

Settler Empire and the United States: Francis Lieber on the Laws of War

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Histories of political science and of the laws of war identify the nineteenth-century scholar Francis Lieber as their modern founder. His 1863 *General Orders 100* codified the modern laws of war, internationalizing his political thought. Yet, relatively unremarked is that Lieber wrote his foundational texts during U.S. settler colonization, which he justified in whole. I argue that *GO100* facilitated settler colonial violence by defining modern war as a public war, arrogating it to sovereign states; distinguishing revenge from retaliation, attributing revenge to the “savage”; and elevating a certain racialized/gendered governance, ascribing it to the Cis-Caucasian race. Producing Native peoples and Native wars as lacking in the proper characteristics of sovereign belligerency resulted in a subordination of status and a legitimization of exterminatory tactics that were subsequently universalized and (re)internationalized through *GO100*’s determinative influence on the laws of war. Tracing *GO100* further exposes the founding of the discipline in Native peoples’ dispossession and extermination.


INTRODUCTION

Traditional histories of political science and of the laws of war identify the nineteenth-century scholar Francis Lieber (1798–1872) as their modern founder. The inaugural professor of political science and history in the United States (Columbia University, 1865), Lieber is taken to be “America’s first systemic theorist of the state,” his work foundational to “an institutionalized, academic discipline” (Farr 1990, 1028; Gunnell 1993). Lieber was also central to the emergence of American political thought (Ross 1991; Schoen 2020) and the development of the modern laws of war (Kinsella 2011; Paust 2001; Witt 2012). His 1863 *General Orders 100* (*GO100*), written and issued during the American Civil War (1861–1865), was the first modern codification of the laws of war. *GO100* provided the blueprint for the subsequent development of the formal international laws of war and “fundamentally altered the way the United States—and then most of the rest of the world—viewed the relationship between law and war” (Finkelman 2013, 2086).

Scholars of political science have addressed various elements of Lieber’s political thought: his belief in the essential nature of prisons, the extensive reach of the patriarchal state, and the restriction of universal suffrage through literacy tests (Benson 2015; Dietz and Farr 1998; Freidel 1947). Scholars of the laws of war have scrutinized his permissive conceptualization of military necessity in *GO100*, the expansive use of force it permitted during the Civil War, and its facilitation

of an “American” way of war (Bjork 2019). This scholarship complicates more conventional assessments of Lieber by foregrounding his racialized, gendered, and ethnonationalist sentiments. It also exposes these disciplines’ incomplete and often “unreliable accounts of their own fields” and the lasting influence of their “foundational myths” (Vitalis 2015, 5; Roberts 2019). However, what remains broadly unaddressed is that Lieber wrote his foundational texts of politics and law during the unmitigated U.S. practice of settler colonization—Native peoples’ dispossession and extermination—which, far from opposing, he justified in whole (a recent notable exception is Dahl 2018). He considered the Cis-Caucasian race—a term coined by Lieber to designate the “Western Caucasian portion of mankind”—a “master” or “favored race” because its “peculiar founding capacity” materialized an “instinctive impulse” to “rear and spread civil liberty” (Lieber 1888, *Civil Liberty* [CL], 21–22; Lieber 1834, *Letters to a Gentleman* [LTG], 296–97; Crăiuțu and Jennings 2009, 87).

Notably, Lieber judged civil liberty properly practiced as specific to the English and Americans, he termed and celebrated it as distinctly Anglican (CL, 55).¹ He argued that to truly “learn liberty” one must visit America and witness its “historic prophecy” of rightfully civilized rule: “God has given us this great country for great purposes ... as much as He gave Palestine to the Jews” (CL, 295; Lieber 1881, *Miscellaneous Writings* [MW], II:38; Freidel 1947, 317).² Bearing in mind he also believed that the “chieftain

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¹ Joining “his political theory to Teutonic history and a defense of American exceptionalism,” Lieber venerates the English and the Americans for attaining “articulated liberty” exemplified in their institutions and practice of government (Ross 1991, 41). Differentiating within the Cis-Caucasian race, but always in categorical opposition to the non-White and Asiatic, Anglican liberty and its further refinements as American liberty are celebrated above all other forms of liberty and governance.

² Guyatt (2007, 172) captures this as an “idiom of historical providentialism” and traces its use by for and against inclusion and recognition of Indigenous peoples.

government of our Indians” lacked civil liberty, it was the prophecy and practice of U.S. settler order to which Lieber prescribed and for which he advocated in his major works of political thought (CL, 129, 21). According to Lieber, the intrinsic dispositions of the Cis-Caucasian race, a uniquely “emigrating and settling one,” necessitated and justified expansive territorial acquisition founding what Rana calls “settler empire” (1855, *The Mormons* [TM], 228; Rana 2010, 3).

GO100 was the “amplification” of Lieber’s politico-ethical thought (Baxter 1963, 176). It drew specifically from ruminations on war developed in his book *Manual of Political Ethics* (MPE), which identified the American Revolution as a just war and “the best and purest” fount of American civic and martial morality (1911, II:440). Therefore, it is striking that GO100 specifically, and Lieber’s thought more generally, has yet to be evaluated as part of the edifice of dispossession and settler empire. After all, as Nick Estes (Kul Wicasa Lower Brule Sioux Tribe) underscores, “in a very real sense, the founding of the United States was a declaration of war against Indigenous peoples” (2019, 91).

Foregrounding settler empire as a condition of emergence for GO100 expands analyses of Native dispossession (Byrd 2011; Nichols 2020a; Simpson 2014) by focusing on a key element of its process and justification—the modern laws of war. The laws of war are crucial to any analysis of overseas imperialism and settler colonization, but scholarly attention focuses less on GO100’s role in both (Anghie 2005; Kinsella and Mantilla 2020; Megrét 2006; van Dijk 2022). Political theory and settler colonial studies neglect GO100 when documenting the licensing of empire (Cocks 2014; Ford 2010; Wolfe 2016), and American Civil War histories and Native histories (Delay 2015; Hahn 2013) have yet to converge on GO100. Locating Lieber, his work, and his law within settler empire also further details Native peoples and war as formative concerns in the development of American political science and the laws of war (Crawford 2017; Ferguson 2016; Sagan 2017).

In what follows, I argue that GO100 functioned as another juridical means by which Native peoples and nations were transformed from sovereign peoples and nations to a matter of domestic relations while formalizing largely unfettered violence against them. GO100 facilitated settler colonial violence by defining modern war as a public war, arrogating it to sovereign states only; distinguishing revenge from retaliation, attributing revenge to the “savage”; and, elevating a certain racialized/gendered characterological governance, ascribing it to the Cis-Caucasian race. Producing Native peoples and Native wars as lacking in the proper characteristics of sovereign belligerency resulted in a subordination of status and a legitimization of exterminatory tactics that were subsequently *universalized* and *(re)internationalized* through GO100’s determinative influence on the laws of war. As a field manual for armies, GO100 provided “material tractability” for collective and individual ethical sensibilities and ideologies, directly affecting the means and methods of war (Nichols 2020b, 297). Consequently, extant interpretations of GO100 remain incomplete,

eliding the mutually constitutive articulation of settler sovereignty, the modern laws of war, and the relationships of violence articulated and enabled.

I make this argument in the three steps. First, in the following section on Native and Civil Wars, I demonstrate that GO100 should be read as an artifact of Native wars and deliberations over Native sovereignty and possession, not simply as an artifact of the Civil War and deliberations over slavery and secession. The two are intertwined. Agreeing with an argument of his time, Lieber held that the most “judicious mode of emancipation” for those enslaved was to create a “peasantry of colored people” which should “colonize either in Africa or some distant part of our continent” (LTG, 298). To protect the racial purity of whites, this peasantry should be kept at a far remove lest it lead to “free social intercourse and intermarriage” and a consequent “mongrel breed” (LTG, 296–97). Thus, as I argue in the sections on Governance and on Property, it was vital to continue expansion and dispossession now in pursuit of emancipation.

Second, as specified in the sections on Ends and Means of War and on Modern War, this expanded analytic scope inclusive of both Native wars and Lieber’s own scholarship illuminates how GO100 is not a decisive or humanitarian break from the past. Both the specific argument that GO100 is “rooted in the imperatives of Lincoln’s emancipation project” (e.g., Mancini 2011; Witt 2014, 162) and the general argument that it was rooted in “the campaign to limit the humanitarian toll of war” (e.g., Kalmanovitz 2020; Paust 2001; Witt 2014, 162), wholly efface the contemporaneous violence of Native dispossession and extermination carried out pursuant to U.S. expansion and African American formal emancipation. This is most evident in the continuation, as Lieber put it, of the “idea that the white man, at least, if not the Christian, is entitled to the earth, if not *cultivated* by the occupier (MW, II:27).³

Third, as detailed in the section on Revenge and Retaliation, my consideration of the relationship among the conceptual cornerstones of GO100, Lieber’s political thought, and the historico-material practices of the time foregrounds the imbrication of the laws of war (and the founding of the discipline) with the legitimization of multiple forms of violence against Native peoples. In 1863, the year GO100 was issued, the U.S. Army “had taken over as the primary state-sponsored ... Indian killers” replacing state and volunteer militia (Madley 2016, 354–55). Five years later, Lieber wrote to Johannes Bluntschli, an equally pivotal figure in the expansion of the laws of war, that while “fighting and slaying the Indians is terrible to me ... their gradual extinction I consider desirable, and the quicker the better” (Perry 1882 [Letters], 385). Tracing his investment in extinction both gradual and quick reveals the convergence of the laws of wars with both armed and reproductive violence, for Lieber’s concern was with the regulation of both militaries and monogamy. I close

³ Lieber is citing *Johnson v. McIntosh*, U.S. Supreme Court (1823) establishing parameters of rightful occupancy.

by suggesting how his desire, not unique for his time, continues to be mobilized in ours, in part through the laws he made.

NATIVE AND CIVIL WARS

Native Wars and the American Civil War have long been “segregated in history and memory” when, in fact, both “grew out of the process of establishing an American empire” (Cothran and Kelman 2015). Where the British employed a Colonial Office, the United States maintained the Bureau of Indian Affairs (Delay 2015, 935). The U.S.–Mexico War underlined the “capacity of the US for imperial conquest,” exemplified in 1856 when Jefferson Davis, Secretary of War, Mexican American War hero, and soon to be President of the Confederacy, favorably compared France’s subjugation of Algeria to the United States and its advance on “their” frontier “Arabs” (Karp 2016, 113, 214). In the recursive circuit of empire, it was the U.S. “state-administered” mass expulsions of Native peoples in the 1830s, of which the Cherokee Trail of Tears might be the most well known, which “became something of a model for colonial empires around the world,” including France in Algeria (Saunt 2020, xv).

In fact, in 1846, Alexis de Tocqueville queried Lieber as to “the colonization of Algeria and whether the US may serve as an example” (Crăiuțu and Jennings 2009, 87). Notwithstanding Tocqueville’s otherwise unvarnished description of the forced removal of the Choctaw in the 1830s, he explicitly advocated for similar practices both as member of the French Parliament and in his essays on the colonization of Algeria (Pitts 2001). Responding to Tocqueville’s letter, Lieber highlighted that America and Algeria are “essentially different” due to the restive character of the American settlers that emerges from their instinct for self-rule (Crăiuțu and Jennings 2009, 88). Further distinguishing America was the bounty of “cheap, fertile, undisputed” land which, even whilst acknowledged to be inhabited, was legislated “as though it absolutely belonged to no one” (Crăiuțu and Jennings 2009, 88–89). As Dahl (2018) points out, Lieber referred to the 1838 law of preemption, which gave squatters and those who cleared the land first right of purchase. Lieber excluded those who only hunt, noticeably using the past tense this one time in the letter to refer explicitly to the “Indians who recede with the buffalo” saying only they “have lived there” (88). His historic prophecy relegates Native peoples to the vestiges of an erasable past whose status is akin to that which they hunt, thereby also attributing to them the cause of their own demise—what Jean O’Brien (White Earth Ojibwe) maps as a repetitive invocation of “temporalities of race,” where the constancy and survival of the settler is juxtaposed against the seemingly inevitable disappearance of Native peoples (2010, 105).⁴

Yet, at the start of the Civil War, despite the devastation and destruction wrought by Federal legislation and the ensuing onslaught of settlers, Native peoples remained. Native peoples and their lands were crucial to Civil War strategies of war and “white Americans of the Lincoln era defined themselves” in relation to a conceptual constellation of “civilized” or “savage” peoples and practices variously formulated in response to the “Indian question” (Cozzens, 2016; Nichols 2012, 2). To take one example, the 1830 Removal Act precipitated “a widespread public examination of the terms in which the nation wished to define itself” that reverberated for decades (Maddox 1991, 17).

Both the Union and Confederacy understood that Native peoples and their land were not peripheral to their goals. No mere pawns during this “white man’s war,” Native peoples fought for their territory, sovereignty, and survival. Each debated the role of Native soldiers and scouts, fielded Native troops, competed for the allegiances of the “Five Tribes,” and believed that their treatment of Native peoples would have international repercussions (Abel 1919; Nichols 2012). In May 1861, Indian Territory was incorporated into the Confederate military district and new treaties signed between the Confederacy and tribal delegations.

For the Union, thwarting Confederate incursion on the Western territories while clearing them of Native peoples were “twin goals” necessary to attain an “empire of free laborers” (Nelson 2020, xix). Although the Union argued against “converting Indian soil into slave soil,” conversion was still its ambition (Benton 1854, 626). An empire of free laborers needed land, whereas soldiers and veterans would and could be paid in kind. In accomplishing these twin goals of removal and remuneration, interchange of military commands, soldiers, and militias from Native to Civil war theaters was dense and diffuse, and the frontier armies grew exponentially during the war.

Neither wars of expansion nor of dispossession ceased during the Civil War. Some of the largest massacres of Native peoples—Bear River (1863) and Sand Creek (1864)—occurred during the Civil War. These events captured national attention and, in the case of the U.S.–Dakota wars (1862–1864), occasioned Lincoln’s direct intervention. Suspension of treaty obligations, combined with legislation such as the 1862 Homestead Act, facilitated indiscriminate violence in Westward expansion (Warde 2013). Consequently, although recognizing distinctions of war(s) in Indian Territory and from the border regions, “significant linkage existed” among “the use of Indian and black troops, abolitionism and Indian policy reform, colonization and Indian removal” (Nichols 2012, 2).

Both the Civil War and U.S.–Native Wars fundamentally concerned U.S. efforts at national consolidation and membership in the commonwealth of “civilized nations.” The very public and juridical debate over the Civil War’s status—rebellion, treason, crime, or war—highlighted questions of belligerency, criminality, and sovereignty not unfamiliar to the characterization of Native Wars. Was the Confederacy a

⁴ As Lieber explained to his son in 1839, the US had “not been peopled” until the arrival of “whites” because Native peoples “never rose above the hunting state” (Schnurmann 2018, 283).

sovereign state with the full rights of belligerency or were Confederates traitors engaged in criminal acts? Depending on one's answer, a different legal regime was applicable. If recognized as a belligerent sovereign power, the laws of war gave the Confederacy the right to kill and capture enemies, occupy territory, and so forth. If, however, the Confederates were traitors, then procedures of law enforcement required prosecution and punishment of individuals for those acts of violence. The Lincoln administration insisted the latter was true, and the Supreme Court (S.C.) ruling in the 1863 Prize cases attributed sovereign and belligerent rights to the Union but only belligerent rights to the Confederacy (Neff 2010). The Confederates, unsurprisingly, disagreed: for them, it was not a civil war but an international one between two wholly sovereign states. The secessionist statement of South Carolina, Lieber's home during 1835–1856, made it explicit: "South Carolina has resumed her position ... as a separate and independent state ... with full power to levy war, conclude peace, and contract alliances" (Armitage 2017, 175). The disagreement was more than simply a matter of law. It directly affected military policies and expectations of permissible means of conducting war, the treatment of those involved, and international standing and recognition.

Questions of rights of belligerency and sovereignty similarly pertained to the U.S.–Native Wars that both predated and continued during the Civil War. Native peoples' rights to wage war, conclude peace, and make alliances were recognized in treaty and practice but by no means unanimously settled. Although the Marshall trilogy of S.C. cases (1823, 1831, 1832) radicalized and constitutionalized the project of dispossession, setting in motion the diminution of Native sovereign and territorial rights, the legal status of Native peoples was not wholly resolved and no "consistent theory" ever developed for "the legal structuring of the Indian wars" (Harring 1994, 16). Infamously characterizing Native nations as "domestic dependent nations" in the 1831 S.C. case *Cherokee Nation v. Georgia*, Judge Marshall also ruled Native peoples are "capable of maintaining the relations of peace and war." Reiterated in the 1832 case *Worcester v. Georgia*, Justice Mclean acknowledged they were not precisely "other foreign nations" nonetheless noting, "We have recognized in them the right to make war. No one ... supposed that the Indians could commit treason against the United States." Assessing the nineteenth-century legal landscape, Chomsky (1990, 81) concludes that "Indians were sovereign nations ... and their members accorded the rights of lawful belligerents." Of course, not everyone agreed. During the U.S.–Dakota War in 1862, Union General Pope wrote, "They are to be treated as maniacs or wild beasts and by no means as a people with whom treaties can be made ... it is my purpose utterly to exterminate the Sioux" (Nichols 2012, 87).

In contrast to Pope, after the 1862 Battle of Pea Ridge, which was the first to involve Native regiments, the Cherokee National Council resolved that "the war now existing between the said United States and the Confederate States and their Indian allies should be

conducted on the most humane principles which govern the usages of war among civilized nations ... to avoid any acts toward captured or fallen foes that would be incompatible with such usages" (Abel 1919, 32–33). The Cherokee Council issued its response in part due to incidents of scalping by Native Confederate allies widely reported in the Northern press. Confederate General Pike, believing that scalping "leads to cruel retaliation, and would expose the Confederate States to the just reprehension of all civilized nations," prohibited it unless "the Indian allies of the northern states continue it, let retaliation in kind be used as to them alone, and those who with them may invade the Indian territory and sanction it" (Brown 1997, 395). Pike's statement belied the contemporaneous belief in a sharp line differentiating "Indian" tactics or wars from those deemed "civilized" as his order allows for targeted retaliation while that of the Council does not.

Indeed, it was not only the scalping at Pea Ridge but also Confederate treatment of the wounded and dead at the first Battle of Bull Run that prompted Lieber's close friend and interlocutor Senator Charles Sumner in April of 1861 to demand the Joint Congressional Committee on the Conduct of the War investigate "rebel barbarities" and "how such warfare has been conducted" (Report on the Conduct of the War 1863, 449). Likewise, debates over belligerent rights and irregular Confederate combatants—whose "marauding and predatory" tactics were both attributed to and practiced against Native peoples—motivated Union General Halleck's first request to Lieber in 1862 to sort out a response (Witt 2012, 191).

Lieber wrote a small pamphlet, *Guerilla Parties Considered with Reference to the Law and Usages of War*, in which he distinguished among guerillas, partisans, and rebels and set forth the requirements of legitimate belligerency and the resultant rights and protections it afforded. *Guerrilla Parties* was in part shaped and governed by the fragile and indeterminate distinction among Native and Civil War practices, informed as it was by the need to sort and stabilize a multifariously referenced distinction of "savage" versus "civilized" war—a distinction whose incoherence was made obvious in a war in which "rebel Indians, like rebel whites, are barbarians still"—to degrade Confederate tactics.⁵

When Halleck, with President Lincoln's encouragement, charged Lieber with drafting a general code clarifying the laws and usages of war, Lieber was directly immersed in disputes over how to define, regulate, and fight the Civil War. But this was preceded by his considerations of Native peoples and wars, which had occupied him since his arrival in Boston in 1827. His first eight years in the country coincided with public scrutiny of the status of Native peoples as "Native memoirs, letters, and speeches circulated widely," including vivid descriptions of Pequot William Apess's

⁵ E.g., those "Union Indians" who "conducted the campaign much more like Christians than the whites have done who claim that character;" <http://www.nytimes.com/1862/02/09/news/important-order-gen-hunter-headquarters-dep-t-kansas-fr-leavenworth-indians.html>.

Mashpee Revolt against the state of Massachusetts in 1833 (Dahl 2018; Saunt 2020, 62). He resided in South Carolina during the long process of Cherokee Removal and at the cusp of the second and third Wars against the Seminoles when it seemed as if “all the southern world is to be in a war” (Saunt 2020, 249). He considered himself an expert on Native languages, coined the term holophrastic to capture their polysemy, and proposed an institute for their study (Freidel 1947).

It was in this context that Lieber delivered his famous lectures on the laws of war in 1861 at Columbia University.⁶ The transcripts were published in the *New York Times* (October 1861–March 1862), and the first series appeared amidst extensive coverage of the battle of Pea Ridge. His primary interlocutors—U.S. S.C. Judge Joseph Story, Sumner, and Halleck—were all distinctly involved in the “Indian question,” from Supreme Court rulings on the status of Native peoples’ sovereignty to prosecuting wars against Native peoples. When Lieber and Halleck were corresponding about Lieber’s primer on guerrillas and irregulars, and eventually GO100, Halleck was managing the 1862 Dakota Trials. Four months before issuing GO100, Halleck promoted to Brigadier General Joseph O’Connor who led the Bear River Massacre of over 450 Shoshones.

Therefore, it is incoherent, both as a matter of law and practice, to argue a priori that debates over the customs and usages of war were simply not applicable to the US–Native wars. The very questions raised in the fighting of both wars—of sovereignty, belligerency, means, and methods—were not unique to the Civil War but had been long contested in the Native wars that preceded and continued throughout. Lieber recounts that he wrote GO100 when “nearly everything is floating,” with “no guide, no groundwork, no textbook” to direct his endeavors (Letters, 331; see also Dilbeck 2015).

Consequently, it is not sufficient to offer a simple comparison that artificially or sequentially separates the Civil and Native wars, nor is it sufficient to state that GO100 was unconcerned with Native wars and Native peoples. This consigns Native wars to aberrations and Native peoples to outright erasure—disquietingly echoing Halleck who wrote in 1864 that the Civil War interrupted a “profound peace of more than three-quarters of a century” (1912, 107). It also unmoors GO100 from Lieber’s own claim that it was his sense of “usage, history, reason” and his “sincere love of

truth, justice and civilization” that informed his task (Letters, 331).

As I outline below, his sensibility, unsurprising for the time, was highly racialized and gendered (Robson 1946; Ross 2005). The Indian was figured as effete, atavistic, corrupt, and threatening, negatively differentiated from Cis-Caucasians and African Americans in a savage and arrested state, but bore the potential for improvement. Lieber’s ethnographic curiosity and evaluative judgments were not necessarily aligned—he simultaneously held that Native languages were sophisticated and uncouth, worthy of an institute of study, and examples of underdevelopment—and he spent little time attempting to resolve these potential contradictions. Accordingly, it was not in service to a grand theory of the Indian that he marshalled arguments about Native peoples or wars. If they were to be reconciled, it was in pursuit of a specific political end—namely, the creation of a nation in which “no one whatever, and no body of men, is sovereign within the United States,” no mere contrivance, but rather the summation of an organic whole (Letters, 341). The laws of war were a necessary means to this end so desired by Lieber.

Audra Simpson (Kahnawá:ke Mohawk) writes movingly of this struggle in contemporary terms, noting that ““indigenous” and “nation” are two terms that seem incommensurable,” the former “embedded conceptually in geographic alterity and a radical past as the Other in the history of the West” (2014, 7). Making Native wars and Native peoples “the structuring analytic through which to assess,” as Jodi Byrd (Chickasaw Nation of Oklahoma) argues, reveals GO100 as neither a decisive break from the past nor a robust humanitarian inflection, much less an unfettered emancipatory project (2014, 154). Rather, it further constituted Native peoples’ dispossession and devastation, exposing Lieber’s vaunted humanitarianism as directly implicated in the extermination of Native peoples.

ENDS AND MEANS OF WAR

Lieber strongly believed that war was stimulative. It excited individual and collective growth and, as an expressly civilizing force war, facilitated a higher end: without war we are left with “the uncouth utterances of a savage ... the hideous painting of our Indians” (MW, II:392). War was also regenerative, often functioning as a “moral rescue” for nations enervated by stasis and for individuals lulled into “a trifling pursuit of life, a state of un-earnestness ... produc[ing] a lack of character” (MPE, II:440; Giladi 2012, 468). As Lieber put it, “war is indeed a state of suffering ... but without which no great or essential good ever falls to the share of man” (MPE, II:443). Among the highest good is, as in the case of the Civil War, the “nationalization” of the state (Letters, 320). Lieber believed that the nation is nothing less than “the sacred union which leads man to civilization ... the humanizer of men (MPE, I:160). Accordingly, “blood is a sad thing,” but it provides the “rich dew of History” (Curti 1941, 277). Wounded

⁶ In Lieber’s (1829–1833) 13 edited volumes of *Encyclopedia Americana* (EA) there are at least 12 distinct entries on Native peoples distinguished by region and tribe, a six-page appendix on Native peoples, and a 20-page appendix titled Indian languages. There is an entry on “public lands” (Vol 10) that set forth Native title and treaties, and another representative entry described the Algonquins as “like most of the other Indians declining, and in a miserable state” (Vol 1, 170). Lieber was close friends with Henry Wadsworth Longfellow whose celebrated mawkish poem, *The Song of Hiawatha*, was based on Henry Rowe Schoolcraft’s epic work on Native peoples. Lieber corresponded extensively with Schoolcraft, requesting for his son an autograph from a proper Indian chief.

as a Prussian soldier in the Napoleonic wars, Lieber intimately knew of the blood of war. Nevertheless, while he dreaded the violence of the Civil War—violence his family was already experiencing as he wrote GO100, one son eventually dying for the Confederacy and another wounded for the Union—he also welcomed it.

Lieber's acceptance of and, often, outright advocacy for violence is evident in his prioritization of ends over means and his definition of military necessity as governing the selection of means. He writes, "modern wars are not internecine wars in which the killing of the enemy is the object" (GO100, 68). However, to "obtain that object of the belligerent which lies beyond the war," the "destruction of the enemy" is permissible if it is the *means* to that end (GO100, 68). Military necessity as defined by Lieber, Witt remarks, "was both a broad limit on war's violence and a robust license to destroy," encompassing measures "indispensable for securing the ends of war" while remaining "lawful according to the modern law and usages of war" (2012, 234–35). However, those measures indispensable and lawful do not include "include any act of hostilities which makes the return to peace unnecessarily difficult" (GO100, 16).

The flexibility inherent in such phrasings cannot be ignored, as that which is indispensable and lawful in the context of a return to peace is subjective and collectively depends upon the definition of the end, even if it is nominally peace itself (Idris 2019). As we saw with Pope or with innumerable exhortations to war until annihilation common at the time, peace can both include and, in fact, necessitate Native dispossession as well as outright elimination. GO100's generous approach to military necessity—which can justify starvation, destruction of property, and of "all withholding of the sustenance or means of life from the enemy"—facilitates the pursuit of a particular contemporaneous form of peace, despotic and deadly. As Ned Blackhawk (Te-Moak Western Shoshone) underscores vis-à-vis the massacre in Bear River, "treaties became political corollaries of ... [violence] ... as massacre and peace became interwoven" (2006, 267).

Lieber was suspicious of less expeditious forms of violence. He believed they would prolong wars, writing repeatedly that wars should be intense, vigorous, and sharp (GO100, Letters, 319). "(I)t is my duty to inflict on my enemy ... the most serious injury I can... the more actively this rule is followed out the better for humanity, because intense wars are of short duration. If destruction of the enemy is my object, it is not only my right, but my duty, to resort to the most destructive means" (MPE, II:451). Clearly, his capacious sense of military necessity, justified primarily with reference to the ends of war conducted sharply, can quickly devolve into an incessant repetition of retaliation and revenge in which no restraint is found. So then why bother with GO100 at all?

For Lieber, the answer was obvious: without GO100 war would become the "internecine wars" of savages, provoking "a dreadful geometrical progression of skulls and crossbones" (GO100, 28; Letters, 334).

GO100 offers a "degree of confidence" for and among recognized belligerents that "certain usages" will be kept bringing war "within the sphere of civilization" (MPE, II:453, 455). In other words, by promulgating GO100, the US claimed its place in the commonwealth of civilized nations by recursively exemplifying the distinction *of* wars of the civilized *for* civilization from those of the savage—a referent fashioned and established by GO100 itself. GO100 produces this referent by defining modern war as a public war, arrogating it to sovereign states only; separating revenge from retaliation, attributing revenge to the savage; and elevating a certain racialized/gendered characterological governance, ascribing it to the Cis-Caucasian race. Consolidated and codified as operative differences, these are *outcomes* not *origins* of the laws of war for the status and treatment of Native peoples and wars were open questions in a time of acknowledged legal fluidity and fervent public contestation.

As discussed earlier, both "settler statehood" and the status of Native peoples and Native wars was in flux (Ford 2010). First, Native peoples and nations were distinct from Southern states because they possessed a form of sovereignty, arising from negotiated treaties as well as S.C. rulings, which encompassed the right to wage war. Second, because this sovereignty was qualified, Native peoples and nations were at the same time positioned as domestic dependents or wards engaged not in proper war but rather rebellion and insurrection. Or, third, as an editorial at the time worriedly queried, were Native peoples and Native wars entirely "something different from either" sovereign nations or domestic insurrections (Deloria and Wilkins 2011, 144–45; Grandin 2019, 62)? GO100 provides an answer, yet another ruling in the legal edifice of settler empire marking the constitutive exclusion of Native peoples and Native wars from the modern laws of war. As I detail next, attention to these three elements of Lieber's civilizational hierarchies also illuminates his overarching concern with property relations, variously understood, their enmeshment with capacities of self and collective government, and their formative influence on the laws of war.

MODERN WAR

Lieber was no admirer of Emer de Vattel, but Vattel's *Law of Nations* was the lodestar of the time and Lieber did not repudiate his theory of public regular war as taking "place between nations or sovereigns ... carried on in the name of the public power, and by its order" (Kalmanovitz 2020, 14). Well versed in the Marshall trilogy, Lieber defined sovereignty (a concept that he thought otherwise troublingly vague) exclusively as international, ascertained solely with "reference" to other sovereign and independent states (MW, II:107, 155). Furthermore, he argued that a nation exists only after "having long emerged" from nomadic life and that there can be but one nation; no "minority of sovereigns" (MW, II:227, 237). As for Lieber, it was the nation that led "the species toward

perfection,” it followed that public war between sovereign belligerents to this end was the highest good and hallmark of modern war. Such war was also, according to Lieber, a just war. His definition of and advocacy for modern war, and its constituent cognates of sovereignty, international, and public, is no less an “ideological imperative” than it was for Vattel (Giladi 2012, 448). For example, although Lieber finds wars of defense against conquest equally just (MPE, II:447), his ascription of revenge solely to Native peoples (as I explain below) strips them of the quality of self-government that he argued was fundamental to the practice of just war while the absence of regular militaries further relegates them to the status of private enemies.

GO100 (58, 57) states that “the law of nations knows of no distinction of color,” and “no belligerent has a right to declare that enemies of a certain class, color, or condition ... will not be treated by him as public enemies,” signaling to the Confederacy that, among other protections, African American soldiers when captured were to be treated as prisoners of war, not summarily executed or reenslaved. Yet, these protections exist only when those enemies are “properly organized as soldiers,” as “wholly unprotected by the laws of war are those persons who carry on war without being commissioned by their government” (GO100, 57). However, this form of military organization was alien to Native peoples and war. Additionally, for Lieber and scholars he referenced, Native societies remained “chieftain” insofar as they lacked distinctions of government and military, with no possibility of belligerent acts commissioned by their government (CL, 129). Consequently, lawful belligerent status was rarely acknowledged, consigning Native combatants to “private” enemies to be “treated summarily as highway robbers or pirates” (GO100, 82).⁷ These articles drew from Lieber’s early work on *Guerilla Parties*, motivated in part to distinguish and debase irregular, “lawless” Confederate tactics and their treatment of African American combatants. Yet, they resulted in a hierarchy of lawfulness with the effect of denying protections to Native belligerents in the main while formally extending them to African Americans.⁸ Under the terms set by Lieber, Native wars were neither modern, nor public, nor regular, nor international, bearing disastrous consequences for the status and treatment of Native peoples.

⁷ Witt argues this emphasis on “properly organized” also stems from Lieber’s hesitancy to extend belligerent status to freed people organizing behind Confederate lines. Dilbeck (2015) disagrees. Yet, neither analyzes the articles vis-à-vis the widespread practice of irregular war against Native peoples in which settlers went unpunished and were often rewarded.

⁸ Multiple extant configurations of racialization and settler colonization, chattel slavery and conquest, land and labor are organized in and through GO100 as perhaps most clearly illuminated, but not bounded, by wars in Indian Territory.

REVENGE AND RETALIATION

According to Lieber (and Halleck), retaliation remained a useful measure of war, practiced by even the most “civilized and Christian people.” Lieber wrote that retaliation could not be “wholly” dispensed with because it is a necessary instrument of war against a “reckless enemy” who “often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage” (GO100, 27). Nonetheless, it must be used with caution, justice, and consideration. Retaliation as an element of the laws of war “implies the idea of thereby stopping a certain evil,” whereas revenge is merely cruelty to “counter cruelty” (Lieber to Sumner, 1865c, 81–82).

Lieber’s immediate concern was the recognition and treatment of prisoners of war, especially African American Union soldiers, exemplified in letters exchanged in 1862 between Halleck and Confederate General McLellan reprinted in the *New York Times* (Letters, 352). Lieber’s position was clear: summary execution and maltreatment of prisoners of war was vengeful. In 1865, he clarified in a letter to Sumner that he did not stand against retaliation—not even if it “strikes those who may or may not be guilty of the outrage” or, in other words, that it is indiscriminate—but instead when retaliation becomes indistinguishable from the revenge of the savage. He believed that “Confederate cruelty against Union prisoners of war should be equated with the Spanish treatment of the Indian.”⁹ And “if we fight with Indians who slowly roast their prisoners, we cannot roast in turn the Indians whom we may capture,” not only because “we would not approve of cruelty by way of retaliation against savages, or those who have fallen back into that state” but also since “revenge is passion, and ought never to enter the sphere of public action. Passion always detracts from power” (Lieber to Sumner, 1865). Thus, underwriting Lieber’s distinction of retaliation from revenge was the “floating signifier” of the savage, indexing particularities of cruelty and passion in acts of war (Megrét 2006; MPE, I:439–40).

Questions of retaliation and revenge specific to the treatment of those captured in war were common to Civil War exchanges, as seen in Pike’s order (see also McCurry 2019) but were not confined to them. Of major importance was the U.S.–Dakota war of 1862–1864, which was deeply interleaved with the Civil War, in part due to fears that the Confederacy fomented it and international reprobation would accompany it. Once quelled, a military commission was established to try those Indians who “perpetuated crimes during the Uprising” (Keenan 2003, 77). Out of the 392 Dakota who surrendered, 303 were initially sentenced to death. In December of 1862, 38 men were hanged—the largest

⁹ In contradistinction to the Spanish, Lieber argues that Anglos practiced far greater restraint and reason in their acquisition of new lands because it was driven by a pursuit of liberty, not by bloodlust and cruelty. However, the Spanish have only temporarily reverted (fallen back), whereas for Native peoples it is a state (savage) that they may never overcome because it is at the same time characterological (savagery).

mass execution in U.S. history. The trials were but one element of the larger war. They were followed by, inter alia, the massacre of 400 Dakota and Lakota peoples; the detention of more than 200 Dakota men, women, and children held without charge until their formal release in 1866; and the imprisonment of more than 1,700 in Fort Snelling until forcible resettlement in South Dakota. It also resulted in the yet unrescinded 1863 Dakota Expulsion Act abrogating federal treaties and criminalizing Dakota residence in Minnesota, propelling extirpative removals farther West. In that same year, the Minnesota Adjutant General granted US\$25 for every Dakota scalp and US\$200 for a proven Dakota death. This order was not annulled until 1868, further deputizing private individuals and militias alongside soldiers to pursue lucrative reward for the murder of Native peoples (Anderson and Woolworth 1988; Routel 2013). The U.S.–Dakota war heralded wholesale dispossession, extreme deprivation, and threatened extermination. This war could be foreseen after the repeated delay and denial of tribal annuities caused widespread starvation and immiseration: “turning enraged on his foe, [the Native] sought vengeance in massacre, crime, and deeds of brutality for which the government itself and its horde of vagabond Indian agents ... were alone responsible” (Schultz 1992, 91; see also Pexa 2019). But these reasons mattered not at all. In 1862, General Pope, freshly defeated by the Confederates and dispensed to fight the Dakota War, called for the execution of all who surrendered, arguing “if the guilty are not all executed, I think that it nearly impossible to prevent the indiscriminate massacre of all the Indians” and a series of “private revenges” would indisputably follow (Nichols 2012, 99).

When apprised of the outcome of the trials, Lincoln reduced the number of hangings by distinguishing between those who had committed rape and those who had not.¹⁰ When, “contrary” to his expectations, that number was too low (two), he expanded his criteria to include those who had participated in massacres. In other words, he *increased* the numbers to hang because, he explained to the Senate, he was “anxious to not act with so much clemency as to encourage another outbreak ... nor with so much severity to be real cruelty” (Nichols 2012, 112). For Native prisoners, the line between life and death, clemency and cruelty was an ill-defined distinction between “battles and massacres” and registers of “timid” and “fiendish” violence with those ruled having participated in massacres sentenced to hang (Chomsky 1990, 32).

The corrupt procedures of the commission, much less the decision to try at all, are worthy of the critiques made against them. The prisoners were captured under a truce, denied legal representation and proper translation, and convicted with hearsay evidence. The trials were conducted with a universal presumption of guilt and the sentencing governed by an explicit desire, in the

words of the presiding General, to “satisfy the longings of the most bloodthirsty” settlers (Nichols 2012, 98). Considering this, Lincoln’s decision to spare all but 38 attempted to rehabilitate the legitimacy of the trials but did nothing to invalidate these corrupt procedures. If read according to Lieber’s division of revenge from retaliation, Lincoln rejected revenge and, indeed, has been widely feted for it (Chomsky 1990, 30; Nichols 2012). However, this deflects from what these trials equally reveal.

As Rifkin explains, the trials exemplify how “Indian violence cannot constitute an act of *war* and, therefore, an expression of Indigenous sovereignty because, instead, it needs to be explained and adjudicated as *crime*” (2017, 63; see Chomsky 1990). This vantage clarifies what can otherwise be obfuscated in Witt’s claim (2012, 108) that “the first thing the laws of war did was immunize the soldier from criminal prosecution when he killed in battle. This deep separation of war from crime had been what distinguished the legal tradition of European warfare and that of Indian wars.” But, the legal tradition of European warfare, which GO100 draws from, *criminalized* Native warfare, revoking most forms of immunity while, secondly, as evident in the Dakota War, *facilitated* the immunization of soldiers and often private citizens when they killed in certain kinds of wars.¹¹ Take Minnesota Governor Ramsey’s 1862 proclamation: “The Sioux Indians of Minnesota must be exterminated or driven forever beyond the borders ... (t)hey must be regarded and treated as outlaws. If any shall escape extinction, the wretched remnant must be driven beyond our borders.” This, along with bounties, explicitly authorized private settler violence for some definitions of public good while simultaneously withdrawing the rights and protections to Native combatants not only as private and paramilitary but also as outlaws (Dunbar-Ortiz 2018). What this suggests is that “massacre is never an aberration” but a lawful form of eliminationist violence against Native peoples (Dwyer and Ryan 2012, xxiii; Martínez 2013).

Furthermore, even if we could grant that the hangings were individual punishment for a crime (if guilt could have been corroborated)—in Lieber’s terms “plain and well-observed justice” and not revenge—it is an error to isolate the trials from the prosecution of the war (Herbert 2009). Remember, for Lieber retaliation remains lawful even if it punishes those who are neither charged nor found guilty. Retaliation is collective and preventative. Lieber insists, “you do not *punish* a spy; you kill him to repress his trade.” Moreover, he continues, retaliation expressly includes “measure[s] of defense and repression in which the opposite party is treated as a unit ... [the] very character [of which is] the innocent or comparatively innocent suffer by it” (Clinton 2003, 69). Thus, if you “only kill the guilty” it is not retaliation (69).

¹⁰ Lurid descriptions of Natives’ ravishing female prisoners proliferated, yet rape of Native and African American women sparked no such outrage.

¹¹ Park outlines how the federal Indian depredations claim system incited a low-intensity war by encouraging settlers to bring reimbursement claims for harm and offsetting risk (Park 2018).

Lieber's telling conjuncture of revenge and retaliation thus further illuminates how the Native is held to be the one who massacres but whose own massacre may not be held against the settler and indeed whose scalping, detention, expulsion, and hunting are understood as legitimate retaliation: retributive, preventative, and anticipatory. These settler tactics conform to GO100's definition—namely, as “protective retribution” against the “repetition of barbarous outrages”—validated as the “only means” left to “secure himself” against what Justice Marshall described in the 1823 S.C. *Johnson v. MacIntosh* case as the “perpetual hazard of being massacred” (GO100, 27, 28). Six months after the hangings, the demands had yet to cease: “Can't we get another expedition started out to hunt Indians?” (Routel 2013, 20).

GOVERNANCE

Lieber believed that it was the character of a gentleman, his capacity for self-government, that enabled him to engage in rational retaliation over impassioned revenge and to conduct himself honorably throughout war. It was nothing more than this strength of character that Lieber trusted to check the limitless capacity for violence that retaliation, or military necessity, otherwise allows. A gentleman's honor would ensure that he adhere to GO100 and its “elementary principle ... *tit for tat* or eye for eye.” (Letters, 334) Predictably, it was once more the white “Anglican race” who was gifted in this respect, by birth and blood, and to whom “manly self-independence” and “the manly ideal of self-government” came naturally—“manly” being one of Lieber's highest accolades (Lieber 1864, *The Character of A Gentleman*, [Character] 31; MW, II:162; Kinsella 2011; Megrét 2018). Indeed, the Anglican race “alone has the word self-government” so uncontested is it in its “political superiority” (CL, 21; MPE, I:389). Such manly traits can be found in “natives,” as Lieber puts it, “by way of exception only” (Lieber 1864, 21).

This characterological assessment elucidates why he thought the “protection of the inoffensive citizen of the hostile country is the rule” in civilized countries, while “protection was and still is with the uncivilized people the exception” (GO100, 25, 24). The characterological deficiencies of the Natives both explain and justify an escalation of violence. As repeatedly editorialized during the trials, “[t]ame [the Indian], cultivate him, strive to Christianize him as you will, and the sight of blood will in an instant call out the savage, wolfish, devilish instincts of the race” (Chomsky 1990, 92). Therefore, it is only in the “modern, regular wars of the Europeans” that boundless violence can be avoided as a rule, founded in and attributed to the racialized masculinity of the Anglican race (Giladi 2012; GO100, 25). Lieber's raced and gendered characterization of self-government is a common theme in the publicists with whom he is familiar (e.g., Grotius and de Vattel) and takes on especial salience in settler colonialism due to its

configuration with monogamy and property and, for Lieber, racial purity.

Lieber's negotiation of race was not rooted in the purely biological. He also acknowledged habit, culture, and context.¹² Although he owned slaves and thought African Americans possessed a particular odor, he railed against the Southern states use of race and “race thinking” to legitimate slavery. Notwithstanding, he was equally adamant that the Cis-Caucasian race reigned supreme (Curti 1941; Robson 1946). In the same letter in which he advocates for the swift dispatch of the Indians, he writes while initially “the white race must lead every other race to civilization,” eventually the “white man is to rule over the Earth” and “sweep away all others” (Curti 1941, 281; Letters, 385). White rule is ordained, he believes, because it is the culmination of the proper relations of “Matrimony, the Family, and Property” (MW II:178). And, as white rule is dependent on the destruction and eventual replacement of Native peoples, it is not just any sort of matrimony that Lieber venerates but one that is monogamous, reproductive, and racially pure.

Lieber's obsessive concern was averting racial amalgamation—so although regulating political rights solely according to “color or race” is disallowed, preventing the “mixture” of many distinct races is allowed because such a “mongrel breed” leads to the overall deterioration of the Cis-Caucasian race (MW, II:83; LTG, 297). In his impassioned critique of “dirty Mormonism” and the practice of polygamy, which he saw as a form of a race crime, he writes, since monogamy is “one of the preexisting condition of our existence as civilized white men,” destroying monogamy would “destroy our very being and when we say *our*, we mean our race” (Letters, 278; TM, 234).

Further, monogamy is “one of the elementary distinctions—historical and actual—between European and Asiatic humanity,” and he believed its absence explains why Asiatic humanity was in a state of degeneration, its societies and men despotic, enervated, and stalled in an arrested or reverted state of civilizational sensibilities (TM, 234; MPE, I:390; EA, 1:414). Now, Lieber also speculated that Native peoples were likely of “Mongolian origins” and held that monogamous marriages were rarely to be found: “polygamy is general” (Freidel 1947, 182; EA, 407). Unsurprisingly then, this buttresses Lieber's supposition of the superiority of collective government practiced by Cis-Caucasians—“greater in extent and superior in kind” to any “aboriginal American tribe” (MPE, I: 389). Corrupting the virility and vitality of the Cis-Caucasian race, polygamy's very promiscuity presages the demise of the Cis-Caucasian race and portends despotic rule. The degradation of racial purity reflects and results in the degradation of self and collective government.

Throughout his writings, Lieber reserved special blame for women who strayed from what he deemed

¹² Bell (2016, 29) points out that whiteness has its own hierarchies (as it did for Lieber) for although “not all whites were Anglo Saxons ... all Anglo Saxons were white.”

the “inter-completing character of the two sexes” or “steps beyond ... her family (MW, II:208, 138). If men were to be virile and nations vital, women had to be “bashful”—sexual shame was a constituent element of civilized races—a trait not found in polygamous couplings (MPE, II:123–24; MW, I:210). Furthermore, if a woman ventured to participate in civil society beyond her appointed tasks, “she would necessarily lose her peculiar character as woman, and thus a necessary element of civilization would be extinguished” (MPE II, 125). Lieber was dismayed by the prominent role of Native women in their societies, their seemingly sexual license, and he repeatedly remarked on what he took to be a confusion of gender roles (e.g., labor, political, sexual; MPE, I:139, 124). Moreover, because women were to be protected from war and Native women were often participants in war—and/as settlers’ war were specifically waged against them—they were, by his terms, already “un-womaned” (MPE, I:125, MW, II:208).

This putative disruption of gender roles in addition to the presumption of polygamy renders Native peoples something less than, and the degendering of Native women results in the withdrawal of nominal protection otherwise offered to them as women (Kinsella 2011; McCurry 2019; Simpson 2016). For example, GO100 prohibits rape in three articles. Yet it does so through its characterization as “crime against property ... troop discipline and ... family honor” (Feimster 2013). Each reifies what Moreton-Robinson (Goenpul, Quandamooka First Nation) terms the “possessive logic” of patriarchal white militarized sovereignty, establishing the prohibition on forms and relations (e.g., property, discipline, troops, and honor) Lieber deemed mostly absent in Native peoples and Native wars and, yet, without which there is *no* crime (2015, xvii).

Lieber so prized monogamy because he additionally feared that a “community of wives” would be accompanied by a “community of property,” poisoning each of these “founts of morality” from which the nation and an international commonwealth of civilized states emerged (Lieber 1841, *Property and Labor* [PL], 160). Morality, indeed, the very ability to discern what is “Right,” (MPE, I:390) depends upon the possessive individual character of both. He writes that “property is ... the realization and manifestation of man’s individuality in the material world,” and, in turn, individuality ensures “man’s whole character ... morality necessarily implies individuality” (MPE, I:112, 57, 102). Consequently, as far as Lieber is concerned, Native peoples remain in an “undefined generality,” appearing repeatedly as “hordes” (MPE, I:111; PL, 69). Lacking individuality gained through monogamy and property, Native peoples remain characterologically and collectively amoral, *incapable* of judgement while, as materialized in the Dakota trials, *subject* to judgment and “condemn[ation] on general principles,” without certainty of individual identity or guilt (Schultz 1992, 247).

The essential nature of morality, the capacity to act with restraint, and to discern what is right is constituted in relation to individual property materialized in proscribed relations to women, wife, and land. It is only the

racialized propertied Anglican male who can prosecute and moderate the violence of war, distinguish between revenge and retaliation in war, and significantly, author what is right and lawful in war—all else should keep to their proper place as “necessary and founded in the great order of things” (MPE, II:136). The multiple meanings Lieber attributed to property—“political, psychological, and economical”—informed his arguments about gendered and racial hierarchies of difference, themselves inextricable from relations of sex, gender, and reproduction, which, in turn, mark GO100 as a product and law of settler colonialism (CL, 101; see also Bhandar 2018).

PROPERTY

Considering the crucial importance of property for the laws of war how is property in land imagined and acquired? For Lieber, just as civilization was destiny, a manifestation of the natural and “aboriginal to man,” so too was property: “(t)he origin of property can be referred to no fixed point of time” (MPE, 133; PL, 28). In one of his more dramatic statements, he writes that property was “the thing ... before the word” (PL, 27). Therefore, it is “erroneous” to hold “that governments preceded and made property,” as it was precisely the opposite (PL, 80). Nevertheless, in the years in which Lieber wrote, it was the U.S. government that established the legal terms of Native peoples’ relationship to their land—transforming wilderness to Federal territory and to individual property. Once again, the Marshall trilogy set the context.

According to Judge Marshall in the SC case of *Johnson vs. MacIntosh* (1823), the US had “exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.” Patrick Wolfe (2011, 15) explains, “in contrast to the form of property right that the doctrine made available to Europeans, Indian occupancy was detachable from title ... [p]roperty starts where Indianness stops.” Native title was validated only insofar as/when it facilitated the right to sell—but only to the federal government. As Robert Nichols (2018, 19, 21) makes devastatingly clear, “this truncated property right” allowed for an “emergence and expansion of a whole new system of proprietary rights in land [that] systematically *extended* and yet *negated* those rights for Indians. What nominally justifies these conclusions are the intertwined doctrines of Discovery, Conquest, and Possession, sedimented over time as canonical to the law of nations and of war. It was buttressed by, as Rana (2010, 111) documents, “the belief—especially connected to populist versions of republican freedom—that native removal was the precondition for settler independence.”

Favorably citing the Marshall trilogy, Lieber advocated for “private property and the unshackled right to acquire it,” including property taken in war and, against all evidence otherwise, he contended it was “founded upon right, not upon mere violence” (PL, 192, 37). He pushed for the annexation and conquest of Northern Mexico in familiar terms, suggesting that because

Native peoples make no use of it we “rob no one ... we would *give* it to mankind” (Freidel 1947, 228). Additionally, “if a country is really over peopled and if they cannot in any other way obtain additional land ... they are perfectly right in conquering it. Who would deny it?” (MPE, I:114). Wolfe (2007, 132) emphasizes that these doctrines “acquired currency through their congeniality to the global expansion of European capital” transacted through land with Native people discharged as collateral.

Lieber promoted free trade and the circulation of capital: “civilization cannot take place without increase of population, and population cannot increase without increased production, increased accumulation and exchange of products” (PL, 41). As Robson points out, accumulation and appropriation are not merely transactional or utilitarian, but are “transcendental” ideals for Lieber (1946, 66). Per usual, Lieber refers to Native peoples as exemplars of the failure to do so, embodying “all the wretchedness, continued suffering, brutality, and mental depravity, resulting as the necessary effect of an absence of saving and accumulation” (PL, 63). Accumulation and appropriation cannot take place without a concomitant increase in security, and such a matter of necessity is potentially one of the “fair grounds for conquest” (Letters, 424).

There is more to be made of these complex relations of population, property, accumulation, and security to that of the modern laws of war, which for reasons of space cannot be addressed here. What remains crucial is Lieber’s characterization of land as property—the meaning he invests in it and its centrality to the laws of war, as a just cause of war, as an object of war, and as integral to the ethics (and prosecution) of war—underscores the entanglement of the laws of war with histories of forcible acquisition—the taking through continual Native dispossession and elimination. Thus, when Lieber wrote that “man cannot become a thing,” yet “the import of Mine and Thine” is organic to man, he was advocating for certain forms of property relationships (Letters, 121; PL, 28). His celebrated critique of slavery as an economic *system* that corrupts the nation equally justifies extermination of Native *peoples*: both slavery and Native peoples jeopardize the nation. Each hazards racial amalgamation; social, moral, and civil stasis; and a certain effeminacy. The reproduction of the white race through the monogamous patriarchal family is fundamental to both the domestic consolidation of the nation and its international recognition. Consequently, a nation imperiled legitimates a highly permissive war. But make no mistake: the favored nation depends on the eradication of Native peoples.

Certainly, the capacious permit of GO100 enables such a war under his precept that sharper wars are *brief*, but so too is the settler immunized against the charge of *gradual* extinction. Lieber clarifies that it would be a “radical error” to believe that the “the extinction or absorption of a race” is murder: it is only “prevention of increase” (MW, II:83). He expounded, “we always speak of the extinction of a race as if we were talking of the murder of an individual, while the question is

merely the non-renewing and the non-regenerating” (Letters, 385). Consequently, in the founding of the modern laws of war we can no more delink reproduction from military necessity, retaliation from nonregeneration, sovereignty from monogamy, property from rape, accumulation from extermination, or the character of a gentlemen from that of a genocidaire than we could conquest from settler empire. For Lieber these are continuous such that neither massacre nor murder of Native peoples is a *war crime*—the modern conceptualization of which Laird and Witt (2019, 86) claim as Lieber’s contribution.

Thus, it is not that the laws of war were “ill equipped for the kinds of Indian wars” fought since the U.S. founding, or that they function primarily to provide a “moral language to describe and condemn practices of Indians,” or that they simply excluded Native wars from their purview (Witt 2012, 108, 93). It is that settler colonialism is a condition for the formulation of GO100 that, interpreted on its own terms, may at first appear to have nothing to do with it. Widening the aperture of analysis to an integrated historical context replete with contestations over the use and meaning of violence that drew upon evolving disputed notions of nation, property, sovereignty, themselves multifariously racialized and gendered, undermines the claim that emancipation was the “quintessential event for the laws of war in American history” (Witt 2012, 367). It was gradual extermination and the quicker the better.

CONCLUSION

Most broadly, I argued that GO100 is a node in the further dispossession, sovereign diminution, and attempted elimination of Native peoples. This structuring function of settler empire informed the development of the laws of war until, arguably, its last formal codification in 1977. The characteristics of lawful belligerency in the contemporary laws of war derive from Lieber’s original formulation, and it is not until the 1977 Additional Protocol I that the elements of combatant status change, due in part to the recognition that wars of self-determination—“armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes”—are not merely domestic disturbances but wars of *international* status. Notwithstanding the restoration of recognition of formerly colonized claims to international sovereignty, the racialized and gendered character of restraint—which those nominated as savages were held to neither practice nor recognize—striated the debates about national liberation movements’ capacity to comply with the law, *even as* the colonized and formerly colonized authored the law (Kinsella 2017; Mantilla 2020).

This structuring function extends to the most recent U.S. Department of Defense War Manual (2015). It names Lieber directly to claim that “the law of war are who we are” while U.S. courts’ legal reasonings and official presentations of the treatment of those detained in the war on terror cites treatment of Native peoples (Fletcher and Vicaire 2012; Ringmar 2010). The coding

of Osama bin Laden as Geronimo and Native American Water Protectors at Standing Rock as jihadists is another instance (Bruyneel 2016; Estes 2019). Here, those so identified by the metonymical slippage of “terrorist” and “Native” are outlaws—not only enemies “by law,” but also enemies “of the law,” echoing the words of the Governor of Minnesota in 1862 (Idris 2019, 17).

Marshalled in service of consolidating the United States, Lieber derived the laws of war from his political thought, which he worked out in and through his material experiences and intellectual milieu. He set forth how the United States would be studied and understood as an exceptional nation among a commonwealth of nations and how its wars were to be justified and fought.¹³ Thus, although his promotion of Native dispossession and extermination through manifold racial, gendered, and settler logics may not surprise, the discipline has yet to wholly contemplate these histories of thought and practice mobilized in support of its normative and empirical premises or to fully trace the exclusionary origins of its universal claims.

Considering this, Lieber’s 1867 lament should be reappraised: “Poor Indians... [f]irst we kill them with brandy, powder and syphilis, and then we put an Indian head on our coins and call men of war after them. The Indian does in no way symbolize America” (Curti 1941, 282). Lieber’s vision of the Indian not only symbolizes America but also concretizes the very gendered and racialized settler violence that founds and continues to inform America’s existence. Those genealogies of violence are constitutive of their own scope and terms, instantiating the distinctions by which the laws of war then proceed, as they do the disciplines of politics and law inaugurated in their wake. Not reckoning with this disavows these material and disciplinary histories and perpetuates the violent erasures of Native sovereignty, of Native claims, and of Native peoples who, as Simpson (2016, 330) pointedly reminds, “never disappeared.”

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¹³ Thus, while neither his detractors nor his supporters thought Lieber a terribly “great and original” thinker, noting an obvious debt to John Locke, among others, and fidelity to Anglo Saxon traditions of political thought, he remains pivotal to understanding the evolution of American political science (Freidel 1947, 417).

CONFLICT OF INTEREST

The author declares no ethical issues or conflicts of interest in this research.

ETHICAL STANDARDS

The author affirms this research did not involve human subjects.

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