Review

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The terrorist attacks of September 11, 2001, and the ensuing global war on terrorism compelled Americans to examine the relationship between warfare, morality, and legal constraints. Critics of President George W. Bush’s post-9/11 policies maintain that the president boldly disregarded long-standing traditions of international laws of war. The complexities of the current struggle against terrorism prompt an examination of how generations of Americans have grappled with blurring boundaries of wartime conduct, morality, and laws of war.

John Fabian Witt, the Allen H. Duffy Class of 1960 Professor of Law at Yale Law School, and a professor in the Yale History Department, chronicles the evolution of the laws of warfare. Although his book is titled *Lincoln’s Code*, Witt traces the history of laws and warfare from the American Revolution to the eve of World War I. In doing so, Witt places Abraham Lincoln’s effort to codify warfare, and the subsequent development of the Lieber Code, within a broader, contextual understanding of an American attempt to balance the harsh brutality of warfare with codified rules of engagement. Witt concludes that the Lincoln administration’s policy of emancipation “called forth the Union’s law of war instructions and thus helped produce the modern laws of war” (8).

Witt provides context to the Emancipation Proclamation by exploring historical precedent for treatment of slaves in times of war. Since the nation’s founding, Americans had grappled with the status of slaves in wartime. Witt argues that slavery defined the American experience in wartime, stating that the rules of civilized warfare precluded freeing and arming of slaves. Instead, slaves retained their status as property and therefore were protected in a time of war. In 1776, for example, Thomas Jefferson chastised the British monarchy for inciting “negroes to rise in arms” (199). A century later the secession of eleven southern states and the ensuing four-year Civil War brought to the
before a series of legal issues. Chief among them were the definition of slaves in wartime.

Though the complexities of slavery in wartime define the bulk of Witt’s Civil War chapters, he also explores other legal matters, including the Federal blockade of the southern states. A matter more complicated than merely closing southern ports, a blockade involved navigating international laws. Secretary of State William Seward and Secretary of the Navy Gideon Welles masterminded the Federal blockade, outlining the access to southern ports from neutral foreign nations, treatment of captured southern privateers, and the status of foreign nationals found on blockade-running vessels. International considerations, namely maintaining friendly relations with Britain and France, guided Lincoln’s policy on the blockade.

Nothing defined the interplay between warfare, morality, and legal codes, however, more than slavery and emancipation. As Witt outlines, for generations Americans had maintained that slaves, defined legally as property, were removed from the considerations of war. Contemporary understandings of warfare maintained that war would be conducted within the confines of civility; any acts that encouraged slave insurrection were deemed in violation of the rules of civilized warfare. This philosophy continued to hold sway on the eve of the Civil War. In 1861 General-in-Chief Henry Halleck declared that slaves “as a general rule of war” were “exempt from seizure or confiscation” (199). A determination to exempt slaves from the rules of war defined initial wartime polices and the conduct of both the Davis and the Lincoln administrations.

Treading familiar ground, Witt outlines Lincoln’s evolution on the status of slaves, arguing that “long-standing ideas about honorable warfare exerted powerful influence on Union policy toward slavery in the first year of the war” (203). Witt maintains that Lincoln’s decision to expand the nature of the war, namely to include the emancipation of slaves, represented a substantive shift in the contemporary understanding of civilized warfare and the rules of war. “Without ever putting it in so many words,” Witt states, “Lincoln had come to his decision by rehearsing the basic moral structure of Enlightenment just war thought” (212). Traditional views of civilized warfare, including the places of slaves within conflicts, remained prevalent within the Lincoln administration. Union general George B. McClellan, a vocal advocate for limited war, maintained that “forcible abolition of slavery should not be contemplated for a moment” (211). Secretary Seward cautioned against emancipation, noting that such a radical policy not
only would violate long-standing rules of civilized warfare but could also give an impression of weakness within the Union. Obviously, the Confederate government responded immediately. In Richmond, Confederate congressmen debated bills declaring “all rules of civilized warfare should be discarded in the future defense of our country,” while another declared that all Federal troops captured after January 1, 1863, be charged with inciting an insurrection (216). The Emancipation Proclamation, according to Witt, was more than a “military necessity.” He maintains that emancipation evolved as a moral issue, challenging long-held views of morality and civilized warfare. By expanding the scope of the war, Lincoln’s actions “threatened to undermine the very moral structure of just wars in the modern tradition” (219). Generations of Americans had determined that the laws of civilized warfare protected property and therefore permitted freeing of slaves. Lincoln did not merely ignore precedent, however, but used the laws of warfare in crafting the Emancipation Proclamation.

Rules of modern warfare lay in the development and implementation of Lieber’s Code. Francis Lieber, a Prussian immigrant and legal scholar, championed hard war policies as a means to compel the southern populace into submission. Initiating contact with the Lincoln administration shortly after the outbreak of war, by 1862 Lieber had established himself as the president’s leading legal advisor. Without modern precedent, Lieber set out to write rules of warfare. The final product, often called General Orders No. 100, or Lieber’s Code, offered 157 articles to guide the conduct of Union officers and soldiers. Covering a myriad of wartime issues and policies, the code offered procedures on the treatment of prisoners and spies, the exchange of mail, interaction of ambassadors, and the procedures for surrender. In an effort to balance morality, rules of war, and the need for military victory, Lieber established humanitarian limits for the treatment of civilians. Approximately twelve articles addressed slaves and emancipation. This break from the precedent of civilized warfare, Witt maintains, laid the foundation for the first modern code of wartime conduct. Influential not only to the conduct of American warfare, Lieber’s Code influenced European, or international, laws of warfare as well. Within several years, Lieber’s Code defined the laws of war in France, Germany, Spain, and Prussia.

Witt’s narrative concludes at the onset of World War I. He explores the efficacy and implementation of the Lieber Code in the post—Civil War campaigns against Native Americans, in the Spanish American War, and in the Philippine Insurrection. Operations in the Philippines, Witt argues, incited an unprecedented crisis of laws and
warfare. Laws established during the Civil War affected the conduct of American units in the Philippines. Lieber’s Code was reproduced and distributed to American troops, and in 1900 General Arthur MacArthur reissued portions of General Orders No. 100. Humanitarian wartime conduct, however, went awry in the Philippines. The insurgent nature of the military operations resulted in unparalleled atrocities, including deadly ambushes, mutilation and defilement of corpses, execution of prisoners, escalating violence toward non-combatants, and torture. During the course of the conflict, from 1899 to 1902, American officers sanctioned and implemented prisoner executions and campaigns of torture. There were at least fourteen documented cases of American officers implementing the “water cure,” that is, forcing prisoners to drink large quantities of water in a short time. Fifteen officers were court-martialed for wartime offenses, but only one was sentenced to prison. Consequently, Witt concludes, “Lincoln’s fierce code seemed to have lost its way in the Philippines,” and the war for empire “detached the code from the righteous cause that had produced it” (361).

*Lincoln’s Code* offers a compelling narrative on the interplay between warfare and law from the nation’s founding to the eve of World War I. In doing so, Witt argues that while struggle between law and warfare characterized each generation of conflict, none further defined the laws of war more than the Civil War, and particularly the Emancipation Proclamation. By chronicling the nation’s history of warfare and legal crisis, Witt aptly demonstrates that contemporary debates of the laws of war, largely as a result of the global war on terrorism, are not new. Instead, current engagement with questions of morality and warfare brings the American Civil War and Lincoln’s code to the forefront of understanding the interaction of law and war.