 *Collected Works* 433–35 (cited in note 184).

<sup>237</sup> No one expected the Confederate states to return to the Union because of the Proclamation. This offer seems to have had the following three purposes. First, it was a sop to Northern conservatives and Democrats who opposed emancipation, by indicating that Lincoln would give the South one more chance to come to its senses. Second, it gave

preliminary and final proclamations, that Major General Halleck asked Lieber to prepare the Lieber Code.

#### VIII. THE LIEBER CODE AND THE REGULATION OF SOLDIERS

The slavery provisions in the Lieber Code were thus centrally important, as Witt correctly claims. Southerners argued that using black soldiers was “[t]he employment of servile insurrection as an instrument of war”<sup>238</sup> and was an unacceptable and immoral innovation in warfare.<sup>239</sup> Confederate Secretary of War James Seddon ranted that the “enlistment of negro slaves as part of the Army” was a barbarous act, “contrary to the usages of civilized nations.”<sup>240</sup> But in taking this position he ignored the historic use of black soldiers in the War of 1812 and the Revolution. He also ignored that during the Yamasee War, authorities in colonial South Carolina had enlisted slaves (who were not emancipated) to fight against the Indians.<sup>241</sup> Surely Seddon knew that during the Revolution thousands of masters had freed their slaves to fight for American liberty, and that after initial hesitation, none other than George Washington—who was the owner of hundreds of slaves—supported the use of recently emancipated slaves in his army.<sup>242</sup> Oddly, while Witt discusses the fear of British use of emancipated slaves during the Revolution, he never discusses the fact that patriots did this as well. Indeed, by the end of the Revolution one of George Washington’s most reliable combat units was the First Rhode Island. About

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the United States a short window to prepare for the dawn of a new age without slavery. Third, it allowed Emancipation Day to be on January 1, giving the act of ending slavery a talismanic date that would be meaningful and easily celebrated. See generally, Finkelman, 2008 S Ct Rev 349 (cited in note 187); Masur, *Lincoln’s Hundred Days* (cited in note 226).

<sup>238</sup> Letter from James A. Seddon to Robert Ould (June 24, 1863), in George B. Davis, Leslie J. Perry, and Joseph W. Kirkley, 6 *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* 41, 44 (GPO 1894).

<sup>239</sup> Confederate Secretary of War James Seddon quoted in Witt at 245. Letter from Seddon to Ould at 44 (cited in note 238).

<sup>240</sup> *Id.* at 44–45.

<sup>241</sup> See, for example, Quarles, *The Negro in the American Revolution* at 8–9 (cited in note 178). See also John Sibley Butler, *Affirmative Action in the Military*, 523 *Annals Am Acad Polit & Soc Sci* 196, 198 (1992); William McKee Evans, *Sociology of Slavery*, in Paul Finkelman and Joseph C. Miller, eds, 2 *Macmillan Encyclopedia of World Slavery* 684, 685 (Macmillan 1998) (“[A]s late as 1715, South Carolina used slaves as soldiers in the Yamasee war.”).

<sup>242</sup> Henry Wienczek, *An Imperfect God: George Washington, His Slaves, and the Creation of America* 218, 223 (Farrar, Straus and Giroux 2003).

half the soldiers in that regiment were black and most had been slaves when the Revolution began.<sup>243</sup>

Seddon's position, which Witt does not really interrogate, also ignored the fact that the United States was not enlisting black "slaves," but free blacks, although some had only been recently emancipated.<sup>244</sup> This of course also followed the pattern of the Revolution, when masters emancipated thousands of slaves in the North, and some in the South, so they could fight in the War of Independence. This also happened in the Civil War. Masters in Kentucky emancipated thousands of slaves so they could serve in the United States Army.<sup>245</sup> These masters usually received the enlistment bonus instead of their ex-slaves, but their ex-slaves were now legally free.

There is one more aspect of using black troops that is central to the importance of the Lieber Code and to understanding the Confederate response to black troops. Initially, many blacks in the US Army were from the North and had been free when the war began. Others were free men of color from Louisiana. Thus, the Confederate objection to black troops must be understood as being not only an objection to "servile insurrection" (p 199), as Seddon put it, and as Witt emphasizes, but more broadly to allowing any African Americans to serve in the military. After all, many of the blacks serving in the US Army had never been slaves and others had been emancipated by their owners. In other words, Confederate policy was not merely about slavery but also about race.

Illustrative of this issue was the disposal of the bodies of soldiers from the 54th Massachusetts Volunteer Infantry Regiment (sometimes known as the "Glory Brigade"), the first black regiment raised in the North, after the attack on Battery Wagner near Charleston. Most of the soldiers in the 54th were free

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<sup>243</sup> Quarles, *The Negro in the American Revolution* at 81 (cited in note 178).

<sup>244</sup> The one exception was the recruitment of blacks on the Sea Islands off the coast of South Carolina. These men had been slaves when the war began, but their masters had abandoned them when the US Army arrived, and the army treated this abandonment of the slaves as an effective emancipation. After the army arrived on the Sea Islands these abandoned slaves—who were now considered to be free people—were fed, housed, and educated by the army and by civilian volunteers when they were recruited for military service. See Willie Lee Rose, *Rehearsal for Reconstruction: The Port Royal Experiment* 22 (Oxford 1964) (stating that Union officials noted that blacks on Sea Island had a "widespread desire to learn to read," and that there was "no reason why Negroes would not make good and responsible soldiers").

<sup>245</sup> Lowell H. Harrison and James C. Klotter, *A New History of Kentucky* 180 (Kentucky 1997).

black men from the North; thus this regiment was not an example of “servile insurrection.” The Confederates refused to return these bodies to the United States Army or to give them a proper burial. Instead, they were dumped into a giant pit along with the body of their white commander, Colonel Robert Gould Shaw.<sup>246</sup> This behavior violated all accepted forms of the treatment of the bodies of enemy soldiers.

More importantly, Seddon ignored the fact that Confederate armies had been kidnapping free blacks in the North and enslaving them, which was clearly a barbarous act “contrary to the usages of civilized nations.”<sup>247</sup> No Western armies had enslaved captured enemies for centuries or longer. The Confederates had resurrected the practices of the ancient and medieval worlds of enslaving their enemies to support their race-based republic.

The Lieber Code was designed in part to protect these newly enlisted black soldiers, whom Southerners sought to enslave—*not re-enslave*—when they were captured in battle. Witt makes this clear (pp 240–41). It was also designed to condemn the enslavement of Northern blacks by Confederate armies, which Witt unfortunately does not discuss.

The slavery provisions were important to the Lieber Code. But, the Lieber Code was equally important for other reasons. The Lieber Code was designed to limit the destructiveness of the war by providing a set of real rules for the disposition of property in the South and to rein in the behavior of United States troops, while at the same time providing a framework to allow US troops to live off the land while crossing the South. The Lieber Code was promulgated before Sherman’s March to the Sea, but both he and Grant had used such tactics in Mississippi in 1862, and it was clear they would be used again. Thus, Lieber provided the military with solid rules as to what they could do, and not do, while conquering the enemy. Significantly, Lieber, ever the scholar, sought to protect works of art, libraries, and buildings used for charitable purposes from looting and destruction. These were important rules that distinguished the Civil War from earlier wars. Lieber knew about the looting by troops of all nations during the Napoleonic wars and he tried to curb such practices as barbaric and unsupported by military necessity.

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<sup>246</sup> See Rose, *Rehearsal for Reconstruction* at 258–59 (cited in note 244).

<sup>247</sup> See Letter from Seddon to Ould at 44 (cited in note 238).

The Lieber Code also included provisions on prisoners of war that set a standard that the United States was supposed to adhere to,<sup>248</sup> and in part created a new view of international law that still exists today. In the first part of his book Witt describes in great detail the horrid conditions of prisoners of war during the Revolution and in conflicts with Indians. Witt provides important evidence of the barbaric treatment of Indians by US officers, including summary executions of captured Indian soldiers (pp 332–38). The Lieber Code was a huge step forward in the treatment of prisoners. It not only set a standard for how the US should behave, but would be the basis of the Geneva Convention provisions on prisoners in the twentieth and twenty-first centuries.<sup>249</sup>

The Lieber Code also set the stage for post-war prosecutions for those who violated the law of war. After the war, the United States tried and executed Captain Henry Wirz for the barbaric conditions at the Andersonville Prison. This was the first time the United States had tried a defeated enemy officer for war crimes.<sup>250</sup> As Witt points out, in proper lawyerly ways, Wirz's trial by a military commission violated modern rules of due process in a number of ways (pp 298–301). It is a great case to pick apart for the failure of the commission to adhere to strict rules of fairness. This was the first time the United States had carried out such a trial, and I suppose we should not be surprised that there were problems with the prosecution. It also may be that the mistakes made in this trial had a long term effect. The prosecutions in Nuremberg and subsequent war crimes trials have been much fairer.

In critiquing the Wirz trial, however, Witt failed to explain two critical issues. First, the Lieber Code put the Confederates

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<sup>248</sup> In fact of course the United States was unable to provide safe and healthy prisoner of war camps for many Confederates, but these horrible conditions were never the result of intentional behavior of US officers, in the way that Captain Wirz behaved in Andersonville. See note 120.

<sup>249</sup> See Geneva Convention, Art 13, 6 UST at 3326 (cited in note 109).

<sup>250</sup> After the Dakota War, the United States brought nearly 400 Dakota (Sioux) soldiers before a military commission and sentenced 303 to death. These hearings were summary proceedings, sometimes lasting less than ten minutes and can hardly be called trials in any meaningful way. See Finkelman, 39 Wm Mitchell L Rev at 426 (cited in note 120) (stating that many of the "trials" lasted no more than five to ten minutes). See also Carol Chomsky, *The United States–Dakota War Trials: A Study in Military Injustice*, 43 Stan L Rev 13, 46–47 (1990) (stating that "as many as thirty or forty trials" involving the Dakota were conducted in a single day); Maeve Herbert, *Explaining the Sioux Military Commission of 1862*, 40 Colum Hum Rts L Rev 743, 777 (2009).

on notice that criminal behavior towards prisoners of war would not be tolerated. Confederates may have hated the Lieber Code, but it did create a new standard for how to treat prisoners. The Lieber Code was of course not legally binding on the Confederacy, but it sent a clear message the United States would expect Confederates to provide humane treatment to prisoners. Even without the Lieber Code, the treatment of prisoners at Andersonville also violated generally accepted usages of war, the Articles of War that had governed American armies before the Civil War, and the General Regulations, which the Confederate government adopted (p 86). In regard to the treatment of prisoners the Lieber Code reiterated and clarified rules, laws, and general understandings and usages that had been accepted by all Americans since at least the Revolution. Indeed, as Witt shows in his early chapters, during and after the Revolution and the War of 1812 the United States (which was led by Southern slaveowners at this time) bitterly complained about the British treatment of American prisoners (pp 21–41, 67–69). In other words, Confederate leaders fully understood that at Andersonville they were intentionally violating what Witt calls “The Rules of Civilized Warfare” (p 49). The Lieber Code simply put them on notice that there might be consequences for such behavior. This was the beginning of modern notions of war crimes.

Second, Witt failed to consider the substantive issues surrounding Andersonville. Most of the deaths at Andersonville were caused by a thoroughly polluted water supply. This was because the only water in the camp available to prisoners came from a stream that ran through the camp that was used by Confederate troops as a latrine. Thus, Confederates upstream poisoned the river, and the prisoners of war were forced to drink this pollution. This problem could have easily been alleviated if Wirz had wanted to solve it. But he did not. By the end of the war there was just a small channel of free flowing water in the center of this stream that was not thoroughly polluted.<sup>251</sup> If US prisoners waded into the stream they could reach this relatively clean water with their water dippers and have somewhat safe water. But, Wirz roped off the center of the stream and declared that anyone reaching over the rope would be presumed to be trying to escape (which was in fact absurd) and would be shot. The result was that US soldiers were forced to choose between risking

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<sup>251</sup> See McPherson, *Battle Cry of Freedom* at 796–97 (cited in note 102).

death by drinking thoroughly polluted water, or risking death by reaching over a rope for clean water. This policy was clearly a war crime, a violation of pre-Civil War understandings of proper military behavior, and a violation of the Lieber Code. Wirz was justly tried for this policy. The fact that his trial was a procedural mess does not detract from the importance of the Lieber Code in setting out rules for the treatment of prisoners.

The tragedy of the postwar experience is not the botched trial of Wirz, but the failure to prosecute those Confederates who enslaved blacks in the North and murdered surrendering black troops. At Fort Pillow, troops under Major General Nathan Bedford Forrest massacred surrendering black troops, shooting many while they attempted to surrender, and according to many witnesses, burying alive, or burning alive some captured black troops.<sup>252</sup> These acts violated all internationally accepted rules of behavior. Sadly, Forrest (who would be the founder of the Ku Klux Klan after the Civil War) was never brought to justice for this, just as Jubal Early was not tried for ordering the enslavement of blacks in Pennsylvania, and Robert E. Lee was not brought to justice for approving the enslavement of Northern blacks and seizing white citizens as hostages and for retribution. Similarly, Confederate political officials, like Secretary of War Seddon, were not tried for refusing to treat captured black troops the same as whites.

To their credit, General Grant and his subordinates refused to participate in prisoner exchanges when the Confederates refused to exchange black prisoners. Lincoln and Secretary of War Stanton backed them on this.<sup>253</sup> The result was of course more misery for both US prisoners in the South and Confederate prisoners in the North (pp 259–60). Importantly, Witt thoroughly demolishes the myth that the refusal to exchange prisoners was part of a ghoulish conclusion by Grant and Sherman that exchanges helped the South, which was running out of soldiers, while adding little to the US war effort. As Witt notes, even before the conflict over prisoner exchanges and black troops arose, Lieber, Major General Halleck, and others concluded that the United States needed to stand firm on the issue of treating black soldiers the same way white soldiers were treated. Witt's discussion of this issue is particularly useful. He notes that the policy

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<sup>252</sup> Cornish, *The Sable Arm* at 175 (cited in note 104); John Hope Franklin, *From Slavery to Freedom: A History of Negro Americans* 292 (Knopf 3d ed 1967).

<sup>253</sup> See McPherson, *Battle Cry of Freedom* at 792–93 (cited in note 102).



was not popular because it left white soldiers in captivity. But it was fundamentally just (pp 259–63). It also exposed the Confederacy for what it was: a white supremacist nation that valued racism above practical and useful policies. Thus, the Confederate official in charge of prisoner exchanges told his United States counterpart that the Confederate soldiers would “die in the last ditch” before agreeing to prisoner exchanges that involved blacks (p 261). The inhumanity on this issue—which led to needless suffering of tens of thousands of soldiers on both sides—was not caused by Lincoln, Halleck, Grant, or Lieber. It was caused by the Confederate administration that valued racism and slavery over both military efficiency and the welfare of their own soldiers who had been captured in battle.

The issue of prisoner exchanges, along with the kidnapping of free blacks, takes us back to the importance of the Lieber Code. By developing the Lieber Code as he did, Lieber provided a nonracist and thoroughly honorable set of rules for the treatment of all human beings. This policy would become even more important in World War II, and it would even affect the most horrible and lawless regimes in world history. Thus, after the war the Allies tried Nazis for war crimes based on a modern law of war that emerged from the Lieber Code.

#### IX. THE LIMITS OF LAW IN WAR

In the last part of his book, Witt details horrendous behavior on the part of the United States towards Indians and combatants in faraway places, such as the Philippines. Witt argues that the Lieber Code allowed for a different kind of warfare against “savages” and thus concludes that Lieber and Lincoln both “helped make the laws of war safe for Indian fighting” (pp 337–38). Such a statement cuts against Lieber’s own views that barbaric behavior by American Indians did not justify the same behavior by the United States. Even before he wrote the Lieber Code, Lieber told Major General Halleck that “[i]f Indians slowly roast our men, we cannot and must not roast them in turn” (p 236). On the contrary, no matter what the provocation of the enemy, the United States could not “sink to the level of fiends” (p 236). As Lieber noted, “Men who take up arms against one another in public war, do not cease on this account to be moral beings, responsible to one another and to God” (p 237). Thus it is hard to imagine that Lieber’s work was designed to justify the massacre of native women and children. Nor was it legitimately

used to do so. Similarly, his absolute opposition to torture precluded the kind of treatment the United States meted out to guerillas in the Philippines. As Witt notes in his book, “Torture was not allowed in civilized war, not even against savages” (p 184). Witt’s analysis of Lieber is correct here, which is why his attempt to connect the Lieber Code to subsequent Indian wars or the atrocities in the Philippines makes no sense (pp 354–56).

Witt’s claims also run counter to Lincoln’s known opposition to unnecessary killing. The statement also conflicts with the evidence we have of Lincoln’s behavior. Lincoln’s actions in the wake of the Dakota War of 1862 illustrate that he opposed unnecessary killing of American Indians just as he did of whites.<sup>254</sup> The outbreak of violence between the Dakota (Sioux) and whites on the Minnesota frontier led to the death of as many as 1,000 whites. After the Dakota had been suppressed, the US Army held summary trials and sentenced 303 Dakota to be hanged, although the vast majority of these men had not committed any recognizable crimes. Lincoln ordered a review of every case and effectively pardoned 265 of those sentenced to death by refusing to certify their executions (p 333). He acted over the strenuous objections of the military authorities in Minnesota and his own Republican allies in that state. When Lincoln’s margin of victory in Minnesota declined in the 1864 election, Senator Alexander Ramsey, a fellow Republican, told Lincoln “that if he had hung more Indians, we should have given him his old majority.”<sup>255</sup> Lincoln’s response reflected his own legal and moral standards: “I could not afford to hang men for votes.”<sup>256</sup> While Lincoln acted in the Minnesota case *before* Lieber had even begun to write the Lieber Code, Lincoln did have at his disposal Lieber’s writings on prisoners of war and guerilla warfare.<sup>257</sup> Thus, it is perhaps more likely that Lieber and Lincoln set a new standard for the treatment of Indians that was less brutal than previous behavior.

Indeed, to accept Witt’s argument, Witt or some other scholar would have to provide evidence that the treatment of American Indians by whites after the promulgation of the Lieber Code was demonstrably worse than before, and then argue that had it not been for Lieber Code the treatment of American Indians

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<sup>254</sup> See Finkelman, 39 Wm Mitchell L Rev at 433 (cited in note 120).

<sup>255</sup> David A. Nichols, *Lincoln and the Indians: Civil War Policy and Politics* 118 (Missouri 1978).

<sup>256</sup> *Id.*

<sup>257</sup> See Finkelman, 39 Wm Mitchell L Rev at 440–42 (cited in note 120).

would have been better in the late nineteenth century than it was. But Witt's own evidence from the colonial and revolutionary period demonstrates that the brutality of Indian wars before the Civil War was surely as bad, and probably much worse, than anything after the war (pp 93–99). Witt's own evidence, in the beginning of his book, shows the routine slaughter of American Indians in battle and after they surrendered, including by American troops during the Revolution.

On the other hand, it is plausible to argue that the Lieber Code may have made Indian wars, or at least their aftermath, less brutal. The army did not summarily execute Geronimo, for example, but instead he was arrested, imprisoned, and ultimately freed (p 335). Similarly, after he was captured, Sitting Bull was not executed, even though his Indian soldiers had wiped out Custer and his band at the Little Big Horn. It is hard to imagine the army not killing Sitting Bull before the Lieber Code. In 1838 the army arrested the Seminole chief Osceola when he came to make peace under a flag of truce in 1838—which was banned by the Lieber Code. Osceola died shortly thereafter in prison.<sup>258</sup> It does not diminish the horrors of Sand Creek and Wounded Knee to imagine that without the Lieber Code the treatment of Indians—especially leaders after wars ended—would have been much worse.

My sense is that Witt is simply wrong in arguing that the Lieber Code is even remotely the cause of these atrocities. The Lieber Code does not explain this brutal violence, which was in violation of the Lieber Code and Lieber's own views of warfare with Indians. Rather, what needs to be explained is not how the Lieber Code led to such atrocities—because it did not—but rather why the United States failed to follow its own rules (including the Lieber Code) and instincts. In the end, the postwar experience demonstrates that the laws of war are difficult to implement, and that at times they fail. In every war there have been atrocities and acts of barbarism, but the Lieber Code has served to lessen such behavior, and has led to punishments for those who violate the rules.<sup>259</sup>

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<sup>258</sup> Thom Hatch, *Osceola and the Great Seminole War: A Struggle for Justice and Freedom* 214–15 (St Martin 2012)

<sup>259</sup> See, for example, Joseph Goldstein, Burke Marshall, and Jack Schwartz, *The Limits of Law: On Establishing Civilian Responsibility for the Enforcement of Laws against War Crimes*, in Joseph Goldstein, Burke Marshall, and Jack Schwartz, eds, *The My Lai Massacre and Its Cover-Up: Beyond the Reach of Law?* 1, 3 (Free 1976).

The American military in the West in the late nineteenth century and in the Philippines in the early twentieth century lacked the leadership of men like Generals Grant, Butler, and David Hunter. After the war some veterans, like Generals Oliver Otis Howard and his brother Charles Howard tried to bring humane warfare to the West and negotiated honestly with Indian nations (pp 336–37). Where they had authority there were no massacres or horrendous violations of human rights. Other veterans, most notably Generals Sheridan and Sherman, were also in the West. They pushed the Indians hard, but despite Sheridan's alleged statement "the only good Indians I saw were dead,"<sup>260</sup> they did not perpetrate massacres of women and children, as happened at Sand Creek (during the war) or at Wounded Knee (after the war). Thus, Witt is incorrect in claiming that the Lieber Code set the stage for the horrible brutality of some of late nineteenth-century campaigns against the Indians. The Lieber Code did not prevent these atrocities (although it may very well have prevented more atrocities from happening in the aftermath of the Civil War), but the Lieber Code certainly did not condone them or lead to them.

More likely, it seems that the brutality of the Indian wars and the horrors of the Philippine insurrection were caused by other factors. One of them is the distance of the violence from the American people. With few newspapers to report what is going on, the army in both places could more freely operate without restraint. This is a lesson about transparency, independent reporting, and the First Amendment. Another involves race. The army may have felt less restrained because Indians and Filipinos were not white. Indeed, the Lieber Code, the US policy on prisoner exchanges, and the whole war against slavery are remarkable for the enormous steps away from the racism of the age. That they did not fully take hold in the West or in the Pacific should not surprise us, but it is hardly a result of the Lieber Code or Lincoln's policies.

Another reason the Lieber Code did not stop brutality in the West may have to do with the quality of military leadership in the West. Many Civil War officers, including many generals, were lawyers, politicians, and abolitionists before the war. They brought a civilian culture with them that was lacking in the

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<sup>260</sup> See Wolfgang Mieder, "The Only Good Indian Is a Dead Indian": *History and Meaning of a Proverbial Stereotype*, 106 *J Am Folklore* 38, 45 (1993).

West after the Civil War. The abolitionist tradition that many US officers carried into battle did not continue after the war. One of the worst massacres in the West took place at Sand Creek in 1864. Sand Creek was perpetrated by local settlers serving in the First Colorado Volunteers, who were not trained by the regular army and who were led by a local commander with no military training and no ties to the antislavery movement.<sup>261</sup> Whether any member of the First Colorado Volunteers read the Lieber Code is unknown. But these were not regular army units and had little connection to the main agenda of the Civil War. This was a local war of vengeance that was reminiscent of the barbaric settler-Indian conflicts in the colonial period. Wounded Knee, on the other hand, took place in 1890, six years after General Sherman had retired and two years after General Philip Sheridan had died. Witt's desire to blame Sherman, Sheridan, Lincoln, and Lieber for the most brutal atrocities against Indians just does not comport with the history.

#### CONCLUSION

As I have indicated, I have some serious disagreements with Witt about the postwar implications of the Lieber Code, his failure to come to terms with the proslavery Constitution and its implications for his history, and his history of Lincoln and early emancipation. I also think his failure to consider Confederate policy on enslaving captured African American soldiers undermines the book.

But despite these reservations, *Lincoln's Code* is an enormously impressive book. It reminds us why legal history is an important component of not only legal education but larger issues of law practice and international law. The law of war is far from perfect. Like many areas of law, it often operates *ex post facto*. Those who violate the accepted codes of behavior are punished, if at all, only after they have committed atrocities and crimes. But in an imperfect world, the fear of *ex post facto* implementation of the law of war may deter some who might commit war crimes, and punishment subsequent to criminal behavior is preferable to none at all.<sup>262</sup> Moreover, in the modern world

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<sup>261</sup> See generally Stan Hoig, *The Sand Creek Massacre* (Oklahoma 1961).

<sup>262</sup> As Nazi Germany implemented its regime of hatred, racism, and death, at least some of that nation's leaders paused before breaking international law. Fritz Sauckel, Hitler's plenipotentiary for labor mobilization, was prosecuted, convicted, and hanged at Nuremberg for the deportation of more than five million human beings for slave labor.

the law of war is increasingly used to support international interventions to prevent crimes against humanity.

Witt's book thus not only teaches us how we came to have an international law of war, but also reminds us of what the costs are if we do not have such a law. *Lincoln's Code* is a tour de force. It should be read by anyone interested in international law and the law of war. For lawyers, judges, and scholars interested in the United States, Witt once again reminds us how the rule of law interacts with the central issue of American history: slavery and the preservation of the national state.

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Many of them died, while almost all suffered "under terrible conditions of cruelty and suffering." At his trial Sauckel rested his defense on the grounds that he had personally told Hitler that this mode of labor recruitment violated international law. Obviously Sauckel was not in the end deterred by international law and his "just following orders" defense failed. But the very notion that he was concerned with international law suggests it can have some power, even in the most ruthless and barbaric of regimes. See Seymour Drescher, *Abolition: A History of Slavery and Antislavery* 449 (Cambridge 2009). For more on this, see generally Seymour Drescher and Paul Finkelman, *Slavery*, in Bardo Fassbender and Anne Peters, eds, *The Oxford Handbook of the History of International Law* 890 (Oxford 2012).