

**"A CONTRIBUTION BY THE UNITED STATES TO THE COMMON STOCK OF  
CIVILIZATION"**

**FRANCIS LIEBER AND GENERAL ORDERS NO. 100**

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## Dedication

To my dear friend Roozie Assadi, you are greatly missed

## CONTENTS

ACKNOWLEDGMENTS IV

INTRODUCTION 1

Chapter One.

“Progress in a Conservative Spirit”

*Francis Lieber and the Origins of General Orders No. 100* 19

Chapter Two.

“The Authoritative Declaration of Military Law”

*The Application of General Orders No. 100 in the American Civil War* 52

EPILOGUE 75

BIBLIOGRAPHY 82

## Acknowledgments

I remember the day I decided to be a history major and Washington and Lee University. I met with Dr. Barton A. Myers in his office to discuss a paper assignment from his American history survey course. What began as a conversation about the mechanics of writing a history paper, quickly turned into a long and enjoyable discussion of the topics we covered in the course up to that point. It was in Dr. Myers's Civil War history course that I discovered Francis Lieber and General Orders No. 100. With Dr. Myers's guidance, I wrote a research paper for the course on the implementation of the General Orders during the Civil War. This research ignited my passion for the study of law of war and inspired me to pursue that topic for my thesis. I thrived off of Dr. Myers passion for the study of history and sought to obtain as much of his knowledge as possible. His efforts were tireless in helping me complete my project and improve my abilities as a historian. I would like to acknowledge the tremendous impact that Dr. Myers has had on my development as a scholar and as a historian.

I would also like to acknowledge the impact Dr. J. Holt Merchant has had on my study of history. I thoroughly enjoyed Dr. Merchant's course on Thomas Jefferson and benefitted greatly from his guidance on writing history papers. Dr. Merchant was patient and willing to help me become the best writer I could be through numerous drafts and revisions.

I want to also acknowledge Richard Shelly Hartigan's work *Military Rules, Regulations, & the Code of War: Francis Lieber and the Certification of Conflict*. The work has provided me with a plethora of primary source material on Lieber and the implementation of his code. Hartigan's work pulls all of the source material on Lieber

from the U.S. War Department's *The War of the Rebellion: A Compilation of the Official records of the Union and Confederate Armies* and has allowed me to thoroughly examine Lieber's source material from that collection.

## Introduction

In 1913, Nobel Prize Laureate and U.S. Secretary of State Elihu Root addressed the American Society of International Law at its meeting in Washington D.C. He chose to give a keynote speech on the critical impact of General Orders No. 100 on the international law of war.<sup>1</sup> In his speech, Root praised both the order and its principle author, Francis Lieber. Root argued that General Orders No. 100 served as a framework for waging ethical warfare throughout the world.<sup>2</sup> He highlighted the order and Lieber's vision of what the law of war should rightfully accomplish. "But in honoring the memory of Francis Lieber," Root asserted, "we should not forget that after the surrender and the triumph came reconciliation, friendship, the restoration of a united country, and beyond all human experience, even within the lifetime of the generation which had waged the conflict, freedom from the bitterness of spirit that time cannot soften."<sup>3</sup>

Root, an influential advocate of reform of the U.S. Army during his years in office, noted that the code served as the foundation for the Brussels Conference of 1874. At that conference the Russian agent, Baron Alexander Jomini, declared that the convention on the international law of war, "... had its origin in the rules of President Lincoln [General Orders No. 100]."<sup>4</sup> The Brussels Conference, directed by Jomini, led to the 1899 and 1907 Hague Conventions, affirming Jomini's and Root's assertions that the modern conception of international law of war began in 1863 with Francis Lieber's Civil

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<sup>1</sup> Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy*, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp); Captain James G. Garner, "General Order 100 Revisited," *Military Law Review* 27 (1995): 2.

<sup>2</sup> Elihu Root, "Francis Lieber," *The American Journal of International Law* 7 (1913): 456-458.

<sup>3</sup> *Ibid.*, 456.; Francis Stanley, *St Petersburg to Plevna: Containing Interviews with leading Russian Statesmen and Generals*, (London: Richard Bentley and Son, 1878), 50. The Russian agent Baron Alexander Jomini is the son of the late military strategist Baron Antoine-Herni de Jomini.

<sup>4</sup> *Ibid.*, 457.

War code. Root concluded his speech saying, "If our Society, at once national and international, were about to choose a patron saint and the roll were to be called, my voice for one would answer 'Francis Lieber.'"<sup>5</sup>

General Orders No. 100, commonly referred to as Francis "Lieber's Code," opened a new era in the discourse on the international law of war. In the spring of 1863, Lieber fashioned a document that simultaneously promoted universal values of justice, honor, and racial equality, while implementing a set of laws that gave the Union an effective path to military victory in the Civil War.<sup>6</sup> Lieber's Code used concepts that prompted a return to peace by "admitting of all measures of destruction of life and limb of armed enemies and those whose destruction is incidentally unavoidable in the armed contests of the war," unleashing the potential for tremendous destruction of civilian and military property.<sup>7</sup> He believed that valid laws of war promoted a return to peace, and the code helped the Union achieve both widespread destruction and diplomatic negotiation.<sup>8</sup> The code's success made it the foundation for the 1899 Hague Convention and the 1949 Geneva Convention decades later.

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<sup>5</sup> Ibid., 466.

<sup>6</sup> Mark Grimsley, *The Hard Hand of War: Union Military Policy Toward Southern Civilians, 1861-1865*, (New York: Cambridge University Press, 1995), 148.; John Fabian Witt, *Lincoln's Code: The Laws of War in American History*, (New York: Free Press, 2012), 29.

<sup>7</sup> Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy*, Article 29, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>8</sup> Burrus M. Carnahan, *Lincoln on Trial: Southern Civilians and the Law of War*, (Louisville: University Press of Kentucky, 2010), 60. General David Hunter ordered the U.S. Army to burn Virginia Military Institute and Virginia Governor John Letcher's property in retaliation for Letcher's proclamation inciting citizens to engage in guerrilla warfare against Hunter's forces. On other occasions, the U.S. Army burned property or collected fines for similar offenses.; John, A. Bolles, "Why Semmes Wasn't Tried", *The Atlantic Monthly*, Volume 0030, Issue 178 (August 1872), 88. Francis Lieber argued that Captain Raphael Semmes should not be tried for, piracy, murder of civilians, violating a flag of truce, and obtaining a parole under false circumstances because the war was over and there United States could not furnish any proof of his more egregious crimes, namely the mistreatment or murder of any noncombatants.

Lieber's study of European and American military history shaped General Orders No. 100. Lieber brought his knowledge of the ideas of Napoleon Bonaparte, Emmerich de Vattel, William Blackstone, Spanish guerrilla fighters, Roman history, and his other European experiences to bear on his code.<sup>9</sup> In addition, he modeled concepts on Winfield Scott's actions in Mexico, conferred with top American military scholar Henry W. Halleck, read Theodore Dwight Woosley's *Introduction to the Study of International Law*, and studied American slavery.<sup>10</sup> Lieber brought his studies in America and Europe together to create a law of war based on international experiences in war.

Lieber wanted to create a code that was practical but also principled. In the code he laid out 157 Articles organized into sections so that commanders could easily apply it in the field. Lieber aimed these practical constraints to reach a principled goal: laws that structured warfare so that true peace could be restored as quickly as possible. His goal was not merely to help Lincoln destroy slavery, nor to provide the Union a practical means to identify different irregular combatants. As Root argued, his code helped a generation that had fought on the battlefield to live in peace after the fighting. His international experience as a scholar and a soldier gave him an understanding of the

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<sup>9</sup> Francis Lieber, "DR. LIEBER ON THE LAWS AND USAGES OF WAR.; Guerrilla War--Buccaneers--Deserters Found in the Ranks of the Hostile Enemy--Treatment of Prisoners--Release of Prisoners--Property of the Enemy: Personal Booty--Appropriation of the Enemy's Property by the Army--Pillage--Contributions or Requisitions--Destruction of the Enemy's Property--Property in General--Works of Art--Indebtedness of the Belligerents.," *New York Times*, March 4, 1862.; Witt, *Lincoln's Code*, 100.; Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy*, Article 43, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>10</sup> Burrus M. Carnahan, "The Civil War Origins of The Modern Rules of War: Francis Lieber and Lincoln's General Order No. 100", *Northern Kentucky Law Review* 39 (4), 2012: 664.; Francis Lieber, "DR. LIEBER ON THE LAWS AND USAGES OF WAR.; Guerrilla War--Buccaneers--Deserters Found in the Ranks of the Hostile Enemy--Treatment of Prisoners--Release of Prisoners--Property of the Enemy: Personal Booty--Appropriation of the Enemy's Property by the Army--Pillage--Contributions or Requisitions--Destruction of the Enemy's Property--Property in General--Works of Art--Indebtedness of the Belligerents.," *New York Times*, March 4, 1862.; Frank Freidel, "Francis Lieber, Charles Sumner, and Slavery", *The Journal of Southern History* 9 (1), 1943.



horrors of war and how best to mitigate them. General Orders No. 100 continues to be significant today because Lieber achieved his goal of renewing peace among his embattled countrymen.

Lieber tied his life closely to warfare. Lieber was born in Berlin in 1798 into a family that participated regularly in military affairs. The family's tradition of military service made a lasting impression on the young boy. His father, Frederick, served as a district service inspector for the Prussian home defense organization *Landstrum*.<sup>11</sup> The *Landstrum*, a result of the Landstrum Edict of 1813, required all Prussian citizens to join loosely organized militias to repel invaders of any type, presumably an answer to the sort of threat posed by Napoléon Bonaparte.<sup>12</sup> Lieber's first memory as a young child was of Napoleon's soldiers marching past his home in Berlin in 1806 following their victories in the Napoleonic Wars at Jena and Auerstadt in Saxony (modern Germany).<sup>13</sup> Lieber's older brothers joined the Prussian secret military following Napoleon's triumph that year.<sup>14</sup>

Lieber continued his family's military tradition when he dropped out of medical school in Berlin to fight against Napoleon in 1815, and witnessed Arthur Wellesley, First Duke of Wellington, win the Battle of Waterloo.<sup>15</sup> In Belgium, Lieber had his first taste of desperate fighting when a French volley hit him in the chest and the throat.<sup>16</sup> His injuries left him lying on the field for days after the battle. After recovering, he marched

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<sup>11</sup>John Fabian Witt, *Lincoln's Code: The Laws of War in American History*, (New York: Free Press, 2012), 519.

<sup>12</sup>Carl Schmitt, *Theory of the Partisan: Intermediate Commentary on the Concept of the Political*, (New York: Telos Press Publishing, 2007), 43.

<sup>13</sup>Witt, *Lincoln's Code*, 519.

<sup>14</sup>Ibid., 520. In addition, all three of Lieber's sons later served in the American Civil War, two for the Union, Norman and Hamilton, and one for the Confederacy, Oscar.

<sup>15</sup>Ibid., 519.

<sup>16</sup>Ibid., 520.

back to Berlin. He later wrote of his fascination with the "indelible horror" of the death and destruction he witnessed at Waterloo.<sup>17</sup> Lieber's experience in Namur, Belgium, a small village outside Waterloo, exemplified one of the main principles he would incorporate into General Orders No. 100, forty years later. Outside of Waterloo, Lieber's experience highlighted the complexity of military necessity. He defined military necessity as the need for an army to employ, yet balance, military actions that may have adverse effects on civilian populations. Lieber's experience as a soldier fostered his belief that allowing civilians to experience the rigors of war through destruction of their property and limitation of their resources was an effective means to prevent future conflict. His experience as a soldier deeply affected his Civil War code.

After the Battle of Waterloo, Lieber returned to Berlin, bearing scars of his battlefield experience, where he aimed to continue his study of war. He felt that he had lived life to the fullest, rather than cheated death, during the Waterloo campaign.<sup>18</sup> In 1816, he continued his education at a gymnasium where he became a student leader in the nationalist *Turnerschaft* movement.<sup>19</sup> The *Turnerschaft* was a Prussian national political movement dating from the early nineteenth century that combined gymnastics with patriotic sentiment that advocated a republican form of government.<sup>20</sup>

Royal Prussian authorities imprisoned Lieber for his political activities in the *Turnerschaft*, and barred him from continuing his education at a university in Berlin after his release. In 1819, he left Berlin and won his Ph.D. in mathematics from the University

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<sup>17</sup> Ibid., 523.

<sup>18</sup> Ibid., 521.

<sup>19</sup> Steven A. Samson, "Francis Lieber on the Sources of Civil Liberty," *Humanitas* IX, no. 2, 1996, <http://www.nhinet.org/samson.htm>.

<sup>20</sup> Mitchell Smith, *Baseballs, Basketballs and Matzah Balls: What Sports Can Teach Us About The Jewish Holidays...And Vice Versa*, (Bloomington: Authorhouse, 2009), 83-84.

of Jena in Prussia in 1820. During his study in Jena, he took classes in military geometry and mathematics, to further his military knowledge.<sup>21</sup> In Jena, Lieber became disenchanted by academic life, the result of the pressure from the Royal Prussian authority exerted to end his support for establishing a democratic regime in Prussia. He joined an international brigade to fight for Greek independence from the Ottoman Empire in 1821.<sup>22</sup> But was dismayed when he learned that the Greek resistance effort was poorly organized and prone to immoral behavior such as thieving and drunkenness.<sup>23</sup> Lieber left Greece and went to study under historian and diplomat Barthold Niebuhr, famous for his comprehensive, three-volume history of ancient Rome, *The History of Rome*, published in 1832.<sup>24</sup> Lieber lived with Niebuhr and studied informally under him for several months. He wanted to learn as much about military history and international politics as he could from the esteemed scholar. During his time with Niebuhr, Lieber reflected on his own experience in warfare, and specifically on the concept of military necessity.

In 1823, Royal Prussian authorities granted Lieber a pardon and allowed him to return to Berlin, but he remained under heavy suspicion for his democratic sympathies and continued association with the *Turnerschaft*.<sup>25</sup> Under pressure, Lieber left Prussia for London in 1826, and spent the summer socializing in London, attempting to gain a teaching position there.<sup>26</sup> He met philosophers John Austin, John Stuart Mill, and Jeremy Bentham, and forged connections that he hoped would allow him to remain in London.

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<sup>21</sup> Witt, *Lincoln's Code*, 528.

<sup>22</sup> *Ibid.*, 521.

<sup>23</sup> *Ibid.*, 522.

<sup>24</sup> *Britannica Online Encyclopaedia*. Rev. ed. Chicago: Encyclopaedia Britannica, 2006.  
<http://www.britannica.com/biography/Barthold-Georg-Niebuhr>

<sup>25</sup> Steven A. Samson, "Francis Lieber on the Sources of Civil Liberty," *Humanitas* IX, no. 2, 1996,  
<http://www.nhinet.org/samson.htm>.

<sup>26</sup> Witt, *Lincoln's Code*, 524.

His efforts did not yield any significant results, and he agreed to take charge of a gymnasium in Boston in 1827.<sup>27</sup>

Lieber remained in Boston, working and pursuing his intellectual passions, until 1835. His gymnasium failed only a year after he took charge, but he continued to pursue a career in the field of education. In Boston, Lieber met many notable American intellectuals: President John Quincy Adams, Supreme Court Justice Joseph Story, and young abolitionist lawyer Charles Sumner.<sup>28</sup> Perhaps the most important person Lieber met in Boston was the soldier and scholar Henry W. Halleck. Halleck would go on to become General-in-Chief of all Union forces in 1862, and appoint Lieber to lead a committee charged with drafting General Orders No. 100.<sup>29</sup> After the failure of his gymnasium, Lieber sought a new way to use his intellectual capabilities to earn a more substantial income. Between 1829 and 1833, he published the *Encyclopedia Americana* in partnership with Philadelphia printer Matthew Carey.<sup>30</sup> After the publication of the encyclopedia, Lieber attempted to use his relationships in Boston to secure a teaching post in the History Department at Harvard University. Unfortunately, his Boston affiliates were unable to help him secure a position.

In 1835, South Carolina College offered Lieber a professorship that he eagerly accepted. He moved, along with his wife and oldest son Norman, to South Carolina, and began to write prolifically on two topics. He publicly championed the cause of civil liberty in his work *On Civil Liberty and Self Government*, and studied the institution of

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<sup>27</sup> Ibid., 524.

<sup>28</sup> Ibid., 525.

<sup>29</sup> John F. Marszalek, *Commander of All Lincoln's Armies: A Life of General Henry W. Halleck*, (Cambridge: Harvard University Press, 2009), 167.

<sup>30</sup> Witt, *Lincoln's Code*, 526.

slavery.<sup>31</sup> Lieber moved to South Carolina firmly believing that the federal government did not have the authority to interfere with the right to own property in slaves. Lieber did find the institution of slavery morally repugnant. One of Lieber's most passionate Boston associates, Charles Sumner, was determined to convert Lieber into an immediate abolitionist.<sup>32</sup> To Sumner's dismay, Lieber refused to champion the immediate abolition of slavery until he had resigned from his position at South Carolina College.

Lieber ran for president of South Carolina College in 1855, but the trustees of the university refused to appoint him because a smear campaign provoked their suspicion that he admired the newly formed Republican Party.<sup>33</sup> Lieber privately admitted that he desired Republican nominee John C. Frémont to be President of the United States, but did not publicly express his admiration for the candidate. Upset by this slight, Lieber resigned his position at South Carolina College. He was dismayed by his failure to win the presidency, and he was cut from his economic dependence on an institution that defended slavery. He began to champion immediate abolition of slavery. In 1855, Lieber advocated the abolition of slavery at any political cost, even the destruction of the Union.<sup>34</sup>

After resigning from South Carolina College, Lieber returned to the North to continue his career in education. He accepted a position as professor of political science and history at Columbia College in 1857. At the school, Lieber focused his instruction on military history, public law, and constitutional history. He gave a series of lectures in

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<sup>31</sup> Frank Freidel, "Francis Lieber, Charles Sumner, and Slavery", *The Journal of Southern History* 9 (1), 1943.

<sup>32</sup> Frank Freidel, "Francis Lieber, Charles Sumner, and Slavery", *The Journal of Southern History* 9 (1), 1943.; David Herbert Donald, *Charles Sumner and the Coming of the Civil War*, (Naperville: Sourcebooks, Inc., 2009), 19.

<sup>33</sup> Freidel, "Francis Lieber, Charles Sumner, and Slavery," 90.

<sup>34</sup> *Ibid.*, 91.

1861-1862 in which he discussed the laws of war.<sup>35</sup> The lectures examined the issues of guerrilla warfare, military emancipation, and military necessity. One scholar in particular, Henry W. Halleck, took an interest in Lieber's lectures, and when the Missouri guerrilla conflict spiraled out of control in 1862, Halleck sought Lieber's advice. Coincidentally, one of Lieber's sons, Hamilton, a soldier in the 9th Illinois Infantry, was serving under Halleck. Hamilton sustained serious wounds outside of Fort Donelson, Tennessee, on February 15, 1862, and his father set out to find him.<sup>36</sup> Unsure of his son's whereabouts, he went first to Cincinnati, Ohio, and then to St. Louis, Missouri. Before Lieber found his son, he found Halleck, whom he had met in Boston nearly twenty-five years earlier. After explaining where Lieber could find his son, Halleck agreed to correspond with Lieber on guerrilla warfare. Lieber sent Halleck *Guerrilla Parties: Considered with References to the Laws and Usages of War* later that year. Halleck appreciated Lieber's work: "I have hastily read your essay and highly approve of it."<sup>37</sup> Halleck then asked Lieber to lead a committee to draft a code that applied to all areas of warfare, not just irregular combat. Deeply impressed by Lieber's erudition, Halleck ordered 5,000 copies of Lieber's work be printed and distributed throughout the army.<sup>38</sup>

Lieber wanted to create a more lasting and comprehensive statement on the law of war than his 1862 pamphlet. In November 1862, he wrote, "since the beginning of our present war, it has appeared clearer and clearer to me, that the President ought to issue a

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<sup>35</sup> Francis Lieber, "DR. LIEBER ON THE LAWS AND USAGES OF WAR.; Guerrilla War--Buccaneers--Deserters Found in the Ranks of the Hostile Enemy--Treatment of Prisoners--Release of Prisoners--Property of the Enemy: Personal Booty--Appropriation of the Enemy's Property by the Army--Pillage--Contributions or Requisitions--Destruction of the Enemy's Property--Property in General--Works of Art--Indebtedness of the Belligerents.," *New York Times*, March 4, 1862.

<sup>36</sup> Witt, *Lincoln's Code*, 560.

<sup>37</sup> Richard Shelly Hartigan, *Military Rules, Regulations, & the Code of War: Francis Lieber and the Certification of Conflict*, (New Brunswick: Transaction Publishers, 2011), 78.

<sup>38</sup> Mark Grimsley, *The Hard Hand of War: Union Military Policy Toward Southern Civilians, 1861-1865*, (New York: Cambridge University Press, 1995), 148.

set of rules and definitions providing for the most urgent issues under the law and usages of war, and on which our Articles of War are silent."<sup>39</sup> Lieber referred to the 1806 Articles of War which served as the American standard for conduct in warfare in 1862.<sup>40</sup> With the help of General-in-Chief Henry Halleck, Secretary of War Edwin Stanton, Major Generals Ethan Allen Hitchcock, George Cadwalader, George L. Hartsuff, and Brigadier General John Henry Martindale, Lieber drafted General Orders No. 100.<sup>41</sup> Several historians have examined the creation and implementation of General Orders No. 100.

John Fabian Witt closely examines the history of American intellectual development of the law of war in his work *Lincoln's Code: The Laws of War in American History*. Witt argues that General Orders No. 100 is the most influential American work on the laws of war, and that substantial American discourse on the laws of war predated the document.<sup>42</sup> Despite evidence that an American discussion on the law of war preceded his code, Lieber also drew from his European experience and ideas contrary to the current American beliefs. It is evident from General Orders No. 100 itself, Lieber's biography, and Lieber's earlier writing that he had a more nuanced view of warfare that included elements outside of established American discourse.<sup>43</sup>

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<sup>39</sup> Ibid., 149.

<sup>40</sup> Adjutant and Inspector General's Office, *Articles of War: Military Laws and Rules and Regulations for the Army of The United States* (E. De Krafft, Washington, 1806).

<https://archive.org/details/articlesofwarmil00adam>

<sup>41</sup> Richard Shelly Hartigan, *Military Rules, Regulations, & the Code of War: Francis Lieber and the Certification of Conflict*, (New Brunswick: Transaction Publishers, 2011), 14.

<sup>42</sup> Witt, *Lincoln's Code*, 1-20.

<sup>43</sup> Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy*, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp); Root, "Francis Lieber," 459-466.; Francis Lieber, "DR. LIEBER ON THE LAWS AND USAGES OF WAR.; Guerrilla War--Buccaneers--Deserters Found in the Ranks of the Hostile Enemy--Treatment of Prisoners--Release of Prisoners--Property of the Enemy: Personal Booty--Appropriation of the Enemy's Property by the Army--Pillage--Contributions or Requisitions--Destruction of the Enemy's Property--Property in General--Works of Art--Indebtedness of

Witt further asserts that President Abraham Lincoln's need to assert the authority of the army to emancipate and protect former slaves and freemen in the South was the reason for the mass production and distribution of Lieber's Code. He argues, "Historians and international lawyers who discuss General Orders No. 100 usually call the order Lieber's code after its principal drafter. But once we see the Union's instructions as arising out of the crucible of slavery, the order is better thought of as Lincoln's. For it was Lincoln's Emancipation Proclamation that required its production and sent it out into the world."<sup>44</sup> Conversely, Lieber had expressed his desire to write the code before Lincoln issued the final Emancipation Proclamation on January 1, 1863. In August 1861 he wrote, "I desire to write a little book on the Law and Usages of War."<sup>45</sup> In 1862, he again expressed his desire to write on issues that the 1806 Articles of War was silent about; slavery was only one of many. While emancipation was an issue that needed clarification in the law of war, this determination alone does not explain why Lieber drafted the rest of General Orders No. 100. He could have written a pamphlet on slavery as he had for guerrilla warfare 1862. Instead, Lieber went beyond Lincoln's need for clarification and reinforcement on the question of emancipation, and drafted a code that became the intellectual foundation of the Hague Convention and Geneva Conventions in the 20th century.<sup>46</sup>

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the Belligerents.," *New York Times*, March 4, 1862.; Richard Shelly Hartigan, *Military Rules, Regulations, & the Code of War: Francis Lieber and the Certification of Conflict*, (New Brunswick: Transaction Publishers, 2011).

<sup>44</sup> Witt, *Lincoln's Code*, 43.

<sup>45</sup> Richard Shelly Hartigan, *Military Rules, Regulations, & the Code of War: Francis Lieber and the Certification of Conflict*, (New Brunswick: Transaction Publishers, 2011), 2.

<sup>46</sup> Elihu Root, "Francis Lieber," *The American Journal of International Law* 7 (1913): 456-458. Francis Stanley, *St Petersburg to Plevna: Containing Interviews with leading Russian Statesmen and Generals*, (London: Richard Bentley and Son, 1878), 50.



Lieber had a larger motivation for his creation of General Orders No. 100 than simply asserting military authority under the law of war to carry out emancipation. He wanted to create a set of practical laws that encouraged a return to peace, which he expected the law of war to accomplish. The 1806 Articles of War, that the U.S. Army used until Lieber's Code was published and continued to use until the early twentieth century, does not discuss, "guerrilla," "civilian," or "slave".<sup>47</sup> Lieber said himself that there were many important issues on which these articles were silent. Guerrilla warfare plagued both the Union and Confederate War Departments throughout the war. Union Generals like William Tecumseh Sherman sought to bring the destruction of property and limitation of resources to bear on civilian populations that were aiding enemy belligerents, and to do it without damaging the Union's ability to reach a peace settlement with the Confederacy.<sup>48</sup> The War Department needed instructions on employing Confederate prisoners of war and coping with Confederate treatment of African American soldiers. Officers encountered three major difficulties in the field from 1863 to 1865 that were not addressed in the 1806 Articles of War. These new topics were extremely controversial in American debates on the law of war. Rather than answer only the slavery question, Lieber sought to promote a new understanding of law in warfare altogether.

The views on slavery Lieber held throughout his life were highly influential on his writing of the code's portions on slavery. If, as Witt argues, it truly was Lincoln's Code, it is apparent from Lieber's correspondence from before the Civil War that the

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<sup>47</sup> Adjutant and Inspector General's Office, *Articles of War: Military Laws and Rules and Regulations for the Army of The United States* (E. De Krafft, Washington, 1806).

<https://archive.org/details/articlesofwarmil00adam>

<sup>48</sup> John F. Marszalek, *Sherman: A Soldier's Passion for Order*, (Carbondale: Southern Illinois University Press, 1993); Witt, *Lincoln's Code*, 27.

code's views on slavery were as much Lieber's as they were Lincoln's. Frank Freidel's "Lieber, Charles Sumner, and Slavery" analyzes this area of Lieber's personal ideology, but Freidel also details Lieber's intellectual evolution on the institution of slavery and its role in American society. Lieber was a professed moderate on the issue of slavery at the time of his acceptance of his position at South Carolina in 1835. Freidel argues, however, that what was most important to Lieber were civil liberties, "protection or checks against undue interference, whether this be from individuals, from masses, or from government."<sup>49</sup>

Lieber presented his views on slavery in his 1835 work, *The Stranger in America*, in which he revealed his disdain for the institution. In the work, Lieber recalled that "[his] scientific study of Negroes confined at Sing Sing Penitentiary proved to him that they were little inferior to whites either physically or mentally."<sup>50</sup> Because of their equality in of intellect, physical stature, and political capacity, Lieber argued, African Americans were entitled to political equality. Freidel discovered that Lieber kept a scrapbook on slavery that showed that he followed lawsuits involving slaves and former slaves. In his diary, Lieber also kept newspaper clippings and his own written reflections on what he called "this nasty, dirty, selfish institution."<sup>51</sup> Lieber's hatred of slavery permeated his scrapbook, and, though he did not publicly attack slavery, he did publish his belief that African Americans were political equals more than two decades before the Civil War. It was no surprise that Lieber attacked slavery by asserting military authority. From this viewpoint, the code's articles on slavery follow logically from Lieber's own views and

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<sup>49</sup> Frank Freidel, "Francis Lieber, Charles Sumner, and Slavery", *The Journal of Southern History* 9 (1), 1943: 78.

<sup>50</sup> *Ibid.*, 80.

<sup>51</sup> *Ibid.*, 82.

experiences. Similarly, Lieber's study of guerrilla warfare translated directly into to the code's articles on guerrilla parties.

Lieber's breadth of knowledge of guerrilla warfare is apparent from his 1862 pamphlet, *Guerrilla Parties Considered with Reference to the Laws and Usages of War*. Burrus M. Carnahan has uncovered the origins of this pamphlet and the possible influences on Lieber's thought on the issue.<sup>52</sup> The pamphlet presented a range of behaviors such as the use of uniforms and proximity to enemy combatants to demonstrate how the law of war treated irregular combatants. Lieber created a spectrum for identifying behaviors. On one end of a spectrum he identified "Partisans" and on the other end "Pirates," and discussed behaviors such as rise *en masse* falling somewhere in the middle. In analyzing the convoluted middle identifications, Lieber focused on the practices irregular combatants undertook and the men who constituted an irregular fighting force. Carnahan and other scholars such as Richard Shelly Hartigan who have written about the pamphlet, fall short in analyzing Lieber's methodology in the pamphlet and the analysis he employed to create the categories.<sup>53</sup> Instead they focus heavily on practical explanations of what Civil War soldiers fit into each category. Lieber's thoughts on irregular warfare were deeply rooted in the European experience; he often cited examples taken from Napoleonic warfare.<sup>54</sup> But Lieber also incorporated his own

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<sup>52</sup> Burrus M. Carnahan, *Lincoln on Trial: Southern Civilians and the Law of War*, (Louisville: University Press of Kentucky, 2010).; Burrus M. Carnahan, "The Civil War Origins of The Modern Rules of War: Francis Lieber and Lincoln's General Order No. 100", *Northern Kentucky Law Review* 39 (4), 2012.

<sup>53</sup> Burrus M. Carnahan, "The Civil War Origins of The Modern Rules of War: Francis Lieber and Lincoln's General Order No. 100", *Northern Kentucky Law Review* 39 (4), 2012.; Richard Shelly Hartigan, *Military Rules, Regulations, & the Code of War: Francis Lieber and the Certification of Conflict*, (New Brunswick: Transaction Publishers, 2011).

<sup>54</sup> Francis Lieber, "DR. LIEBER ON THE LAWS AND USAGES OF WAR.; Guerrilla War--Buccaneers--Deserters Found in the Ranks of the Hostile Enemy--Treatment of Prisoners--Release of Prisoners--Property of the Enemy: Personal Booty--Appropriation of the Enemy's Property by the Army--Pillage--Contributions or Requisitions--Destruction of the Enemy's Property--Property in General--Works of Art--

philosophical viewpoints on what was acceptable in the realm of irregular combat into his work. Lieber's arguments demonstrated the significant contribution he made to the understanding of how to regulate and combat irregular warfare. Carnahan demonstrates that Lieber incorporated the mechanisms he had fashioned in the pamphlet to identify and classify different of irregular combatants into his code. Lieber's success in identifying irregular combatants helped officers distinguish peaceful civilian populations in enemy territory. Under Lieber's Code, even peaceful civilians, could experience the loss of property and other hardships if it was militarily necessary.

Lieber's Code as it related to civilian populations in enemy territory demonstrated his philosophy of "sharp war".<sup>55</sup> Mark Grimsley in *The Hard Hand of War: Union Military Policy Toward Southern Civilians* captured this aspect of the code: "Lieber's Code was thoroughly dedicated to providing the ethical justification for a war aimed at the destruction of the Confederacy".<sup>56</sup> Grimsley agrees that the code incorporated Lincoln's need for clarification of emancipation and the ideas that Lieber had shared with Halleck on guerrilla conflict, but insists that "significant portions discussed the status of enemy civilians and property. At the core of this discussion lay Lieber's discussion of military necessity, 'those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war'".<sup>57</sup> It is difficult to discern the exact concept of military necessity that Lieber held when he was writing the

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Indebtedness of the Belligerents.," *New York Times*, March 4, 1862.; Francis Lieber, *Guerrilla Parties: Considered With Reference to the Laws and Usages of War*, (New York: D. Van Nostrand, 1862).

<sup>55</sup> Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy, Article 29*, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>56</sup> Mark Grimsley, *The Hard Hand of War: Union Military Policy Toward Southern Civilians, 1861-1865*, (New York: Cambridge University Press, 1995), 149.

<sup>57</sup> *Ibid.*, 150.

code. To understand what Lieber meant by military necessity, it is necessary to look more deeply at the origins and implementation of General Orders No. 100.

Chapter one of this thesis describes the origins of General Orders No. 100 in Francis Lieber's life as a soldier and a scholar, his philosophy, and his political ideology. Lieber's rich knowledge of the European law of war shaped his conception of the law of war. Lieber did not, however, wholly subscribe to the European traditions he had learned from his studies as a teenager, his education in Jena, and his study under Niebuhr. In America, he developed strong views on racial equality that transcended European tradition, and formed ideas on the status of irregular combatants that ran contrary to common European understandings.<sup>58</sup>

Lieber's religion--he was an Episcopalian--also influenced his idea of justice in warfare. He believed that all men were accountable to their fellow man and to God, and this belief colored his conception of military necessity. Lieber believed that all men were responsible to God to resolve their differences effectively and return to a state of peace as soon as possible. Lieber's Code permitted targeted destruction of civilian property and resources to force men who engaged in war without sufficient cause to reconsider their actions. If civilians and military personnel understood the grave cost of war, Lieber believed, they would be more inclined to avoid future wars. This conception of the law of war allowed Lieber to draft a code with the goal of destroying the economic and military resources of a slaveholding republic. On the other hand, Lieber forbade measures of torture, cruelty, and deception. He argued that these measures disproportionately delayed

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<sup>58</sup> Richard Shelly Hartigan, *Military Rules, Regulations, & the Code of War: Francis Lieber and the Certification of Conflict*, (New Brunswick: Transaction Publishers, 2011), 34-35.

reconciliation, especially compared to their strategic utility.<sup>59</sup> These actions provided little military benefit gained in their use. Both junior officers and the President of the United States implemented Lieber's Code to secure a Union victory and a lasting peace.

Chapter two of this thesis examines the implementation of General Orders No. 100 by the Union Army between 1863 and 1865. In most cases, the order gave officers in the field the power to apply the code as they saw fit. In some instances, officers even used the code to reverse decisions made by their commanding officers. Soldiers often applied the code with little or no consultation with officials in Washington. The Confederate response to this authoritative declaration of military law revealed the impact of the code on the enemy and his tactics. Confederate officials agreed that armies should prosecute war with the goal of returning to peace and avoiding civilian casualties. Lieber's Code provided for the emancipation of slaves, and so the Confederates disagreed with the very nature of warfare Lieber's Code promoted. Confederates argued that Lieber had discarded the laws of civilized warfare by encouraging slave insurrection.<sup>60</sup>

Lieber's response to the final draft of the code reflected his beliefs about how officers in the Union Army should implement it and the significance of the code. When a situation in the field was unclear or complex, Lieber corresponded with officers in the field to answer their questions of implementation. Lieber answered questions on the use of prisoner of war, for example. Evidence of officers reaching out to Lieber on their own prerogative further revealed that numerous officers in the field were concerned about the

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<sup>59</sup> Francis Lieber, "The Law and Usages of War.: Continuation of the Lectures of Francis Lieber, LL.D., Before the Columbia College Law School." *New York Times*, January 13, 1862.

<sup>60</sup> Richard Shelly Hartigan, *Military Rules, Regulations, & the Code of War: Francis Lieber and the Certification of Conflict*, (New Brunswick: Transaction Publishers, 2011), 125-126.

proper implementation of the code. In responding to officers inquiries Lieber always held to his critical principle, promoting a return to peace.

General Orders No. 100 became the foundation for modern secular law of war following the Civil War. Lieber envisioned that his code would outlast the Civil War, but he did not hesitate to tailor it to suit the Union war aims. General Orders No. 100 was an effective guide for warfare aimed at the destruction of the Confederate war effort, but ensured that the destruction would not damage reconciliation disproportionately. Lieber concluded that establishing peace was the goal of the law of war. The code aimed to achieve victory through allowing "sharp war" against the Confederacy, it also restrained the same "sharp war" from breaking of good faith because the ultimate goal of the war was not mere destruction. "To save the country," Lieber argued, "is paramount to all other considerations".<sup>61</sup> Regulating warfare so that the warring parties could conduct a lasting peace after the end of hostilities was Lieber's primary goal in promulgating his code, and it is one that remains the imperative of the contemporary law of war.

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<sup>61</sup> Witt, *Lincoln's Code*, 28.

Progress in a Conservative Spirit: The Origins of General Orders 100

Francis Lieber's study of the laws of war began during his career as a soldier that culminated before of the battle of Waterloo in 1815. After days of hard marching and small rations, Lieber approached a Belgian peasant outside the village of Namur and demanded that he give him some bread.<sup>1</sup> The peasant initially refused, and Lieber threatened violence because the bread was a military necessity: “I told my comrade to hold him while I would seem to prepare to shoot him.”<sup>2</sup> After Lieber’s threat, the peasant relinquished the bread. Days later, Lieber was gravely wounded in the neck and chest outside at Waterloo, and he lay in agonizing pain on the field for a large portion of the battle. Lieber felt the consequences of military necessity when “the local peasants had their revenge, stealing his watch, his money, and his clothes, and aggravating his wounds.”<sup>3</sup> Lieber's actions revealed that he believed it was permissible to steal bread from civilians when the army had none, but he also understood the consequences of the peasants' retaliation for the losses they suffered. Lieber believed that if the Prussian army needed bread to win the battle of Waterloo, the army was justified in taking it from civilians.<sup>4</sup> Lieber's experience as a soldier colored the rest of his career as a writer, professor, and the principle author of General Orders No. 100.

General Orders No. 100 is a significant document in American and international military history. It reflects Lieber’s ideas on the how best to limit warfare through the

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<sup>1</sup> John Fabian Witt, *Lincoln's Code: The Laws of War in American History*, (New York: Free Press, 2012), 523.

<sup>2</sup> *Ibid.*, 523.

<sup>3</sup> *Ibid.*, 523.

<sup>4</sup> Witt, *Lincoln's Code*, 522.



implementation of laws of war, and reflects his efforts to draft laws of war that would allow the Union to wage war in an efficient and effective manner. Lieber's Code contributed significantly to the American discourse in areas where there was little precedent. The American understanding of the law of war in regard to slavery, guerrilla warfare, and military necessity was distinctly shaped by Lieber's Code. His knowledge of European warfare, his political philosophy, and his determination to write a code that would help the Union win the Civil War significantly shaped the style and spirit of the General Orders.

After he migrated to America in 1827, Lieber continued his study of warfare and ingratiated himself with American intellectual elites. He met notable Boston intellectuals and continued his career in education until he was offered a position at South Carolina College in 1835.<sup>5</sup> He felt out of place in South Carolina and longed to return to the North. He got that opportunity in 1857 when he was offered a professorship at Columbia College. His study of the law of war culminated in a series of lectures he gave in 1861-1862 at Columbia College. The lectures were the summation of the years of research he had undertaken from his time at Waterloo. In his lectures, he spoke extensively on the rights of a civilian population under the authority of an occupying army, and espoused ideas of military necessity and retaliation that came to bear heavily on his writing of the code. He argued that military necessity encompassed all but a few practices that were deceptive or cruel. In reference to civilian property he said, "This may be seized and taken away; everything that may serve the enemy or the victor; but not destruction".<sup>6</sup>

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<sup>5</sup> Frank Freidel, "Francis Lieber, Charles Sumner, and Slavery", *The Journal of Southern History* 9 (1), 1943: 75.

<sup>6</sup> Francis Lieber, "DR. LIEBER ON THE LAWS AND USAGES OF WAR.; Guerrilla War--Buccaneers--Deserters Found in the Ranks of the Hostile Enemy--Treatment of Prisoners--Release of Prisoners--

Lieber acknowledged that enemies must surrender personal property if it would help the army end the engagement more efficiently. Lieber gave historical examples in his lectures that provided much insight into his principle of military necessity.

In his lectures, Lieber used General Winfield Scott's 1847 campaign to Mexico City as an example of military necessity properly executed. Scott exemplified the balance that Lieber sought between the need for an occupying army to be efficient in procuring the resources it needed to win a war and preventing the imposition of undue burdens on the civilian population:

Take the case of Gen. SCOTT in Mexico -- he did not take private property, if he could help it. Still, if I have a regiment of cavalry, I must have hay for them, and then bonds are given for it, which may not be worth much, still an acknowledgment is made. It should be acknowledged by all publicists that private property does not pass into the hands of the enemy, although he will exercise martial law over it, if it be dangerous or injurious to him.<sup>7</sup>

General Scott achieved the balance Lieber sought when he applied his principle of military necessity. Scott prosecuted the war using the most efficient means possible, taking from his enemy supplies he needed to continue the war in an organized and efficient manner. On the other hand, Scott did acknowledge the rights of enemy citizens and required the army to compensate them for their lost property. Lieber used Scott's campaign as a model for his conception of military necessity. It was a model that allowed the army to seize property to engage the enemy efficiently and weaken his resources, but without the wanton destruction of civilian property.

Lieber's Code as it related to civilians allowed all but a few practices of warfare, so long as they were militarily necessary. In his lectures he explicitly denounced pillage

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Property of the Enemy: Personal Booty--Appropriation of the Enemy's Property by the Army--Pillage--Contributions or Requisitions--Destruction of the Enemy's Property--Property in General--Works of Art--Indebtedness of the Belligerents.," *New York Times*, March 4, 1862.

<sup>7</sup> Ibid.

and wanton destruction because of the demoralizing effects these practices had on both the conquering army and the occupied civilians. Lieber cited the example of the British during the War of 1812 “who destroyed, for mere destruction's sake, the Capital in 1812. If it had been a fortress...the case would have been different. All victorious Generals should protect the property that might be exposed to destruction; it brutalizes the army, and impoverishes society by which it inflicts unnecessary suffering.”<sup>8</sup> The contrast between Lieber’s denunciation of the British and his argument that anything may be seized if it helps the enemy, reveals the convoluted nature of military necessity in Lieber's lectures. He later added clarifications in General Orders No. 100 as a result of this uncertainty.

A closer look at the practices that he explicitly permitted or forbade adds clarity to his principle. Lieber permitted all forms of destruction that did not involve deception or the breaking of universally accepted laws of war. Universally accepted laws of war, according to Lieber, came to light in historical examples through which principles could be tested for their universality through time and space. In Article 15 of the code, Lieber explained the extent to which the principle of military necessity allowed the destruction of enemy property and the infliction of suffering on enemy civilians. He provided parameters within which the Union Army could inflict damage on enemy and civilian populations:

Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such

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<sup>8</sup> Ibid.

deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.<sup>9</sup>

Lieber allowed commanders to use discretion to decide what was militarily necessary. He forbade only practices that were in bad faith, practices that broke a good faith agreement between the two warring sides. He also argued that the commander was responsible to society and God for his actions. In his public essays and private letters Lieber's religious faith influenced his moral arguments in his code, and his emphasis on the historical and moral importance of religion.

Lewis Reifsneider Harley, an early biographer of Lieber, wrote about his religious beliefs. Harley noted, "No one has ever expressed a deeper reverence for the Christian religion than [Francis] Lieber".<sup>10</sup> Harley asserted that Lieber had lived the life of an exemplary Christian, and pointed to Lieber's defense of religion in his private and public writings. Harley's most compelling evidence was Lieber's essay titled "The Necessity of Religious Instruction in Colleges". Lieber wrote, "Christianity, considered purely as a branch of knowledge, constitutes an indispensable element of liberal education."<sup>11</sup> Lieber emphasized that it was crucial to impart the moral elements of Christianity to the youth of America, but he also emphasized the historical significance of Christianity. Lieber believed that religion was pertinent to the development of moral character: "Without a comprehensive knowledge of Christianity, and as a matter of course, the Bible, an

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<sup>9</sup> Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy*, Article 15, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>10</sup> Lewis Reifsneider Harley, *Francis Lieber: His Life, Times, and Political Philosophy*, (New York: Columbia University Press, 1899) 181.

<sup>11</sup> Francis Lieber, *The Miscellaneous Writings of Francis Lieber*, (Philadelphia: J.B. Lippincott & Co., 1881) 525.

institution for the education of youth, of this country, would be as defective as a similar one in the [Middle] East, which should omit imparting proper knowledge of the Koran".<sup>12</sup>

Lieber argued that both Islam and Christianity were essential to their respective cultures:

"It is the office of all education to cultivate in the young whatever constitutes essential humanity... and if true religion not be imparted he will become the dupe of a bad one, of superstitions, fanaticism, or enervating indifference."<sup>13</sup> Lieber believed that religion provided a moral foundation for society. He was tolerant of other world religions, believing that they could share distinct yet acceptable views, just like two professors could argue over the historical significance of a great military victory.<sup>14</sup> His conception of Christian morality, including the idea that all men were responsible to God for their actions, shaped the writing of the code. His belief in man's accountability to his fellow humans and to God impacted his conception of military necessity.

In his 1861 lectures at Columbia Lieber forbade cruelty and deception in the exercise of military necessity because it damaged the restoration of peace. Lieber included a concise definition of cruelty: "Cruelty consists in inflicting pain for the sake of the pain, to satisfy the lust of revenge, or a fiendish hatred".<sup>15</sup> He banned the use of torture and similar forms of cruelty because they were deceptive and made peace unnecessarily difficult to achieve: "In general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult".<sup>16</sup> Lieber believed that the ultimate goal of the law of war was to mitigate the horrors of war so that peace

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<sup>12</sup> Ibid., 526.

<sup>13</sup> Ibid., 527.

<sup>14</sup> Ibid., 528.

<sup>15</sup> Francis Lieber, "The Laws and Usages of War.; Continuation of the Lectures of Francis Lieber, LL.D., Before the Columbia College Law School.," *New York Times*, January 13, 1862.

<sup>16</sup> Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy*, Article 16, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

could be more easily achieved and sustained: "how can we carry on transactions with the enemy if we allow the principle of treachery to be acted upon. How could we conclude peace -- a lasting, honest peace? On the ground of expediency, it would be better to abstain from treachery."<sup>17</sup> Military necessity, Lieber argued, permitted all means of waging war that were not cruel for the sake of cruelty and were not deceptions or in bad faith. Lieber did not object to deception on the battlefield in the movement of armies during battles, but he rejected measures that broke agreements made during negotiation or by universal understanding. Lieber saw his principle put into effect during General William Tecumseh Sherman's Atlanta Campaign in 1864 when Sherman imposed the burden of war on enemy civilians as well as armies.

Lieber introduced another principle in his code that was, in many ways, more novel than his articulation of military necessity: the right of military emancipation. Lieber faced a significant challenge in writing the sections of the code that discussed on slavery. The American law of war discourse held that slaves were property that was safe from the rigors of war. In the Revolutionary War and during the War of 1812, American military leaders and diplomats had argued for protection of slave property. They also argued that slaves must be returned to their masters after the end of hostilities. After the War of 1812 American diplomats secured £250,000 sterling as reparations for the seizure of slave property.<sup>18</sup> Lieber rejected the notion that slavery was protected under the law of war, in part because he hated the institution. He was determined to draft a code that gave military

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<sup>17</sup> Francis Lieber, "DR. LIEBER ON THE LAWS AND USAGES OF WAR.; Guerrilla War--Buccaneers--Deserters Found in the Ranks of the Hostile Enemy--Treatment of Prisoners--Release of Prisoners--Property of the Enemy: Personal Booty--Appropriation of the Enemy's Property by the Army--Pillage--Contributions or Requisitions--Destruction of the Enemy's Property--Property in General--Works of Art--Indebtedness of the Belligerents," *New York Times*, March 4, 1862.

<sup>18</sup> Witt, *Lincoln's Code*, 223.

support for the Emancipation Proclamation. He needed to impart this authority because during the Revolutionary War and the War of 1812 American diplomats had argued that slave property was protected under the laws of war.<sup>19</sup> Emancipated slaves fought for the Union against the Confederacy, and Lieber had to reconcile the Confederate view that African American soldiers were not lawful combatants with the Union policy that the law of nations did not distinguish race. Lieber's Code reflected his hatred of slavery and Lincoln's need for military authority to enforce the Emancipation Proclamation.

Before Lieber's Code, most American officers saw slaves as a form property. They agreed with legal historian Emmerich de Vattel's writing the issue in his work *The Law of Nations*:

Among the Romans, indeed, slaves were not treated like other movable property; they, by the right of postliminium, were restored to their masters, even when the rest of the booty was detained. The reason of this is evident: for, as it was at all times easy to recognise a slave, and ascertain to whom he belonged, the owner, still entertaining hopes of recovering him, was not supposed to have relinquished his right.<sup>20</sup>

Vattel argued that the international law of war treated slaves as property, and they must be returned to their owners after the end of hostilities.<sup>21</sup> At the same time, Vattel argued, "I suppose the justice of the war to be problematical, and that it is not an insupportable oppression which he opposes: for if this governor maintains a cause that is evidently just—if he fights to save his country from slavery—his misfortune will be pitied; and

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<sup>19</sup> *Ibid.*, 223.

<sup>20</sup> Emmerich de Vattel, edited by Béla Kaposy and Richard Whitmore, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, (Indianapolis: Liberty Fund, 2008). [http://oll.libertyfund.org/titles/2246#Vattel\\_1519\\_1233](http://oll.libertyfund.org/titles/2246#Vattel_1519_1233)

<sup>21</sup> Emmerich de Vattel, edited by Béla Kaposy and Richard Whitmore, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, (Indianapolis: Liberty Fund, 2008). [http://oll.libertyfund.org/titles/2246#Vattel\\_1519\\_1233](http://oll.libertyfund.org/titles/2246#Vattel_1519_1233)

every man of spirit will applaud him for gallantly persevering to the last extremity, and determining to die free”.<sup>22</sup> Vattel argued that slaves were viewed as property under the laws of war, and therefore subject to being returned to their owners after the end of hostilities. But Vattel also viewed the abolition of slavery as a moral justification for war, and so left room for interpretation of the status of slavery under the law of war. The American understanding that Lieber had to overcome in his code was rooted in Vattel’s argument that slaves were property and had to be returned after war. Vattel’s contradiction--destruction of slavery was a moral justification for violence, but slave property was protected under law of war--bore heavily on Lieber’s writing of the code’s passages on slavery.

George Washington carried Vattel's work throughout the Revolutionary War and read Vattel’s passages on slavery. In 1775, the British Earl of Dunmore asserted that “All indentured Servants, Negroes, or others” owned by Patriots were free if they were “able and willing to bear Arms” for the British.<sup>23</sup> This proclamation fostered a widespread fear of a domestic slave insurrection. Thomas Jefferson charged in the Declaration of Independence that the king had “excited domestic insurrections amongst us,” and wrote in the Virginia Constitution that the British had incited, “our negroes to rise in arms among us”.<sup>24</sup> The Founding Fathers believed that the law of war protected slaves from the rigors of war.<sup>25</sup>

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<sup>22</sup> Ibid.

<sup>23</sup> John Fabian Witt, *Lincoln's Code: The Laws of War in American History*, (New York: Free Press, 2012), 95.

<sup>24</sup> Ibid., 103.

<sup>25</sup> Alan Taylor, *The Internal Enemy: Slavery and War in Virginia 1772-1832*, (New York: W.W. Norton Company, 2013) 29. Jefferson and Madison were able to recover some of their slaves after the war, while Washington, Lee, Henry, Mason and others sought to persuade the Patriot public of the crime against the law of war committed by the British.



The American delegation that negotiated the 1783 Treaty of Paris argued that the British had violated the law of war when Lord Earl of Dunmore issued his 1775 proclamation.<sup>26</sup> Dunmore's proclamation had encouraged slaves to run away from their masters and to join the British forces in exchange for a guarantee of their freedom. The treaty required British armed forces to leave without "carrying away any Negroes or other property of the American inhabitants".<sup>27</sup> The British nevertheless took 3,000 slaves, and Washington, Jefferson, and other prominent statesmen joined in the call for compensation for their loss.<sup>28</sup> In 1794, John Jay failed in his efforts to secure compensation for the Americans' lost property in slaves in the Jay Treaty. Many American planters shared Washington's and Jefferson's sentiments. They were dismayed by Jay's failure, and were determined to prevent such a loss in future conflicts.<sup>29</sup>

The War of 1812 presented another challenge to the American understanding of slavery and the law of war. In the spring of 1813, British Rear Admiral George Cockburn raided towns along the upper Chesapeake Bay and in defiance of his orders and the American understanding of the law of war liberated hundreds of slaves.<sup>30</sup> The Southern press responded by publishing articles that slaves who joined Cockburn were being shipped off to harsh conditions in the West Indies.<sup>31</sup> In 1814, Vice Admiral Sir Alexander Cochrane proclaimed that all slaves who came to the British lines were to travel, "as free settlers to the British possessions in North America or the West Indies".<sup>32</sup> An estimated 3,000 to 5,000 slaves escaped during the War of 1812 and enlisted in the Colonial

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<sup>26</sup> Witt, *Lincoln's Code*, 224.

<sup>27</sup> Witt, *Lincoln's Code*, 223.

<sup>28</sup> *Ibid.*, 223.

<sup>29</sup> Taylor, *The Internal Enemy*, 13-55.

<sup>30</sup> Witt, *Lincoln's Code*, 223-224. Taylor, *The Internal Enemy*, 178-192, 331-336.

<sup>31</sup> Witt, *Lincoln's Code*, 225.

<sup>32</sup> *Ibid.*, 229.

Marines.<sup>33</sup> Many Americans viewed this practice as illegal even though the 1806 Articles of War made no mention of “slaves,” and forbid only the waste or destruction of enemy property.<sup>34</sup> Regardless, following the War of 1812 American statesmen sought compensation for their lost property in slaves.

At the conclusion of the war, the American delegation to the Treaty of Ghent was eager to exact reparations for lost property in slaves. John Quincy Adams, the leading American representative in Ghent, made the return of slaves, or the payment of financial compensation, a primary condition of the Treaty. “Our object,” Adams explained, “was the restoration of all property, including slaves, which, by the usages of war among civilized nations, ought not to have been taken”.<sup>35</sup> Adams, unlike Jay in 1794, was successful in extracting £250,000 sterling (a little more than \$1.2 million in 1826 dollars) as reparations for property confiscated by the British.<sup>36</sup> The success of American diplomats following the War of 1812 established that the American understanding of the law of war sanctioned confiscation of property, but did not permit the liberation of slaves.

Abraham Lincoln was aware of the American understanding of the law of war and the rights of slave property in war, and needed a defense of his Emancipation Proclamation by an expert on the law of war. The Emancipation Proclamation sharply departed from the Union's protection of slavery until 1862, and replaced it with Lincoln's argument that slave property could be legally confiscated. “Civilized belligerents,” Lincoln argued in 1863, “do all in their power to help themselves, or hurt the enemy,

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<sup>33</sup> Ibid., 230.

<sup>34</sup> Adjutant and Inspector General's Office, *Articles of War: Military Laws and Rules and Regulations for the Army of The United States*. E. De Krafft, Washington, 1806.  
<https://archive.org/details/articlesofwarmil00adam>

<sup>35</sup> Witt, *Lincoln's Code*, 231.

<sup>36</sup> Ibid., 236.

except a few things regarded as barbarous or cruel".<sup>37</sup> He insisted, "To whatever extent the Negroes should cease helping the enemy, to that extent it weakened the enemy in his resistance" the principle of military necessity supported his Emancipation Proclamation.<sup>38</sup> To succeed in his argument Lincoln had to overcome historical precedent. Both Dunmore and Cochrane's proclamations supported Lincoln's definition. The intellectual Francis Lieber was up to the task.

Lieber's political ideology was Whiggish, but he objected to partisan politics and did not publicly identify with any political party. He criticized both the Whig and Democratic parties harshly. In a letter to an acquaintance he wrote, "I still say, and with much more conviction every day, that we want a new party, a country party, repudiating Whig and Democrat, or rather absorbing both, a party with this programme--Free trade -- that is, exchange as God wills it; Rational views on slavery; No fanaticism one way or the other...progress in a conservative spirit".<sup>39</sup> Lieber's political ideology focused on civil liberty. He wrote a book, *On Civil Liberty and Self Government*, which laid out that ideology. In his "Notes and Fallacies of American Protectionists," he advocated free trade and opposed tariff legislation.<sup>40</sup> He argued that protective tariffs were "despotic and often tyrannical in the extreme, and incompatible with civil liberty".<sup>41</sup> His emphasis on civil liberty put him squarely in line with the Whig ideology of his time. The Whigs believed in fostering self-reliance, internal improvements, and domestic trade. Lieber stated, "No artificial legislation or fanciful regulation can make people wealthier".<sup>42</sup> Robert J.

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<sup>37</sup> Ibid., 712.

<sup>38</sup> Ibid., 712.

<sup>39</sup> Francis Lieber and Thomas Sergeant Perry, *The Life and Letters of Francis Lieber*, (Boston: James R. Osgood and Company, 1882) 209.

<sup>40</sup> Harley, *Francis Lieber*, 165.

<sup>41</sup> Ibid., 165.

<sup>42</sup> Ibid., 166.

Walker, Secretary of the Treasury under James K. Polk, called Lieber "the philosophic head of the Free Traders of the United States".<sup>43</sup> Lieber supported Whig economic and political ideologies, but lacked partisan zeal. He developed strong views on slavery and favored immediate abolition by the end of his stay in South Carolina.

Lieber's journey to abolitionism began in the heart of American slave country. He became a professor at South Carolina College in 1835, and when he accepted the position he proclaimed, "Sir, I am not an abolitionist".<sup>44</sup> He defended himself from pro-slavery critics who were suspicious of his foreign heritage and his ties to prominent Northern advocates of reform.<sup>45</sup> On one hand, he viewed the institution of slavery as repugnant and characterized the whole South as "Nigritia".<sup>46</sup> On the other hand, he was not yet an abolitionist, and was committed to preserving law and order. He continued to champion civil liberties, "protection or checks against undue interference, whether this be from individuals, from masses, or from government," and his respect for the rule of law and for civil liberties acted as a counterweight to his hatred of slavery.<sup>47</sup> In addition to being immoral, he believed the institution of slavery was an economic blight on the United States.

Lieber argued that slavery was the cause of the disparity between the Southern and Northern economies, as did Hinton Rowan Helper in *The Impending Crisis of the South and How to Meet it*, published in 1857. Lieber's early writing on the topic--as early as 1837--was, in many respects, ahead of his time. He sought out intellectuals in South

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<sup>43</sup> Ibid., 164.

<sup>44</sup> Frank Freidel, "Francis Lieber, Charles Sumner, and Slavery", *The Journal of Southern History* 9 (1), 1943: 75.

<sup>45</sup> Ibid., 75.

<sup>46</sup> Ibid., 76.

<sup>47</sup> Ibid., 76.

Carolina who shared his liberal orientation in regard to slavery, and was surprised to find he was not alone. Senator William C. Preston and Professor Josiah Nott shared his disdain for the institution.<sup>48</sup> Lieber, Preston, Nott, and later Helper shared the belief that the “wastefulness” of slavery that had led to the South’s economic problems.<sup>49</sup> He argued, “The only solution might be a gradual amelioration of the plight of the Negro until he had achieved the status of serfdom or peasant”.<sup>50</sup> He believed self-interest would eliminate the wastefulness of slavery and make it a more efficient labor system. Serfdom was superior to slavery because slaves could gradually earn limited rights and privileges. Still, Lieber preferred the gradual abolition of the institution.

Lieber’s northern associates from his early years in Boston ultimately influenced his intellectual evolution. He met Senator Charles Sumner in Boston shortly after Sumner had graduated from Harvard Law School.<sup>51</sup> Sumner would become a prominent statesman and abolitionist from Massachusetts who committed himself publicly to the destruction of the institution.<sup>52</sup> He was enthralled with Lieber’s liberal bent and intellectual ability, and wrote to him after he moved to South Carolina in 1835. Sumner served as both a press agent for the *American Jurist* and carried out the other tasks Lieber assigned him. Lieber addressed their relationship saying, “the rogue plumes himself with my sayings. Well he has a right, for he gives me always some good and substantial things or other for my writings”.<sup>53</sup> Sumner was unhappy only that Lieber was not an immediate

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<sup>48</sup> Nys, Ernest. 1911. “Francis Lieber--his Life and His Work: Part I”. *The American Journal of International Law* 5 (1). American Society of International Law: 84–117. doi:10.2307/2186767.

<sup>49</sup> Freidel, “Francis Lieber, Charles Sumner, and Slavery” 80.

<sup>50</sup> *Ibid.*, 78.

<sup>51</sup> David Herbert Donald, *Charles Sumner and the Coming of the Civil War*, (Naperville: Sourcebooks, Inc., 2009) 19.

<sup>52</sup> *Ibid.*, 111.

<sup>53</sup> Freidel, “Francis Lieber, Charles Sumner, and Slavery”, 81.

abolitionist, an objection that grew as Sumner became increasingly radical in his own views.<sup>54</sup>

As Sumner and Lieber continued to correspond, Lieber became increasingly interested in studying the institution of slavery. Lieber presented his views on the institution in his work, *The Stranger in America*, in which he demonstrated his disdain for the institution. He argued that his “scientific study of Negroes confined at Sing Sing Penitentiary proved to him that they were little inferior to whites either physically or mentally. Thus many of them were capable of the responsibility of political equality”.<sup>55</sup> Lieber kept a scrapbook in which he followed lawsuits involving slaves and former slaves, kept newspaper clippings about the institution, and wrote his reflections on what he called “this nasty, dirty, selfish institution”.<sup>56</sup> Lieber’s moral disdain for the institution and his literary advocacy for political equality was not enough for Sumner. For him, Lieber's moderation was unacceptable; “Lieber deplored the intemperate agitation of Sumner and the abolitionists as the main cause of growing secessionist feeling in the South”.<sup>57</sup> Lieber filled his scrapbook with letters that he would never send. He addressed many of them to South Carolina Senator John C. Calhoun. He insisted, ““it is not the North that is against you...It is mankind, it is the world, it is civilization, it is history, it is reason, it is God, that is against slavery””.<sup>58</sup> Lieber did not publish the letters because he was committed to the Union. He believed that slavery should be abolished gradually, and that the condition of the slaves must be ameliorated immediately. He was a gradual abolitionist motivated by economic and moral factors, but he was restrained by his

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<sup>54</sup> Donald, *Charles Sumner and the Coming of the Civil War*, 159.

<sup>55</sup> Freidel, “Francis Lieber, Charles Sumner, and Slavery”, 80.

<sup>56</sup> *Ibid.*, 82.

<sup>57</sup> *Ibid.*, 83.

<sup>58</sup> *Ibid.*, 74.

respect for the rule of law. Sumner tried to persuade Lieber to become an immediate abolitionist, and he did achieve mixed results.

Sumner tried to convince Lieber that immediate abolition was the best choice for the Union, and his effort destroyed their friendship. As Sumner became more aggressive in his attempts to persuade Lieber, Lieber became more disenchanted with Sumner. The two ended their correspondence in 1848 and 1849, and renewed it only after Sumner wrote to Lieber asking how he had offended him.<sup>59</sup> After a meeting in Boston failed to mend their relationship, Sumner mailed Lieber stories of atrocities committed by slaveholders in an attempt to persuade him to become an immediate abolitionist, but Lieber continued to hold a moderate position. He criticized Sumner's rashness, and tried to quell the rising tide of secession in South Carolina. He wrote to George Stillman Hillard, Sumner's former law partner, after Sumner was elected to the Senate, "If I am silent he will go about ranting that I am a slavery man; if I write, there will be another letter to a certainty still worse, and he will show about my letter, so that some fine morning I should see it in the papers".<sup>60</sup> Lieber faced a conundrum; he despised slavery but he did not want to upset the balance of law and order by becoming an immediate abolitionist. Only after his bid for election to president of South Carolina College failed in 1855 did he opt for immediate abolitionism.<sup>61</sup>

Lieber's loss of the election hardened his stance on slavery. The brutal beating of Sumner by Representative Preston Brooks on the floor of the Senate on May 22, 1856, further galvanized his position. Lieber announced, "The ill-feeling against the North of those Southerners who are the leaders of the malcontents is owing in a great measure to

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<sup>59</sup> *Ibid.*, 85.

<sup>60</sup> *Ibid.*, 89.

<sup>61</sup> *Ibid.*, 90.

the malaise which is always felt in a period in which the centre of power, or influence or the hegemonia [sic] is removed when wealth, population, knowledge, renown or anything that is power shifts.”<sup>62</sup> As a result, Lieber underwent a radical transformation. He moved from favoring Union above slavery to believing that a Union with slavery was not worth saving. He wrote in 1856, “Let us part, come what may”.<sup>63</sup> Lieber dedicated himself to attaining his ultimate goal--a Union without slavery. He devised the portions of the code that dealt with slavery to give the Union the most effective means to wage war against a slaveholding republic.

Lieber’s Code includes four articles that directly address the issue of slavery. In each article Lieber made a conscious attempt to refute the existing American understanding of the law of war in regard to slavery, and to replace it with his view of natural justice. Article 42 of the code refuted Vattel’s understanding of slavery as property that must be returned after hostilities ended:

Slavery, complicating and confounding the ideas of property, (that is of a thing,) and of personality, (that is of humanity,) exists according to municipal or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that "so far as the law of nature is concerned, all men are equal." Fugitives escaping from a country in which they were slaves, villains, or serfs, into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.<sup>64</sup>

The European countries Lieber described had taken their law from William Blackstone’s *Commentaries*, “The ‘right of making slaves by captivity,’” Blackstone wrote, depended

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<sup>62</sup> Ibid., 91.

<sup>63</sup> Ibid., 92.

<sup>64</sup> Francis Lieber, “INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD,” *The Avalon Project, Documents in Law, History, Diplomacy*, Article 42, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).



on a "‘supposed right of slaughter’".<sup>65</sup> The right of slaughter argued that combatants could slaughter their prisoners if they were unwilling or unable to give them quarter. The French and British traditions replaced this with a right of enslavement, which they saw as a humane alternative to slaughter.<sup>66</sup> The laws of war allowed the enslavement of captured populations and mandated the return of chattel slaves after hostilities ended.<sup>67</sup> Blackstone argued that slaughter was illegal and the right of enslavement was illegal as well.<sup>68</sup> The French philosopher Charles-Louis Montesquieu and Scottish philosopher Henry Home supported Blackstone’s assertions.<sup>69</sup> Lieber added his belief that “so far as the law of nature is concerned, all men are equal”.<sup>70</sup> That statement reflected of Lieber’s disgust with slavery and his genuine belief that all people were equal.

Lieber’s Article 43 gave the Emancipation Proclamation authority under the law of war. The Article made it a crime for Union soldiers to fail to enforce the Emancipation Proclamation. Lieber understood Lincoln’s determination to give the Emancipation Proclamation authority under the law of war, and drafted an article in which he gave Lincoln that authority:

In a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law

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<sup>65</sup> Witt, *Lincoln’s Code*, 100.

<sup>66</sup> Witt, *Lincoln’s Code*, 100.

<sup>67</sup> *Ibid.*, 101.

<sup>68</sup> *Ibid.*, 100.

<sup>69</sup> Witt, *Lincoln’s Code*, 100.

<sup>70</sup> *Ibid.*, 101.

of nations, and the former owner or State can have, by the law of postliminy, no belligerent lien or claim of service.<sup>71</sup>

Union soldiers who refused to protect fugitive slaves faced severe punishment. In Article 58 Lieber stated that an enemy enslaving a member of the United States Army was subject to execution, but did not specify what would happen to a Union soldier who refused to enforce the Emancipation Proclamation.<sup>72</sup> Ostensibly, he too would face execution.

Lieber included in the code a provision that dealt with the status of captured African American soldiers. Lieber knew that Confederates who captured African American Union soldiers could enslave, re-enslave, or execute them. The massacres at Fort Pillow and the Crater are brutal examples of the atrocities Lieber sought to prevent. In Article 58 he provided 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. The United States cannot retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations.<sup>73</sup>

The article created one of the biggest problems that faced the Union War Department, the breakdown of the exchange cartel in 1863. The article provided for the execution of Confederate prisoners of war who had enslaved African American soldiers. The Confederates were unwilling to grant them the same status they granted white prisoners

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<sup>71</sup> Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy*, Article 43, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>72</sup> Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy*, Article 58, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>73</sup> Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy*, Article 58, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

of war. Lincoln insisted that the United States could not engage in prisoner exchanges as long as Confederacy violated the law of war in their treatment of African American soldiers.

Lieber incorporated his own views on slavery, as well as Lincoln's and those of prominent European thinkers, into his articles on slavery. Lincoln understood that the American current understanding of the law of war required that slaves be returned after hostilities ended, and he needed a legal justification of his Emancipation Proclamation. Lieber became an immediate abolitionist in 1855 as a result of his intensive study of slavery, southern culture, and the mental ability of African Americans. Lieber's passages on slavery are a product, above all, of his views on racial equality and the injustice of slavery.

Guerrilla warfare plagued the Union throughout the Civil War. The regulation of irregular combat was a novel facet of modern war that had evolved by 1863, and few writers before Lieber had addressed it. The Union problem was varied widely in its appearance, location, and practices. Lieber fashioned a guerrilla policy that reflected his political philosophy and historical precedents, and provided a means for the Union to deal with the problem.

Lieber began developing his thoughts on guerrilla warfare during his time at Columbia. In his third lecture he articulated his views on the subject and provided a general definition of war that addressed irregular warfare:

This meant, in the times Of NAPOLEON, when WELLINGTON was fighting against the French, that war which single individuals carried on in the mountains on their own hook. NAPOLEON declared that the moment they were taken prisoners they should be shot. When the number becomes very large the same rule

will apply to them as in the case of prisoners taken in a civil war by the Government.<sup>74</sup>

In his lectures, Lieber articulated ideas that he incorporated into his pamphlet *Guerrilla Parties: Considered with Reference to the Laws and Usages of War*, combining philosophical arguments with historical examples.

All three of Lieber's sons fought during the Civil War, two for the Union and one for the Confederacy. The wounding of Lieber's son Hamilton in 1862 brought two top American scholars of the law of war together in Missouri where a heated guerrilla conflict was raging. As 1st lieutenant in the 9th Illinois Infantry, Hamilton was wounded outside of Fort Donelson in February 1862.<sup>75</sup> Lieber began to search for his wounded son as soon as the news of the Union victory at Ft. Donelson was known. He did not find his son in Cincinnati, and continued on to St. Louis, and then to Mound City where he met with the Commander of the Union Army's Department of the Missouri, General Henry Halleck. The conflict in Missouri had spiraled out of control and, "[Halleck] now felt the need for well-thought-out regulations for the American war, but he was too busy to produce them himself. He noted with interest a series of eight lectures in late 1861 and early 1862 given by Francis Lieber, a Columbia University professor."<sup>76</sup> Halleck had known Lieber for almost twenty years.<sup>77</sup> The two agreed to continue correspondence on the laws of war after Lieber left St. Louis. In July 1862, Lieber wrote to congratulate Halleck on his recent promotion to command of all United States forces, and added that

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<sup>74</sup> Francis Lieber, "DR. LIEBER ON THE LAWS AND USAGES OF WAR.; Guerrilla War--Buccaneers--Deserters Found in the Ranks of the Hostile Enemy--Treatment of Prisoners--Release of Prisoners--Property of the Enemy: Personal Booty--Appropriation of the Enemy's Property by the Army--Pillage--Contributions or Requisitions--Destruction of the Enemy's Property--Property in General--Works of Art--Indebtedness of the Belligerents," *New York Times*, March 4, 1862.

<sup>75</sup> Witt, *Lincoln's Code*, 508.

<sup>76</sup> Burrus M. Carnahan, "The Civil War Origins of The Modern Rules of War: Francis Lieber and Lincoln's General Order No. 100", *Northern Kentucky Law Review* 39 (4), 2012: 664.

<sup>77</sup> Burrus M. Carnahan, "The Civil War Origins of The Modern Rules of War: Francis Lieber and Lincoln's General Order No. 100", *Northern Kentucky Law Review* 39 (4), 2012: 664.

he had been contemplating the “the very important question of *Guerrilleros*”.<sup>78</sup> Halleck asked Lieber to share his findings. The result of this correspondence was the pamphlet *Guerrilla Parties: Considered with Reference to the Laws and Usages of War*. The pamphlet was twenty-two pages long and included historical examples drawn from Lieber’s study of European irregular warfare and from philosophical arguments he drew from his political ideology.<sup>79</sup>

Lieber based his arguments on the legality of guerrilla warfare on his own experience and his knowledge of European military history. He used Napoleon’s treatment of guerrillas to illustrate the previous understanding of the status of irregular combatants under the laws of war, and then moved from historical precedent to present context: “When the number becomes very large the same rule will apply to them as in the case of prisoners taken in a civil war by the Government”.<sup>80</sup> Lieber based his arguments on a universal understanding of the law of war, and when he diverged from the common historical understanding, he used philosophical arguments to justify the departure: “I think, that the exchange of prisoners was nothing but a recognition that there are men against us in arms, and that we think it our advantage to do so. If I met a highway robber and he demanded my purse, and I give it to him. It is no acknowledgment of his right to it; it is a matter of expediency with me”.<sup>81</sup>

Lieber’s *Guerrilla Parties* attempted to establish a legal definition of the term “guerrilla”. He began by arguing that the main cause of the War Department’s inability to

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<sup>78</sup> Ibid., 668.

<sup>79</sup> Ibid., 668.

<sup>80</sup> Francis Lieber, “DR. LIEBER ON THE LAWS AND USAGES OF WAR.; Guerrilla War--Buccaneers--Deserters Found in the Ranks of the Hostile Enemy--Treatment of Prisoners--Release of Prisoners--Property of the Enemy: Personal Booty--Appropriation of the Enemy's Property by the Army--Pillage--Contributions or Requisitions--Destruction of the Enemy's Property--Property in General--Works of Art--Indebtedness of the Belligerents,” *New York Times*, March 4, 1862.

<sup>81</sup> Ibid.

suppress the guerrilla conflict in Missouri was the lack of a coherent definition of the term. Lieber argued, “The term Guerrilla is often inaccurately used, and its application has been particularly confused at the present time. From these circumstances arises much of the difficulty which presents itself to the publicist and martial jurist in treating of guerrilla parties”.<sup>82</sup> Lieber’s primary goal was to lay out a definition of guerrilla acceptable in law. He wrote, “The position of armed parties loosely attached to the main body of the army, or altogether unconnected with it, has rarely been taken up by writers on the law of war,” and expanded his definition by citing historical examples as well as his own ideology to establish the legal status of irregular combatants.<sup>83</sup>

Lieber traced the word "guerrilla" to Spanish, and used the Spanish experience during the Peninsular War to explain his conception of the term: “The term Guerrilla is the diminutive of the Spanish word guerra, war, and means petty war, that is war carried on by detached parties; generally in the mountains.”<sup>84</sup> That definition raised the problem he aimed to address in the pamphlet. He noted that not all Europeans used the term "guerrilla" but rather various terms that encompass a wide range of ideas, for example, “the term Partidas for the chiefs and men engaged in the petty war against the French.”<sup>85</sup> This distinction was significant because the French authorities dealt differently with armed men deemed “guerrillas” versus armed men deemed “Partidas”.<sup>86</sup> Lieber explained,

many of the guerrillas were shot when made prisoners; as the guerrillas chiefs executed French prisoners in turn.... yet when the *partidas* of Mina and

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<sup>82</sup> Francis Lieber, *Guerrilla Parties: Considered With Reference to the Laws and Usages of War*, (New York: D. Van Nostrand, 1862), 5.

<sup>83</sup> *Ibid.*, 5.

<sup>84</sup> *Ibid.*, 6.

<sup>85</sup> *Ibid.*, 6.

<sup>86</sup> *Ibid.*, 6.

Empecinado had swelled to the imposing number of twenty thousand and more, which fact of itself implies a certain degree of discipline, Mina concluded a treaty with the French to allow the passage of some French goods through the lines.<sup>87</sup>

Lieber demonstrated that the name and the scale of irregular warfare was the difference between life and death for these combatants. He argued that his goal in the pamphlet was to create legal definitions that corresponded to specific practices and to create a coherent body of martial law to regulate irregular warfare.

Lieber argued that different writers had brought several practices under the umbrella label “guerrilla”. He began by identifying the characteristics of guerrilla practices that were universally accepted: “it is universally understood in this country at the present time that a guerrilla party means an irregular band of armed men, carrying on an irregular war, not being able, according to their character as a guerrilla party, to carry on what the law terms a regular war”.<sup>88</sup> He abandoned this concept by arguing that aside from the definition, “Other ideas are associated with the term, differently by different persons”.<sup>89</sup> He then listed examples of what “publicists” had uncritically termed guerrilla warfare.<sup>90</sup> For example he wrote, “Others connect with the guerrillero the idea of necessitated murder, because guerrilla bands cannot encumber themselves with prisoners of war; they have, therefore, frequently, perhaps generally, killed their prisoners”.<sup>91</sup> It was crucial for Lieber to separate different practices of irregular warfare because that allowed him to argue the law of war sanctioned some practices but not others.

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<sup>87</sup> Ibid., 6.

<sup>88</sup> Ibid., 7.

<sup>89</sup> Ibid., 7.

<sup>90</sup> Ibid., 7.

<sup>91</sup> Ibid., 8.

Lieber used historical examples to create a spectrum of practices and their punishments under the law of war. He understood that different groups of irregular combatants would employ different tactics. He incorporated historical examples to describe typical irregular combatants, and he set them out on a spectrum ranging from legitimate soldiers to domestic criminals to help officers in the field make judgments when they encountered novel situations:

History confirms these associations, but the law of war as well as the law of peace has treated many of these and kindred subjects, — acts justifiable, offensive, or criminal, — under acknowledged terms, namely: the Free booter, the Marauder, the Brigand, the Partisan, the Free-corps, the Spy, the Rebel, the Conspirator, the Robber, and especially the Highway Robber, the Rising en Masse, or the ‘Arming of Peasants’<sup>92</sup>

Each of the terms identified categories he used to describe forms of irregular warfare and their corollary punishment.

Lieber identified domestic criminals as irregular combatants. That included the freebooters, the pirates, the brigands, and the highway robbers.<sup>93</sup> He described the historical context of the term freebooter to explain his classification: “The Sea-Gueux, in the Revolution of the Netherlands, were originally freebooters at sea, and they were always treated, when captured, simply as freebooters”.<sup>94</sup> Freebooters were pirates, often detached from any political goals, and were unlawful combatants.<sup>95</sup> During the Revolution of the Netherlands, as well as the American Civil War, freebooters were treated as highway robbers subject to execution.

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<sup>92</sup> Ibid., 9.

<sup>93</sup> Ibid., 10.

<sup>94</sup> Ibid., 10.

<sup>95</sup> Ibid., 10.



Lieber next defined the term "brigand," a soldier who is detached from the army who commits pillage and rapine on the civilian population. Lieber described the historical origin of the term: "The word Brigand, derived as it is from *briyuer*, to beg, meant originally beggar, but it soon came to be applied to armed strollers, a " class of men which swarmed in all countries in the middle ages".<sup>96</sup> Brigands differed from freebooters only in their enlistment as soldiers in a regular army. Brigands, pirates, robbers, and freebooters were all criminals, according to Lieber, and their punishment was death under the law of war.<sup>97</sup>

Lieber continued by introducing the opposite end of the spectrum. His second category of irregular combatants included legitimate soldiers who deserved to be treated as of prisoners of war under the law of war. He began by distinguishing these combatants from guerrillas: "The terms Partisan and Free-corps are vaguely used. Sometimes...partisan is used for a self-constituted *guerrillero*; more frequently it has a different meaning."<sup>98</sup> Lieber made the constitution of these forces as a major determinant of their status under the law of war: "Both partisan-corps and free-corps designate bodies detached from the main army; but the former term refers to the action of the troop, the latter to the composition".<sup>99</sup> Partisans are troops enlisted in or closely associated with a regular army, detached to interrupt enemy supply and communication lines and to attack the enemy's rear and flanks. Free-corps, on the other hand, are not part of the regular army, but are commissioned by the army or belligerent government to harass the enemy. Lieber cited historical examples to clarify this distinction:

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<sup>96</sup> Ibid., 10.

<sup>97</sup> Ibid., 9-11.

<sup>98</sup> Ibid., 11.

<sup>99</sup> Ibid., 11.

The French *Compagnies Franches* were free-corps; but this latter term came into use only in the 18th century.... There were many free-corps in Germany opposed to Napoleon, when that country rose against the French, But [sic] the men composing them were entitled to the benefits of the law of war, and generally received them when taken prisoner.<sup>100</sup>

The *Compagnies Franches* were self-constituted to harass Napoleon's forces.<sup>101</sup> They were legal belligerents because they were constituted to achieve a military objective and because they harassed enemy armies, a practice of legitimate belligerents.

After laying out the opposite ends of the spectrum, domestic criminals and legitimate belligerents, Lieber explored more nuanced categories. He argued that spies were treated according to their appearance and behavior. A spy, according to Lieber, was "A person dwelling in a district under military occupation, and giving information to the government of which he was subject, but who has been expelled by the victorious invader".<sup>102</sup> Even the most patriotic motives did not protect the spy from death when he was captured.<sup>103</sup> Lieber adopted a broad definition of spy: "Even mere secret correspondence of a person in an occupied district with the enemy, though the contents of the correspondence may have been innocent, has subjected the correspondent to serious consequences".<sup>104</sup>

Lieber next focused on the rising en masse. Lieber wrote extensively on the topic, because it directly related to Halleck's initial inquiry about the treatment of Confederate forces. He began by marking the beginning of modern warfare: "Down to the beginning of the first French revolution, toward the end of the last century, the spirit which

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<sup>100</sup> Ibid., 11.

<sup>101</sup> John Grenier, *The First Way of War: American War Making on the Frontier, 1607-1814*, (New York: Cambridge University Press, 2005) 98.

<sup>102</sup> Francis Lieber, *Guerrilla Parties: Considered With Reference to the Laws and Usages of War*, (New York: D. Van Nostrand, 1862), 12.

<sup>103</sup> Ibid., 12.

<sup>104</sup> Ibid., 12.

pervaded all governments of the European continent was, that the people were rather the passive substratum of the State than an essential portion of it.”<sup>105</sup> He cited a historical example to clarify his distinction: “They [the people] were believed to be of so extensive a character that the French, when in Germany, during the seven years' war [sic], literally drafted Germans for the French army, and used them as their own soldiers”.<sup>106</sup> Lieber argued that this practice had caused considerable disagreement about the legal status of the “rising of the peasants”. He argued, “The safety of the State is their principal problem, the safety of the individual is one of our greatest”.<sup>107</sup> The change from a focus on the state to a focus on the individual changed the authority that governments used to call peasants to rise up against the enemy. Rather than acting as a component of a state focused on the defense of a state, the peasants fought to secure their individual welfare and safety. A rising en masse, Lieber argues, involved the arming of citizens who are not part of the national army to harass enemy invaders. Before the 19th century, these combatants were considered brigands subject to death.<sup>108</sup> Lieber argued, “that the rising of the people to repel invasion entitles them to the full benefits of the law of war, and that the invader cannot well inquire into the origin of the armed masses opposing him”.<sup>109</sup> Past writers, most notably Carl von Clausewitz, had viewed the peasants as brigands or pirates, but he believed this type of warfare merited additional study.<sup>110</sup>

Lieber examined the rising of the peasants because it was critical to resolving the guerrilla conflict in Missouri. His argument that guerrillas or peasants rising en masse

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<sup>105</sup> Ibid., 14.

<sup>106</sup> Ibid., 14.

<sup>107</sup> The American Whig Review, “The Anglo-Saxon Race” (New York: Wiley and Putnam etc, 1848) 42.

<sup>108</sup> Francis Lieber, *Guerrilla Parties: Considered With Reference to the Laws and Usages of War*, (New York: D. Van Nostrand, 1862), 14.

<sup>109</sup> Ibid., 15.

<sup>110</sup> Witt, *Lincoln's Code*, 556.

must be treated as prisoner of war was a reflection of his views of government. Lieber argued that peasants rising en masse must be fighting in unconquered territory and in large numbers.<sup>111</sup> Often combatants had to meet additional qualifications by wearing distinguishing uniforms to be recognized as legitimate combatants. On the other hand, their detachment from the regular army did not give them a different character from the regular army under the law of war. Lieber attempted to prevent a despotic officer from conquering an area and declaring all the people who rose against him pirates. Such soldiers no longer fought along side regular armies, but did not lose protection of the laws of war.

Uniforms were important for Lieber. He argued that the lack of uniforms did not change the status of combatants. On the contrary, “It makes a great difference.... whether the absence of the uniform is used for the purpose of concealment or disguise.”<sup>112</sup> Those who used the lack of uniforms as a disguise, or those found in arms where no peaceful citizen could plausibly be may be executed as armed prowlers.<sup>113</sup> Lieber distinguished the rising of citizens from war rebels to add nuance to his examination of irregular warfare.

Lieber defined the war rebel as a “renewer of war within an occupied territory, [who] has been universally treated with the utmost rigor of the military law”.<sup>114</sup> The most crucial distinction between war rebels and rising peasants was that war rebels attempted to reinvigorate war in a territory that has been decisively conquered and occupied by an enemy army. Lieber wrote, “The war-rebel exposes the occupying army to the greatest

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<sup>111</sup> Francis Lieber, *Guerrilla Parties: Considered With Reference to the Laws and Usages of War*, (New York: D. Van Nostrand, 1862), 15.

<sup>112</sup> Francis Lieber, *Guerrilla Parties: Considered With Reference to the Laws and Usages of War*, (New York: D. Van Nostrand, 1862), 16.

<sup>113</sup> Francis Lieber, *Guerrilla Parties: Considered With Reference to the Laws and Usages of War*, (New York: D. Van Nostrand, 1862), 16.

<sup>114</sup> *Ibid.*, 13

danger, and essentially interferes with the mitigation of the severity of war, which it is one of the noblest objects of the modern law of war to obtain”.<sup>115</sup> Lieber argued that the purpose of the law of war was to mitigate the severity of war. He defended the punishment of those who renewed war in an area that had been conquered and occupied because it impaired the ability of the conquering army to impose a lasting peace. Lieber would not punish irregular combatants who met his other criteria for legitimate combatants, who undertook or renewed war in contested territory because no peace existed there or would exist there without an occupying force. Lieber’s pamphlet was a significant contribution to the law of war, but was also difficult to apply for less educated officers because of its lack of practical instruction.

Lieber’s examination of the practice of irregular warfare and its legal status under the law of war in *Guerrilla Parties* led directly to his code’s pronouncements on irregular warfare. Lieber's Code included five articles on the practice of irregular warfare. He identified partisans as legitimate combatants to be treated as prisoner of war: “Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war”.<sup>116</sup> Partisans must appear to be soldiers, and must not partake in practices contrary to the law of war. They must be treated as soldiers because they were constituted by the enemy army and observed the law of war.

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<sup>115</sup> Ibid., 14.

<sup>116</sup> Francis Lieber, “INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD,” *The Avalon Project, Documents in Law, History, Diplomacy*, Article 81, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

Lieber identified the practices of guerrillas. He argued that as a result of their appearance and practices, guerrilla fighters were not legitimate combatants entitled to treatment as prisoners. Lieber defined bands of guerrillas as “Men, or squads of men, who commit hostilities...without being part and portion of the organized hostile army, and without sharing continuously in the war...or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers.”<sup>117</sup> These men could be part of the Confederate Army who had divested themselves of the appearance of soldiers in order to wage irregular war. They could also be self-constituted fighters separate from any army. Lieber considered these men combatants but not soldiers: “if captured, [they] are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.”<sup>118</sup> Taking off a uniform for purposes of deception and engaging in practices of irregular warfare changed the enemy combatant into a guerrilla. Guerrillas could be hanged or shot without trial if captured.<sup>119</sup> Guerrillas had the same aims as regular soldiers, but had a different status because of their lack of uniform was a means of deception.

The war rebel was a criminal and was subject to death. He was a belligerent who continued to fight after the enemy had conquered the territory. Confederate soldiers could not be treated as war rebels because they were fighting for a sovereign nation. The Lincoln administration did not recognize their government, but their constitution as a separate body by that government and the lack of Federal control in the areas claimed by

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<sup>117</sup> Francis Lieber, “INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD,” *The Avalon Project, Documents in Law, History, Diplomacy*, Article 82, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>118</sup> Francis Lieber, “INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD,” *The Avalon Project, Documents in Law, History, Diplomacy*, Article 82, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>119</sup> Burrus M. Carnahan, *Lincoln on Trial: Southern Civilians and the Law of War*, (Louisville: University Press of Kentucky, 2010), 66.

the Confederacy made them legitimate soldiers.<sup>120</sup> The punishment of the war rebel was the same as the highway robber: “If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or armed violence”.

<sup>121</sup> Lieber added that the scale of the rebellion did not determine their status, and that conspiracy to rebel was also a violation of the law of war.

Lieber identified spies as irregular combatants who violated the law of war. Lieber's Code identified spies by the means they used and lack of uniform. Lieber stated, “Scouts, or single soldiers, if disguised in the dress of the country or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.”<sup>122</sup> The code defined spies by their lack of uniform, which they employed to deceive the enemy. In most cases, this was the only difference between partisans, guerrillas, and spies: partisans wore uniforms but guerrillas and spies did not. Legal historian Burrus M. Carnahan explains, “On this basis Pro-Confederate bridge burners in Missouri faced the same fate as the Unionist bridge burners in Tennessee”.<sup>123</sup> Union and Confederate soldiers had to wear to use their army's uniforms to be treated as lawful combatants.

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<sup>120</sup> The American Whig Review, “The Anglo-Saxon Race” (New York: Wiley and Putnam etc, 1848) 42.

<sup>121</sup> Francis Lieber, “INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD,” *The Avalon Project, Documents in Law, History, Diplomacy*, Article 85, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>122</sup> Francis Lieber, “INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD,” *The Avalon Project, Documents in Law, History, Diplomacy*, Article 83, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>123</sup> Burrus M. Carnahan, *Lincoln on Trial: Southern Civilians and the Law of War*, (Louisville: University Press of Kentucky, 2010), 56.

Francis Lieber significantly expanded the law of war in General Orders No. 100. He used his ideology to build on European and American traditions. He introduced the principle of military necessity to deal with civilian populations and to allow the Union to wage destructive yet humane campaigns in enemy territory. He established that the law of nations did not recognize any distinction of color, and did not permit practices of enslavement in any context. He gave Lincoln's Emancipation Proclamation the authority of law, but created significant challenges by the Confederacy in the treatment of prisoners of war. Lieber's work on irregular warfare brought order to a chaotic realm of the Civil War by identifying different categories of irregular combatants and specifying their status under the law of war. His identification did leave much discretion to officers in the field, as had the concept of military necessity. He contributed to the identification of irregular combatants and the classification of their status. General Orders No. 100 was a product of his ideology and of the need for the Union to wage an effective and efficient war in as humane a manner as possible.



The Authoritative Declaration of Military Law': The Implementation of General Orders No. 100

On May 4, 1862, when the Confederate Army of Northern Virginia evacuated its defenses outside of Yorktown, Brigadier General Gabriel J. Rains seized the opportunity to test the explosive devices he had fashioned. Rains was not a typical Confederate general, and did not have a typical understanding of the law of war. He made "deception is the art of war" his maxim.<sup>1</sup> That maxim diametrically opposed the principles that Francis Lieber had laid out in the code he drafted to mitigate and direct warfare.<sup>2</sup> Rains improvised land mines that were more akin to weapons faced by the contemporary American army than by a nineteenth-century army. He connected mortar primers to overturned carts and other objects that Union soldiers would be tempted to disturb. Rains was somewhat successful in his attempt to overcome the massive Union advantage in manpower by employing these improvised mines. On May 4 according to Union General George McClellan his mines injured "a number of our men."<sup>3</sup> Rains's superior officer, Confederate General James Longstreet, strongly disapproved of Rains's tactics and on May 11 ordered him to stop using them. The Confederate War Department transferred Rains to the Naval Department where in December of 1862 he became the head of the

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<sup>1</sup> Davis Waters, "'Deception is the Art of War': Gabriel J Rains, Torpedo Specialist of the Confederacy", *The North Carolina Historical Review* 66 (1989): 29.

<sup>2</sup> Davis Waters, "'Deception is the Art of War': Gabriel J Rains, Torpedo Specialist of the Confederacy", *The North Carolina Historical Review* 66 (1989): 29.

<sup>3</sup> Richard Shelly Hartigan, *Military Rules, Regulations, & the Code of War: Francis Lieber and the Certification of Conflict*, (New Brunswick: Transaction Publishers, 2011), 130.

Torpedo Department.<sup>4</sup> This brush with modern and deadly technology left McClellan reeling. A year later, he asked Lieber to analyze the legality of Rains's behavior outside Yorktown.

Soon after the War Department released Lieber's Code on April 24, 1863, Union generals began asking Lieber to clarify the status of actions under the law of war. In one of the first instances, Brigadier General William F. Barry wrote to Lieber about a novel situation that had occurred in Yorktown on May 4, 1862. In 1863 Barry wrote, "In reply of your note of to-day's date I have to state the information for Dr. Lieber as follows."<sup>5</sup> Barry began by describing the situation in detail. Believing that the enemy had withdrawn their pickets, McClellan ordered his men to occupy the Confederates' defensive works. Several Union soldiers were severely injured by improvised land mines planted in the works by the evacuating Confederates: "Concealed strings or wires leading from the friction primer of the shell to the superincumbent articles were so arranged that the slightest disturbance would occasion the explosion...McClellan ordered that the Confederate prisoners taken by us at Yorktown should be made to search for these buried shells."<sup>6</sup> McClellan acted in accordance with General Orders No. 100, Article 76 of the code.

As the Civil War continued, Lieber corresponded with increasing numbers of officers, answering their questions about his code and the law of war. He answered Quartermaster General Montgomery Meigs who asked if Confederate prisoners of war

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<sup>4</sup> Davis Waters, "Deception is the Art of War': Gabriel J Rains, Torpedo Specialist of the Confederacy", *The North Carolina Historical Review* 66 (1989): 29.

<sup>5</sup> Richard Shelly Hartigan, *Military Rules, Regulations, & the Code of War: Francis Lieber and the Certification of Conflict*, (New Brunswick: Transaction Publishers, 2011), 130.

<sup>6</sup> *Ibid.*, 131.

could be used as laborers.<sup>7</sup> Lieber's answer confirmed Meigs's initial interpretation of the code and also implicitly asserted that McClellan had acted legally in using Confederate prisoners. Lieber argued, "They [prisoners of war] are set to work to do anything for which the captor can conveniently use them."<sup>8</sup> McClellan's use of prisoners of war to uncover land mines would serve the Union and act as a deterrent to the future use of such weapons. In addition, Lieber stated that the practice was permissible under the law of war in Article 76 of the code: "They [prisoners of war] may be required to work for the benefit of the captor's government, according to their rank and condition".<sup>9</sup> Lieber also condoned such measures as retaliation for the Confederates use of deceptive tactics: "These shells were not thus placed on the glacis at the bottom of the ditch, which, in view of an anticipated assault, might possibly be considered a legitimate use of them, but they were basely planted by an enemy who was secretly abandoning his post on common roads."<sup>10</sup> Lieber considered these hidden explosive devices a deceptive tactic of warfare that violated the law of war. He argued that retaliation be closely regulated, but believed it was lawful to force Confederate prisoners of war remove mines from the ground. Lieber's own response to the final version of the code warrants particular attention when examining its application in the field.

President Abraham Lincoln published General Orders No. 100 on April 24, 1863. One month later, Lieber received a copy of the final version of the orders. Lieber believed that the authors had created a treatise that would stand the test of time. He

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<sup>7</sup> Ibid., 135.

<sup>8</sup> Ibid., 135.

<sup>9</sup> Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy*, Article 59, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>10</sup> Richard Shelly Hartigan, *Military Rules, Regulations, & the Code of War: Francis Lieber and the Certification of Conflict*, (New Brunswick: Transaction Publishers, 2011), 130.

believed that the code embodied the concept of the law of war he intended to promulgate, and that other nations would use it as a model. He wrote, "I think the No. 100 will do honor to our country. It will be adopted as a basis for similar works by the English, French, and Germans. It is a contribution by the U.S. to the common stock of civilization."<sup>11</sup> His passion for the study of war was not tempered by the completion of the code: "I almost feel sad in closing this business".<sup>12</sup> Lieber believed that the committee had created a code that embodied his understanding of the law of war and that it would serve as a model for future generations.

Lieber wrote to Henry Halleck about his reservations about the code. First, Lieber wanted Halleck to be recognized for the remarkable achievement: "I regret that your name is not visibly connected with this code...Some opportunity will occur I have no doubt and hope, when I shall yet chisel your name on the marble tablet of this code."<sup>13</sup> Lieber also expressed serious reservations about some parts of the code. He argued that his code did not solve the problem of free speech in a nation at war: "A very important paper might be written on the limit of free speech, especially in times disturbed by war. Is it lawful to call on fellow beings to commit a crime--to steal, to poison, to set fire to a house?"<sup>14</sup> Democratic Congressman Clement Vallandigham, a vocal supporter of the Confederacy and who publicly opposed the Union war effort, provoked Lieber's concern. The code's failure to address the topic was Lieber's most serious criticism of his code.

Lieber concluded by urging Halleck to call attention to General Orders No. 100. He believed that the Union campaigns in the "South" and "West" violated the policies set

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<sup>11</sup> Ibid., 108.

<sup>12</sup> Ibid., 108.

<sup>13</sup> Ibid., 109.

<sup>14</sup> Ibid., 109.

forth by the code: "I believe it is time for you to issue a strong order, directing attention to those paragraphs in the Code which prohibit devastations, demolition of private property, etc."<sup>15</sup> Lieber believed that the Union war effort was being severely damaged by this wanton destruction. In his letter to Halleck, he revealed what he believed was the purpose of the law of war. He believed the Union's wanton destruction was unwise because "it annihilates wealth irrevocably and makes a return to a state of peace and peaceful minds more and more difficult".<sup>16</sup> Lieber's reference to the return to peace after war mirrors his statements on cruelty, torture, and deception. His code expressly forbade conduct that made the return of peace unnecessarily difficult. Lieber believed that the law of war should encourage both sides to restore peace as soon as possible. The Union War Department sent out instructions to many of the top ranking officers in the South and West, including Major General David Hunter and United States Secretary of the Navy Gideon Welles, to implement General Orders No. 100.<sup>17</sup> The Confederate War Department saw a different, malicious principle espoused by the code and hastened to publicly refute it.

One of the first Confederate responses to Lieber's Code was an order by Confederate President Jefferson Davis on May 1, 1863. Dated December 24, 1862, it was an attack on Union General Benjamin F. Butler. The Confederate Congress confirmed the order a week after the publication of Lieber's Code, indicating that it was a direct response to the code. Davis charged Butler with violating the law of war in numerous ways; the most egregious was his call for a slave insurrection. In addition to calling for Butler's execution, Davis also ordered "That all negro slaves captured in arms be at once

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<sup>15</sup> Ibid., 109.

<sup>16</sup> Ibid., 109.

<sup>17</sup> Ibid 110-130.

delivered to the executive authorities of the respective States to which they belong to be dealt with according to the laws of said states".<sup>18</sup> For captured African American troops, this proclamation amounted to a sentence of death or enslavement.<sup>19</sup>

Confederate officials, like Jefferson Davis and Secretary of War James A. Seddon, believed General Orders No. 100 promoted slave insurrection. On June 24, 1863, Seddon wrote to the Head of Prisoner Exchange Robert Ould about the Confederate response to the General Orders.<sup>20</sup> Seddon made numerous objections to the concept of justice promulgated by Lieber's Code. First, he outlined the portions of the code that he agreed should be adopted, and second, he explained why the code violated the law of war. He argued it was unjust because it encouraged the liberation of slaves through servile insurrection. Seddon's analysis highlighted the Confederate understanding of the laws of war at the midpoint of the war.

Seddon began by briefly praising of Lieber's Code and identifying the aspects of the code that the Confederate War Department could accept:

The Confederate States agree that "it is incumbent upon all who are in situations to administer martial law that they should be strictly guided by the principles of justice, honor, and humanity.... and that the law of war disclaims all cruelty and bad faith concerning engagements concluded with the enemy during the war, all transactions for individual gain, all acts of private revenge, or connivance of such acts."<sup>21</sup>

Seddon agreed with Lieber that the basic principles of the laws of warfare were justice, honor, and humanity. He also believed that all deception or cruelty that made the return

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<sup>18</sup> U.S. War Department, *The War of the Rebellion: A Compendium of the Official Records of the Union and Confederate Armies*, 128 vols. (Washington, 1880–1901), series 2, vol. 5, pp. 795–797.

<sup>19</sup> Burrus M. Carnahan, *Lincoln on Trial: Southern Civilians and the Law of War*, (Lexington, The University Press of Kentucky, 2010) 73.

<sup>20</sup> Richard Shelly Hartigan, *Military Rules, Regulations, & the Code of War: Francis Lieber and the Certification of Conflict*, (New Brunswick: Transaction Publishers, 2011), 120.

<sup>21</sup> *Ibid.*, 121.

to peace unnecessarily difficult should be banned. The Confederate Articles of War mirrored these assertions but were much less specific on the purpose of the law of war.<sup>22</sup> Seddon also supported the parts of Lieber's Code that related to noncombatants and the use of deception noting that, "These principles condemn the murder of noncombatants".<sup>23</sup>

Seddon then turned to his criticism of Lieber's Code. Seddon attacked Lieber's endorsement of military necessity. He argued that his concept could not be employed in moderation, and that it would necessarily lead either to war and devastating destruction or would be so constrained that war would fail to achieve its political objectives.<sup>24</sup> Seddon insisted that Lieber's conception of military necessity was rife with contradictions and could not be employed by any army as a standard for prosecuting a just war. In 1861, the Confederate States had adopted their own Articles of War that were remarkably similar to those published by the United States in 1806 but did not explicitly address the issue of military necessity.<sup>25</sup> Seddon argued that Lieber had revised Winfield Scott's doctrine of military necessity, which Seddon approved. His assertion was ironic, if only because Lieber had praised Scott in a lecture a year earlier.<sup>26</sup> Seddon believed that Lieber had employed the concept of military necessity to justify widespread destruction of civilian property and to encourage slave insurrection: "It is in this code of military necessity that the acts of atrocity and violence which have been committed by the officers of the United States and have shocked the moral sense of civilized nations are to find apology and

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<sup>22</sup> Confederate States of America War Department, *Articles of War for the Government of the Army of the Confederate States*, (Montgomery: Barrett, Wimbish & Co., Printers and Binders, 1861).

<sup>23</sup> Richard Shelly Hartigan, *Military Rules, Regulations, & the Code of War: Francis Lieber and the Certification of Conflict*, (New Brunswick: Transaction Publishers, 2011), 120.

<sup>24</sup> *Ibid.*, 122.

<sup>25</sup> *Ibid.*, 122.

<sup>26</sup> *Ibid.*, 122.

defense."<sup>27</sup> He argued that the Union Army had used the principle of military necessity to justify the emancipation of slaves. Seddon insisted that emancipation was a result of the promulgation of General Orders No. 100.

Seddon countered General Orders No. 100 by arguing for a limited definition of military necessity. To him, military necessity was a limited grant of power. He refuted Lieber whose idea of military necessity forbid only measures that were cruel and deceptive. Seddon also proposed a definition that differed from Lieber's: "Military necessity as a legislator has supreme authority; but the range of its jurisdiction is limited. The necessity must be present, urgent, and overruling, and the acts done under it must afford probable means of escape from impending danger."<sup>28</sup> Military necessity could apply to very few circumstances, but in those circumstances military necessity was supreme. Seddon argued that Lieber had allowed the Union to apply the principle of military necessity far too widely. He did agree with Lieber that when the army needed to act in ways that civilian populations felt adverse the effects of war, the army had supreme authority to carry out such actions. Seddon argued that Lieber's definition of military necessity was a facade he used to justify wanton destruction and cruelty: "They [U.S. War Department] cannot frame mischief into a code or make an instituted system of rules embodying the spirit of mischief under the name of a military necessity."<sup>29</sup> Seddon argued that the Union continued to employ military necessity uncritically, but he proposed constraints that were equally susceptible to abuse.<sup>30</sup> His definition left it to the

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<sup>27</sup> Ibid., 123.

<sup>28</sup> Ibid., 124.

<sup>29</sup> Ibid., 124.

<sup>30</sup> Ibid., 124.



discretion of the officers to decide what was "present," "urgent," and "overruling," just as General Orders No. 100 left discretion to officers in the field.

Seddon next attacked Lieber's view of retaliation. He wrote, "It is not at all surprising that those who would make a law-giver of military necessity should desire the abduction or dethronement of the rule of military retaliation, and so in this code retaliation is deprecated."<sup>31</sup> Seddon argued for a limited concept of retaliation: "The Confederacy acknowledges the obligation to employ retaliation carefully and with circumspection. The infliction of a merited punishment upon notorious offenders against law and humanity should always be characterized with judicial moderation and temperance."<sup>32</sup> He pointed to Jefferson Davis's 1862 condemnation of Benjamin Butler as a criminal under the Confederate law of war to demonstrate the Confederate position on retaliation, and cited Butler's actions to build to his analysis of General Orders No. 100.

Seddon argued that General Orders No. 100 was unjust because it promoted servile insurrection. He argued that inciting slaves to rebel, as Butler had done, was the worst possible crime a nation could commit. He asserted that it was universally agreed that the law of war forbid disturbing slave property: "The employment of a servile insurrection as an instrument of war is contrary to the usages of civilized nations...The highest judicial tribunal has determined that slavery and the slave trade are not contrary to the law of nations."<sup>33</sup> Seddon pointed to Vattel's analysis of the Roman concept of *postliminium* and slave property in war, but he ignored Vattel's assertion, "I suppose the justice of the war to be problematical, and that it is not an insupportable oppression which he opposes: for if this governor maintains a cause that is evidently just—if he fights to

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<sup>31</sup> Ibid., 124.

<sup>32</sup> Ibid., 125.

<sup>33</sup> Ibid., 125-126.

save his country from slavery—his misfortune will be pitied; and every man of spirit will applaud him for gallantly persevering to the last extremity, and determining to die free.”<sup>34</sup> Despite their different interpretations, both men cited Vattel. Seddon argued that General Orders No. 100, by encouraging servile insurrection, had discarded the rules of civilized warfare: "Such a war involves necessarily the abandonment of all rules, conventions, mitigating influences, and humanizing usages. The enemy who adopts such auxiliaries proclaims in advance his desire as well as design that the war shall be one for mutual extermination."<sup>35</sup> He insisted that Lieber's Code made war more brutal because it encouraged servile insurrection and because of its approved tactics targeted at civilian populations.

Seddon ended his dissection of General Orders No. 100 with an attack on Lieber and an assertion of the moral superiority of the Confederacy. He argued that Lieber had departed from the American, even the democratic, law of war, and unleashed an ad-hominem attack on Lieber:

The fact is stated in the title of Military Order No. 100 that it was proposed by a German professor, an alien by nativity to the Constitution, laws, and institutions of the United States. The intrinsic evidence furnished by the order itself shows that it is the handiwork of one much more familiar with the decrees of the imperial despotisms of the continent of Europe than with Magna Charta, the Petition of Right, the Bill of Rights, Declaration of Independence, and the Constitution of the United States. The words war-traitor, war-rebel, are not words of the American vocabulary.<sup>36</sup>

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<sup>34</sup> Emmerich de Vattel, edited and with an Introduction by Béla Kapossy and Richard Whitmore, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, (Indianapolis: Liberty Fund, 2008). 11/9/2015. [http://oll.libertyfund.org/titles/2246#Vattel\\_1519\\_1233](http://oll.libertyfund.org/titles/2246#Vattel_1519_1233)

<sup>35</sup> Richard Shelly Hartigan, *Military Rules, Regulations, & the Code of War: Francis Lieber and the Certification of Conflict*, (New Brunswick: Transaction Publishers, 2011), Richard Shelly Hartigan, *Military Rules, Regulations, & the Code of War: Francis Lieber and the Certification of Conflict*, (New Brunswick: Transaction Publishers, 2011), 127.

<sup>36</sup> *Ibid.*, 128.

Seddon next pledged that the Confederacy would uphold the American tradition that Lieber had discarded. He ended, "We have not prosecuted war as an instrument of massacre or confusion, but in the maintenance of rights which were achieved for us by the expenditure of blood and treasure, and for which our fathers endured suffering and privations".<sup>37</sup> Seddon drafted his analysis of Lieber's Code for Robert Ould just two months after the code was released. He was correct that Lieber had made a major departure from the American law of war in his definition of military necessity and in his endorsement the legality of emancipation.

The first answer to Davis and Seddon's criticism of General Orders No. 100 came from Abraham Lincoln when he halted the prisoner exchange cartel. On July 31, 1863, Lincoln issued General Orders No. 252 and defended the Union's use of African American troops:

It is the duty of every government to give protection to its citizens, of whatever class, order or condition, and especially to those who are duly organized as soldiers in the public service. The law of nations and usages and customs of war, as carried on by civilized powers permit no distinction as to color in the treatment of prisoners of war, and public enemies to sell or enslave any captured person on account of his color, and for no offense against the laws of war, is a relapse into barbarism and a crime against civilization.<sup>38</sup>

Lincoln echoed Lieber's argument, especially in his assertion that the law of nations and the usages and customs of war know no distinction of color. That assertion came directly from Lieber in Article 58 of the code. His assertion of racial equality helped Lincoln defend the legality of the Emancipation Proclamation. General Orders No. 252 halted the prisoner exchange between the Union and the Confederacy until September of 1864.

When the exchange reopened, it included only sick prisoners unfit for immediate military

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<sup>37</sup> *Ibid.*, 129.

<sup>38</sup> United States War Department, "General Orders 252." (Washington D.C., Executive Mansion, July 30, 1863).

service. Lincoln threatened to execute a rebel prisoner for every Union soldier the Confederacy enslaved or executed. He cited the language of General Orders No. 100 to assert that the punishment for enslaving Union soldiers was death, but he did not execute the order even after the massacre at Ft. Pillow in 1864. Lincoln hesitated because, as he explained, "Once begun, I do not know where such a measure will stop".<sup>39</sup> By refusing to execute Confederate prisoners, Lincoln refused to provoke a vicious cycle of retaliation that could devolve into the barbarism of which Lieber warned of in Articles 27 and 28. Lincoln applied Lieber's Code in his response to the Confederates' treatment of African American troops. It was a momentous application of General Orders No. 100 in the field.

The question of the treatment of Confederate prisoners of war came to Lieber's attention again in early 1864. On January 22, 1864, Quartermaster-General Montgomery Meigs asked Lieber if the Union could use prisoners of war as laborers. This question was especially important because of the difficult relationship of the Union and Confederacy in regard to prisoners of war created by General Orders No. 252. Meigs later described Lieber's reply in a letter to Henry Jarvis Raymond, editor of the *New York Times*.<sup>40</sup>

In his letter, Meigs demonstrated his understanding of the new law of war promulgated by General Orders No. 100. He explained the way some Union generals understood the code less than a year after it was published. Meigs believed that officers in the field should implement the code without consulting officials in Washington. He told Lieber that, initially, he had done exactly that; "While at Chattanooga, where the

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<sup>39</sup> Burrus M. Carnahan, *Lincoln on Trial: Southern Civilians and the Law of War*, (Lexington, The University Press of Kentucky, 2010) 73.

<sup>40</sup> Richard Shelly Hartigan, *Military Rules, Regulations, & the Code of War: Francis Lieber and the Certification of Conflict*, (New Brunswick: Transaction Publishers, 2011), 138-139.

population was thin... I advised the employment of 6,000 prisoners taken in battles of Chattanooga upon public work".<sup>41</sup> He believed that Article 76 of the code gave him the power to take this action. This assertion was remarkable; it revealed the initiative that General Orders No. 100 allowed commanders. Meigs and doubtless other officers understood that it allowed the commander in the field to enforce the code so long as "[He] found the practice sanctioned by the authoritative declaration of military law of General Orders, No. 100".<sup>42</sup> His question was not about the use of prisoners of war for a limited, local purpose. Meigs wrote, "The only objections I heard urged against it at Chattanooga were the trouble [it gave the Union] of taking care of them, a trouble now only transferred to another place."<sup>43</sup> Meigs wanted Lieber to sanction a wider use of Confederate prisoners: "We feed, clothe and shelter 40,000 rebels rotting in idleness, with no prospect of release or exchange. Why not give them a new lease on life by employing them upon this or some other national work intended to strengthen the bonds of Union which they have striven to destroy?"<sup>44</sup> Meigs anticipated that Lieber would confirm his understanding of the code.

Lieber did confirm Meigs's understanding of General Orders No. 100 by approving his use of Confederate prisoners. He continued, however, by using Meigs's letter as a springboard for an inquiry into the purpose of Article 76. His answer disparaged the Confederacy and illuminated his philosophy of the law of war. He returned Article 76 and his motivation for the statement that "They may be required to

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<sup>41</sup> Ibid., 133.

<sup>42</sup> Ibid., 133.

<sup>43</sup> Ibid., 134.

<sup>44</sup> Ibid., 134.

work for the benefit of the captor's government, according to their rank and condition".<sup>45</sup>

Lieber conceded that initially he had thought such language might be "superfluous":

Still, I thought of the unmeasured arrogance of our enemy--one of the motive elements of this whole war--how he pretended to lay down the most extravagant and immoral things as law for us, and I recollected an article in an Alabama journal, in which the editor called upon his authorities not to forget to send with all the troops a sufficient number of negroes to do working business, for, said he, our soldiers are all gentlemen, every one of them. I thought of all of this and concluded to put down paragraph 76. It appears from your letter that I did right.<sup>46</sup>

Lieber believed that without this article, commanders in the field might believe that they did not have the authority to force Confederate prisoners of war do manual labor. He considered the Confederate's assertion of moral superiority as "unmeasured arrogance".<sup>47</sup> Lieber's affirmation of the equivalency of religions, paired with his condemnation of racial discrimination in the code, confirmed this belief. Lieber's letter to Meigs justified the construction of an article of the code in detail.

Lieber continued by giving his statements historical credibility under the law of war. Lieber justified Meigs's proposal to employ prisoners of war on civilian and military projects by citing historical examples. He frequently cited historical precedent and then argued for or against the continuation of such practices based on his perception of the just prosecution of war. He cited acts of the Prussians, Russians, and French to strengthen his argument, and concluded, "If, then, it is universal usage of war to make prisoners work, and thus reimburse in part the expenditure they cause, the only remaining question for me in drawing up the little code was--Is there any reason of honor or humanity why this

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<sup>45</sup> Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy*, Article 76, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>46</sup> *Ibid.*, 135.

<sup>47</sup> *Ibid.*, 135.

usage should be stopped? There is none whatsoever."<sup>48</sup> Meigs's proposition did not contradict Lieber's idea of the purpose of law of war. Using prisoners as laborers did not make the return of peace unnecessarily difficult. The work was hard, but Meigs and Lieber believed it was better than allowing prisoners to rot in idleness.<sup>49</sup> Meigs's proposal was valid because it conformed to Lieber's conception of justice in warfare. Lieber felt compelled to give historical examples to defend his position and to condemn the, "unmeasured arrogance of our enemy".<sup>50</sup> Lieber's argument embodied the international understanding of this issue to protect his code against Confederate counter claims.

Meigs believed that officers in the field should enforce the law of war. Several times during the Civil War Union officers interpreted the code without consulting officials in Washington. In nearly every instance, neither Lieber nor officials in Washington overturned the commanders' decisions. There were cases, such as that of John Singleton Mosby, in which a commander did overturn his superior officer's decision based on changing circumstances, without consultation with officials in Washington. Union General Ulysses S. Grant ordered his subordinate General Philip Sheridan in August 1864, "Where ever any of [John S.] Mosby's men are caught...hang them without trial".<sup>51</sup> Mosby's Rangers were organized under the Confederate States Partisan Ranger Act of April 1862, and under the code they were partisans. Grant's experience in the Western theater led him to condemn these men in spite of the law of war. Sheridan, without advice from Washington, changed his designation of these men after Mosby executed three Union soldiers in retaliation for the execution of three partisans in October

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<sup>48</sup> Ibid., 136.

<sup>49</sup> Ibid., 136-137.

<sup>50</sup> Ibid., 135.

<sup>51</sup> Carnahan, *Lincoln on Trial*, 57.

of 1864.<sup>52</sup> Grant's, paired with Sheridan's, actions demonstrated that in many cases officers used their discretion in implementing the code. Officers did adjust their interpretations of the law of war to changing circumstances.

In many areas the code was ambiguous, silent, or contradictory, and Lieber continued to interpret those provisions for officers. William Tecumseh Sherman's "March to the Sea" from November 15 to December 21, 1864 tested the limits of military necessity outlined in General Orders No. 100. Lieber closely followed Sherman's campaign in the fall of 1864 and in large part condoned the tactics he used. Sherman's ability to maneuver his troops impressed Lieber: "Sherman moves his army better than Uncle Sam [delivers] our letters."<sup>53</sup> Lieber believed Sherman was a general who took to heart his declaration in the code that "the more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief".<sup>54</sup> Lieber agreed with Sherman that the code did not require him to issue a warning before he shelled Atlanta. Sherman explained, "I was not bound by the laws of war to give notice of the shelling of Atlanta, a 'fortified town with magazines, arsenals, foundries, and public stores...You [General John Bell Hood] were bound to take notice. See the books".<sup>55</sup> Lieber believed that Sherman had authority under the law of war to wage sharp war against Southern civilians because they were giving aid to the Confederate Army. They had stored weapons, ammunition, and food in the city, and provided transportation routes for the Confederate army. Sherman's tactics conformed to the code's provision that "The commander will throw the burden of the

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<sup>52</sup> Carnahan, *Lincoln on Trial*, 58.

<sup>53</sup> John Fabian Witt, *Lincoln's Code: The Laws of War in American History*, (New York: Free Press, 2012), 883.

<sup>54</sup> Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy*, Article 29, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>55</sup> Witt, *Lincoln's Code*, 751.



war, as much as lies within his power, on the disloyal citizens, of the revolted portion or province.”<sup>56</sup> From Lieber’s perspective only one area of the campaign may have violated the laws of war. That area was the unregulated foraging policy implemented by Sherman.<sup>57</sup> To what extent Lieber believed Sherman's policy violated the law of war is unclear because he never directly addressed the matter in his correspondence. His experience at Namur forty-nine years earlier suggested that he approved of foraging, but did insist that soldiers and citizens were liable for their actions. The code and Lieber’s statements suggest that he believed Sherman acted lawfully during the campaign.

Lieber did reveal his opinion on the case of Raphael Semmes in 1865. The applicability of Lieber’s code was severely tested by the arrest of Confederate Naval Captain Raphael Semmes in 1865. Semmes was the captain of the *C.S.S. Alabama* that had “captured or destroyed sixty-two merchantmen, and whalers” during the Civil War.<sup>58</sup> In addition to interrupting civilian commerce and destroying civilian property, Naval Solicitor John Bolles believed that Semmes might have inflicted cruelties against civilians. After Semmes's arrest in December 1865, Bolles charged that: “Semmes had violated the laws of war by cruelties inflicted upon unresisting victims, by perfidious conduct at Cherbourg, [France] during and after the fight, and that he had knavishly contrived to obtain a parole as a Brigadier-General, to which he was not entitled.”<sup>59</sup> Bolles asserted, “No name connected with the Rebel service, unless that of some spy, 'bushwhacker,' or guerrilla of the grossest criminality, was so generally detested as that of

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<sup>56</sup>Francis Lieber, “INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD,” *The Avalon Project, Documents in Law, History, Diplomacy*, Article 157, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>57</sup> Witt, *Lincoln’s Code*, 834.

<sup>58</sup> John, A. Bolles, “Why Semmes Wasn’t Tried”, *The Atlantic Monthly*, Volume 0030, Issue 178 (August 1872), 88.

<sup>59</sup> *Ibid.*, 88.

Raphael Semmes".<sup>60</sup> Semmes's case was complex and Bolles called on Lieber for advice on how the United States should pursue the matter under the law of war.

Bolles presented his account and Semmes's report of the incident to Lieber for review.<sup>61</sup> On June 19, 1864, Raphael Semmes fought a major battle with the *Kearsarge* commanded by United States Navy Captain John A. Winslow outside the harbor of Cherbourg, France. After an hour Semmes's *Alabama* was sinking from damage it sustained during the conflict. Bolles insisted, and Semmes's 1864 report verified, that Semmes sent his men to the *Kearsarge* to surrender under flag of truce as the *Alabama* continued to sink.<sup>62</sup> At the last moment, Semmes jumped into the water, and the English yacht, *Deerhound*, rescued him, allowing him to escape capture. Winslow was stunned by

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<sup>60</sup> Ibid., 88.

<sup>61</sup> Ibid., 151-152. John M Browne, "The Duel Between The 'Alabama' and The 'Kearsarge'" Civil War Trust, 2014, (<http://www.civilwar.org/education/history/primarysources/the-duel-between-the.html?referrer=https://www.google.com/>). The events of the battle of Cherbourg are debated among historians. Some assert that Semmes abandoned the ship with the intention of deceiving Winslow. James M. McPherson, *War on the Waters: The Union and Confederate Navies, 1861-1865*, (Chapel Hill: University of North Carolina Press, 2012), 204-205. Other historians have suggested that this account is inaccurate. Instead they assert that after sinking the *Alabama* the U.S. Navy refused to rescue the survivors and Semmes boarded the *Deerhound* as a matter of survival.

<sup>62</sup> Ibid., 152. In his Semmes's 1864 account of the incident that he submitted to the Confederate Naval Department he wrote that he was, "fortunate enough thus to escape to the shelter of a neutral flag." In 1869, in a letter to an acquaintance he wrote about the incident, "I caused one of my seamen to wave in his hand a white flag, to attract the attention of the enemy to the fact that my colors were down and that I had ceased combat. In the last few minutes that my ship floated after my colors were struck, I filled the only remaining boat that I had with my wounded men and shoved her off to board the *Kearsarge*, remaining on board my ship until the last moment, ready to yield possession to the enemy and expecting him to take possession. No enemy's boat having reached me, and my ship sinking from under me, I leaped into the sea, after having ordered my officers and men to do so likewise, to endeavor to save my life. I was still at the mercy of the enemy, and he might have picked me up at any moment, and thus completed his conquest by making me his prisoner. Being in the sea, and having no longer any ship to deliver to him, I was not bound by the laws of war to seek him personally. It was his business to seek me, and failing to obtain mutual possession of me, I was, in no sense, his prisoner, but had the undoubted right to make my escape if I could." Winslow also gave an account of the incident: "At the end of which period [the battle] the *Alabama*, then actually sinking, struck her flag and made signals of distress. In twenty minutes more she sank, before any boat from the *Kearsarge* could board her. Semmes, having sent his wounded men in his own boats to the *Kearsarge*, leaped overboard as his vessel was going down, and, being picked up by the English yacht *Deerhound*, [commanded by] Captain Lancaster, was hurried off to England while some of his crew were yet struggling in the water....This letter stated that after the *Alabama* struck her flag, she sent an officer to announce her surrender, and ask for help; that at his, Captain Winslow's, request, the English yacht *Deerhound* helped save some of the *Alabama*'s men, and then made off with Captain Semmes."

the affair. He commented afterwards, "I could not believe that the commander [of the yacht] could be guilty of so disgraceful an act as taking our prisoners off, and therefore took no means to prevent it."<sup>63</sup> Semmes defended his actions: "Being in the sea, and having no longer any ship to deliver him, I was not bound by the laws of war to seek him personally."<sup>64</sup> Bolles charged that Semmes had used a flag of truce improperly and that after his escape under false pretenses, he returned to the Confederate service.

The United States Navy captured Semmes in August 1864 and treated him and his crew as sailors under the law of war established in General Orders No. 100. In his report, Winslow quoted several witnesses that swore to Semmes cruelty on the high seas, but none were present at the time of his arrest to present evidence against him. A few months later, the Annual Report of the Secretary of the Navy labeled Semmes' *Alabama* as a, "piratical cruiser" that "roamed the seas, robbing and destroying...shunning all armed antagonists".<sup>65</sup> Bolles, Secretary of the Navy Gideon Welles, and many other Americans believed that Semmes was a pirate who had inflicted cruelties on merchants, sailors, and civilians, but the navy treated Semmes as a legitimate combatant. He was imprisoned, but was released on parole in 1865. Semmes's parole read,

In accordance with the terms of the military convention entered into, etc., R. Semmes, Rear Admiral and Brigadier General, C.S. Navy and C.S. Army, Commanding Brigade, released from this obligation; and is permitted to return to his home, not to be disturbed by the United States authorities so long as he observes this obligation, and obeys the laws in force where he may reside.<sup>66</sup>

Welles issued a warrant for Semmes's arrest after the Confederate surrender at Appomattox. The United States government charged him with several violations of the

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<sup>63</sup> Ibid., 151.

<sup>64</sup> Ibid., 152.

<sup>65</sup> Ibid., 89.

<sup>66</sup> Ibid., 94.

law of war. The United States Navy indicted Semmes in December 1865 for piracy on the high seas, improper use of flags of truce, and unlawful re-entry into the Confederate service. Bolles conceded, "In not one solitary instance was there furnished a particle of proof that 'the pirate Semmes,' as many of my correspondents called him, had ever maltreated his captives, or subjected them to needless or avoidable hardships."<sup>67</sup> Bolles realized that it would be very difficult to convict Semmes of piracy without more substantive evidence. He did have proof, however, that Semmes's had used a flag of truce improperly and had reentered the Confederate service while under parole.

Bolles consulted Lieber about the case. First, he asked, could Semmes be tried for violations of the laws of war after he had been imprisoned and paroled as a lawful prisoner of war? Second, did Semmes's actions at Cherbourg constitute a crime under the law of war? Lieber ruled that Semmes could be tried under General's Orders No. 100: "A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities. All prisoners of war are liable to the infliction of retaliatory measures".<sup>68</sup> The status of a prisoner of war under the code was fluid. Captain Winslow had used his discretion to parole an enemy combatant. When evidence of Semmes's violation of the law of war appeared, that status changed in spite of his initial treatment as a legitimate combatant. Lieber asserted that the United States Departments of War and Navy had authority to overrule decisions made by officers in the field. Lieber concluded that civil

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<sup>67</sup> Ibid., 150.

<sup>68</sup> Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy*, Article 59, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

courts deferred to the judgment of the military officers on matters of the law of war, even in peacetime.

Lieber gave a perplexing answer to the second question. First, he dealt with the technical aspects of the case. According to Lieber, at Cherbourg Semmes had deceived Winslow by escaping after his surrender.<sup>69</sup> Lieber also believed that Semmes was guilty of piracy, but he did not believe that it was just to charge Semmes with piracy. He argued, "We see that it was resolved not to try him by military court for mere piracy or treason; not to try him at all unless, upon due inquest, it should appear certain that he had offended the law of war."<sup>70</sup> The lack of evidence placed severe constraints on the ability of the United States to prosecute Semmes for piracy. To foster a return to peace, Lieber asserted that law of war demanded that Semmes not be charged with improper use of flag of truce. He opposed the prosecution of Semmes for either offense on the grounds that it would violate the spirit and purpose of the code:

If we consider that his offence was universally known when the special agreement of May 1, 1865 was signed, and that, in view of this fact, Semmes signed the parole, undoubtedly believing that he would not be tried for his Alabama offence; that his offence, disreputable though it be, is not one of deep moral turpitude such as Wirz's cruelty was; and that taking up so odious an offender on this single charge would look very much as though we were desirous of getting at him, but cannot find a better handle--if we weigh these considerations it would appear better that he be sent away.<sup>71</sup>

Lieber argued that it was not prudent to try Semmes for a menial offense at Cherbourg and that the government had no proof that he had committed more grievous offenses. Lieber believed that Semmes's contribution to the Confederate war effort after Cherbourg was negligible, and he knew of no compelling evidence that Semmes had committed

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<sup>69</sup> John, A. Bolles, "Why Semmes Wasn't Tried" 154.

<sup>70</sup> *Ibid.*, 154.

<sup>71</sup> *Ibid.*, 154.

other crimes. He valued reconciliation and peace more than the persecution of minor offenses. He wrote, "his neglect to complete his surrender, and his return to the Rebel service, just at the end of the war, had produced no appreciable difference in the result of the Rebellion, but were, practically of no consequence to either party in the strife."<sup>72</sup> Other rebels--"the most red-handed raiders," "bushwhackers," and "jayhawkers,"--were "left 'unwhipped of justice'," and it would be unjust to punish Semmes in spite of the lack of evidence.<sup>73</sup> His actions did not have an impact on the conflict, and any damage to reconciliation that might result from the appearance of "trying to get at him" without evidence was not in the interest of the United States.<sup>74</sup>

Lieber's argument was part of his effort to establish principled laws of war. He did not intend for his code to punish minor infractions committed by losers in conflict. He intended to inflict the consequences of war on all those who engaged and supported it, but he was also determined to uphold justice. He believed that his code established principles of justice and that they were more important than courtroom victories: "Just wars...were 'not demoralizing,' they do not unduly punish the losers of the conflict and do not make the return to peace unnecessarily difficult."<sup>75</sup> Several Union witnesses, Welles, Winslow, Lieber, and Bolles believed Semmes was guilty of piracy, but Lieber believed that Semmes's offenses had no effect on the outcome of the rebellion. He argued that punishing him for a menial offense would make the United States appear vengeful and make peace more difficult to achieve. The law of war was meant to ensure justice and, "military necessity does not include any act of hostility which makes the return to

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<sup>72</sup> Ibid., 154-155.

<sup>73</sup> Ibid., 155.

<sup>74</sup> John, A. Bolles, "Why Semmes Wasn't Tried" 154.

<sup>75</sup> John Fabian Witt, *Lincoln's Code: The Laws of War in American History*, (New York: Free Press, 2012), 532.

peace unnecessarily difficult".<sup>76</sup> Charging Semmes for crimes for which there was no evidence would make it appear as though, "we were desirous of getting at him, but cannot find a better handle".<sup>77</sup> Such an appearance would render securing a lasting peace after the war more difficult. Lieber decided that the appearance of being spiteful must be avoided even at the cost of freeing a person who he believed was a notorious pirate.

Lieber believed that for his work to stand the test of time, for it to serve its intended purpose, it must not be used uncritically. He believed it was better to free a notorious pirate the government did not have evidence to convict, rather than corrupt the law of war by letting it become an instrument for punishing the losers in a conflict. Punishing a pirate for a relatively minor offense after he was paroled threatened to pervert the principle of justice his code worked to create. He valued the spirit of the code, the spirit of reconciliation and peace, above the strict letter of the code, which, he believed, made Semmes a pirate subject to death.

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<sup>76</sup> Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy*, Article 16, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>77</sup> John, A. Bolles, "Why Semmes Wasn't Tried" 154.

## Epilogue

Robert K. Evans graduated the military academy at West Point in 1875.<sup>1</sup> He was an officer in the 12th U.S. infantry assigned to the Nez Perce expedition of 1877 and the Bannock Campaign of 1878.<sup>2</sup> A skilled young officer, he received a promotion to lieutenant before the army transferred him to Arizona in 1878.<sup>3</sup> He served in Arizona for four years and learned the Native American way of war there.<sup>4</sup> He later wrote a piece in the *Atlantic Monthly* that described his experience in Arizona. He aimed to capture the lessons he had learned about how to regulate warfare between groups who held different ideas of what constituted lawful combat. His account provided insight into how laws of war documents evolved in a democratic society. General Orders No. 100 was a document of significant importance to Evans in his career, and his writing detailed how the officers adapted their implementation as ideas about war changed in America. Evans described himself in the piece as the young lieutenant and created the figure of his commander to represent several men who had given him advice during his time in Arizona. His account of the atrocities committed by the Apaches is based on the San Simon massacre of 1882.<sup>5</sup> Evans presented his account of the reality of regulating combat in Arizona through the following fictional account.

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<sup>1</sup> Peter Cozzens, *Eyewitnesses To The Indian Wars, 1865-1890*, (Mechanicsburg: Stackpole Books, 2001), 677.

<sup>2</sup> *Ibid.*, 677.

<sup>3</sup> *Ibid.*, 677.

<sup>4</sup> *Ibid.*, 677.

<sup>5</sup> Robert K Evans, *The Indian Question in Arizona, The Atlantic Monthly*, Volume 58, Issue 346 (August 1886), 170. Evans described the massacre at San Simon in his work. He gave the following description of the events: In May, 1882, I followed the trail of an Apache war-party from near San Carlos to San Simon, New Mexico, and counted forty-two men, women, and children murdered in mere savage caprice, and, when time and opportunity permitted, murdered with accompanying barbarities which curdle the blood and sicken the heart.



The United States Army assigned a young lieutenant to a regiment fighting the Apache Native American tribes in southern Arizona in 1881. During his training to become an officer, this young man had thoroughly studied the American law of war promoted by General Orders No. 100, "a manual which is still in force with us, and which is considered so able a treatise on the subject that it has been translated and adopted by nearly every civilized nation."<sup>6</sup> He gave particular attention to the code's discussion of the principle of retaliation, because he knew that the Apache warriors made rigorous application of that principle. After finishing his training in the officer corps and receiving his commission, he headed out south and west to begin his assignment. As he marched through the country of Arizona, he found stark reminders to the manner of warfare he faced: "he sees burned ranches and the mutilated corpses of men, women, and children."<sup>7</sup> After some reconnaissance, the young man devised a plan to capture the fighters responsible for the carnage he described. In a tactical maneuver, this young lieutenant was able to capture the Apache fighters presumed responsible for the recent atrocities he had witnessed. Upon capturing these fighters, the young soldier contemplated Articles 27, 59, and 62 of General Orders No. 100, which urged a strong retaliation against the prisoners. He determined that he should execute the prisoners for their crimes, and he approached his commanding officer for further instruction.

The young man's commander provided him with a shocking response. He ordered, "Sir, you will take charge of these prisoners, and place over them a strong guard in the centre of camp".<sup>8</sup> This initial order left the young officer surprised, but intrigued. He awaited further instruction anxiously. He gave two orders to follow his initial command,

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<sup>6</sup> Ibid., 171.

<sup>7</sup> Ibid., 172.

<sup>8</sup> Ibid., 172.

"First, you will take every precaution to ensure to prevent their escape; second, you will see that none of the guides, scouts, or frontiersmen approach within one hundred paces of them, for some of these men have had friends and relations killed by these very Indians," and the officer feared these men would seek retribution.<sup>9</sup> The young man recalled Article 27 of the code from his study at West Point: "civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage."<sup>10</sup> He also thought of Article 59: "All prisoners of war are liable to the infliction of retaliatory measures."<sup>11</sup> After contemplating these articles, which, to him, argued that he should execute the Apaches, the young man felt compelled to ask, "will not these prisoners be either hanged or shot, in retaliation for the atrocities which they have committed on citizens and prisoners?"<sup>12</sup> The commanding officer's response demonstrated a continued understanding, by both him and the American populace, of the main principle Francis Lieber sought to implement in his Civil War code. Lieber valued the return to peace amongst warring nations as the primary goal of the law of war.

The young lieutenant's commanding officer believed that the Army should avoid devolving into, "the internecine wars of savages" as specified by Article 28 of General Orders No. 100.<sup>13</sup> The commanding officer's response highlighted the continued

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<sup>9</sup> Ibid., 172.

<sup>10</sup> Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy*, Article 27, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>11</sup> Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy*, Article 59, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>12</sup> Evans, *The Indian Question in Arizona*, 172.

<sup>13</sup> Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy*, Article 28, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

prominence of General Orders No. 100 in the American discussion of the law of war. In addition, it highlighted the complexity of adhering to and implementing such a code in a democratic society: "If I should retaliate against these prisoners, I should be expected to be ignominiously relieved from my command...The Eastern press would denounce me as an assassin and a monster of cruelty...An officer must regard the dominant prejudices of the day as well as the laws of war and General Orders."<sup>14</sup> His response highlighted the role of the American populace in dictating the interpretation, and subsequent application, of the principles of General Orders No. 100. He asserted that regardless of the letter of the code the commander must remember that he served in the army of a democratic nation and was subject to follow its ideas of just combat: "We serve in the people's army, and we must be careful of their feelings."<sup>15</sup> For the commander, it would have been expedient to execute these Native Americans and continue his campaign without diplomatic negotiation for their exchange. But the mission of the Army, as dictated by Congress, was to secure peace for the frontiersmen who wanted to settle that disputed Native American land.<sup>16</sup> He realized that such an action would be unpopular with the American people because they held their own Army to a higher moral standard than that of the Apache.

The commanding officer understood the larger motivation put forth under Lieber's Code was encouraging a return to peace, even if he did not agree with the outcome this motivation led to. The commanding officer conceded to the young man that General Orders No. 100 would permit him to execute these men in retaliation for their crimes. But he also expressed to the aspiring officer that such an execution would continue the cycle

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<sup>14</sup> Evans, *The Indian Question in Arizona*, 172.

<sup>15</sup> *Ibid.*, 173.

<sup>16</sup> *Ibid.*, 172.

of retaliations and ultimately upset the American people to whom the army was responsible. In light of the Apache tradition of retaliation, the commanding officer understood the army had trapped itself in a cycle of violence by their prior retaliations against the Apache. The officer resolved this situation with exchange with an Apache agent, and the Apache fighters returned to their reservation without recourse from the United States Army.

Evans wrote this fictional account to speak about his experience in the Apache Indian Conflicts in Southern Arizona from 1878-1885. He wrote of this event, "Perhaps some readers will say this is merely a romance. But every incident in this hypothetical case has been repeatedly true in the lives of many officers now in the service."<sup>17</sup> Evans argued that the Native American fighters in these conflicts exemplified savagery in warfare far beyond the usages of civilized nations outlined in General Orders No. 100. He wrote of several examples of massacres perpetrated by the Apaches, such as the May 1882 massacre at San Simon, New Mexico where forty-two civilians were mutilated and grotesquely murdered.<sup>18</sup> Evans transitioned his narrative of Apache atrocities into an argument for continuing the upstanding the moral conduct of the United States Army promoted by General Orders No. 100.

Evans's narrative demonstrated the continued importance of General Orders No. 100 in the American and international discussion of law of war. In addition to highlighting that the army required every young American officer to study General Orders No. 100, Evans articulated that several other nations were already employing the code to govern their own armies as well. Evans's narrative of the young lieutenant, based

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<sup>17</sup> Ibid., 173.

<sup>18</sup> Ibid., 170.

loosely on him, highlighted the importance placed on General Orders No. 100 as part of officer training. He wrote, "Every officer of the army, before he receives his commission, is supposed to be instructed in international law and the laws of war."<sup>19</sup> In his case, Evans was able to cite articles of Lieber's Code by their number and translate them to experiences in the field. His application of Lieber's Code in the field demonstrated the considerable flexibility of interpretation and application of the code. Evans listed Articles 27, 59, and 62 to argue that the code allowed for severe retaliation against the Apache prisoners. But he also demonstrated, through the commanding officer's explanation of his decisions, that the code takes into consideration the "dominant prejudices" of the day as well. In other words, if the American government and the American people favored a policy of reconciliation with the Apaches, as opposed to retaliation, the commander was supposed to side with the people. All three articles listed by Evans, 27, 59, 62, permit for retaliation, but they do not order it. The code allowed for the commander in the field to decide if it was militarily and politically expedient for him to execute such an action. Ultimately, Evans's commander acted on the underlying principle of the code, "Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace," rather than the strict letter of it, which urged retaliation against the fighters.<sup>20</sup> His goal in enforcing the code, like Lieber's goal in the case of Raphael Semmes, was to renew a state of peace.

Lieber's Code aimed to encourage nations to renew peace. It relied on commanders understanding this goal and being able to apply it in a way that

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<sup>19</sup> Ibid., 172.

<sup>20</sup> Francis Lieber, "INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD," *The Avalon Project, Documents in Law, History, Diplomacy*, Article 29, [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

accomplished this goal. Lieber and Evans understood this goal and were able to adapt their implementation to suit it. As European nations adopted the code they encountered new technology in war and new types of war based on that technology. Lieber conceded that his code some problems unsolved, such as the rights of free speech in time of war.<sup>21</sup> When Lieber died in 1872 he left those questions unanswered. In 1874, Czar Alexander II invited agents from 15 European nations to draft a new document. Their work became base of the Hague Convention in 1899.<sup>22</sup> The convention bound these nations together in the spirit of Lieber's Code, regulating warfare so that peace could be renewed as soon as possible.

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<sup>21</sup> Richard Shelly Hartigan, *Military Rules, Regulations, & the Code of War: Francis Lieber and the Certification of Conflict*, (New Brunswick: Transaction Publishers, 2011), 109.

<sup>22</sup> "CONVENTION WITH RESPECT TO THE LAWS AND CUSTOMS OF WAR ON LAND (HAGUE, II) (29 July 1899)," *The Avalon Project, Documents in Law, History, Diplomacy*, [http://avalon.law.yale.edu/19th\\_century/hague02.asp](http://avalon.law.yale.edu/19th_century/hague02.asp)

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