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Moral Principle vs. Military Necessity

The first code of conduct during warfare, created by a Civil War-era Prussian immigrant, reflected ambiguities we struggle with to this day

DAVID BOSCO

During the hot and desperate summer of 1862, a senior American commander found himself consumed with the question of insurgents. Major General Henry Halleck had become general-in-chief of the Union armies in July of that year, and he soon discovered that the army had no laws or regulations to govern its contacts with the bands of irregular Southern forces in the field. A lawyer by training, Halleck found the absence of guidance maddening. Union troops were encountering an array of rebel forces, some uniformed, some not. "The rebel authorities claim the right to send men, in the garb of peaceful citizens, to waylay and attack our troops, to burn bridges and houses and to destroy property and persons within our lines," Halleck vented in a letter sent on August 6.

Halleck's correspondent was eager to help. Francis Lieber (1798–1872) was then a professor of history at Columbia College. A Prussian immigrant, he was a military veteran who had recently devoted himself to studying the conduct of war. What's more, he was a passionate supporter of the Union cause and was keenly ambitious to influence national policy. Less than a

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year after that first exchange, a short paper Lieber wrote for the general on how international law regards insurgents and guerrillas had blossomed into America's first code regulating the conduct of its army in warfare.

"Lieber's Code," as it soon became known, was widely disseminated, and it deeply influenced the later Hague and Geneva conventions. It is no exaggeration to say that this émigré professor with longstanding connections to the Southern aristocracy made one of the most substantial contributions to the modern law of war. Lieber was acutely aware of the novelty of his project. "It is an honor of the United States that they have attempted, first of all nations, to settle and publish such a code," he wrote to Halleck.

The code achieved its stature with remarkable speed. Lieber completed the text in March 1863, and it was cursorily reviewed by a panel of generals and quickly approved by President Lincoln. Dispatched to military commanders in May 1863 as General Orders No. 100, it circulated through the army ranks and within a few years had been lauded by a United States Supreme Court Justice as an authoritative expression of the law of war.

But the deeper one delves into the details of this seemingly inspiring tale, the muddier it becomes. Lieber's life and thought embodied some of the most serious contradictions in the struggle to humanize warfare. Those contradictions became painful as the Civil War grew more intense, and whether the gifted scholar restrained the conduct of the fighting in any way is uncertain at best. He certainly did not resolve the tensions he confronted; 150 years after his death, his adopted country is still struggling to reconcile the competing demands of security and humanity, principle and pragmatism.

Francis Lieber may have been assigned a lawyer's task, but he still wrote like the professor he was for most of his adult life. At South Carolina College, where he first taught, and at Columbia, Lieber's lectures were famously dense essays that he read verbatim to his students, who were then asked to regurgitate this received wisdom in writing. Frank Freidel recounts in his superb 1947 biography of Lieber that the professor's heavy-handed pedagogy often wore on his students and enervated his colleagues, one of whom described his teaching as "singularly ill-suited to the needs of undergraduates."

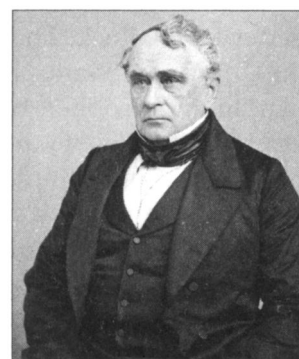
That style infuses his pamphlet on guerrilla warfare and the code itself, which was, as one scholar wrote, less a code than a "persuasively written essay on the ethics of conducting war." The two documents included lengthy asides on recent European military campaigns, lofty thoughts on the progress of civilization, and several obsequious references to General Halleck's own writings on international law.

At the heart of Lieber's view of how war should be fought was the distinction between combatants and civilians and the conviction that civilian life and property should be spared whenever possible. "The principle has been more and more acknowledged," he wrote, "that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies

of war will admit.” Commanders had an obligation to give warning whenever feasible before bombarding a location where civilians were likely to be. Libraries, hospitals, and art collections were to be spared. Cruelty and revenge had no place in Lieber’s concept of war, and he insisted that soldiers pay heed to the effects their actions would have after the guns fell silent. “Military necessity,” he insisted, “does not include any act of hostility which makes the return to peace unnecessarily difficult.”

Lieber consistently opposed the abuse of prisoners, and he quickly dispensed with the notion that captured Southern soldiers should be treated as criminals, traitors, or bandits. Instead, they were to be housed humanely and fed “plain and wholesome food.” Torture and public humiliation were forbidden, and chivalry was very much alive: To reward exemplary bravery and honor, captors could even return sidearms to enemy officers.

Few of Lieber’s insights were new. Classic “just war” doctrine, developed by Christian theologians including St. Augustine and Thomas Aquinas, stressed the importance of proportionality in conflicts and the need to avoid action that would make a return to peace impossible. The doctrine of immunity for noncombatants had roots in the Middle Ages’ chivalric codes. In the 18th and early 19th centuries, scholars and philosophers includ-



Francis Lieber

ing Emmerich de Vattel, Jean Jacques Rousseau, and Immanuel Kant plowed the field as well, anticipating many of Lieber’s provisions on prisoners and civilians. Rousseau insisted that wars take place between states, not between peoples, and that “private persons are only enemies accidentally.” Vattel contended that foreign civilians are, in theory, enemies, but he leavened that harsh conclusion with an injunction that they should not be harmed if they pose no danger.

Lieber wasn’t alone in realizing the value of a code to regularize the behavior of combatants. In the wake of the bloody Crimean War in the mid-1850s, a movement grew in Europe to address war’s savagery. In 1856, Jean Henri Dunant began organizing what would become the International Committee of the Red Cross, the guardian of the law of war to this day. Lieber’s contribution lay in summarizing and synthesizing existing works, leavening them with examples from modern practice, and placing them in the form of a succinct code of conduct directed toward military commanders.

Although expressed in general terms, the code was designed to meet the particular conditions of the American Civil War. Lieber’s challenge was to regularize the conduct of the war—to treat it as if it were a conflict between sovereign states—without recognizing the acts of secession or the legitimacy of the Southern authorities. He did this quite simply. The Union, he implied, was not obliged to accept captured Confederate soldiers as pris-

oners of war. It did so out of noble sentiment rather than legal obligation. "When humanity induces the adoption of the rules of regular war toward rebels," he wrote, "it does in no way whatever imply a partial or complete acknowledgement of their government, if they have set up one, or of them, as an independent and sovereign power."

This was a clever rationale, but it was not entirely forthright. As Lieber well knew, the Confederates held hundreds of Union prisoners. Refusing to treat Southern troops as prisoners of war would very likely produce a similar refusal on the part of the Confederacy. The result would be the horror of a war in which neither side gave quarter. Reciprocity as much as humanity was behind the decision to accord Southern troops POW status.

Lieber's good will did not extend to the guerrillas and insurgents that bedeviled Halleck. Those Southerners who engaged in hit-and-run attacks on Union forces and then blended back into civilian life could be treated like "highway robbers or pirates," he wrote. They deserved none of the benefits of prisoners of war, and they could be summarily executed. Guerrillas, he wrote in his pamphlet on the subject to Halleck, "are peculiarly dangerous, because they easily evade pursuit, and by laying down their arms become insidious enemies; because they cannot otherwise subsist than by rapine, and almost always degenerate into simple robbers or brigands."

The code also contained broad language that reflected Lieber's determination not to restrain the progress of Union arms. "The more vigorously wars are pursued the better it is for humanity," he wrote in one notable passage. "Sharp wars are brief." One of the code's most explicit statements that necessity can trump principle comes in Article 5: "To save the country," it reads simply, "is paramount to all other considerations." It was a point that Lieber echoed in his personal letters. Early in 1862, he wrote to his friend Senator Charles Sumner of Massachusetts that "action is our present problem, and one action above all, namely: save the integrity of the country. Every thing that may interfere with this, however good in itself, is to be put aside."

Lieber had crafted a protean document that could bless the most restrained campaign or the most brutal. This ambiguity was not lost on the Confederacy. On June 24, the Confederate secretary of war, James Seddon, released a lengthy critique. Lieber's notion of military necessity, he argued, was hopelessly muddled. "A military commander under this code may pursue a line of conduct in accordance with the principles of justice, faith, and honor, or he may justify conduct correspondent with the warfare of the barbarous hordes who overran the Roman Empire, or who, in the Middle Ages, devastated the continent of and menaced the civilization of Europe." Which imperative would prevail, Seddon demanded to know, humanity or necessity?

The edge in Seddon's critique may have been born of a sense of betrayal. Many in the Southern aristocracy knew Francis Lieber well; in fact, they had once embraced the scholar as one of their own.

Lieber, named Franz when he was born in Prussia at the turn of the century, knew war from an early age. The specter of Napoleon hung over his whole childhood: "Boys, clean your rifles," Lieber recalled his father saying when Napoleon escaped from Elba. "He is loose again." By 1815, the young Franz had enlisted in a Prussian regiment. He fought at Ligny and Namur (where he was wounded badly in the neck) and witnessed the decisive battle of Waterloo. He returned to Prussia to recuperate but quickly fell in with a German nationalist group, which all but doomed Lieber's career as a scholar in Prussia. Because he was being hounded by the Prussian authorities, he moved from one educational institution to another, mainly in Jena and Berlin.

Unable to escape political harassment, Lieber set sail for London and then on to America. He arrived in New York in June 1827 and soon ended up in Boston as the head of a new gymnasium. John Quincy Adams, who swam at Lieber's pool, helped him land a contract to write an encyclopedia. Boston offered stimulating contacts but no full-time employment. When an offer to teach history and political economy at South Carolina College arrived in June 1835, Lieber headed to Charleston.

The scholar's life in South Carolina was simultaneously productive and maddening. He chafed at the lack of sophistication around him even as he entered his most productive years as a scholar. Slavery disgusted him, but he eventually bought several slaves to tend to his household. He downplayed his Unionist sentiments in an effort to protect his academic position. His 1853 magnum opus, *On Civil Liberty and Self Government*, was greeted in the South as a robust defense of states' rights. Whether or not it was intended as such—and it is difficult to imagine that it was—Lieber apparently did little to counter the impression.

As war approached, however, the professor could no longer reconcile the contradictions. He left South Carolina in 1857 to teach at Columbia. But the Lieber family's move north was not complete. His two younger sons, Hamilton and Norman, joined their father in supporting the Union, but Lieber's eldest, Oscar, remained body and soul in South Carolina. In 1856, Lieber had tried to forestall the inevitable fracturing of their relationship. "What is more important, my son," he wrote Oscar, "let us solemnly resolve to remain closely attached friends to our deaths."

Oscar's death would come quickly; he joined the Confederate army, and in February or March of 1861 succumbed to wounds suffered at Williamsburg. Lieber appears to have begun letters to Oscar twice before his son's death. In March 1861, he promised not to "speak of the dark cloud which overshadows my mind, and will darken the remainder of my years." He went on: "I merely write because I can no longer delay it; and I have delayed so long because I turned from the task with a bleeding heart." The letter trails off without a signature; Lieber never sent it.

Lieber nearly lost another son. The elder of his remaining sons, Hamil-

ton, was wounded grievously in February 1862 during fighting in the West. Lieber immediately left New York to locate him. "I knew war as [a] soldier, as a wounded man in the hospital, as an observing citizen," he wrote to Sumner, "but I had yet to learn it in the phase of a father searching for his wounded son, walking through the hospitals, peering in the ambulances."

Whatever his personal anguish, Lieber threw himself into the Union cause without hesitation. He helped launch a Loyal Publication Society, which devoted itself to collecting and disseminating good news about the war. And he struck up the relationship with General Halleck that resulted in the code. His letters to the general and others betray a desire to crush the rebels. New Yorkers, he wrote Halleck in August 1862, "have yearned for concentrated blows, physical and moral, and government has directed a scattered pelting." In letters to Sumner, Lieber worried incessantly about the peace camp in the North, which he labeled "treasonable." He even urged Halleck to publish captured letters from Northern figures to Jefferson Davis (the general informed Lieber that making the letters public would expose a valuable Southern spy).

By the standards of today's humanitarianism, Lieber was an awkward apostle. He sometimes reveled in war and believed passionately that the fight he was witnessing was essential; indeed, for many months, he wanted the war pursued far more aggressively than Union generals and politicians would allow. The modern guardians of civility in warfare, notably Dunant's International Committee of the Red Cross and the parade of nongovernmental organizations that have followed in its footsteps, eschew Lieber's enthusiastic talk of just causes. For them, there must be a rigid separation between the *jus ad bellum*—the right to go to war—and the *jus in bello*—the rules for how one fights. As a scholar who emphatically brought the schools together, Lieber embodied the central tension of his code: men convinced of the justness of their cause will rarely accept limits on how they pursue it. When military necessity clashes with moral principle, necessity will usually prevail.

Even as General Orders No. 100 was circulating through the ranks, Union military strategy was undergoing a radical shift that resulted from frustration and desperation. As historian Mark Grimsley describes it in *The Hard Hand of War*, many Northern politicians and military commanders believed that secession was the work of a radical clique in Southern society and that Union forces had to drive a wedge between the quiet Southern majority and its firebrand leadership. The theory dictated restraint and the utmost respect for the civilian population.

This was an easy theory to uphold in the hopeful early weeks of the war, when the Union expected a speedy victory and a return to unified government. By 1863, after the bloody Peninsula campaign, Antietam, and Fredericksburg, the conviction that the Southern population could be wooed back to the Union had faded. Instead, anger was growing toward



Confederate prisoners captured at the battle of Fishers Hill, Virginia

Southern civilians, who showed no inclination to throw off their radical leadership. The gloves were about to come off Union military power.

In the eyes of many Civil War historians, the shift toward an aggressive war against the Southern economy and way of life began with General John Pope, who took command of the Army of Virginia in June 1862 (just as Lieber was striking up his correspondence with Halleck). Within a few weeks of taking command, the brash general issued an array of orders that established a new phase of warfare: Union forces would live off the land. No longer would they expend energy “in protecting private property of those most hostile to the Government.” Southern civilians would be held accountable for acts of sabotage in their midst, and they would either pledge loyalty or be deported. The new tactic took hold quickly—too quickly. Union troops saw the orders as a license to pillage, and many of the directives were soon repealed or modified.

Pope’s bumbling notwithstanding, the course toward a more aggressive war was set. By 1864, Generals Ulysses S. Grant and William Tecumseh Sherman had sharpened the strategy and used it to devastating effect during the conquest of Atlanta and the march through the Deep South. Factories and fields that might have been left untouched in the war’s early days were put to the torch. The shelling of Atlanta and the subsequent eviction of its inhabitants, in particular, aroused deep anger in the South and ignited controversy that still endures. Sherman’s position was clear: destroying the South’s economic resources and sapping its morale was militarily necessary. “You cannot qualify war in harsher terms than I will,” the general famously wrote. “War is cruelty, and you cannot refine it; and those who brought war into our country deserve all the curses and maledictions a people can pour out.”

What role did Lieber’s cherished code play in all this? Likely very little. “Union generals showed scant interest in the code and soldiers none,” con-

cludes the historian Harry S. Stout. What influence it did have, he continues, leaned in the direction of latitude. The code “gave Lincoln and his generals what they needed as they contemplated a new war that would deliberately invade civilian lives and properties.” Another scholar is even harsher. “Often touted as a humanitarian milestone,” writes Mark Grimsley, “Lieber’s code was thoroughly dedicated to providing the ethical justification for a war aimed at the destruction of the Confederacy.” This may be too harsh. A Union hardened to war and bent on victory needed no scholarly treatise to clear the way for Sherman’s march.

It is true though that Lieber wanted nothing so much as Union victory. From New York, he read about the spate of Union successes with mounting elation—and without, it appears, a troubled conscience. “What a bold man Sherman is,” he exulted in a letter to Halleck. “If he succeeds, you will have to create another Lt. General.” But the scholar did not abandon entirely his critical eye. On several occasions he pushed back against the Northern impulse for vengeance, particularly as stories about atrocious conditions in Confederate-run prisoner camps reached Northern papers. Lieber understood the calls for revenge against Southern prisoners. “I am indeed against all dainty treatment of the prisoners in our hands,” he wrote Sumner, “but for the love of our country and the great destiny of our people, do not sink, even in single cases, to the level of our unhappy, shameful enemy.”

Lieber’s opposition to vengeance appears to have slipped only occasionally—once on the day after Lincoln’s assassination. “Drive the fiends from our soil,” he wrote feverishly to Halleck, “and let Grant be a stern uncompromising man of the sword, and sword alone, until the masses in the States rise against their own fiends, and hang them or drive them out, and until the masses offer themselves, re-revolutionized, back to the Union, freed from slavery and assassins and secret society.” The outburst was not surprising given the shocking news, and in any case there is little evidence to suggest that Lieber’s missives were at this point influencing government policy. The war had taken its course, and the code was quickly assuming a prominence in the international legal debate that it never had on the battlefield.

The pressure in the North for harsher measures against the Confederacy, including its civilian population, reflects an almost unalterable dynamic of war: as blood is shed, moral restraints loosen. Americans and Britons who would have been appalled at the firebombing of cities in 1938 barely blinked at the idea in 1943. Harsh measures deemed out of bounds on September 10, 2001, became acceptable practice a few days later. As warfare evolves, then, and as conflicts develop, ethicists and regulators must struggle to keep pace: holding the line where they can, ceding ground where they must.

The undeniable achievement of Lieber’s Code was that it attempted just this—imperfectly, to be sure—in the midst of conflict and by the hand of someone who cared deeply about the conflict’s outcome. The professor’s

effort at codification has come in for severe criticism, but the very act of memorializing standards was valuable. It advanced the growing debate in Europe on how to restrain warfare and as a result influenced generations of soldiers. His code, writes historian Geoffrey Best, “served as the quarry from which all the subsequent codes were cut.” Lieber’s insistence that prisoners of war were not criminals but detainees entitled to certain rights became accepted doctrine. The Hague Conventions were animated by a Lieberesque “desire to diminish the evils of war, as far as military requirements permit” and included provisions on protecting civilian property and life, dealing with spies, and administering occupied territory, all of which drew heavily on the professor’s work.

Lieber’s Code had immediate credibility with politicians and warriors, in no small part because it was written by a man who knew war, understood its occasional necessity, and believed deeply in the justness of his cause. Today, by contrast, the task of monitoring and developing the law of war has often fallen to—or been taken up by—a host of nongovernmental organizations. Many of these activists believe that the use of force has little place in world affairs and hope to legislate it out of existence. As the legal scholar Kenneth Anderson has argued, “The pendulum shift toward [nongovernmental organizations] has gone further than is useful, and the ownership of the laws of war needs to give much greater weight to the state practices of leading countries.” What’s more, these activists have a strong preference for supranational mechanisms to supervise the behavior of states. Nongovernmental organizations, for example, played a critical role in the development of the International Criminal Court (ICC), which promises regular international prosecutions for many war crimes.

Not only has enthusiasm for the regulation of warfare passed into new and nonofficial hands, but the realities of today’s conflict have further reduced official incentives to engage in the task Lieber embraced. The brigands, thieves, and insurgents whose status Lieber struggled to define were at least operating on the edge of a classic war between organized armies. America’s struggles in Iraq and Afghanistan offer no such order. Insurgents are now the heart of the matter, not a nettlesome complication. The disappearance of organized opponents undercuts reciprocity, the law of war’s most valuable ally. American troops are now rarely taken captive, and when they are, there is little expectation that they will be treated humanely. The moral calculus that led regular armies toward mutual moderation, at least in how they treated prisoners, has been upset. “The legal framework for regulating war,” contends Syracuse University professor William Banks, “does not contemplate asymmetric warfare waged by non-state actors and thus fails to regulate perhaps the dominant form of warfare for the 21st century.” Some of the provisions in existing codes, as former Attorney General Alberto Gonzales famously put it, “have been rendered quaint.”

Why not then craft a new code or revise the old ones to deal more effec-

tively with today's conflicts? As the realities of warfare have changed, the law has changed many times to adapt. Some specialists have argued that a new protocol is needed to better define who is entitled to prisoner-of-war status, what force is appropriate against nonstate terrorist networks, and what rules should govern interrogations. The realities of today's conflicts, they contend, no longer fit the legal structures society has developed. In effect, a new Lieber is needed for today's General Hallecks.

Unfortunately, the prospects for another "Lieber moment" appear slim. Many American leaders feel estranged from recent developments in international humanitarian and criminal law. The bewildering network of international conventions, courts, and commissions that is so inspiring to activists often appears menacing to those officials responsible for security policy. The ICC's birth, for example, occasioned far more handwringing than applause in the Pentagon and the State Department. The pride Lieber felt about being part of the international effort at codification has all but dissipated in government circles.

This change of tone and tactics has much to do with the geometry of power. Lieber's United States was weak, divided, and struggling to assure foreign observers that it could contribute to the civilizing goals of international law. Today's United States has unparalleled power, and the international law that once signified membership in a rarefied club now threatens to hinder its freedom of action. Lieber also operated in a simpler legal age. His code, we should not forget, was a unilateral declaration; it was not negotiated with the Confederacy, let alone the rest of the world. The prospect today of amending the international rules governing warfare via negotiations with dozens of countries—some of them hostile—is daunting.

Yet the unwillingness to take up the task has had painful consequences. As the United States conducts its global campaign against terrorism, the Bush administration has often preferred to operate in the murky spaces between vague provisions of existing law. Bush officials have sometimes grumbled about the inadequacy of the existing framework but have proffered little to take its place. The effect on American legitimacy and reputation has been grievous; many foreigners, including close allies, have concluded that the world's superpower now operates outside the law. Troops from Canada, Britain, and the Netherlands fighting in Afghanistan hand over detainees to the Afghan government rather than risk giving them to the Americans. Even in light of these criticisms, the U.S. government has made only halfhearted efforts to create a joint code of conduct that would reassure its allies.

Lieber and Lincoln proudly published their code, flawed and ambiguous though it was. The nation's current leadership has preferred secret memoranda and strained interpretations. Too often now, the noble effort to expand and codify the international law that Lieber gloried in no longer appeals to the world's most powerful state. For the good of international law and of the United States, that must change. ❖