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# The Dismal History of the Laws of War

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## PART I

For the past five years I have been working on a book about the laws of war in American history, and in particular on a book that tries to make sense of the seminal order issued by Abraham Lincoln in the midst of the American Civil War, General Orders Number 100. What’s startling and exciting about General Orders 100 is that it formed the source for much of the international law of war of the subsequent half century and more, influencing military manuals, expert commissions, and multilateral treaties around the world.<sup>1</sup>

But I have a confession to make. For all the excitement inherent in the subject, lately I’ve come to feel that the field of the history of the laws of war inspires dismay. I find myself thinking, as the great Civil War historian James Randall did in 1950, that “to read ‘the laws and customs of war’ is a disheartening business.”<sup>2</sup>

Randall is not alone. The French intellectual Diderot beat him to the punch by almost two centuries, when in his advice to Catherine the Great for the creation of a Russian university he warned that nothing made the mind more “inaccurate, dull, confused, uncertain” than reading international law publicists such as Grotius and Pufendorf.<sup>3</sup> Closer to Randolph’s time, Charles Francis

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1. For an early take, see JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* (forthcoming 2012).

2. See JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN*, at xxx (rev. ed. 1951).

3. See Albert de Lapradelle, *Introduction* to EMMERICH DE VATTEL, *LE DROIT DE GENS, OU PRINCIPES DE LA LOI NATURELLE APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS*, at xxxii (1916).

Adams described the history of the laws of war as “quite unintelligible and somewhat ludicrous.”<sup>4</sup>

Sometimes I think my feelings about the subject are best captured by the journalist John Reed’s story of Pancho Villa in Mexico in 1914. As Reed told the story, Villa received a copy of the laws of land warfare from an American general stationed just across the U.S. border. The pamphlet—probably the small yellow-bound *Rules of Land Warfare* field manual published by the U.S. army that same year—contained the state-of-the-art rules for civilized armed conflict. The Hague Conference of 1907 from which the rules in part derived was still fresh. The First World War had not yet broken out. But according to Reed, the rules completely confounded the Mexican revolutionary general. As Reed recalled, Villa “spent hours poring over it.” The Hague rules “interested and amused him hugely.” But then he turned sour. “What is this Hague Conference?” Villa asked. “Was there a representative of Mexico there?” Villa wanted to know. (Interestingly, there was!) Ultimately Villa concluded that it seemed “a funny thing” to make laws for war. “If you and I are having a fight in a *cantina*,” he told Reed, “we are not going to pull a little book out of our pockets and read over the rules.”<sup>5</sup>

Pancho Villa had the rules in front of him for only a few hours. I’ve been at it for a few years. But I sometimes feel I am still asking his question. What is this thing, the laws of war?

## PART II

I do not mean here to rehearse the oft-repeated observation that the laws of war are morally disheartening. Kant’s essay on perpetual peace captured this line of thought when he called the men who systematized the modern law-of-war tradition the “sorry comforters” of warring states.<sup>6</sup> Voltaire suggested something similar when he compared the laws of war to the portraits of famous but remote people; both presented the idea of that which we cannot see in the world around us as it actually is.<sup>7</sup> In the United States, members of the fast-growing peace movement of the 1830s and 1840s agreed. The movement’s most famous member, Charles Sumner, for example, insisted that regulating warfare was a moral abomination.<sup>8</sup>

What I want to observe here is not that the laws of war are morally disheartening, though they sometimes are. The problem I have encountered is that the laws of war are *historically* disheartening. This is true in at least two senses. One reason they are historically frustrating, of course, is that they are so often violated

4. Charles Francis Adams, *The Trent Affair*, 17 AM. HISTORICAL REV. 540, 545 (1912).

5. JOHN REED, INSURGENT MEXICO 142–43 (1914).

6. IMMANUEL KANT, POLITICAL WRITINGS 103 (Hans Siegbert Reiss ed., H.B. Nisbet trans., 2d enlarged ed. 1991).

7. Lapradelle, *supra* note 3, at xxxii.

8. CHARLES SUMNER, THE TRUE GRANDEUR OF NATIONS 48 (Boston, Lee & Shepard 1893).

or invoked hypocritically. My Yale colleague Paul Kahn is fond of observing that the twentieth-century proliferation of law-of-war norms coincides almost perfectly with the advent of warfare more destructive than anything known to mankind.<sup>9</sup> Sophisticated observers ranging from Tolstoy to today's critical legal theorists have noted much the same thing.<sup>10</sup> Here the historical dismay closely resembles the moral dismay that one inevitably feels while working through the often gruesome history of the laws of war in action. Few fields so bewilderingly juxtapose hope and its destruction.

A second ground for historical dismay is different. Here the problem is that history of the laws of war seems to have made very little impression on the way in which observers think about the laws of war. The history of the field barely exists.

This is not to say there are no basic narratives out there that purport to present accounts of the trajectory of the laws of war over time. There are, of course. And in American history, two such narratives have become especially salient in recent years. Let's call them the declension theory and the novelty theory.

According to the declension theory, the United States had a deep and abiding tradition of respect for the international laws of war from the time of its founding until the latter part of the twentieth century. Daniel Patrick Moynihan was one of the earliest expositors of this version of the history of international law in America. "In the annals of forgetfulness," he wrote in 1990, "there is nothing quite to compare with the fading from the American mind of the idea of the law of nations." Beginning in the 1970s and 1980s, with episodes such as the Iranian hostage crisis, the invasion of Grenada, the mining of the Nicaraguan harbors, and the invasion of Panama, Moynihan believed, an American tradition began to fall away. The terrorist attacks of September 11, 2001, which took place just two years before Moynihan's death, accelerated the trend Moynihan already thought he saw. "Real men," he had commented archly, no longer cited Grotius.<sup>11</sup> In the wake of September 11, real men did not cite the Geneva Conventions either. And in the wake of September 11, a whole host of journalists and scholars have embraced Moynihan's basic idea of a rupture in the history of the laws of war in the United States, a transformation from historic respect to contempt.<sup>12</sup>

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9. See generally PAUL W. KAHN, *THE CULTURAL STUDY OF LAW* (1999).

10. DAVID KENNEDY, *OF WAR AND LAW* (2006); LEO TOLSTOY, *WAR AND PEACE* (Henry Gifford ed., Louise Maude & Aylmer Maude trans., Oxford Univ. Press 2008) (1869); Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 49–95 (1994).

11. DANIEL PATRICK MOYNIHAN, *ON THE LAW OF NATIONS* 7 (1990).

12. See generally EDWIN G. BURROWS, *FORGOTTEN PATRIOTS* (2008); DAVID HACKETT FISCHER, *WASHINGTON'S CROSSING* (2004); JANE MAYER, *THE DARK SIDE* (2008); PHILIPPE SANDS, *TORTURE TEAM* (2008); David Glazier, *Playing by the Rules: Combating Al Qaeda within the Law*, 51 WM. & MARY L. REV. 957, 957–1052 (2009); Stewart Jay, *The Status of the Law of Nations in the Early Republic*, 42 VAND. L. REV. 819, 819–50 (1989); Gregg L. Lint, *The American Revolution and the Law of*

The second basic narrative—the novelty theory—proceeds differently. In this view, the laws of war have never been more involved in shaping the conduct of the armed forces than they are in the early twenty-first century American military. Observers of the American military have noted the extraordinary integration of law and lawyers into the most basic military operations. David Kennedy's recent book, *Of Law and War*, is centrally concerned with this idea, as is Jack Goldsmith's *The Terror Presidency*.<sup>13</sup> Volumes by distinguished scholars dedicated to exploring its significance come out regularly.<sup>14</sup> An entire field of study that goes under the awkward and much-abused term "lawfare" has arisen to examine its impact.<sup>15</sup> The basic idea in all of this work is that (for better or for worse, and observers disagree on which it is) law is suddenly far more involved in war than ever before in modern history.

There are important elements of truth in each of these basic narratives, of course. But just as obviously, they are at loggerheads with one another. They can't both be right. One version of the history suggests that the law was once important and now is all too often disregarded. The other contends that law has become a central shaping factor in war, where it was once virtually absent.

I fear that the situation is worse than even this suggests. The reason to be dismayed at the state of the history of this field is not that there are mistakes or misimpressions in the historical literature. That is true of all fields. It's what keeps us in business! The disheartening factor is not that one of these master narratives is wrong. It is that *both* of these master narratives are wrong—deeply wrong, and based in a set of assumptions that bespeak the scholarly poverty of the field.

### PART III

The novelty theory is especially prominent among observers and commentators who remark on the institutionalization of the laws of war in the increasingly sizeable legal presence in the armed services. Lawyers sit in on targeting decisions. Legal guidelines shape the rules of engagement and conduct of operations. (Just watch the recently leaked video of a U.S. helicopter firing on a gathering of men in Iraq in 2007 that included Reuters reporters—the helicopter pilots unknowingly killed two journalists, but operated according to an abundantly evident set of rules and called in cameras to record the aftermath immediately

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*Nations, 1776-1789*, 1 *DIPLOMATIC HIST.* 20, 20–34 (1977); Jordan Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 *U.C. DAVIS J. INT'L L. & POL'Y* 205, 209–11 (2007).

13. KENNEDY, *supra* note 10; JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007).

14. E.g., MICHAEL W. LEWIS, *THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* (2009).

15. See Charles J. Dunlap Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* 11–15 (Harv. Kennedy Sch. Program on Nat'l Security & Human Rights, 2001 Workshop Papers), <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf> (last visited May 10, 2011).

thereafter.)<sup>16</sup> The novelty theory also appears in the work of those who note the advent of the International Criminal Court, of universal jurisdiction claims in places like Spain and Great Britain, where courts have asserted jurisdiction over alleged war criminals, and of domestic statutes that have criminalized international law-of-war violations. The novel threat of criminal sanctions, they assert, has suddenly put the laws of war front and center.<sup>17</sup>

There is no denying that there is substantial novelty involved here. Today there are more than 3,400 judge advocates in the U.S. Army Judge Advocate General's corps alone.<sup>18</sup> That's not even counting the thousands more in the Department of Defense, the State Department, the CIA, and the White House. Little in the experience of lawyers in the U.S. armed services before the Second World War can compare. In sheer numbers of professionals, there is a striking story of professionalization to be told, one with significant implications that scholars have only begun to explore.<sup>19</sup>

But we should not confuse the novelty of professionalization and criminalization with a sudden relevance for the international laws of war. From 1775 onward, as Washington lobbied British General Thomas Gage to recognize captured Americans as prisoners of war, the laws of war have run like a thread through the history of American military operations.<sup>20</sup> They animated Thomas Jefferson's controversial decision as Governor of Virginia to jail captured British officer Henry Hamilton and propelled the retaliation manifestos penned by James Madison and others in the Congress in the fall of 1781.<sup>21</sup> In the postwar period, arguments about the laws of war and their significance for the powers of the federal government underlay almost every political controversy about federal power. Alexander Hamilton and his political allies raised the law of war as an obstacle to state interference with British creditors, as a basis for Washington's declaration of neutrality in the wars of the French Revolution, as a defense of the Jay Treaty, and as a ground for the enactment of the Alien Friends Act.<sup>22</sup>

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16. See *Leaked U.S. Video Shows Deaths of Reuters' Iraqi Staffers*, REUTERS (Apr. 5, 2010), <http://www.reuters.com/article/2010/04/06/us-iraq-usa-journalists-idUSTRE6344FW20100406>.

17. See, e.g., GOLDSMITH, *supra* note 13, at pp. 43–70.

18. See Army Jag Corps: History, U.S. ARMY, <http://www.goarmy.com/jag/about/history.html> (last visited May 10, 2011).

19. See generally U.S. JUDGE ADVOCATE GENERAL'S DEPARTMENT, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975* (1975).

20. George Washington, George Washington to Lieutenant General Thomas Gage, 19 August 1775, in 1 *THE PAPERS OF GEORGE WASHINGTON: 1748–AUGUST 1775*, at 326–27 (W.W. Abbott et al eds., 1983).

21. See John D. Barnhart, *A New Evaluation of Henry Hamilton and George Rogers Clark*, 37 *MISS. VALLEY HISTORICAL REV.* 643, 643–52 (1951).

22. See ALEXANDER HAMILTON, *PAPERS OF ALEXANDER HAMILTON ADDITIONAL LETTERS 1777–1802* (Harold C. Syrett & Patricia Syrett eds., 1987); Alexander Hamilton to George Washington (Phila., May 2, 1793), in 14 *THE PAPERS OF ALEXANDER HAMILTON* 398 (Harold C. Syrett & Jacob E. Cooke eds., 1969); ALEXANDER HAMILTON, *To Defence No. XX* (Camillus Essay No. 20), in 19 *THE PAPERS OF ALEXANDER HAMILTON* 329; 8 *ANNALS OF CONG.* 1984 (1798)

Into the first decade of the nineteenth century, popular political movements mobilized themselves around the continuing controversies with Great Britain. Artisans marched in the streets of New York carrying the remains of Revolutionary War prisoners.<sup>23</sup> Newspaper editors published long diatribes against purported British violations of American neutral rights at sea.<sup>24</sup> The U.S. Supreme Court became a central forum for the working out of prize cases, which were the laws of war at sea.<sup>25</sup> A specialized prize case bar developed in the East Coast's major cities. James Madison explained the War of 1812 as the American response to Britain's violation of the rights afforded to neutrals by the laws of war.<sup>26</sup> The burning of the capitol triggered a wave of law-of-war debates, and in the aftermath of the war, a bitter two-decade argument broke out between the United States and Great Britain over the extent to which the laws of war protected slaveowners' rights in their slaves.<sup>27</sup>

One gets a sense of the cultural centrality of the laws of war in the early decades of the American republic simply by looking at the United States House of Representatives in January 1819. For virtually an entire month, the House was taken up in a fractious debate over the conduct of Andrew Jackson in Florida. Much of the controversy was over whether Jackson had been authorized by President Monroe to go into Spanish Florida in the first place. But by January 1819, when the imminent Transcontinental Treaty with Spain made clear that Jackson's conduct was likely to win Florida for the United States, this critique had come to seem less politically palatable to Jackson's political opponents. And so for a month, the partisans of Jackson and his enemies battled over whether Jackson had violated the laws of war, batting citations to Vattel and Bynkershoek and Grotius back and forth on the House floor.<sup>28</sup>

I could go on and on. But I trust that the point has been made. The laws of war are not new to the social experience of warfare in American history. They have played a significant social role since the dawn of the republic.

In this light, the declension thesis might seem more appealing. If the United States has a long history of interacting with the laws of war, the idea proposed by

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(comments of Congressman Gordon).

23. See Robert E. Cray, Jr., *Commemorating the Prison Ship Dead: Revolutionary Memory and the Politics of Sepulture in the Early Republic, 1776–1808*, 56 WM. & MARY Q. 565, 565–90 (1999).

24. William John Duane, *The Law of Nations, Investigated in a Popular Manner* (BiblioBazaar 2010) (1809).

25. E.g., *Schooner Exchange v. McFadden*, 11 U.S. 116 (1812); *Md. Ins. Co. v. Woods*, 10 U.S. 29 (1810); *Fitzsimmons v. Newport Ins. Co.* 8 U.S. 185 (1808).

26. James Madison, *Proclamation—Calling All Citizens to Unite in Defense of the District of Columbia (Sept. 1, 1814)*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=65968> (last visited Dec. 19, 2011).

27. DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC 93–96* (2001); JOHN BASSETT MOORE, *HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 350–90* (1898).

28. 33 ANNALS OF CONG. 600–1073 (1819).

Moynihan in the 1990s and by others in the period since September 11 gains plausibility. But it too just won't do. The problem here is that although there was substantial engagement with the laws of war in the early republic, it was a complex and sometimes ugly experience. The idea of a transition from respect to contempt does not usefully make sense of the social significance of the field.

In particular, the declension thesis cannot make sense of the debates and controversies that broke out routinely in the early republic over the content of the laws of war. The declension thesis is a classic example of what Kahn calls international law's detrimental obsession with presentist normative questions.<sup>29</sup> Because international law scholarship so often first asks whether international law should be followed, the literature all too frequently looks for evidence of respect for or commitment to international law, and stops there. The history of the field, however, should be interested in much more. It should be interested in the interpretation of international law, in the cultural uses to which it is put, and more.<sup>30</sup>

Ultimately, the best way to think of the declension and novelty theses is as alternative complimentary strategies for coping with the gruesome historical material served up by the history of the laws of war. The first offers the past as an imagined source of support for the invocation of law-of-war norms today. The second offers historical amnesia as a way of fending off the threat posed by the troubled history of law's attempts to limit the effects of warfare in American history.

#### PART IV

Serious work on the history of international law in the early republic is rare. Just think of the standard reference volumes in legal history. There's little to nothing on international law in Lawrence Friedman's *History of American Law*.<sup>31</sup> There's nothing from Willard Hurst on the law of nations.<sup>32</sup> Nor are the historians of American foreign relations much more interested in international law and the laws of war. Following historians such as Charles Francis Adams from a century ago, the historical profession is prone to be realist in its view of international law and cynical about its significance. (Understandably but unduly so, in my view.)<sup>33</sup>

So how might historians—legal historians—go about addressing the deficits in the history of the laws of war? One approach would be to adopt Christopher

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29. KAHN, *supra* note 9, at pp. 108–12.

30. See John Fabian Witt, *Social Histories of International Law*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT 164–87 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011).

31. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (3d ed. 2005).

32. See JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW (1950).

33. E.g., Adams, *supra* note 4.



Tomlins's view that legal history comes in multiplicities. This is a theme of Tomlins's important recent edited volumes, *The Many Legalities of Early America* (coedited with Bruce Mann) and the massive three-volume *Cambridge History of Law in America* (coedited with Michael Grossberg).<sup>34</sup> To put it in Tomlins's language, we might say that the framing of the history of the laws of war that could begin to make sense of the field would be to think of the history of the laws of war as a field of social contestation among competing groups.

#### A. Indian Wars

What are the contests I have in mind? We would do well to start with the wars between European settlers and their descendants, on one hand, and Indians, on the other. These wars undoubtedly occupy a central place in the history of North America from European arrival well into the nineteenth century. Among many other things, they present us with case studies in the laws of war gone badly awry. And strikingly, we already have a literature of contested norms for warfare in the context of Indian wars.

Historians such as Adam Hirsch, Jill Lepore, Daniel Richter, Richard White, and others have written movingly about what Hirsch calls "the collision of military cultures" in early warfare between settlers and Indians.<sup>35</sup> In their accounts, both the Indians and the settlers come to armed conflict with a set of embedded norms about the limits on warfare. There is considerable diversity among different groups of Indians, of course, and one might very well be able to tell a similar story about intra-Indian warfare. But the important thing I want to focus on here is that when Indians and settlers were thrown together, their very different ways of ritualizing and organizing armed conflict often produced a fast race to the bottom by all concerned.<sup>36</sup>

European settlers arrived with norms constraining things such as torture. Many Indian tribes along the East Coast possessed norms that limited the destruction and slaughter of the enemy. But such norms were badly mismatched. Early conflicts witnessed European horror at the ritualized ways in which some Indians tortured and killed prisoners taken in battle. Such horror seems to have existed alongside Indian shock and disgust at the destructiveness and mass slaughter entailed by European styles of warfare. Out of the collision of cultures that arose on the battlefield came a systematic breakdown of the ritualized limits

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34. THE CAMBRIDGE HISTORY OF LAW IN AMERICA (Michael Grossberg & Christopher Tomlins eds., 2008); THE MANY LEGALITIES OF EARLY AMERICA (Bruce Mann & Christopher Tomlins eds., 2001).

35. Adam J. Hirsch, *The Collision of Military Cultures in Seventeenth-Century New England*, 74 J. OF AM. HIST. 1187 (1988).

36. See JILL LEPORE, NAME OF WAR *passim* (1999); DANIEL RICHTER, FACING EAST FROM INDIAN COUNTRY *passim* (2001); RICHARD WHITE, THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650–1815 *passim* (1991).

that constrained in some small way armed conflict in each of the cultures.

What the Indian wars case makes clear is that thinking about the history of the norms that shape warfare in North America entails more than merely understanding the status of the those norms: whether they were believed in, respected, perceived as legitimate, etc. It entails understanding their social significance and making sense of the social logics in which such norms took part.

Consider here the limits of the novelty narrative. Consistent with the novelty thesis, one might say that the laws of war were irrelevant to the kinds of frontier warring that went on in North America. One could cite Henry Wheaton and James Kent for the proposition that non-Christians fell outside the boundaries of the laws of war.<sup>37</sup> Or one could cite their European predecessors for the slightly different proposition that savage peoples were not entitled to the law of war's civilizing protections. But such an approach would overlook the social significance of the law-of-war tradition in such conflicts. Norms for warfare were not irrelevant to such wars. What happened in wars between Indians and European settlers and their descendants was that the norms that existed collided with one another to produce terrifyingly ferocious forms of violence.

And of course the clash and breakdown of norms for the restraint of warfare qualify the declension thesis as well. An observer committed to the declension thesis might try to rescue it by relying on the move by men such as Kent and Wheaton to exclude Indian conflicts from the domain of the laws of war. If these conflicts are conflicts that existed beyond the reach of the relevant norms, then the experience of violence in such conflicts can hardly be said to reflect on the history of the norms themselves. So the story would go. But it's hardly a satisfying account. After all, Kent and Wheaton and their European predecessors helped to construct the legal boundary between European states and the Indian tribes. That boundary isn't exogenous to the history of the laws of war. It doesn't drop into the laws of war from some other social space. It is a central feature of the laws of war, one that American jurists and soldiers helped to elaborate and secure.

### *B. Populists and Professionals*

A second strand of cultural contestation over the laws of war has made less of an impression on the historical literature than the Indian wars. From the early days of the republic to the present, a struggle has unfolded between professionals and populists over the content of the norms in the laws of war.

Much of the most sophisticated history of international law in the nineteenth and twentieth centuries has focused on the development of a professional class of

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37. See, e.g., 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 3–4 (O.W. Holmes Jr. ed., Boston, Little, Brown, and Company 1873) (1826); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 44–45 (London, B. Fellowes 1836); see generally MARK W. JANIS, THE AMERICAN TRADITION OF INTERNATIONAL LAW (2004).

international lawyers.<sup>38</sup> The United States witnessed precisely such a development in the nineteenth century. Indeed, one could push the timing back well before the late nineteenth-century formation of professional associations for international lawyers in Europe and their turn-of-the-twentieth-century American counterparts. At the turn of the nineteenth century, a specialist branch of the bar emerged to handle prize cases in the federal courts of Boston, New York, Philadelphia, Baltimore, Washington, and Charleston. In the Supreme Court, a group of a little more than a dozen lawyers (most of them Philadelphians) handled virtually every case arising out of the law of war at sea between the 1790s and the end of the 1810s.<sup>39</sup>

In the 1820s and 1830s the military academy at West Point began to train its cadets in the laws of land warfare. At first they used an English translation of Vattel, but they soon switched over to reading Kent's *Commentaries on American Law*.<sup>40</sup> The training was somewhat rudimentary, to be sure. West Point was an engineering school first and foremost until well after the Civil War. But we can see nonetheless the beginnings of a professional commitment to the laws of war, the kind of commitment that would underlie George McClellan's famous Harrison Landing letter in the summer of 1862, in which he undertook to upbraid the President of the United States for the aggressiveness of the President's war plans.<sup>41</sup> By 1845, when the Naval Academy opened its doors at Annapolis, it too was using Kent, this time to teach the laws of war at sea to naval officers who would be called on to make snap judgments in distant locales of the world.<sup>42</sup>

What we see in the years prior to the Civil War, then, is the advent of professional constituencies for the laws of war in the legal profession and in the military. Yet it is not enough to look to these constituencies if we want to make sense of the history of the laws of war during this period, for at the very same time a populist militia tradition was making itself heard on the laws of warfare.

It is a striking feature of the history of the laws of war in Europe that the *levée en masse* of the French Revolution is rightly seen as a central part of the story.<sup>43</sup> In the U.S. context, the Second Amendment should be seen as playing a comparable role. For what the Second Amendment did—one thing it did, at any rate—was to limit the significance of professionalization in the military. Resistance to standing armies meant that going to war required mass enlistments from outside the professional training of West Point and Annapolis. Just as European

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38. E.g., MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS* (2001).

39. See JANIS, *supra* note 37, at pp. 51–94; see also JOHN FABIAN WITT, *LINCOLN'S CODE: WAR AND HUMANITY IN AMERICA* (forthcoming 2012) (ch. 3).

40. See WILLIAM B. SKELTON, *AN AMERICAN PROFESSION OF ARMS* 171 (1992).

41. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* (1988).

42. PETER KARSTEN, *THE NAVAL ARISTOCRACY* 34–35 (1972).

43. See DAVID BELL, *THE FIRST TOTAL WAR* 10 (2007); GEOFFREY BEST, *HUMANITY IN WARFARE* 80–81 (1980); Gunther Rothenberg, *The Age of Napoleon*, *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 86–97 (Michael Howard et al. eds., 1994).

observers feared that the *levée en masse's* mobilization of a patriotic population would overwhelm the fragile balance of the European limits on warfare, the militia and later the volunteer tradition in U.S. history badly undercut the influence of the professionals. We can see this in the behavior of Andrew Jackson's Tennessee militia in its march through Spanish Florida.<sup>44</sup> We can see this perhaps most spectacularly of all in the Mexican War, where the volunteers under General Zachary Taylor quickly earned a widespread and well-deserved reputation for terrorizing Mexican civilians.<sup>45</sup>

It would be tempting to excise the militia from the story of the laws of war. This is precisely what the literature (such as it is) has effectively done to date. But that would be a mistake. Setting the militia outside the history of the laws of war recapitulates the exclusion of Indian wars from the field. It writes the history of the laws of war by cooking the books.

### C. State Building and Its Opponents

A third area in which the laws of war played an important role was in the political contests of the early republic over the scope and power of the federal government. Here Alexander Hamilton was the key figure. From the end of the Revolution to his death by duel with Aaron Burr, Hamilton repeatedly relied on the international laws of war as a source of authority for a federal government that at the moment of its establishment in 1787 he thought too weak for the world of European empires.

Hamilton was hardly an uncomplicated fan of the laws of war. In the aftermath of the execution by hanging of Major John André for spying in the Revolution, Hamilton wrote bitterly to Henry Laurens that the "authorized maxims and practices of war" were "the satires of human nature."<sup>46</sup> In *Rutgers v. Waddington*,<sup>47</sup> in 1784, Hamilton relied on the laws of war as a way to sustain the United States' commitments under the Treaty of Paris as against state policies that targeted British creditors and British loyalists. In *Rutgers*, Hamilton persuaded the New York Mayor's Court to construe extremely narrowly a New York statute that sought very clearly to make British authorization no defense to lawsuit by property holders against those who had taken possession of their property during the course of the British occupation of New York. Why? Hamilton insisted that the laws of war had always accepted the right to take possession of enemy private property during occupation, and the legislature of New York was not to be presumed to have violated the laws of war without a clear statement of its intent

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44. See generally DAVID S. HEIDLER & JEANNE T. HEIDLER, *OLD HICKORY'S WAR* (2003).

45. MARK E. NEELY, JR., *THE CIVIL WAR AND THE LIMITS OF DESTRUCTION* 12 (2007).

46. MINUTES OF A COURT OF INQUIRY, UPON THE CASE OF MAJOR JOHN ANDRÉ, 57 (Albany, J. Munsell 1865).

47. THE CASE OF ELIZABETH RUTGERS VERSUS JOSHUA WADDINGTON (Morrisania, N.Y. 1866).

to do so.<sup>48</sup>

Hamilton made similar moves move time and again for the next twenty years. Against critics of executive authority, he argued that the laws of war sustained Washington's declaration of neutrality in 1793.<sup>49</sup> In 1798 his political allies defended the Alien Friends Act as grounded in, among other things, the authority afforded the federal government by the laws of war.<sup>50</sup> And in 1801 he ridiculed Jefferson's constitutional scruples in responding to attacks on American naval vessels by Tripoli.<sup>51</sup>

Each of Hamilton's arguments prompted fevered rebuttals by the opponents of federal government authority, most notably Madison's Helvidius letters. Hamilton's view sought to demonstrate that the laws of war provided the federal government with certain unwritten inherent powers. Madison's reply countered that the structure of the Constitution's enumerated powers required that the laws of war be subordinate to the Constitution's express terms.<sup>52</sup> And interestingly, the problem of slavery in the federal system was never too far from the surface. In the Alien Friends Act debates, southern critics wondered aloud whether the justifications offered by the Act might also support a reading of the Constitution that allowed the federal government into the business of limiting slavery.<sup>53</sup>

The debate over the laws of war and the capacity of the federal government was necessarily inconclusive, of course. Arguments like this in the laws of war rarely have clear answers. But once again we see the capacity of the laws of war to establish the framework in which political debate proceeded.

#### *D. Contesting the Content of the Law*

A striking feature in Hamilton's version of the laws of war in these years is that for Hamilton the laws of war were a source of state power. Hamilton was virtually alone among the early statesmen of the republic in framing the laws of war in this way. The more characteristic move by statesmen such as Jefferson and Madison was to see the laws of war as a limit on state power and to praise the civilizing and humane virtues of the laws of war in their capacity to restrain the actions of states at war. On this account, the United States was heir to Enlightenment laws of war that had achieved the great triumph of restraining the violence of the barbaric forms of warfare familiar to Europeans of an earlier

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48. ALEXANDER HAMILTON, Remarks on the Treaty of Amity Commerce and Navigation lately made between the United States and Britain, in 18 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 22, at 413–24.

49. Alexander Hamilton and Henry Knox to George Washington (Phila., May 2, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON 367, *supra* note 22, at 368–87.

50. Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 935 (1991).

51. ALEXANDER HAMILTON, *The Examination (No. 1)*, in 25 THE PAPERS OF ALEXANDER HAMILTON 444, *supra* note 22, at 455.

52. THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794 (Morton J. Frisch ed., 2007).

53. JOHN CHESTER MILLER, CRISIS IN FREEDOM 164 (1951).

generation. For many American statesmen, this was a powerfully appealing conception, not the least because of the tiny size of the young weak republic's military force.<sup>54</sup>

Take, for example, the engaging (but almost completely unnoticed by the literature) debate in the early republic over the status of private property in wartime under international law. From early on, men like Franklin and John Adams championed the idea that the Enlightenment laws of war immunized private life from war's destruction.<sup>55</sup> With increased confidence in the years after the end of the Revolution, American statesmen such as John Quincy Adams drew on some doubtful language and a few weak precedents in the European tradition to identify a purported rule prohibiting the seizure of private property.<sup>56</sup> Kent and Wheaton picked up the same idea, announcing it as a rule of the international laws of war in their treatises in the 1820s and 1830s.<sup>57</sup>

But there was nothing inevitable about the private property rule articulated by Kent or Wheaton. In fact, a close reading of eighteenth-century jurists such as the Swiss Emerich de Vattel suggested that although eighteenth-century jurists aspired to shelter private property from war's destruction as much as possible, they could not say that attacks on private property were illegal *per se*.<sup>58</sup> The Dutch jurist Cornelius van Bynkershoek stated explicitly that the laws of war "permit[ted] the destruction of the enemy by whatsoever means."<sup>59</sup> And Alexander Hamilton, perhaps not surprisingly, agreed. In Hamilton's view, the laws of war authorized the seizure of private property. This idea formed the basis of his defense of Joshua Waddington in 1784. And it was one of his central arguments in defense of John Jay in 1794 and 1795 when the latter man's treaty with Great Britain failed to win reparations for property carried off by the British in the wake of the Revolution.<sup>60</sup>

The private property rule is but one example of the contest over the content of the international law of war during the early republic, but there were many more. Even where there was little domestic American dissent from a proposition of law, a number of the propositions that circulated in the United States in the decades after the founding of the republic were shaped and crafted in creative ways by American jurists. When Kent and Wheaton excluded non-Christians from

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54. REGINALD STUART, *WAR AND AMERICAN THOUGHT* (1982).

55. *Id.* at 27.

56. 3 JOHN QUINCY ADAMS, *MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848*, at 257–59 (Charles Francis Adams ed., 1969).

57. KENT, *supra* note 37, at 86–87; WHEATON, *supra* note 37, at 252–53.

58. See 3 EMMERICH DE VATTEL, *LE DROIT DES GENS [THE LAW OF NATIONS]* ch. 9, § 161, at 364 (Chitty ed., 1867).

59. 2 CORNELIUS VAN BYNKERSHOEK, *QUAESTRIONUM JURIS PUBLICI DUO [ON QUESTIONS OF PUBLIC LAW]* 17 (James Brown Scott ed., Tenney Frank trans., 1930) (1737).

60. See 1 *THE LAW PRACTICE OF ALEXANDER HAMILTON* 347 (Julius Goebel, Jr. ed., Columbia University Press 1964); ALEXANDER HAMILTON, *Philo Camillus* No. 3 (Aug. 12, 1795), in 19 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 22, at 124–34.

the domain of international law, they were cementing an idea the traces of which could be found in the European jurists that had come before them.<sup>61</sup> But they moved the idea forward in important ways. The content of the law of nations was thus plastic and malleable, not fixed. But neither the declension nor the novelty theses is prepared to make any sense of such creative construction of views about the content of the law because, as we have seen before, their principal concern is the status of the law, not its social significance.

#### *E. Slaves and Slaveholders*

One of the fiercest contests over the content of the international law of war during the period took place over a special application of the private property rule. It involved the question of slavery and its status in the international law of war.

The problem of slavery put American statesmen in a somewhat uncomfortable position. There was virtually nothing about slavery in the European tradition going back to the early modern jurists Vitoria and Grotius. Slavery simply had not been an issue in wars on the European Continent. And on the colonial periphery, where slavery had become a booming business, the laws of war were often thought not to apply. The most frequent role for slavery in European jurists' accounts was the celebration of the shift from executing prisoners to enslaving them to ransoming them and finally to exchanging and releasing them. In the hands of Montesquieu, this evolution had become a basis for the critique of slavery as an institution. If prisoners of war could not be turned into slaves, Montesquieu famously argued that there was no valid basis on which human beings could be enslaved.<sup>62</sup>

Yet this did not stop American statesmen from asserting with great confidence that slavery (as a form of private property holding) was protected by the laws of war. Jefferson, for one, made the protection of slaveowners' property in their slaves a testing ground for the enlightened and civilized character of armies.<sup>63</sup> Henry Laurens of South Carolina insisted that a ban on carrying off slaves be inserted in the Treaty of Paris on the ground that the laws of war prohibited such acts.<sup>64</sup> And when the British left New York with hundreds of former slaves in tow, Washington and the Continental Congress protested loudly.<sup>65</sup>

Even statesmen who espoused antislavery views contended that the laws of war protected slave owners' property during wartime. John Jay, who signed New York's gradual emancipation law as governor, sought compensation from the British for slaves carried off in the wake of the Revolution. (Jay drew back at the

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61. See, e.g., VATTEL, *supra* note 58, ch. 8, § 141, at 348.

62. DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 425 (1966).

63. MICHAEL KRANISH, FLIGHT FROM MONTICELLO (2010).

64. SIMON SCHAMA, ROUGH CROSSINGS 136 (2006).

65. *Id.* at 147.

strongest claims of southern slaveholders, which was that they were entitled to the return of their slaves, even those whom the British had purported to free. When Jay failed to get compensation as part of the eponymous 1794 treaty with Great Britain, southerners believed bitterly that the antislavery Jay had quietly abandoned their interests.)<sup>66</sup> A generation later, another antislavery statesman, John Quincy Adams, became the early republic's greatest champion of slaveholder rights in wartime. At Ghent in late 1814, Adams negotiated a clause barring the British from carrying off slaves as they had in 1783. Once again, the British disputed Adams's construction of the clause. For more than a decade, through his service as Secretary of State and his one term as President, Adams pursued the compensation for slaveowners whose slaves had been seized and freed by British forces during the war.<sup>67</sup>

The slavery question played so prominent a role in the law of war debates of the early republic that it became the principal application of the ostensibly civilized Enlightenment law of war advocated by American statesmen. The protection of slavery became the chief test of a civilized armed conflict.

So far in my description of the slavery question in the laws of war I have not described very much contestation, at least not within the United States. And there seems not to have been much debate about the question among white Americans. As Don Fehrenbacher has noted, the slave interest had a hammerlock on American foreign policy until the very eve of the Civil War.<sup>68</sup>

But there was a dissenting group, and that was the slaves themselves. Just as professional elites were not the only American constituency for the laws of war in the Age of Jackson, nor were the partisans of the slave interest the only stakeholders in the debates over the status of slavery in war. For American slaves seem to have taken an active interest in the possibilities that war opened up for them.

From 1775 onward, slaves in Virginia and elsewhere, especially though not exclusively in the South, understood very well that the outbreak of violence between their owners and the British government held out an unprecedented opportunity for freedom. Estimates suggest that one hundred thousand slaves escaped from plantations in the South to British lines during these years.<sup>69</sup> Their story has been told by scholars such as Sylvia Frey, Benjamin Quarles, and Simon Schama.<sup>70</sup> But it has not been integrated into the narrative of the laws of war. It should be. By their willingness to resort to flight, the slaves of southern plantations made warfare an exceedingly dangerous endeavor for the United

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66. JERALD A. COMBS, *THE JAY TREATY* 155 (1970).

67. FRANK ARTHUR UPDYKE, *THE DIPLOMACY OF THE WAR OF 1812*, at 399–404 (1915).

68. FEHRENBACHER, *supra* note 27, at 132.

69. SCHAMA, *supra* note 64, at 8.

70. SYLVIA R. FREY, *WATER FROM THE ROCK* (1991); BENJAMIN QUARLES, *THE NEGRO IN THE AMERICAN REVOLUTION* (1961); SCHAMA, *supra* note 64.



States. And when they did so they were essentially lawyering with their feet, taking advantage of the sudden existence of jurisdictional maneuvers made available by the presence of British lines. To put it differently, tens of thousands of American slaves in the Revolution recognized something akin to the idea articulated by Grotius and Locke and Pufendorf in the European political theory literature. They recognized that the juridical structure of the master-slave relationship was a relation of (temporarily) suppressed warfare.<sup>71</sup> Grotius quoted the ancient Scythians telling Alexander that “[t]here is no friendship between lord and slave, for though they live in peace the laws of war remain.”<sup>72</sup> And with the collapse of peace the laws of war became salient once more. In New Jersey, a black man named Colonel Tye led a mixed-race band of marauders that burned, stole, and plundered their way through the middle ground between British forces in New York City and the rebels in the countryside.<sup>73</sup> Encampments of hundreds of slaves along the Savannah River fought to hold out against their owners for years after the end of the Revolution, much like Japanese soldiers holding out on Pacific islands long after the end of the Second World War.<sup>74</sup>

Slaves in the American South repeated the process of the Revolution during the War of 1812. This time fewer of them managed to escape to British lines. Nonetheless, thousands of slaves did manage to do so.<sup>75</sup> Beginning in the early part of 1813, as British forces raided plantations and towns along the Chesapeake, countless slaves served as guides for British raiding parties. Hundreds signed up for the Colonial Marines, an all-black corps organized by the British.<sup>76</sup> White southerners were sufficiently concerned that in an effort to deter flight, they began to fabricate reports in newspapers of British officers selling captured slaves into harsh slavery in the British West Indies.<sup>77</sup> It is not clear whether these efforts were successful or not. What reports exist suggest that those slaves who did escape were unwilling to return to their masters even when asked to do so personally by those who until recently had possessed such power over their lives.

#### PART V

What I have offered here is just a smattering of the cultural contestation that took place over the laws of war during the early republic. The social conflicts I

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71. David Brion Davis, *Introduction to CHRISTOPHER LESLIE BROWN & PHILIP D. MORGAN, ARMING SLAVES 2, 2–3* (2006).

72. 3 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 1510–11 (Richard Tuck ed., Liberty Fund 2005) (1625).

73. SCHAMA, *supra* note 64, at 124–26.

74. *Id.* at 125.

75. Frank A. Cassell, *Slaves of the Chesapeake Bay Area and the War of 1812*, 57 J. NEGRO HIST. 144, 154 (1972).

76. Christopher T. George, *Mirage of Freedom: African Americans in the War of 1812*, 91 MD. HIST. MAG. 427, 435–36 (1991).

77. See, e.g., *Negro Stealing*, PALLADIUM OF LIBERTY, Jan. 8, 1814 at 1.

have described seem to me to be deeply at odds with the historical master narratives of declension and novelty. They do not offer an account of the laws of war that is immediately or obviously useful in any simple sense to the partisans of law of war controversies in the twenty-first century. But they do seem to me to produce an account of the history of the law of war that is far more dynamic and socially significant than the dry and—let's face it—often dreary accounts of doctrinal exegesis offered by a handful of early nineteenth-century jurists. The usual suspects, men like Kent and Wheaton and Marshall, are critically important, of course. But they can only tell us so much about the social significance of the laws of war in American history, and it is that topic and the set of questions it entails that we know far too little about.

What then is the history of the laws of war in America? I'm three years in and it still seems too early to tell. But one way of thinking about the problem, the way I've tried to present here, describes the laws of war as a framework for moral contestation and debate about ends and means, a framework for conceptualizing and arguing about some of the gravest moments in American history. Not a discontinuous one, as the declension and novelty accounts posit, but a persistent one. The capacity of legal discourse to animate and shape the ethical consideration of means and ends in warfare over such a long time period is really quite extraordinary. And it is, so far as I can see it at this stage in my project, the defining feature of the alternately dismal and inspiring history of the laws of war.