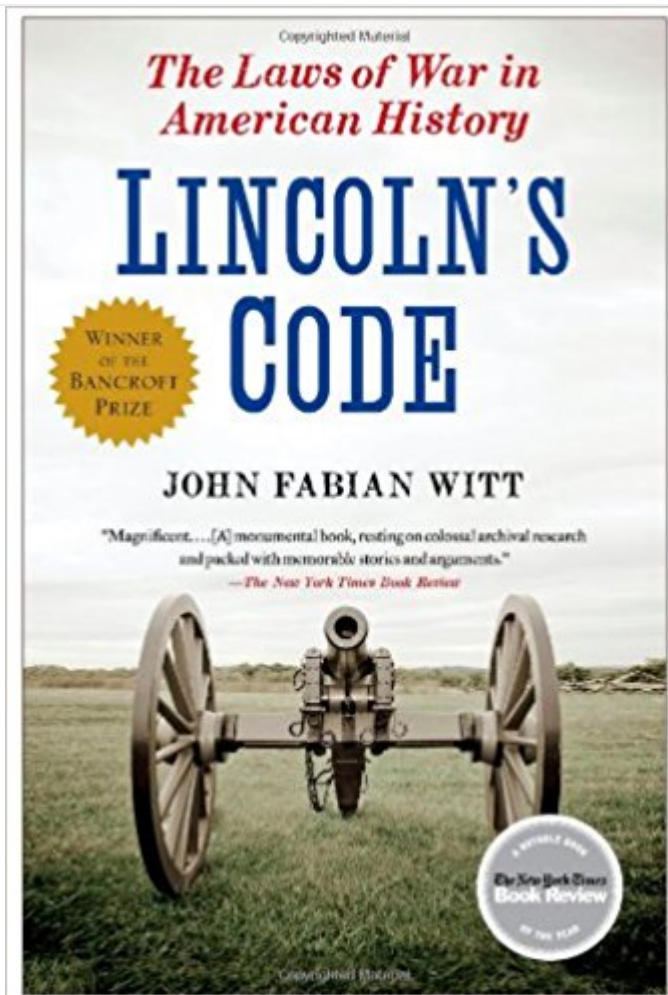


{essays in history}

The Annual Journal produced by the Corcoran Department of History at the University of Virginia

Lincoln's Code: The Laws of War in American History — A Roundtable Review



Volume 47 (2014)

Reviewed Work(s)

Lincoln's Code: The Laws of War in American History. By John Fabian Witt (New York: Free Press, 2012) Pp. 498. Cloth, \$32.

Kate Brown:

As his title suggests, John Fabian Witt's *Lincoln's Code: The Laws of War in American History* attempts to tell a seamlessly integrated story about something quite specific ("Lincoln's" code—or, more accurately, Francis Lieber's code) and a topic much too broad for Witt's single volume (the laws of war across American history). The result, though admirable and generally a good book, is really two books combined into one, with a much more limited scope than Witt's subtitle suggests. All historians must make choices about what to include in their narratives, but Witt's sweeping subtitle, coupled with his failure to take any notice of the types of wartime law not featured in his narrative (e.g. martial law), gives a misleading impression about the depth of Witt's exploration of the laws of war.

Witt is primarily interested in the rules of wartime conduct written by legal scholars across the eighteenth and nineteenth centuries, particularly those of Emmerich de Vattel and Francis Lieber. Because Witt focuses on the wartime codes produced by these two treatise-writers (writing in different centuries), he can begin to unite his otherwise disjointed narratives of the "pre" and "post" Lieber-code eras. The Vattel/Lieber dichotomy running through *Lincoln's Code* also illustrates the crucial argument Witt makes about the transforming nature of wartime law in the mid-nineteenth century: underlying assumptions had changed, and Lieber's Code had a different premise than Vattel's treatises on the laws of war.

In the eighteenth century, Europeans and Americans embraced a new "European" style of warfare that relied heavily on a limited, rule-bound warfare, instead of the earlier, almost limitless, and "just"—as in morally righteous—approach to war approach. By thinking of warfare as morally neutral, Vattel could impose strict guidelines on the practice of war,

reducing it to a game of bloody chess and replacing the former, no-holds-barred rampages of carnage and destruction. (18) Eventually, however, Vattel's formalistic approach to the lawfulness of wartime acts gave way to Lieber's more functional code: some rules still existed, of course, but their underlying premise had changed, and Lieber's code proved much more conducive to justifying violent acts as lawful. According to Vattel's warfare, belligerents consulted treatises' fairly specific rules in order to determine whether or not their conduct was fair or in violation of the law. Under Lieber's Code, however, all wartime conduct—with only a few, narrow exceptions (e.g. cruelty for its own sake, the use of poison, torture)—could be defended on the basis of necessity, or their ability to accomplish the goals of the war. And so, during the American Civil War, “virtually all destruction seemed permissible so long as it was necessary to advance a legitimate war effort.” (184)

Witt advances a second argument related to this broad claim that legal formalism gave way to legal functionalism in the laws of war. He argues that Abraham Lincoln's Emancipation Proclamation should be understood as lawful and in conformity with Lieber's new code for warfare. Before discussing the Proclamation, however, Witt focuses on the one exception to the Vattel's rules that was developed and promulgated by Americans since the Revolutionary War. Although European jurists proclaimed that enemy private property could be taken in wartime, America's founding generation argued for an amended rule that considered enemy private property to be immune from confiscation during wartime (Alexander Hamilton and Joseph Story, both sticklers for international legal principles, were notable exceptions, as both endorsed the European property-confiscation rule). (71, 72) While some, like Benjamin Franklin, supported this altered rule in order to protect American commerce, slaveholders supported it in order to protect their human property. (70, 72)

Thus, while Vattel's principles failed to protect slave property during wartime, Americans carved out an exception for themselves. And as Witt makes clear, Lieber's code would undermine this amended rule by adopting the crucial, transformative premise that necessity—that is, meeting a legitimate war effort like preventing slave uprisings, undermining the Confederacy's social and economic infrastructure, and accomplishing “God's justice”—rendered most wartime acts permissible.

(217, 218) The transformation in the laws of war not only meant that Lincoln's Emancipation was lawful and "morally momentous," but it also gave Lincoln the functionalist flexibility to justify a humanitarian gesture as a necessary wartime measure. (219)

Lincoln's Code won the Bancroft Prize and earned recognition as a Pulitzer Prize finalist because Witt tells a novel and important story about law and warfare in American history. His book is ambitious, smart, well-written, and entertaining; and perhaps most importantly in the eyes of his many lay-readers, *Lincoln's Code* is timely. Witt explicitly draws connections between the shifting moral lines drawn and justified during American wars from the Civil War (where wartime imperatives begat emancipation) up through the wars in Iraq and Afghanistan (where the United States considered torture to be a wartime necessity). By connecting a sweeping legal history to a politically-charged, current debate in our own time, Witt has accomplished what the best professor-historians strive to do: demonstrate to their students and readers that learning about and analyzing the past is crucial for understanding the world we currently inhabit. Witt does this very well.

The book also excels when it explores a variety of episodes in early republic and antebellum America that rarely receive consideration together. For example, Witt's discussions of key admiralty-court decisions were informative and excellent, as were Witt's equally masterful treatments of the United States' legal troubles involving American Indians and Canada. These more obscure episodes in American history (especially from a non-specialist's perspective) underscore the importance of wartime law in American history, and help Witt to make his now familiar refrain about law and society. Like Witt's other book-length publications, *The Accidental Republic* and *Patriots and Cosmopolitans*, *Lincoln's Code* demonstrates that lawmaking and legal interpretation is not confined solely to the hallowed-halls of courts and legislatures.^[1] To the contrary, in Witt's narratives the law is partly shaped by jurists and law-like things (rules from legal treatises, court decisions), but many "external imperatives" and non-legal actors (statesmen, diplomats, soldiers) also transform the laws of war and shape the content of those legal rules. (369)

For the legal historian eager to dive into the nitty-gritty of wartime law, Witt's book is a bit of a disappointment. The corpus of law governing

warfare encompasses more than just the treatises of a few legal scholars —prize law and the rules of courts-martial immediately come to mind— and Witt does not seriously introduce the substance of other varieties of the “laws of war,” nor does he address why those sorts of wartime law have little or nothing to do with his story. Perhaps Witt’s choice to exclude other varieties of wartime law was a judicious one, but a little explaining about their absence is still in order.

Also, *Lincoln’s Code* begins with a brief survey of the work of Vattel and other Continental jurists, followed by focus on George Washington in the Revolutionary War—an opening completely devoid of any mention of the English legal heritage that informed all of American law in the eighteenth century. Surely a discussion of the colonies-turned-states’ experience with English martial law before, during, and after the American Revolution is relevant to our understanding of how the laws of war impacted American history. And Witt’s discussion of the complications in Major John André’s treason trial would have been exceptional had he added any discussion of the substance and procedures of courts-martials, an under-explored jurisdiction in Anglo-American legal history.

There is yet another glaring omission in *Lincoln’s Code*: the U.S. Constitution is almost nowhere to be found in it. The entire body of the laws of war creates a national common law of sorts, where the “laws” of warfare flow from custom, usage, and common acceptance by the international community. And yet America, a nation whose *written* constitutions and laws are grounded in legal positivism, seems to readily accept this martial common law throughout its history. This acquiescence is worth Witt’s acknowledgment, as is a larger question: what was (or is) the relationship of American military law to the U.S. Constitution? The sweeping scope of the narrative suggests that the laws of war deserve a significant place in the narrative of American legal history, and yet Witt does not tell us what that place should be. Instead, *Lincoln’s Code* only begins this discussion, leaving it for another legal historian to take up the task of integrating the laws of war into the story of American constitutionalism.

D.H. Dilbeck

The American Civil War suffers no shortage of brilliant and fascinating personalities. John Fabian Witt has reminded us not to forget to add Francis Lieber to the list. The influence of the Lieber-drafted General Orders No. 100 on international law reverberates down through the decades and across the world; Lieber's global significance, in fact, might well be second to none among those who lived through the Civil War. Witt's graceful prose certainly helps us appreciate why the Lieber Code was such an exceptional and remarkable achievement. Amid the "impassioned heat of battle," not in "the dismayed aftershock of the conflict," came a sincere effort to distill the laws of war into succinct guidelines for the Union army, and thereby reconcile the hard hand of war with humanitarian restraint (3).

Witt's study of "the laws of war in American history" is not only about the Civil War, but, not surprisingly, he devotes more than half the book to the conflict. These chapters are wide ranging and full of significant if not familiar topics. Taken together, though, they raise two particularly important questions about the laws of war and the Lieber Code that Civil War historians cannot afford to ignore. One concerns the Code's origin, the other its effectiveness.

First, on origins: In Witt's retelling emancipation is the dominant inspiring cause of the Lieber Code.^[2] Since America's inception, Witt suggests, "slavery helped shape a distinctive approach to the law of war in a slave society that insisted it was also a civilized nation." Emancipation — "the quintessential event for the laws of war in American history" — starkly departed from this "distinctive approach" (367). It raised the specter of violent slave insurrection, which for many was the much-feared antithesis of civilized warfare. Moreover, it upended the tenuous balance of justice and humanitarianism maintained by the laws of war.

If the Union committed itself to wartime emancipation, an act that "threatened to undermine the very moral structure of just wars," it would also have to re-conceive this moral structure. Lieber (and others) did so not only by sketching out how civilized restraint could be maintained in a war against slavery, but, more provocatively, also by repackaging wartime emancipation as the noblest fulfillment of the better angles of the laws of war's nature, its humanitarian impulse.

The Lincoln administration dedicated itself to ending slavery, and, as a result, inspired Lieber's effort to draft General Orders No. 100 and "[remake] the American law of war tradition for the age of Emancipation" (240). Just look to the text of the Code itself, Witt suggests. By his count, at least a dozen articles of the Code dealt directly with emancipation, more than the number dealing with "torture, civilian targets, wounded soldiers, war hospitals, and spies combined" (240).

Witt leaves little doubt that many (but not all) eighteenth- and nineteenth-century interpreters of the laws of war deemed wartime emancipation an illegitimate action, an inevitable source of "violence that defied the civilized constraints of modern war" (199).

But he is less convincing that it was the Lincoln administration's eventual commitment to emancipation that compelled Lieber to draft General Orders No. 100 and thereby provide a "new blueprint for the international law of war" (368). It is one thing to insist that wartime emancipation stood contrary to longstanding understandings of the laws of war, yet it does not necessarily follow that Lieber's unique laymen-friendly formulation of the laws of war arose by necessity from the Union's embrace of emancipation. General Orders No. 100 exists because Lieber pressed Henry Halleck and other leading Union officials about its importance. Despite the obvious implications of Lieber's Code for the future of slavery in America – and despite the new ground it broke as a seminal laws of war document that expressly advocated abolition in war – the wartime dismantling of slavery does not convincingly explain why Lieber so tenaciously sought to draft something like his Code, and why he thought it was necessary to the Union war effort.

Lieber, in fact, offered his own explanation of the "genesis" of the Code in a letter to Charles Sumner written soon after the Code's issuance. The Code is worth quoting in full:

The genesis of this little tablet with my name is this: When the war broke out, our government hesitated to exchange prisoners of war fearing that it would amount to an acknowledgement of the rebels. I wrote an article in the Times, to show that this was not the case. At the same time I concluded the lecture on the law of war in the law school. Then came the abuse of flags of truce, the arrogant pretensions of the enemy to lay down absurd rules of the law of war, and then the 'guerrilla' business and

confusion of ideas. Gen Halleck called upon me, after my correspondence with him, to write a pamphlet on guerrillas, which I did. The fearful abuse of paroling, becoming a premium on cowardice, went on. The Harper's Ferry affair happened. At last I wrote to Halleck that he ought to issue a Code on the Law of Nations so far as it relates to the armies in the field. I was approached, and here is the thing.^[3]

In this brief paragraph, Lieber explained in direct and candid terms why he felt compelled to produce something like the Code for Union armies. Lieber mentioned at least four major concerns in the letter: prisoner exchanges, flags of truce, guerrilla warfare, and paroling. All four raised complex and numerous laws of war quandaries, and Lieber's voluminous private correspondence from April 1861 through the winter of 1862-3 strongly suggests these three issues, more than any others, compelled Lieber to lobby for the creation of a useable guide to the laws of war.

In fairness, Witt considers all of these issues, the laws of war dilemmas they posed, and Lieber's answers to these dilemmas. Yet the thrust of Witt's narrative pays inordinate attention to slavery and emancipation, and, in doing so, obscures Lieber's reasons for wanting to draft something like the Code.

Second, on effectiveness: Did the laws of war in general, and the Lieber Code in particular, do what it was supposed to?

In mid-nineteenth-century America, only a handful of jurists and career military officers were experts in the laws of war. Lieber and Henry Halleck were anomalies. The average volunteer citizen soldier who filled the ranks of Union armies knew little or nothing about the laws of war; neither did most professional officers, for the laws of war were scantily covered in the West Point curriculum. Even President Lincoln, Witt acknowledges, "had no more experience with the laws of war than he did in the heat of combat" (142).

If most Americans who fought in or commanded Union armies were largely unfamiliar with the laws of war, could it have really affected the actions of Federal armies? In the end, were documents like the Lieber Code ineffective in their implementation, useful only for propaganda and conscience-clearing purposes? *Lincoln's Code* is not an uncritical, flag-waving paean to American virtue and lawful action in war; Witt

acknowledges that hypocrisy and moral failings abound in the history of American wars. American armies have not always abided by the laws of war, even when they claimed they did and claimed their enemies did not. And yet, Witt smartly criticizes those who simplistically denounce the laws of war as “hypocrisy through and through” (6). If we truly want to make sense of the effectiveness question—“Did the laws of war do as it was supposed to?”—then, in Witt’s words, “the hypocrisy answer is too easy” (7). Witt has not lost faith—a faith confirmed by the history of American wars—that the laws of war can effectively constrain the actions of belligerent armies far short of brutal, indiscriminate killing and destruction. The history of law and morality in American war, Witt concludes, is ultimately the story of Americans collectively confronting the irresolvable tension at the heart of the laws of war: “the idea of a law of war has contained inside itself two powerful but competing ideals for armed conflict,” Witt writes. “One is humanitarianism. The other is justice” (9).

We struggle today to reconcile the impulses to do what is humane and what is just. Witt shows us how Lincoln, Lieber, and other Americans living through the Civil War did so as well. When Witt goes about this business in detail, he covers a predictable set of events and controversies that will be well familiar to Civil War historians—among many other things, the legal status of Confederate enemies, the blockade of southern ports, the *Prize Cases* and *Trent* affair, the justifiable means of subduing irregular warfare, and the treatment of prisoners of war. Stephen Neff’s masterful *Justice in Blue and Gray: A Legal History of the Civil War* (Harvard, 2010) covers much of the same ground, albeit in more technical detail.

Campaigns of notorious destruction near the war’s end – like Sherman’s March to the Sea, for example – are not merely “proof that the laws of war cannot constrain the machinery of industrialized warfare.” Sherman’s March in particular, Witt says, is instead the ominous logical conclusion of the Lieber Code’s fundamental commitment to military necessity as “both a broad limit on war’s violence and a robust license to destroy” (234). Sherman agreed with Lieber that shorter wars are best for humanity, and so he let slip the dogs of war in the hopes that a war waged in terrible earnest would end sooner: “reducing long-term suffering sometimes meant increasing war’s short-term destruction”

(277). There's hardly a pithier summation of Sherman and Lieber's most fundamental belief about morality and destruction in war.

This is no cheery picture of the laws of war, and yet, neither is it one in which law and morality are divorced from warfare entirely. Witt does not carelessly denounce Lieber's rationale about "short wars" as morally objectionable. He successfully seeks instead to explicate its inner logic on its own terms, and reveal its centrality to the Lieber Code and the latter stages of the Union war effort.

Witt admits that the distinguished Civil War historian James G. Randall was partially correct when he declared the history of the laws of war "a disheartening business." And yet, Witt has also found in its history "glimmers of hope." The dual imperatives of humanitarianism and justice at the heart of the laws of war are not merely ineffectual cant; they are instead a remarkably durable and compelling challenge to those living in a modern war where war endures to try to make it a bit more humane.

[1] *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge, MA: Harvard University Press, 2004) and *Patriots and Cosmopolitans: Hidden Histories of American Law* (Cambridge, MA: Harvard University Press, 2007).

[2] Matthew J. Mancini makes a similar argument, drawing upon a once-forgotten post-war letter Lieber penned that is now housed in the Lieber Papers Collection at the Library of Congress. See, Mancini, "Francis Lieber, Slavery, and the 'Genesis' of the Laws of War," *Journal of Southern History* 77 (2011): 325-348.

[3] Francis Lieber to Charles Sumner, May 19, 1863, The Papers of Francis Lieber, Box 43, Huntington Library, San Marino, California.

Issue:

2014

Quarter:

Spring



Published by

 [View all posts by](#)

Book Reviews, Historiographical Reviews

19th century, Civil War, Military, Politics

COMMENTS ARE CLOSED.

FIND US ON:

» [Facebook](#)

» [Twitter](#)

ADMIN:

» [Log in](#)

» [WordPress.org](#)

