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Cover Page Footnote

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The Lieber Code: A Historical Analysis of the Context and Drafting of General Orders No. 100

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ABSTRACT

During the American Civil War, the United States changed in dramatic fashion. The national crisis of the Civil War encompassed all aspects of the United States. In 1862, a forward-thinking German American intellectual named Francis Lieber lobbied the Lincoln administration to update the United States laws of war. On April 24, 1863, President Lincoln issued General Orders No. 100 or “Instructions for the Government of the Armies of the United States in the Field.” General Orders No. 100, better known as the Lieber Code, modernized the United States laws of war. Not only that, but the Lieber Code traveled across the Atlantic Ocean and impacted European international and military law for decades after the Civil War.

As a revolutionary document, the Lieber Code was an outworking of President Lincoln’s goals for the Union in the Civil War. The Code answered vital questions regarding emancipation and how a massive, modern, biracial, and volunteer army would wage a Civil War against rebellious states. The Lieber Code was often an unsung hero in United States history outside of legal or military history, but upon closer inspection, the Lieber Code was a window into what Lincoln and his cabinet believed about the Civil War. The Lieber Code embodied the answers to the moral, political, constitutional, legal, and international problems that the Union faced. Since the Code played such a key role in the Civil War, this paper investigates the historical and legal context of the Code as well as the drafting and impact of the Code during and after the Civil War.

KEYWORDS: History; International Law; Law; Military History; Military, War, and Peace; United States History

On April 24, 1863, almost two years before the end of the American Civil War, President Abraham Lincoln issued General Orders No. 100: The Lieber Code. The Lieber Code’s full name was “Instructions for the Government of the Armies of the United States in the Field.” Francis Lieber drafted the Code at the request of President Lincoln’s General-in-Chief, Henry Halleck, in order to regulate Union troops and establish doctrine on what was permissible in war. The Code affected how the Union prosecuted the war; and, after the conclusion of the war, international powers used the Lieber Code as a template for their own military regulations.

On a more practical scale, General Orders No. 100 was both an outworking of the Lincoln administration’s political strategy and a tool in its policies as the president maneuvered the Union through the complex issues of civil war, emancipation, and reconstruction. In light of such a complex and rich history, this paper investigates the historical context, drafting, and content of General Orders No. 100.

The American War of Independence and the American Civil War occurred relatively close together in the

chronology of United States military history, ending within 85 years of each other. Although the antebellum United States experienced political and cultural changes, those changes were rooted in eighteenth century developments and beyond. Indeed, the War of Independence was the crucible through which United States policies and opinions on war began to crystallize.

American colonists in the eighteenth century assumed that a common international law governed the nations. The colonists functioned from the European-Christian worldview that developed into what became known as western thought. Prior to the development of eighteenth-century Anglo-American international law, Europe grappled with the concept of warfare. War was, by nature, a conglomeration of violence, chaos, ambition, and power; however, war was more than simple violence. War was a power struggle between at least two belligerent parties. Christian theologians and intellectuals sought to understand how war was permissible in a worldview that valued peace, goodwill, and self-denial. Since the ancient times of Abraham and the pagan kings of Canaan, the biblical narrative included war.

The doctrine of “just war” developed out of this paradox. The rudimentary theory of just war postulated that, in each war, there was a belligerent side which fought for just reasons and another side which fought for unjust reasons. The theory assumed that war was a conflict between good and evil. Right and wrong were relevant values and if a belligerent nation was in the right, the just war theory allowed that nation to fight its war. The just war doctrine related to the Christian notion of justified personal violence through self-defense. However, the catch was “there could only be one just side in a war.”¹ The whole matter of just warfare hinged upon the question of which cause was just. Of course, if one side was victorious, the victors claimed their cause as just. Unfortunately, if a belligerent army believed its cause was just, then it was unclear what limits the just war theory should or could place upon a military’s actions. If both belligerents believed they fought for a just cause, then they could punish the evil actions of their respective opponents with military force and retribution. However, if the party which perceived itself to be wronged, lashed out in reprisal at its antagonists, nothing restrained the antagonists (the original perpetrators) from retaliating at the retribution they received with further “justified” violence. Each side believed itself to have the moral high ground. Thus, any act of retribution was permissible to punish the opposing “evil” belligerents and to bring about the justice of one’s cause. Furthermore, in the pursuit of justice, nearly any action was permissible so long as it was “necessary” to achieving justice.² The religious wars of medieval Europe exemplified the dangers of such a theory.³

Enlightenment philosophers recognized the danger of this medieval just war formula. Witt described the Enlightenment diplomat Emmerich de Vattel as capturing the “new spirit of European warfare.”⁴ Vattel solved the dilemma of which belligerent was acting justly by severing the idea of justice from war entirely. Of course, justice was mutually exclusive in war, and only one of the belligerents could have been fighting a just war. But that was unrelated to the practical application of military power in war. For humanity’s sake, Vattel claimed warring parties should set aside their convictions of justice and wage war according to a strict set of rules. The rules which Vattel set forth confined war to a gentleman’s game, much like Benjamin Franklin’s comparison of war

and chess. Vattel prescribed that war was strictly between the opposing combatants. The rules restrained war from entering into retributive contests fueled by convictions of justice which descended into greater and greater degrees of bloodshed. Witt described this as “moral neutrality” and “separating means and ends.”⁵ No matter how righteous the end, the rules of war still limited the means to achieving that end.

By the eighteenth century, Europe and the American colonies accepted Vattel’s rules for conduct in war. Enlightenment humanitarian constraints on war established the parameters in which the infant United States grew up. The doctrine of “civilized” or limited warfare was the foundation upon which the United States built its early military tradition.⁶

In the American War of Independence and the War of 1812 the United States utilized the Enlightenment’s humanitarian framework for war. Military and international law developed in several ways in the late eighteenth and early nineteenth centuries; however, three key debates between Great Britain, France, and the fledgling United States were fundamental to the context of the American Civil War. While the debates may have appeared to be unrelated, they impacted the Lincoln administration’s view of military law and formed the legal context in which Lieber wrote General Orders No. 100. The first debate dealt with free shipping, blockades, and international naval law.

At the turn of the nineteenth century, the United States’ naval power proved insignificant in comparison to the European heavyweights of France and Great Britain. Thus, as the United States economy expanded and private trading vessels sailed across the globe, the United States turned to international naval law to protect its private interests abroad. When Great Britain and France fought against each other, the United States attempted to tread the thin line of neutrality. Britain and France routinely seized vessels belonging to neutral nations if those vessels sailed for the ports of their respective enemies. Many times, those vessels were United States merchant ships. Denying material goods from an enemy was an excellent military strategy, but it did not appeal to United States merchants or the United States government. The United States questioned what right belligerent nations had to seize and search ships flying the flag of a neutral nation.

¹ John F. Witt, *Lincoln’s Code: The Laws of War in American History* (New York, NY: Free Press, 2012), 17. The most important work on the Lieber Code was *Lincoln’s Code: The Laws of War in American History*, published in 2012 by John Fabian Witt, the Allen H. Duffy Class of 1960 Professor of Law at the Yale Law School. Witt explained at great depths the traditions of

United States military and international law and how the Lieber Code affected those traditions.

² Witt, *Lincoln’s Code*, 17.

³ *Ibid.*, 16.

⁴ *Ibid.*, 16.

⁵ *Ibid.*, 18.

⁶ *Ibid.*, 19.

Furthermore, if a nation declared a blockade on another's port, it was unclear what responsibility a neutral nation had to recognize that blockade.

A common saying in the United States was that "free ships make free goods." The saying summarized the goal of United States international policy to establish neutral shipping protections under international law; however, results were slow. It was not until 1856 after decades of arduous debate, that neutral shipping and the United States mantra of "free ships make free goods" became international policy. In the Declaration of Paris of 1856, Britain, France, and several other nations "pledged that neutral flags would cover enemy goods except for contraband."⁷ In addition, "neutral goods were not liable to capture when found aboard an enemy vessel, and that blockades had to be 'effective.'"⁸ If European nations went to war, international law protected neutral shipping and United States merchants could continue trading unmolested. The Declaration required neutral ships to respect a blockade only if nations deemed the blockade to be "effective." The powers of Europe resolved the debate 44 years after the start of the War of 1812. Witt noted that "the neutral rights principles for which the United States went to war in 1812 seemed at last to have become the governing rules for war on the high seas."⁹ However, this issue would surface again in 1861 with the advent of the Civil War, except this time the United States was on the opposite end of the issue. The recognition of neutral shipping rights under international law, which the United States had fought so hard for, no longer protected the nation's merchant fleet; it restricted the actions of the United States Navy.

The second key debate of the 1776-1820 era centered around slaves in wartime. According to Vattel's civilized rules of war, armies could not confiscate civilian property. If armies did so, the rules of war required that armies compensate civilians. American slaveowners believed their slaves were property. As property, slaveowners claimed that the international laws of war protected their slaves from confiscation. United States chattel slavery had the problem of identifying slaves as both property and people, depending on the context. But the British military viewed slaves as people they should free and not as property they should protect. Thus, the British military freed slaves and claimed their actions were in accordance with the laws of war.

From 1776-1783 and from 1812-1815, British commanders recruited American slaves to help them in

wars against the United States. In return for helping the British, slaves could receive their freedom. United States slaveholders protested that the British actions violated the laws of war. Thomas Jefferson took such a position in the Declaration of Independence where he decried the British for "excit[ing] domestic insurrections amongst us."¹⁰ The Virginia State Constitution also accused King George III of "prompting our negroes to rise in arms against us."¹¹ Jefferson and his fellow Virginian politicians believed that slaves were private property and the laws of war protected slaves from confiscation. Furthermore, Jefferson argued that it was against the rules of war for an invading army to incite slaves to rebel against their masters. John Quincy Adams took the same position after the War of 1812 when he fought for British repayments to United States slaveholders who lost slaves in the war. Eventually, Great Britain capitulated to the United States' demands and provided a lump sum to the United States government.

The debate cemented the American tradition, in the Declaration of Independence no less, that the laws of war protected slaves as private property. Later in his life, however, John Quincy Adams changed his position on the status of slaves in wartime. Adams acknowledged that slaves did not receive special protection under the laws of war. Witt explained that Adams "would decide that the laws of war gave armies and presidents and nations the power to emancipate slaves in wartime."¹² While Adams' position was in the minority at the time, his opinions served as an omen of what was to come.

The third and final military law issue of the antebellum era was how governments should treat rebellions and whether they should grant prisoner of war status to rebels. When the American colonies resisted against Great Britain on April 19, 1775 at the Battles of Lexington and Concord, the British government viewed the American colonists as rebels and traitors. As such, American militiamen and members of the Continental Congress were under threat of death for treason. During the American War of Independence, the British captured many American soldiers. The question was whether the captured soldiers were traitors or prisoners of war. The law stipulated that the captured rebellious soldiers were traitors, and that the British should execute them. In reality, mass executions for traitors did not happen. Witt explained that, "From the very beginning of the war, Washington announced his intention to treat British prisoners by exactly the same 'rule' the British adopted

⁷ *Ibid.*, 133.

⁸ *Ibid.*, 133.

⁹ *Ibid.*, 133.

¹⁰ Thomas Jefferson, *The Declaration of Independence*, (1776).

¹¹ Virginia Constitution (1776).

¹² Witt, *Lincoln's Code*, 78.

for Americans in their hands.”¹³ Thus, the practical outworking of British policy toward American prisoners was not summary execution for treason. While the legal rationale remained unclear since the Continental Army was a rebellious army, the actual events of the American War of Independence resulted in a workable solution in the context. The British and American governments captured and exchanged prisoners during the war, much like two peer European nations would have done. Executions did take place, but those were primarily for spying rather than for treason. While this option was the most practical path to choose for both the Continental Army and the British, some legal ambiguities remained. Nations only granted prisoner of war status to armed combatants who fought for another nation engaged in war. Thus, by granting prisoner of war status to American soldiers, the British government implicitly recognized the Continental Congress as a legitimate government. The solution to this legal conundrum was not immediately clear. While the practical policy that the armies observed on the ground worked itself out, the unanswered questions would resurface in the Civil War.

On March 4, 1861, Chief Justice Roger B. Taney inaugurated Abraham Lincoln as the sixteenth president of the United States. The Civil War began one month later on April 12 when Confederate forces attacked Fort Sumter in the harbor of Charleston, South Carolina. With the advent of the Civil War, two figures loomed large in the development of international and military law. The first was President Lincoln. Witt explained that “It is one of the most enduringly striking features of the United States’ greatest wartime president that he came into office with virtually no prior experience of war.”¹⁴ But what Lincoln lacked in experience, he made up in aptitude. Although the president was ignorant regarding the laws of war and foreign relations, he learned quickly and assembled both a cabinet and a war department of individuals who compensated for his lack of experience.¹⁵ With that team supporting him, Lincoln’s leadership was critical in establishing Union policies in the midst of a civil war. Even though Lincoln may have been an unlikely candidate for president in 1860 and despite his inexperience in war, the second major figure dealing with

military law in 1861 was similarly unlikely but no less qualified.

Francis Lieber was born in Berlin, Germany on March 18, 1800. During his lifetime Lieber fought in two separate military conflicts including the Battle of Waterloo and the Greek War of Independence. Lieber experienced the horrors of war and suffered wounds himself. The romantic’s glorified image of war did not disillusion Lieber, but he did believe that war was a stage upon which men demonstrated the highest values of courage and honor. War was neither all victories nor all medals, nor an end in and of itself. Rather, the goal of war was to achieve something for one’s own nation. In this view, Lieber understood war to be what the military theorist Carl von Clausewitz defined it as. Namely war was “a duel on an extensive scale,” as both groups attempted to exert their will on the other and “compel the other to serve his will.”¹⁶

Under the pressure of an authoritarian Prussian state, Lieber left Europe and immigrated to the United States, longing to participate in United States academia. Lieber was, if nothing else, a thinker and a writer. Law professor Aviam Soifer stated that “Lieber was indeed always scrambling, always proposing projects and looking for work, always reading and thinking and investigating.”¹⁷ Perhaps one of his most apparent qualities was his self-promotion. Lieber maintained a wide correspondence and became connected with several elites in the United States hoping to use his learning and intellect in a professorship. After years of searching and participating in reforms and projects, he received a professorship position at South Carolina College in 1835.

Over the next two decades he became a well-respected intellectual and professor; however, he despised the South. Lieber believed in the American ideals of freedom and personal rights, especially the right of private property. He possessed strong anti-slavery opinions but kept them to himself. He did own slaves in South Carolina but did so to assimilate into southern culture.¹⁸ Lieber was alone and uncomfortable in the South. Although it was an intellectually productive time for him at South Carolina College, he often journeyed north. The politics of higher education in a slave state placed Lieber

¹³ *Ibid.*, 22.

¹⁴ *Ibid.*, 141.

¹⁵ *Ibid.*, 142, 146.

¹⁶ Carl von Clausewitz, *On War*, trans. Michael Howard and Peter Paret, (Princeton, NJ: Princeton University Press, 1976), 43.

¹⁷ Aviam Soifer, “Facts, Things, and the Orphans of Girard College: Francis Lieber, Protopragmatist,” *Cardozo Law Review* 16, no 6 (1995): 2305.

¹⁸ Charles R. Mack and Henry H Lesesne, *Francis Lieber and the Culture of the Mind: Fifteen Papers Devoted to the Life, Times, and Contributions of the Nineteenth-Century German-American Scholar, with an Excursus on Francis Lieber’s Grace. Presented at the University of South Carolina’s Bicentennial Year Symposium Held in Columbia, South Carolina, November 9-10, 2001* (Columbia, SC: University of South Carolina Press, 2005), 5.

at a disadvantage.¹⁹ Despite his work, the college did not grant Lieber a promotion. He resigned from the college in 1856 and moved to New York in 1857, where he received a professorship at Columbia College. When the Civil War began, Lieber's three sons joined the war. Oscar, the oldest son, served as a Confederate officer while Norman and Hamilton fought for the Union. Lieber was 61 years old in 1861 and the aging professor longed to act.²⁰ Although he could not fight, he applied himself to use his position as a northern intellectual to impact public opinion and public policy on the war, presenting himself and his ideas to members of Lincoln's administration. He was available for work, but the war began with him on the sidelines. So Lieber lectured at Columbia about the laws of war and continued corresponding with his connections in Washington D.C.

With Professor Lieber still teaching in New York, the Lincoln administration faced the issue of international naval law on its own. In 1861, the War Department developed its strategic plan for the war. The plan known as the Anaconda Plan called for the military and economic constriction of the South. The plan required the closure of all Confederate ports on the Atlantic and Gulf coasts, which created problems with Europe. Great Britain and France both had economic interests in the South, with their textile industries connected to the cotton empire of the South. European interests created a complicated minefield that Lincoln's secretary of state, William Seward, had to step through. At first, Seward toyed with the idea of declaring the southern ports closed, but European statesmen rejected this notion.²¹ If the Union wanted to close its ports, it would face strong European opposition, which was something the Lincoln administration could ill afford. If the Union chose that course of action, Europe would either submit to the closure and lose economic profits or recognize the Confederacy as an independent nation and treat the ports as open.²² The latter option would have been disastrous for the Union.

Seward also proposed a blockade. As in 1812, the United States Navy was small in 1861—too small to create an effective blockade. However, given enough time, the Union could create a fleet large enough to constrict the Confederacy. A blockade would also deflect European opposition because international law recognized blockades and Great Britain had political interests in maintaining the power of the navy.²³ But, in order to

establish a blockade and implement the Anaconda Plan, the Lincoln administration had to resolve the issues raised by the 1856 Declaration of Paris.

President Lincoln's policy declared that seceded southern states were still a part of the Union. Disloyal rebels had simply taken over the Confederate state governments. To resolve the conflict, the Union needed to defeat the rebels and reconstruct loyal state governments in place of the disloyal ones. However, if the seceded states were still within the Union, the United States would have to blockade its own ports in order to implement a blockade, which violated international naval law. In addition, the 1856 Declaration of Paris required nations to recognize a blockade only if it was effective. Thus, in order for the Union to close southern ports and for the Anaconda plan to work, the United States Navy had to establish an effective blockade over thousands of miles of coastline with an inadequate fleet all while unlawfully blockading its own ports.²⁴ Despite the inconsistencies of blockading its own ports, the United States government blockaded them anyway. Many argued that the blockade declaration recognized the Confederacy as a belligerent party to the conflict and thus an independent government. While these arguments had implications upon Lincoln's long-term position of rebellious state governments within the Union, in the short term it allowed him to implement an effective strategy against the Confederacy. Declaring the blockade allowed the Union to limit the flow of material goods into the South while preventing European interference in the Civil War because the blockade was a policy that European powers knew and respected from the Declaration of Paris.²⁵ Ultimately, the Navy became large enough to establish an effective blockade by the end of the war.

With the naval issue politically resolved, the Lincoln administration implemented the Anaconda plan. As the land war commenced, more issues began to develop. Finally, the German born professor from New York was able to lend a hand. Lincoln had to face a similar question to the one which had plagued the British military in 1776. It was unclear whether the Union could capture Confederate troops as prisoners of war without recognizing the legitimacy of the Confederacy or if international law required the Union to treat Confederates as traitors and separate from the laws of war. Some people argued that if the Union did recognize Confederate troops as prisoners of war, the captured

¹⁹ Mack and Lesesne, *Francis Lieber and the Culture of the Mind*, 5.

²⁰ "Would to God": Francis Lieber to Henry Halleck, February 9, 1862, as cited in [John F. Witt, *Lincoln's Code: The Laws of War in American History* (New York, NY: Free Press, 2012), 179].

²¹ *Ibid.*, 143.

²² *Ibid.*, 143.

²³ *Ibid.*, 144–145.

²⁴ *Ibid.*, 145.

²⁵ *Ibid.*, 146.

troops could be immune from charges of treason. Additionally, as the Union army advanced southward, runaway slaves began coming to Union lines. Some Union generals turned the slaves away, unwilling to challenge the personal property rights of southern slaveholders. Others treated the slaves as free in a type of preliminary emancipation. Seward and Lincoln had created a workable (though not legally watertight) solution to the naval law questions. Professor Lieber helped to answer the other two questions in the trifecta of international military law: slavery and captured rebels.

In February 1862, Union and Confederate forces clashed at Fort Donelson, Tennessee. Lieber heard that the Confederates had wounded his son, Hamilton, during the battle and so Lieber travelled west to find his son. While searching for Hamilton, Lieber met Henry Halleck, the Union general in command of the Department of the Missouri. They developed a close friendship which would be advantageous for Lieber in the months ahead. In July 1862, Lincoln appointed Halleck to be his General-in-Chief in Washington. As General-in-Chief, Halleck addressed many of the legal questions the Civil War raised about military law and corresponded with Lieber regarding some of the issues. Biographer Lewis Harley stated that “[Lieber] was frequently called to Washington for consultation in the War Department.”²⁶ In the summer of 1862, General Halleck commissioned Lieber to research the use of guerillas in war and write a proposal for how the United States should deal with Confederate guerillas. Lieber’s argument created helpful distinctions between classes of combatants and Halleck strongly approved of his work.²⁷

Lieber proposed to Halleck on multiple occasions that the Union needed a strong codification of its policies and the laws of war. The War Department had often constructed its policies as the war progressed through the changing landscape of Civil War military law. Many times, Union generals adopted contradictory policies, such as the policies regarding runaway slaves. Lieber argued “that the President ought to issue a set of rules and definitions providing for the most urgent cases, occurring under the Law and Usages of War, and on which our Articles of War are silent.”²⁸ In his biography of Lieber, historian

Frank Freidel further elaborated that Lieber wanted the President to “appoint a committee to draw up a code defining the acts or offences and in some instances stating the punishment under the laws of war.”²⁹ Lieber was correct that a code would be valuable, but another reason existed which Freidel did not mention when he discussed the reasons for drafting a code. In addition to the apparent need for a general codification to the laws of war, 1863 witnessed dramatic changes in the nature of the Civil War.

On January 1, 1863, President Lincoln issued the Emancipation Proclamation which declared all slaves in Confederate held territory to be free. In April 1863, African American men were serving in the Union army as combat infantrymen. The inclusion of African American men in the military as combat units carried massive implications. The South refused to recognize African American men as real soldiers and did not grant them prisoner of war status. The Union had to respond when Confederate forces refused to grant prisoner of war status to African American troops and commenced selling the captured soldiers into slavery. Thus, although the Lieber Code was about military law and the conduct of United States armies in the field, it was also about slavery and Lincoln’s war goals. When the Civil War began, Lincoln’s primary goal was to preserve the Union.³⁰ But after January 1, 1863 emancipation became the other prominent war goal. When Lincoln expanded his war goals to include emancipation, the second war goal pointed to what the war had always been about, namely slavery.

Historians have debated the “genesis” of Lieber’s Code and attempted to determine what Lieber’s governing principle was when he wrote the Code. John Witt and historian Matthew Mancini argue that slavery and emancipation were prominent factors in Lieber’s motivations.³¹ Other historians point to the preeminence of preserving the Union or how the challenges of war made the Code necessary. Historian D. H. Dilbeck disagreed with Witt and Mancini when he said “Emancipation-related concerns neither preoccupied Lieber throughout the war nor primarily motivated him to draft his code. He did not set out on a grand effort to reenvision the laws of war for the age of emancipation.”³²

²⁶ Lewis R. Harley, *Francis Lieber: His Life and Political Philosophy* (New York, NY: Columbia University Press, 1899), 148.

²⁷ Frank Freidel, *Francis Lieber: Nineteenth-Century Liberal* (Baton Rouge, LA: Louisiana State University Press, 1947), 329.

²⁸ Lieber to Halleck, November 13, 1862, as quoted in [Frank Freidel, *Francis Lieber: Nineteenth-Century Liberal* (Baton Rouge, LA: Louisiana State University Press, 1947), 331].

²⁹ Freidel, *Francis Lieber*, 331.

³⁰ Thomas Mackey, (lecture, undergraduate seminar at the University of Louisville on the American Civil War and Reconstruction, Louisville, KY, April 2, 2021).

³¹ Matthew J. Mancini, “Francis Lieber, Slavery, and the ‘Genesis’ of the Laws of War,” *The Journal of Southern History* 77, no. 2 (2011): 325-348.

³² D. H. Dilbeck, “‘The Genesis of This Little Tablet with My Name’: Francis Lieber and the Wartime Origins

Dilbeck went on to explain, “Lieber drafted General Orders No. 100 in response to the ‘confusion of ideas’ about the laws of war revealed by how Federals handled the issues of prisoner exchanges, guerrilla warfare, and the parole.”³³

While different historians qualified Lieber’s motivations and emphasized one motivation over the other, the Professor spoke for himself. Mancini cited letters where Lieber described his motivations to be on both sides of the debate.³⁴ Lieber never said that the two motivations were mutually exclusive. He could and did combine multiple motivations into his passion for the Code. Perhaps one motivation was primary in his mind. In the language of the Code, “To save the country is paramount to all other considerations.”³⁵ Regardless of the supremacy of his goals, Lieber did have more than one goal when he set out to write Union military regulations. Historian Richard Shelly Hartigan balanced the issue well when he said Lieber had a “desire to see his adopted country at peace, unified, with all its members free” and “he set aside the first of these goals to secure the latter two.”³⁶

Thus, in order preserve the Union, ensure a free nation, and return to peace, Lieber sought a military code of conduct which preserved the Union, achieved peace quickly, and applied to biracial armies. He had to establish codes for how the United States would view its soldiers, white or black, and how the United States would expect its enemies to do the same.

In December of 1862, Halleck invited Lieber to come to Washington to join a committee to create a code for the United States Army. Lieber created the rough draft, and after suggestions & revisions by the committee and Halleck, the president approved the Code and issued it from the War Department as General Orders No. 100 on April 24, 1863.³⁷ Lieber titled the Code “Instructions for the Government of the Armies of the United States in the Field.” Because of his initiative and primary authorship, the Code was known as Lieber’s Code. When Lincoln’s administration issued the Code, it represented the Union’s

position on key matters regarding how it viewed and fought the war. However, in writing General Orders No. 100, Lieber not only codified the Union’s positions on key questions regarding slaves in wartime and who were prisoners of war, but also established a new philosophy regarding war and a prescriptive code which reflected that philosophy. Witt argued in his book *Lincoln’s Code*, that the Code should be “better thought of as Lincoln’s.”³⁸ Witt took this position because “the Union’s instructions [rose] out of the crucible of slavery” and “it was Lincoln’s Emancipation Proclamation that required its production and sent it out into the world.”³⁹ Lincoln provided the leadership and change which created the context of emancipation. Lieber was responsible for codifying the ideals of emancipation within the military regulations. Thus, although Lieber was the author of the Code, Lincoln played a foundational role in its creation.

Lieber wrote the Code in 157 short articles that described what military law allowed and did not allow in war. Equally important, however, was the fact that Lieber included the rationale behind each prescription or prohibition in the Code. Lieber divided the Code into ten sections. Each section dealt with a specific category of military law.

Section I addressed martial law, military jurisdiction, military necessity, and retaliation. The section was vitally important for three reasons. First, Lieber laid out the three principles which governed military power: justice, honor, and humanity.⁴⁰ War was a competition between powers that could be brutal, but the Code required nations to wage war justly, honorably, and humanely. Second, Lieber defined the most important factor to examine in war. In Article Five he wrote “To save the country is paramount to all other considerations.”⁴¹ This statement was a strong reflection of Lincoln’s first war goal to save the Union. Third, in Articles 13 through 16, Lieber described the test of military necessity.⁴² A military action was necessary if

of General Orders No. 100,” *Journal of the Civil War Era* 5, no. 2 (2015): 233.

³³ Dilbeck, “The Genesis of This Little Tablet with My Name,” 234.

³⁴ Mancini, “Francis Lieber, Slavery, and the ‘Genesis’ of the Laws of War,” 330-332.

³⁵ Executive Order 100 of April 24, 1863, “Instructions for the Government of the Armies of the United States in the Field,” sec. I, art. 5.

³⁶ Richard S. Hartigan, *Military Rules, Regulations and the Code of War: Francis Lieber and the Certification of Conflict* (New Brunswick, NJ: Transaction Publishers, 2011), 6.

³⁷ Richard R. Baxter, “The First Modern Codification of the Law of War: Francis Lieber and General Orders No. 100,” *International Review of the Red Cross* 3, no. 25. (April 1963): 185; Mancini, “Francis Lieber, Slavery, and the ‘Genesis’ of the Laws of War,” 329; Jordan J. Paust, “Dr. Francis Lieber and the Lieber Code,” *Proceedings of the Annual Meeting (American Society of International Law)* 95 (Spring 2001): 114.

³⁸ Witt, *Lincoln’s Code*, 8.

³⁹ *Ibid.*, 8.

⁴⁰ Executive Order 100, sec. I, art. 4.

⁴¹ *Ibid.*, sec. I, art. 5.

⁴² *Ibid.*, sec. I, art. 13-16.

it achieved the goal of preserving the Union or “sav[ing] the country.”⁴³

Lieber’s doctrine of military necessity received criticism in the nineteenth century. Law professor Burrus Carnahan, in his article reviewing the doctrine of military necessity, described how the Confederacy condemned the doctrine of military necessity because it could be “a License for Mischief.”⁴⁴ The Confederacy feared that any Union military action would be justifiable because it was “necessary.” Carnahan described how this happened in World War I when Germany used the doctrine of necessity to justify its actions; however, Carnahan noted that “Lieber’s principle of military necessity had evolved there into the doctrine of *Kriegsraison*, which permitted the German army to violate many of the laws and customs of war on the basis of military necessity.”⁴⁵ Carnahan’s point was that, even if the Confederacy condemned the doctrine of military necessity and the German army abused it, that was not the original intention of Lieber’s Code and his view of military necessity. The principles of justice, honor, and humanity governed military necessity. Military necessity must and could not have been a blank check for an army to take whatever action it desired. On the other hand, military necessity did mean that war could and would be violent and tragic. Lieber believed some things in war were never necessary because they were not just, honorable, or humane. Such things included the use of torture and poisons.⁴⁶ But other times, some things were necessary, as long as they were just, honorable, and humane. The ultimate concern was to win the war. Lieber’s conclusion to Article 29 followed this logic when he wrote the remarkable words, “The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.”⁴⁷

Section II dealt with the protection of private property and private persons as well as public works of art and science. Lieber mandated the protection of private property even in war, but there were two important exceptions. The first was if military necessity required the seizure of private property. The second was if the private property was a slave. In that case, Lieber made a strong defense which drew heavily from Lord Mansfield’s decision in *Somerset vs. Stewart* in 1772 which established that only positive law could hold a person as a slave and once that person reached free land (or free jurisdiction under the United States military), that person was free, and no one could

return them to slavery.⁴⁸ This argument was a powerful tool to carry out Lincoln’s second war goal of emancipation. Under Section II, any slave who fled to the United States Army was thereby free.

Section III handled deserters, prisoners of war, hostages, and booty on the battlefield. The key articles built on the emancipation argument of Section II and stated that “The law of nations knows of no distinction of color, and if an enemy of the United States should enslave and sell any captured persons of their army, it would be a case for the severest retaliation, if not redressed upon complaint.”⁴⁹ The statement protected the African American soldiers in the Union military and gave the War Department power to address the actions of the Confederacy.

Section IV codified the War Department’s policy on guerilla warfare and the different categories of combatants which Lieber had submitted to General Halleck in 1862. Section V established rules for spies, traitors, and those who otherwise acted outside of the realms of justice, honor, and humanity. The latter category included belligerents who abused flags of truce. The Code dealt with anyone who violated those principles in the strictest terms. Section VI elaborated on prisoner exchange, flags of truce, and flags of protection. Section VII clarified prisoner exchanges by outlining the Union’s position on parole.

Section VIII listed rules for armistice and capitulation. Section IX outlawed assassination. Like poisons and torture, assassination was illegal in war. Section X defined insurrections, civil wars, and rebellions. It was worth noting that, although each of the three definitions were distinct, the Code defined the secession of the South and the American Civil War, as an insurrection, civil war, and rebellion simultaneously. Article 149 stated, “Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government.”⁵⁰ Article 150 defined civil war as “war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government.”⁵¹ According to Article 151, rebellion was “applied to an insurrection of a large extent, and is usually a war between the legitimate government of a country and portions or provinces of the same who seek to throw off their

⁴³ *Ibid.*, sec. I, art. 5.

⁴⁴ Burrus M. Carnahan, “Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity,” *The American Journal of International Law* 92, no. 2 (April 1998): 217-218.

⁴⁵ Carnahan, “Lincoln, Lieber and the Laws of War,” 218.

⁴⁶ Executive Order 100, sec. I, art. 16.

⁴⁷ *Ibid.*, sec. I, art. 29.

⁴⁸ *Somerset v Stewart*. 1772. 98 ER 499.

⁴⁹ Executive Order 100, sec. III, art. 58.

⁵⁰ *Ibid.*, sec. X, art. 149.

⁵¹ *Ibid.*, sec. X, art. 150.

allegiance to it, and set up a government of their own.”⁵² Under Section X of General Orders No. 100, the Confederate States were guilty of all three charges.

Article 155 and Article 157 were the two final articles of importance in Section X. Article 155 divided the United States’ enemies in war into combatants and non-combatants.⁵³ The Code stipulated that, while they were both enemies, the Union army should not treat both classes the same. There were special protections for both as according to their actions. However, it is imperative to note that non-combatants were not simply non-combatants. They were non-combatant enemies. The Code defined both combatants and non-combatants as enemies. Because non-combatants were enemies, the Code included them in the general sufferings of war. According to General Orders No. 100, the enemy was not solely the infantryman across the field, but the enemy was also the farming family who supported the soldier from the home front. In order to save the country, the Union had to defeat both. Lastly, Article 157 stated that “Armed or unarmed resistance by citizens of the United States against the lawful movement of their troops, is levying war against the United States, and is therefore treason.”⁵⁴ The final article of the Code established that resistance by a citizen of the United States was unlawful and treason.

On April 24, 1863, Lincoln issued and distributed the Code to both the Union army and the Confederacy. Harley described the Code as “obligatory upon all the armies of the United States.”⁵⁵ The immediate impact of the Lieber Code upon the Civil War was that it established the Union army’s policies on how it would fight the war. The Code impacted prisoner exchanges, provided a standard for Union soldiers’ behavior, and defined the enemy and who would or would not receive certain privileges such as prisoner of war status. Law professor Jordan Paust stated that “The Code undoubtedly lessened human suffering during the Civil War, and it formed an authoritative exposition of the laws of war for prosecution of soldiers and civilians then and for years to come.”⁵⁶ In the bloodiest war in United States history, anything which limited human suffering proved a praiseworthy accomplishment.

When Lieber wrote General Orders No. 100 in 1862-1863, it served as a seminal work. Historians from the twenty-first century had the difficult task of endeavoring to enter into Professor Lieber’s context and accurately discern what his intentions were in writing the Code. The

context of two world wars, a cold war, and a war on terror could tempt twenty-first century historians and lawyers to glorify the humanitarian aspects of Lieber’s Code. It was true that General Orders No. 100 did place some remarkable restraints on the United States army. However, the same man who wrote the General Orders No. 100 also advocated for a fierce, “sharp war.”⁵⁷ It was imperative that lawyers, politicians, historians, and military service members understand the proper context of the Lieber Code and not overemphasize either the humanitarianism or the ferocity of the Code in an imbalanced manner. Harley wrote his work on Lieber prior to the First and Second World War. Harley published his book the same year as the first Hague Convention in 1899. His perspective on General Orders No. 100 was helpful to understand the Code from a nineteenth-century context. Harley wrote, “Throughout the code, two leading ideas prevail; the one, a desire to save even our enemies from unnecessary injury and destruction; the other, the necessity of displaying the greatest energy in the conduct of war, so as to speedily bring hostilities to an end, and restore conditions of peace.”⁵⁸ Lieber himself balanced both Vattel and Clausewitz. According to Hartigan, he remedied the “gap between theory and practice” that Vattel and Clausewitz each presented in turn.⁵⁹

From the strategic perspective, the Code laid forth a just, honorable, and humane path through war that sought to limit unnecessary suffering and preserve human life and culture. At the same time, however, the Code embodied a belief that war had a goal, and nothing was more important than accomplishing that goal. For Lincoln, that primary goal was preserving the Union. After January 1, 1863, the second goal was to emancipate slaves. The Code enabled the Union army to fight for both of those goals. If a military action was necessary to accomplish those goals and it was just, honorable, and humane, it was legal in war. The Code did not sanction unnecessary suffering. But the Code did allow for hard, sharp, extreme suffering if it was necessary. Lieber argued through the Code that sharp (or harsh) wars were short, and short wars were more humane because they reduced overall suffering.

Politically and militarily, the Code helped the Lincoln administration pursue a vigorous policy of reunification and emancipation. The Code proved an essential key in protecting the African American soldiers of the United States Army. While the Code did not prevent horrible acts

⁵² *Ibid.*, sec. X, art. 151.

⁵³ *Ibid.*, sec. X, art. 155.

⁵⁴ *Ibid.*, sec. X, art. 157.

⁵⁵ Harley, *Francis Lieber*, 149.

⁵⁶ Paust, “Dr. Francis Lieber and the Lieber Code,” 114.

⁵⁷ Executive Order 100, sec. I, art. 29.

⁵⁸ Harley, *Francis Lieber*, 150.

⁵⁹ Hartigan, *Military Rules, Regulations and the Code of War*, 4-5.

of violence against African American soldiers, it was still an integral part of Union military policies. By having a clear published standard of how the Union army and its enemies should act, the Union could punish any violations of those standards according to a predetermined code. The Code laid out the path by which the Union could and would retaliate against illegal acts in wartime. Thus, while the Code did not physically protect African American soldiers, it gave the Union the legal ammunition to respond to its policies of utilizing African American soldiers in combat.

Socially, the Lieber Code redefined the status of former slaves, at least while they were in the army. The scheme of master-slave race relations no longer defined African American men. If they were in the army, they were soldiers, although not yet fully equal to white soldiers. Another cultural impact of the Lieber Code was that it further strengthened the position military law had in United States constitutionalism. United States constitutionalism sought to protect liberty while restricting power, and military might was the epitome of power. The Lieber Code enabled a vigorous military to take the necessary actions to save the country, while simultaneously restraining that power under the Commander-in-Chief and the United States Constitution.

The effects of General Orders No. 100 did not restrict themselves to the United States. Internationally, the Lieber Code was the foundation to several aspects of military law through the Second World War. Several European nations adopted the Code or versions of it as their military regulations. The Code's stipulations on acceptable war tactics influenced international law such as the Hague Conventions of 1899 and 1907. However, Paust reminded historians that the Code did not apply solely to international warfare.⁶⁰ In addition to international wars, the Code applied to civil wars, wars of insurrection, and United States conflicts with Native Americans.⁶¹ Thus, the influence of Lieber's Code reached much further than either international wars or civil wars.

Ultimately, the Code was not only a codification of rules of war. Lieber and Lincoln together redefined the way western culture thought about war. Vattel's idea of a morally neutral war did not apply to the American Civil War. Law professor David Kennedy stated that "Vattel wrote for those, like Franklin, who aspired to be wise

statesmen for nations participating in an established international order – not those who wished to revolutionize that order."⁶² The Civil War was an unorthodox war between a Union and rebellious insurgents within it, rather than between two independent nations.

For Lincoln, the Civil War was a just war, and he could not separate justice from the goals he pursued. He believed that preserving the Union was a divine task. Lincoln fought the Civil War on moral terms; however, he did not revert to the early European notion of just war which Vattel had rejected. Lincoln would not say he was absolutely justified in his moral position.⁶³ Lincoln claimed that only God knew what was the right course of action, but as best Lincoln knew, he was doing what was right and thus, he decided to press forward to achieve his goals.⁶⁴ Witt succinctly described Lincoln's vision as an attitude of "resolve and humility."⁶⁵ President Lincoln said it best; "With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation's wounds; to care for him who shall have borne the battle, and for his widow, and his orphan—to do all which may achieve and cherish a just, and a lasting peace, among ourselves, and with all nations."⁶⁶ That was the true legacy of the Lieber Code. Captain James Garner stated that "the moral and humanitarian principles" of the Code "balance the notions of military necessity and those of humanity in order to (1) protect both combatants and noncombatants from unnecessary suffering, (2) safeguard fundamental human rights of those who fall into the hands of the enemy, and (2) facilitate the return of peace."⁶⁷ With these three goals in mind, the Lieber Code represented harsh justice, yet, other times, considerate humanitarianism. The Code focused on the goal of preserving the Union; its true vision, however, was lasting peace.

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⁶⁰ Paust, "Dr. Francis Lieber and the Lieber Code," 115.

⁶¹ *Ibid.*, 115.

⁶² David Kennedy, *Of War and Law* (Princeton, NJ: Princeton University Press, 2006), 56.

⁶³ Witt, *Lincoln's Code*, 365-373.

⁶⁴ *Ibid.*, 368, 373.

⁶⁵ *Ibid.*, 373.

⁶⁶ President Abraham Lincoln, "Second Inaugural Address," (speech, Washington, DC, March 4, 1865).

⁶⁷ James G. Garner, "General Order 100 Revisited," *Military Law Review* 27. (January 1965): 48.

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