

Book Review

Lincoln's Code: The Laws of War in American History¹

Reviewed by Lieutenant Andrea M. Logan*

*The life of the law has not been logic; it has been experience The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.*²

I. Introduction

John Fabian Witt's *Lincoln's Code* explores the law of war in American history. It is not just a historian's account of President Lincoln as the title suggests, although it is one of the more original books on the subject in recent years.³ Nor does Witt focus, as the majority of contemporary legal scholars do, on the highly debated American experience with the law of armed conflict after 9/11.⁴ Witt instead draws upon four centuries of historical experience to discover the evolving uses of the law of war⁵ in American history, from the founding fathers, through slavery and Emancipation, to World War I.⁶ Few historians write as well as Witt does in *Lincoln's Code*, nor do they unearth from America's battlegrounds as many useful insights. Structured around the drafting of the Lieber Code, which was approved by President Lincoln in 1863 during the Civil War to guide the conduct of the Union Army,⁷ *Lincoln's Code* is as much about the history of the law of war in America as it is about the moral struggles of America's military leaders. Witt portrays the stories of these leaders who fought America's wars, created its policies, argued its legal battles and who ultimately became important contributors to the laws of war as they exist in international law today.

In this context, no readership will benefit more from *Lincoln's Code* than the military professional and lawyer. This book is essential reading for military lawyers who are, or should be, trying to understand and employ the legal and military framework for the law of armed conflict in America's

present and future wars. Witt's discoveries about the usages of international law in America remind military and other government lawyers that they must obtain a deeper understanding of the historical origins of the law of war. Not only does American society expect it, the profession of arms increasingly requires it.

This review examines three insights from *Lincoln's Code* that are important and enduring realities for the military lawyer's practice. It bears repeating that history *is* the greatest teacher. In order to understand the law of armed conflict so that it can be *usefully applied* in future conflicts, a military lawyer should recognize how the rules were utilized in the past, as well as how they have evolved dynamically over time. Second, the law of war is as much about the process of ethical decision-making for military leaders and promoting a climate, ethos, and framework for principled action by Soldiers,⁸ as it is reciting rules to a military commander. Lastly, a criticism of the law of armed conflict embodied in treaties and conventions of the twenty-first century is that some areas of the law, such as the protections afforded to non-state actors, are too vague and non-specific.⁹ *Lincoln's Code* reminds us that for centuries military scholars and lawyers have attempted to apply humanitarian, principled-based approaches in evolving conflicts when aspects of their engagements did not fit neatly into established rules under

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¹ JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* (2012) [hereinafter *LINCOLN'S CODE*].

² OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

³ *Lincoln's Code* was a 2013 Bancroft Prize Winner, Am. Bar Ass'n Silver Gavel Award Winner, Pulitzer Prize Finalist, and a *New York Times* Notable Book of the Year for 2012. See also ERIC FONER, *THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY* (2010) (focusing on the evolution of Lincoln's ideas and policies about slavery through his career). *The Fiery Trial* won the 2011 Pulitzer Prize, the Bancroft Prize, and the Lincoln Prize; JAMES M. MCPHERSON, *TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER-IN-CHIEF* (2008) (concentrating on a portrayal of Lincoln as a wartime president.) *Tried by War* won the 2009 Lincoln Prize.

⁴ See, e.g., Naz K. Modirazadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT'L SECURITY J. 225 (2014).

⁵ The law of war is also called "the law of armed conflict or international humanitarian law." For purposes of this review, the terms are used interchangeably. Witt uses the plural, the laws of war, in *Lincoln's Code*.

⁶ WITT, *supra* note 1.

⁷ WAR DEP'T, *INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD* (Wash., Gov't Printing Office 1898).

⁸ Geoffrey S. Corn, Guest Lecture on the Law of War, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia (Sept. 11, 2015).

⁹ This criticism is seen in some reviews of the Department of Defense (DoD) *Law of War Manual* released in June 2015. U.S. DEP'T OF DEF., *LAW OF WAR MANUAL* (2015) [hereinafter *WAR MANUAL*]; see Chris Jenks, *A Missed Opportunity: DoD's Law of War Manual & Applying Law as a Matter of Policy*, JUST SECURITY (Aug. 7, 2015), <https://www.justsecurity.org/25287/dod-law-war-manual-applying-law-matter-policy-missed-opportunity/>; see also Eric Jensen, *The Law of War Manual, Information or Authoritative Guidance?*, JUST SECURITY (Jul. 1, 2015), <https://www.justsecurity.org/24332/law-war-manual-information-authoritative-guidance/> & cd=1 & hl=en & ct=clnk & gl=us.

customary international law.¹⁰ Accordingly, an essential part of a military lawyer's craft is to be comfortable in the grey, and, in the fog of war, to be capable of rendering sound, principled advice to a military commander.

II. The Life of the Law (of War) is Experience

Oliver Wendell Holmes wrote "the life of the law has not been logic . . . it has been experience."¹¹ Holmes was writing about the common law but the same is true about the law of armed conflict. John Fabian Witt illustrates in *Lincoln's Code* that the experience of the nation's history with war is the greatest teacher. In his prologue, Witt challenges the reader to go beyond the two competing, yet shallow, partisan positions heard most often today about the laws of war in America: That the actions of the United States after September 11, 2001, disrupted a long American tradition of respect for, and participation in, the international laws of war and that international law has taken on a more prominent role in American policymaking in the past few decades.¹²

Witt dispels as myths these two generalities about the law of war. Witt illustrates the enduring presence of the law of war in American thought and dialogue throughout its history. The author shows how America's leaders have struggled with all too familiar issues, such as the legal status and treatment of detainees, combatant immunity for Soldiers, military tribunals, and war crimes. He portrays George Washington's treatment of British soldiers as prisoners of war as an early example of the nation's adherence to international law and custom.¹³ Witt also describes—as departures from humanitarian law principles—Andrew Jackson's treatment of enemy combatants and civilian populations in the Indian wars;¹⁴ General Sherman's disregard for civilian property in Confederate States during the Civil War;¹⁵ and tactics used by American troops during the counterinsurgency in the Philippines.¹⁶

Witt argues that there are two competing ideals American leaders have struggled to reconcile throughout history: *humanitarianism and justice*.¹⁷ He explains that in pursuit of justice, Americans have at times put humanitarian ideals aside and departed from accepted principles of international law.¹⁸ Witt advances this thesis in his prologue and epilogue and

describes Lincoln's use of his war powers to justify Emancipation as his central example.¹⁹ Witt explains how Lincoln's use of the principle of military necessity to bring an end to slavery was an important departure from customary international law protecting civilian property rights in wartime.²⁰ He also describes how the law of armed conflict was applied to emancipated Soldiers who fought in the Civil War so that they were afforded the same protections as other Union Soldiers and subject to the same laws of war.²¹

Witt convincingly speaks the language of the military professional in *Lincoln's Code*. He not only describes the historical rationales for national command decisions, but also adeptly examines the realities of each conflict from an operational perspective. The author's account of Francis Lieber, the Prussian-American soldier and jurist who assisted the U.S. War Department in drafting General Order No. 100, demonstrates the importance of the drafters of the laws to have the military experience and perspective to understand the nature of war.

By describing the drafting of the Lieber Code, Witt reveals that the law of war has been employed by America's leaders for many purposes: national strategy interests, a military code of honor in combat, and, importantly, for humanitarian ideals.²² Some of America's positions on the law of war and its written policies, such as the Lieber Code, would later inform the Hague and Geneva traditions and become customary international law.²³ Through his original research and engaging anecdotes, Witt shows the reader that the American experience with the law of war is complex and cannot be reduced to generalities. Witt reminds us that history and experience provide the necessary context and allow the reader to understand the law of war comprehensively and intuitively.

III. The Law of War as a Forum for Moral Engagement

Lincoln's Code is more than a historical account of America's development of the law of armed conflict. Witt illustrates the moral struggles of America's military leaders during war. In a refreshingly honest and non-partisan way, Witt explores the nation's experience with war "in all its ugly complexities."²⁴ The author reveals that the law of war has

¹⁰ WITT, *supra* note 1.

¹¹ HOLMES, *supra* note 3; see WITT, *supra* note 1, at 369.

¹² WITT, *supra* note 1, at 5.

¹³ *Id.* at 15–27.

¹⁴ *Id.* at 93, 95–99.

¹⁵ *Id.* at 250–84.

¹⁶ *Id.* 353–62.

¹⁷ *Id.* at 5–8.

¹⁸ *Id.*

¹⁹ *Id.* at 1–10, 220–49, 366–74.

²⁰ *Id.* at 367–70.

²¹ *Id.* at 240–49.

²² *Id.* at 367–74; see *Lincoln's Code: The Laws of War*, LIBRARY OF CONGRESS (Apr. 9, 2013), http://www.loc.gov/today/cyberlc/feature_wdesc.php?rec=5904&loclr=ytb [hereinafter *Lincoln's Code Webcast*].

²³ WITT, *supra* note 1, at 51–59, 87, 367–74 (describing the U.S. prize courts' position on neutral shipping rights and Lincoln's use of a blockade as informing the law of neutrality).

²⁴ *Id.* at 6.

been applied throughout American history for many purposes, “sometimes for good and sometimes for ill,” and that the law of war was then, as it is today, an important forum for moral engagement.²⁵ *Lincoln’s Code* also helps remind military professionals and lawyers that the law of war serves as an important framework for principled action for their Soldiers during hostilities. This is the author’s point when he argues that “the laws of war have served as tools of practical moral judgement in moments of extreme pressure.”²⁶

There are several current terms in the U.S. law of war policy that reflect Witt’s point—one is good faith and another is honor.²⁷ A reviewer of the *Department of Defense (DoD) Law of War Manual* commented last July that the emphasis on principles, such as the term “honor” in U.S. law of war policy, may recalibrate the military’s understanding of principle-based rather than rules-based law-of-war concepts.²⁸ Notably, the *DoD Law of War Manual* states that when no specific rule applies, the principles of the law of war are to be used as a general guide for conduct during war.²⁹ This is a key take-away. Military lawyers may not feel comfortable advising their commanders without a rule of application or on a vague understanding of honor,³⁰ but that is exactly what the law of war policy requires. The military commander must understand the importance of promoting a principled climate and ethos for the warfighter.³¹ Teaching principles instead of rules in law of war training may be a step towards realizing Witt’s understanding of moral judgement in times of extreme pressure. The moral principles that underlie the law of war provide an important and enduring foundation for the military professional. *Lincoln’s Code* reminds military lawyers that they must obtain a deeper understanding of the law’s historical origins and be prepared to employ the law of armed conflict in our evolving present and future wars.

IV. Judge Advocates: The Timeless Interpreter of the Laws of War

This review of *Lincoln’s Code* comes after the release of the *DoD Law of War Manual*, which has received praise and criticism in the last year. One comment is that the *Manual* it is too broad and voluminous to usefully and specifically

inform DoD personnel responsible for executing military operations.³² In the context of this criticism, *Lincoln’s Code* reminds us of the gift Professor Francis Lieber gave to the world when he drafted the first rulebook for Soldiers in the field. The influence of Lieber’s Code can be seen in virtually every service manual in the twentieth century.³³ However, perhaps due to this field-manual tradition, or the operational value of the pocket-card, or perhaps simple convenience, an attitude has formed among military professionals and lawyers that the law of armed conflict can be reduced to a couple pages and separated from comprehensive command advice.³⁴

Unfortunately, the full body of the law, and principles governing armed conflict, cannot be captured on an index card. An important take-away from *Lincoln’s Code* is that military scholars and lawyers have been present over centuries to apply humanitarian, principled-based approaches in evolving conflicts when aspects of their engagements did not fit neatly into established rules under customary international law. Military lawyers play a vital role advising military commanders. Their command advice has reflected law of war principles and considered practical realities in conflict in order to accomplish national strategic ends. If state leaders wished to apply humanitarian limitations, they turned to military professionals, scholars, and lawyers for interpretations for a specific conflict, just as they do now.

Considering the fact that guidance available to Lieber was not translated into English as he furiously drafted his manual over Christmas in 1862,³⁵ the privilege of having 1,204 pages of law of war policy³⁶ to draw from to provide command advice does not seem that bad at all. What *Lincoln’s Code* illustrates, and the release of the *DoD Law of War Manual* reinforces, is the truth that the interpretation of the law of armed conflict—specialized knowledge and not laminated formulas—will continue to be the domain of the military lawyer.

V. Conclusion

John Fabian Witt’s *Lincoln’s Code* offers military professionals and judge advocates the benefit of

²⁵ *Id.* at 6, 368.

²⁶ *Id.* at 5–10.

²⁷ WAR MANUAL, *supra* note 9, § 2.6 at 93 (stating that honor, or *chivalry*, demands a certain amount of fairness in offense and defense and a certain mutual respect between opposing forces). In U.S. law of war policy, *good faith* is used frequently. *See, e.g., id.* § 5.2.1, § 12.2 (asserting absolute *good faith* with the enemy must be observed as a rule of conduct in hostile and non-hostile relations); *see also id.* § 18.3.1 (affirming [e]ach member of the armed forces has a duty to comply with the law of war in *good faith*).

²⁸ Sean Watts, *The DoD Law of War Manual’s Return to Principles*, JUST SECURITY (June 30, 2015), <https://www.justsecurity.org/24270/dod-law-war-manuals-return-principles/>.

²⁹ WAR MANUAL § 2.1, *supra* note 9, at 77.

³⁰ Watts, *supra* note 1.

³¹ Corn, *supra* note 9; *see* WAR MANUAL, *supra* note 9, § 18.4 (stating [m]ilitary commanders also have a duty to implement and enforce the law of war and this duty extends to taking appropriate measures to control their forces and to prevent violations of the law of war).

³² Jensen, *supra* note 9; *see also* Jenks, *supra* note 9.

³³ The preface to the *DoD Law of War Manual* contains a descriptive and inclusive summary. *See* WAR MANUAL, *supra* note 9, at preface.

³⁴ This attitude is expressed in a commentary by David Glazier, *The DoD Law of War Manual: What is it Good For?*, JUST SECURITY (July 28, 2015), <https://www.justsecurity.org/24977/dod-law-war-manual-good-for/>.

³⁵ WITT, *supra* note 1, at 230–49.

³⁶ The *DoD Law of War Manual* is 1204 pages in length.

understanding America's historical experience with war. The author invites discussion about current conflicts but stops short of examining the armed conflicts of the twentieth and twenty-first centuries. Some could say this omission makes the author's work less relevant to the contemporary reader because he avoids taking a position on the law of war as interpreted in U.S. policy in the last century. But this criticism would misunderstand the author. Witt is a historian focused on revealing American history in a novel way to the reader. He does not advocate a particular doctrine or approach for the management of hostilities. But, it is clear that the author respects the leader, like Lincoln, who holds strong moral convictions but is also aware of his moral fallibility, in the Enlightenment model of warfare.³⁷ By examining history honestly, Witt hopes the law of war will survive as a forum for moral engagement in the twenty-first century.

³⁷ *Lincoln's Code Webcast*, *supra* note 22.