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## **Martial Lawyers: Lawyering and War-Waging in American History**

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Bernard J. Hibbitts\*

### I. AMERICAN LAWYERS AS WARRIORS: RECOVERING AN INCONVENIENT TRUTH

American lawyers like to celebrate themselves as practitioners of peaceful dispute resolution. On public and professional occasions they proudly proclaim their loyalty to the rule of law over brute force. Beneath their pacifistic rhetoric, however, lurk less placid and more problematic realities. Many American lawyers are highly adversarial and even combative; in seeking business, they often stress on TV, billboard, and bus advertisements that they “fight” for their clients, and more than a few take that pugnacious attitude into courtrooms where they conduct notoriously uncivil litigation. Prosecuting lawyers representing the American state command overwhelming physical power that is routinely applied to law-breakers, sometimes with intentionally fatal results; speaking of criminal law and punishment, Yale law professor Robert Cover was right to observe 30 years ago that “legal interpretation takes place in a field of pain and death.”<sup>1</sup>

But the relationship of American lawyers with violence runs deeper and is potentially even more disturbing than all this because in one fundamental

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<sup>1</sup> Robert Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1616 (1986). See also generally LAW’S VIOLENCE (Austin Sarat & Thomas R. Kearns eds., 1995).

yet conveniently overlooked respect it has been so concrete, so bloody, so persistent, and so intensely personal. From the very beginning of colonization, lawyers in America have been primary wagers of war. Leaving aside for the moment professional soldiers who only began proliferating in significant numbers in the late nineteenth century, lawyers as an occupational group have been uniquely prominent in American history as invaders, battlefield commanders and soldiers, militia leaders, armed revolutionaries, filibusters, rebels, paramilitary intelligence agents, proponents of militarism, and civilian war managers. American lawyers have enthusiastically organized war, led war, and fought war. In this article I will substantiate and develop these claims, arguing that war has shaped American lawyers both professionally and personally, and that lawyers have in turn played a major role in shaping the American way of war.<sup>2</sup>

It stands to reason that lawyering and war in America should be intimately and perhaps uncomfortably linked. Both have been integral to American society. The fundamental role of lawyers in American culture from Revolutionary times to the present day need not be reviewed here. Alexis de Tocqueville's classic nineteenth century characterization of lawyers as the putative "American aristocracy"<sup>3</sup> is well known. Given their involvement over time in multiple areas of American life (from business to

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<sup>2</sup> While including sufficient historical citations to support the general argument and adding some that I believe would add real value to it, I have intentionally declined the *Bluebook's* invitation to cite virtually every "factual assertion" made in the pages that follow. Basic details concerning the historical activities of particular individuals mentioned here are well-documented in multiple standard biographical dictionaries and databases—e.g. AMERICAN NATIONAL BIOGRAPHY, <http://www.anb.org/> (last visited Feb. 2, 2015); the OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, <http://www.oxforddnb.com/> (last visited Feb 2, 2015)—and I would refer the curious or doubting reader to those. In other instances I have assumed that the reader has a rudimentary understanding of American history in general, and American legal history in particular, which is otherwise beyond the purview of this article to provide.

<sup>3</sup> ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 268 (J.V. Mayer ed., George Lawrence trans., 1966) ("If you ask me where the American aristocracy is found, I have no hesitancy in answering that it is not among the rich, who have no common link uniting them. It is at the bar or bench that the American aristocracy is found.").

journalism to education to religion), a case could be made—*pace* Gramsci—that lawyers have been America’s “organic intellectuals,”<sup>4</sup> holding the country together by their very ubiquity as much as by their inclination. Similarly, war has been a central element of the American experience. The country was seized in war (against Native Americans), defined in war (against the British), and preserved in war (against the Confederacy). Several commentators have noted that war has been virtually continuous in the American record.<sup>5</sup> Its prevalence may also be necessary in the American environment. Absent a long history or a common ethnic or religious core, war may be the ultimate tool of American nation-building,<sup>6</sup> what theologian Stanley Hauerwas has called the “glue that gives Americans a common story.”<sup>7</sup> Foreign observers—especially those whose countries have been subject to (sometimes repeated) American attacks—have long been struck by the prominence of war in American history,<sup>8</sup>

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<sup>4</sup> The term was made famous in ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Geoffrey N. Smith & Quintin Hoare eds., 1971).

<sup>5</sup> Recently, see generally MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES (2012).

<sup>6</sup> Of course, relatively high population, a favorable geographic position between smaller and less powerful neighbors, and insulation from competing major powers by vast oceans have historically favored this policy choice.

<sup>7</sup> STANLEY HAUERWAS, WAR AND THE AMERICAN DIFFERENCE: THEOLOGICAL REFLECTIONS ON VIOLENCE AND THE AMERICAN IDENTITY 4 (2011) (“War is a moral necessity for America because it provides the experience of the ‘unum’ that makes ‘pluribus’ possible. War is America’s central liturgical act necessary to renew our sense that we are a nation unlike other nations.”).

<sup>8</sup> Canadians such as myself, for instance. This is not surprising given that (1) Canada has a significantly less violent (albeit hardly bloodless) political and military past; (2) Canada’s original English population was heavily composed of refugees from an American war (i.e., the Loyalists); and (3) Canada (or its antecedent British colonies) has been the target of attempted American invasions on at least four occasions in the past 250 years (1775, 1812, 1838, and 1866); prior to that, French colonies in Canada were attacked by English colonies in what is now the United States in 1613, 1690, 1710, and 1745. Working war plans for the US invasion of Canada developed as late as the 1920s were only shelved in 1939 at the onset of World War II. War Plan Red, declassified in 1974, provided for the strategic bombing of my hometown of Halifax, Nova Scotia, and the potential use of poison gas against Canadian targets in the context of a projected military struggle with the British Empire. For a general—and still the only—

although most Americans have understandably ignored or underplayed the phenomenon.<sup>9</sup> Symbolically, if unwittingly, modern Americans bring war and lawyers together every time they sing the national anthem: the *Star-Spangled Banner* was written by a lawyer watching a battle.<sup>10</sup>

In no other common law jurisdiction (not in the United Kingdom, not in Canada, not in Australia)—perhaps in no other jurisdiction, period—has the linkage between lawyering and war-waging been so massive and so clear.<sup>11</sup>

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comprehensive evaluation of American cultural martiality from the Revolution down to the Civil War, see MARCUS CUNLIFFE, *SOLDIERS AND CIVILIANS: THE MARTIAL SPIRIT IN AMERICA, 1775–1865* (1968). Cunliffe was a British historian.

<sup>9</sup> See Ira Leonard, *Violence Is the American Way*, INFORMATION CLEARING HOUSE (Apr. 23, 2003), <http://www.informationclearinghouse.info/article17195.htm> (“Americans have little genuine understanding of the major role played by war throughout the American experience.”); see also Russell F. Weigley, *America as a Martial Society*, AIR UNIVERSITY REVIEW, <http://www.airpower.maxwell.af.mil/airchronicles/aureview/1969/may-jun/weigley.html> (last visited July 24, 2014) (opining that “[f]or an American to emphasize the distinctly military qualities of American society . . . would seem either too much of a boast or too much a *mea culpa*, depending on the point of view”).

<sup>10</sup> The lawyer was of course Francis Scott Key, who witnessed the bombardment of Baltimore from a British ship he had boarded to negotiate the release of American prisoners of war. As Marcus Cunliffe observed,

The “Star-Spangled Banner” is a good example of [a] formative martial impulse: here was a nation fashioned on the battlefield no less than in the council chamber—brought into existence through violence, among the thud of guns and in the rockets’ red glare. The “Star-Spangled Banner” is both anthem and battle cry.

Cunliffe, *supra* note 8, at 68. That generations of Americans have enthusiastically embraced a *lawyer’s* “battle cry” as their own says as much about the traditional place of lawyers in American culture as it does about the longstanding martial ethos of American lawyers themselves.

<sup>11</sup> This is not to say that the linkage has been absent or altogether unnoticed in those jurisdictions. On the United Kingdom, see, e.g., Thomas Frost, *Fighting Lawyers, in THE LAWYER: HISTORY, LITERATURE AND HUMOUR* (William Andrews ed., 1896). On Canada, see, e.g., *The Life of Sir John Beverley Robinson*, 41 CANADA L. J. 199 (1905) (describing the military service of the future Chief Justice of Upper Canada [Ontario] in the War of 1812 while still a law student and noting that “within thirteen years, viz., between 1828 and 1846, seven judges were sitting in the Bench all of whom had seen fighting in the Revolutionary War, or in that of 1812-15, and two of whom had been severely wounded.”) In neither Britain nor Canada, however, did lawyer-soldiers dominate military professionals or the general waging of war to the degree they did in the United States.

And yet, we lawyers have missed it. Perhaps persuaded by our own professional propaganda, we have instead become enamored with what I call the “JAG myth”—the prevailing notion that the exclusive military role of lawyers in American history has been the relatively benign one of administering military justice while standing by to advise battlefield personnel of their legal rights and responsibilities, as needed. The image is neat, tidy, bloodless, and notably self-satisfying in its displacement of responsibility for violence onto others. It is also an ahistorical conceit.

Why have we refused to even entertain an alternative perspective? The problem is a combination of self-absorption and self-interest. American military historians—more than a few with some measure of military background themselves—have largely been concerned with the history of professional soldiers and soldiering. Not only have they not been particularly interested in lawyers, but they have implicitly considered the prominent role of ostensibly unmilitary lawyers in the American military past as something of a military embarrassment, to be politely overlooked rather than focused on or celebrated. Meanwhile legal historians have paid woefully little attention to what lawyers have done in American culture outside of practice; the concrete military role of lawyers in particular has arguably been so counterintuitive and potentially distasteful to pacifistic modern legal scholars with few if any connections to the military that it has not even been looked for, let alone looked at.

The result of our inattention has been a major scholarly blind spot I only noticed in developing a course on the history of lawyering that I have taught in Pittsburgh for some four years now.<sup>12</sup> Preparing the American segment of the survey, I was struck by the number of lawyers I encountered who had had significant military responsibilities and experiences—some political and bureaucratic, but many others personal and grimly concrete. At the end

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<sup>12</sup> See generally BERNARD J. HIBBITTS, *Teaching the History of Lawyering: Who Do We Think We Are?*, in *TEACHING LEGAL HISTORY: COMPARATIVE PERSPECTIVES* (Robert M. Jarvis ed., 2014).

of the day it turned out that American lawyers were by tradition “armed and dangerous,” and in that capacity they figured in virtually all American wars and many other lesser conflicts.

Of course in this respect American lawyers are not unique among American occupational groups. Due especially to the long-standing American military reliance on citizen-soldiers, there have over time been thousands of doctors, merchants, farmers, bankers, and others who have fought in official and unofficial American campaigns, and whose collective contributions to American war-waging are similarly understudied. Certainly there have been more farmer-soldiers and merchant-soldiers than lawyer-soldiers. But in the American experience, lawyer war-wagers have nonetheless been different. In comparison with other occupational groups, lawyers—as we shall see—have played a disproportionately prominent leadership role in war. As personal agents of law in American society, many moreover appear to have been drawn to military service and war-waging on principle as an extension of their dedication to law and their profession, despite what we, from our contemporary perspective, might assume to the contrary. Once in military roles, they did not seek or find themselves compelled to shed all aspects of their professional identity; indeed, they not infrequently leveraged those, affecting military practice and outcomes. Back in civilian life, lawyers’ military service in various capacities in turn arguably shaped their legal careers, their legal thought, and their professional attitudes. The martial role of American lawyers is therefore worth independent examination.

In the remainder of this article, I propose to sketch the basic outlines of the occupational relationship I have suggested here. Part II describes the changing place and significance of martial lawyers over the course of American history, chronicling their initial appearance at colonization, their post-Revolutionary rise to social and professional prominence, the existential crisis they experienced in the devastating Civil War, and their subsequent (albeit gradual) retreat afterwards to other less violent fields of

endeavor. Part III offers an initial assessment of the professional and/or military implications of martial lawyering, exploring the impact that war-making had on American lawyers, and how martial lawyers in turn influenced American war-waging.

Much of this argument deserves extended elaboration that cannot be offered in the confines of the present piece. I nonetheless hope to whet the reader's appetite for more by starting down some untrodden paths, suggesting along the way that the ostensibly incidental (and to our minds perhaps idiosyncratic and even peculiar) personal relationships that some of us may have been vaguely aware of between a few individual American lawyers and war-waging may add up to a connection of much larger professional and national significance.

## II. LAWYERS AT WAR: MARTIAL LAWYERS IN AMERICAN HISTORY

### *A. Martial Lawyers at Colonization: Invading the New World*

Lawyering and war-waging arrived in English America together in 1607. The first successful colonizing expeditions to Virginia were not led by relatively peaceful religious dissenters, like those who later landed in New England, but rather by grizzled, battle-scarred soldiers—men like Captain Edward Wingfield, Captain Bartholomew Gosnold, Captain Gabriel Archer, and the aristocrat George Percy.<sup>13</sup> This much is well known, even if it is not emphasized in most standard accounts that tend to demilitarize and romanticize the Jamestown settlement. What is often forgotten, however, is that all the men just named were also old members of the Inns of Court in London.<sup>14</sup>

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<sup>13</sup> For a recent volume providing general background on the Jamestown expedition and its personnel, see KAREN ORDAHL KUPPERMAN, *THE JAMESTOWN PROJECT* (2009).

<sup>14</sup> For details of their tenures at the various Inns, see the entries for these individuals in the *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY*, *supra* note 2; *AMERICAN NATIONAL BIOGRAPHY*, *supra* note 2, and other standard biographical dictionaries available both online and in print. Archer, the first recorder or secretary of the colony,



At the turn of the seventeenth century, the Inns were more than just law schools. They were hotbeds of English patriotism, expansionist Reformation Protestantism, and entrepreneurial enterprise. In the contemporary spirit of humanistic curiosity about the world, they welcomed cartographers and explorers into their chambers and capacious dining halls.<sup>15</sup> In these veritable incubators of empire, English judges, lawyers, law students, aristocrats, soldiers, and sea captains collectively planned colonies, financed expeditions, and celebrated victories over colonial competitors (such as Spain) as well as any other groups that stood in their way.<sup>16</sup> Some of the young gentlemen who initially went to London to learn law for their own personal or family purposes abandoned their legal education once they were seduced by soldiering,<sup>17</sup> but what they learned

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appears to have been the only member of this group who had previously practiced law in England.

<sup>15</sup> See generally PETER C. MANCALL, *HAKLUYT'S PROMISE: AN ELIZABETHAN'S OBSESSION FOR AN ENGLISH AMERICA* (2007) (discussing, among other things, the network of explorers, geographers, politicians, merchants, soldiers, and lawyers who surrounded Richard Hakluyt the elder [Middle Temple] and his nephew, the better known travel chronicler of the same name). On the Middle Temple as a particular hub of lawyerly interest in exploration, see Richard Hill, *The Maritime Connection*, in *HISTORY OF THE MIDDLE TEMPLE* (Richard O. Havery ed., 2011); R.M. Fisher, *William Crashaw and the Middle Temple Globes 1605-15*, 140 *GEOGRAPHICAL J.* 105 (1974).

<sup>16</sup> Members of the Inns were prominent in the actual exploration of the New World from the very beginning of English efforts, although their initial activities were characterized more by failure than success. Lawyer-printer John Rastell (Lincoln's Inn) personally led a colonizing expedition to Newfoundland in 1516; his crew mutinied on the way, however, and he was unceremoniously deposited in Ireland. In 1536, Rastell's son John (Middle Temple) was a member of an expedition captained by "Master Hore" that carried "many gentlemen of the Innes of court, and of the Chancerie" to the same destination. They made land, but were supposedly so starved that some of them resorted to cannibalism before they were able to get passage home on a French ship. In addition to entries on John Rastell (the younger) and Richard Hore in the *DICTIONARY OF CANADIAN BIOGRAPHY*, <http://www.biographi.ca/en/index.php> (last visited Feb. 2, 2015); see generally the chapter on *The Voyage of M. Hore*, in RICHARD HAKLUYT [the younger], *THE PRINCIPAL NAVIGATIONS, VOYAGES, TRAFFIQUES & DISCOVERIES OF THE ENGLISH NATION* (2d ed., 1972 [1598-1600]).

<sup>17</sup> The student population of the Inns rose precipitously in the late sixteenth and early seventeenth centuries, especially as more gentry families sent their younger sons to law as opposed to war. The decline of the post-Armada Spanish threat and a stalemate in the

about the world in their time at the Inns nonetheless helped inspire them to take the remarkable step of reaching for America. In turn, they never forgot their early exposure to legal process, regularly turning to it at times of collective crisis.<sup>18</sup> Apart from the erstwhile Inns of Court students who crossed the ocean, it must also be remembered that a significant number of the initial investors in the Virginia Company who made their voyages possible were also lawyers—lawyers who had been their teachers, their mentors, and their friends.<sup>19</sup> The colonization of Virginia was very much a lawyers’ enterprise.

In America, the former law students embraced war out of both ambition and necessity. Native American tribes in the area (in particular the Pamunkey and other groups in the so-called Powhatan confederacy)

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Thirty Years War in the Low Countries, in which many English soldiers fought, probably contributed to this trend. There were, however, still martial temptations for ambitious law students seeking power, property, and patronage.

<sup>18</sup> For instance, when the leadership of Captain Edward Wingfield was deemed unsatisfactory in late 1607, he was formally put on trial by his colleagues and ultimately sent back to England. In January 1608, formal charges were similarly brought against Captain John Smith (who had no legal education) by George Percy and others, accusing Smith of causing the death of two other colonists. Smith only avoided hanging by the fortuitous arrival of a supply ship from England, which concentrated the colony’s leadership on other matters. Smith later crowed:

Some no better then they should be, had plotted with the President, the next day to haue put him to death by the Leviticall law, for the liues of *Robinson* and *Emry*, pretending the fault was his that had led them to their ends: but he quickly tooke such order with such Lawyers, that he layd them by the heeles till he sent some of them prisoners for *England*.

JOHN SMITH, THE GENERALL HISTORIE OF VIRGINIA, NEW ENGLAND AND THE SUMMER ISLES 49 (1624), available at <http://docsouth.unc.edu/southlit/smith/smith.html> (last visited Dec. 26, 2014). One wonders whether this is the first recorded expression of anti-lawyer (or at least anti-legalist) sentiment in the annals of American history. The fact that former Inns of Court students and other English gentry all but marooned in a primitive palisaded settlement surrounded by a wilderness and threatening natives would choose to go to law to settle fundamental internal disputes in dire circumstances within literally months of landing suggests how remarkably legalized—and lawyerized—the process of American colonization was from the outset.

<sup>19</sup> On the involvement of Inns of Court lawyers (and judges) in backing and organizing the early expeditions to “Virginia”, see Hill, *supra* note 15, at 131–33.

understandably viewed the first colonists as invaders,<sup>20</sup> and responded accordingly. Gabriel Archer (Gray's Inn) became one of the first recorded casualties of the Jamestown expedition when he was wounded in an early attempted landing. Edward Wingfield (Lincoln's Inn) repulsed a later attack on the settlement by some 400 warriors. George Percy (Middle Temple) eventually took over as commander of the Jamestown fort and led English war parties in bloody raids against local Native American villages in 1610.<sup>21</sup> Despite not having any military background himself, newcomer William Strachey (Gray's Inn), the Virginia colony's secretary between 1610 and 1611, helped governor Sir Thomas Gates, his successor Thomas West (Lord De La Warr), and deputy governor Thomas Dale—all former soldiers themselves—frame and issue military-style regulations for the colony. These included the infamously harsh “Dale's Code,” the first American law code notably known as “The Lawes Divine, Morall and Martiall,” which stabilized Jamestown after the so-called “Starving Time” and made it more secure against Indian attack.<sup>22</sup> In 1622, when the Powhatans almost succeeded in wiping out the settlement by massacring some 400 colonists on Good Friday, among them Virginia Company stalwart George Thorpe<sup>23</sup>

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<sup>20</sup> In these days of greater sympathy for indigenous peoples, it is surprising that only a few American historians have explicitly taken this perspective. For one example, see FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM AND THE CANT OF CONQUEST* (1975).

<sup>21</sup> Further details on Archer's wounding and the military activities of Jamestown's early leaders may be found in any of the standard histories of the colony. A good recent starting-point for the curious is FRANK GRIZZARD & D. BOYD SMITH, *THE JAMESTOWN COLONY: A POLITICAL, SOCIAL AND CULTURAL HISTORY* (2007).

<sup>22</sup> On Dale's Code and its impact, see generally DAVID H. FLAHERTY, *FOR THE COLONY IN VIRGINEA BRITANNIA LAWES DIVINE, MORALL AND MARTIAL, ETC.*, COMPILED BY WILLIAM STRACHEY (1969).

<sup>23</sup> Thorpe himself was distinguished by his unmilitary character and his genuine solicitousness towards Native Americans, even as he tried to evangelize them. At first disbelieving rumors of a massacre underway, he was killed when he went out to reason, unarmed, with the people he called his “children.” *Thorpe, George*, in *THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1604–1629* (Andrew Thrush & John P. Ferris eds., 2010), available at <http://www.historyofparliamentonline.org/volume/1604-1629/member/thorpe-george-1575-1622> (last visited Jan. 14, 2015).

(Middle Temple—making him the first member of any of the Inns to be killed in Virginia), Thorpe’s lawyer friends in England (including prominent lawyer-poets Christopher Brooke and John Donne, both of Lincoln’s Inn) called for retaliation and continued aggressive colonization.<sup>24</sup>

In the decades after initial settlement, the inflow of Inns of Court members to Virginia slackened as the leadership of the relatively lawyer-heavy Virginia Company gave way to royal government.<sup>25</sup> Still, legal newcomers made their presence felt: another former law student who arrived in 1674, Nathaniel Bacon (Gray’s Inn), burned down Jamestown itself when the authorities tried to stop him from attacking Native Americans who had raided his plantation.<sup>26</sup> If anything, the modicum of legal training that Bacon and his forbearers possessed seems to have made them more rather than less bellicose. Perhaps it was the metropolitan English lawyer’s seemingly insatiable appetite for land, profit, and social prestige in an increasingly competitive environment that lured legally-educated gentlemen into combat with those who literally stood in their way.<sup>27</sup> Or perhaps it was the contemporary legal notion that war against indigenous tribes was not really “war” (in the sense of an armed struggle

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<sup>24</sup> See generally Christopher Brooke, *A Poem on the Late Massacre in Virginia*, 72 VIRGINIA MAGAZINE 259 (1964) (reproducing a copy of the *Poem* published in London in 1622). Brooke wrote:

Take heart, and fill your veynes; the next that bleed  
Shall be those fiends: and for each drop of ours,  
I strongly hope we shall shed theirs in showers.

<sup>25</sup> For more on the transition and the life of one English lawyer caught up in it, see THEODORE K. RABB, *JACOBEAN GENTLEMAN: SIR EDWIN SANDYS, 1561–1629* (1998).

<sup>26</sup> On Bacon’s Rebellion, see generally JAMES RICE, *TALES FROM A REVOLUTION: BACON’S REBELLION AND THE TRANSFORMATION OF EARLY AMERICA* (2013).

<sup>27</sup> In connection with this question, it is worth observing that seventeenth century English lawyer-investors—typical of members of the gentry, as opposed to English merchants—seem to have been much more interested in companies primarily proposing colonization and settlement (Virginia, Plymouth) rather than trade (East India, Muscovy). Far fewer lawyers invested or participated in the latter. See generally THEODORE K. RABB, *ENTERPRISE AND EMPIRE: MERCHANT AND GENTRY INVESTMENT IN THE EXPANSION OF ENGLAND 1575–1630* (1968).

against a civilized enemy) at all, a conclusion that may have reduced any martial or moral restraint they may have felt.

*B. Martial Lawyers Fight for Their Country: The Revolution Through the War of 1812*

By the mid-eighteenth century the initial round of Indian wars on the East Coast was largely over, but colonial American lawyers continued their martial tradition. Many became leaders of local militia units, not so much because they were natural warriors or experienced soldiers, but because militia office reflected and helped to secure public status, constituted obvious public service, and potentially opened the door to political office. Prominent lawyers like James Otis, Sr., in Massachusetts and even the ostensibly unmilitary Thomas Jefferson<sup>28</sup> in Virginia saw their militia service as a welcome duty reflecting not only their willingness to resist potential invaders, but also their commitment to keeping public order in an otherwise policeless society. Along with their land ownership, their personal mastery of arms moreover demonstrated their “public virtue” as independent citizens, an aspect of contemporary classical republican ideology hearkening back to ancient Roman traditions that scholars have described as a “public ethic of martial virtue most suited to war and the threat of war.”<sup>29</sup> With his classical college education and his legal training

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<sup>28</sup> As explained by the National Guard Educational Foundation:

In 1770, at the age of 27, the Governor of Virginia appointed Thomas Jefferson as the county lieutenant, with the rank of colonel, of the Albemarle County Militia. Colonel Jefferson was responsible for all militia affairs in the county including insuring that the Albermarle County Regiment of Militia drilled on a regular basis, that the regimental and company muster rolls were kept up, and that militia fines were collected by the sheriff. Jefferson also presided over courts-martial and councils of war.

*Jefferson, Thomas*, NATIONAL GUARD EDUCATIONAL FOUNDATION, <http://www.ngef.org/guardmuster/jefferson-thomas/> (last visited January 14, 2015).

<sup>29</sup> William A. Galston, *Freedom, Virtue and Social Unity: Gordon Wood's Classical Republicanism and the American Revolution*, 66 CHI.-KENT L. REV. 39, 41 (1990). In later life, Jefferson notably advised his nephew to prefer the gun to the ball as an object of exercise: “while [the gun] gives a moderate exercise to the body, it gives boldness,

under polymath George Wythe, Jefferson in particular was doubtless aware that in taking on military duties he was following in the footsteps of some of the greatest Roman advocates and jurists, including Cicero, Ulpian, and Papinian.<sup>30</sup> Finally, for Jefferson and other lawyers, militia service was a way for individuals often associated with desk work and paper-pushing to manifest their masculinity in a rural agriculture-based society that for the most part still privileged manual skills and considered professionals such as lawyers, clerics, and doctors vaguely effeminate.

From the 1770s, however, duty demanded direct action as colonial consensus fell apart and Patriot fought Loyalist in an American Revolution that was very much a civil war. Animated by both personal interest and heightened awareness of the legal and political issues underlying the conflict, lawyers on both sides took up arms in defense of their chosen causes. Some of the new lawyer-soldiers were already famous (like Pennsylvanian pamphleteer John Dickinson<sup>31</sup> and Virginian orator Patrick Henry),<sup>32</sup> many were not. Some achieved military distinction;<sup>33</sup> some

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enterprize [sic] and independance [sic] to the mind.” On the other hand, “[G]ames played with the ball and others of that nature are too violent for the body and stamp no character on the mind.” THE PAPERS OF THOMAS JEFFERSON 405, 407 (J. Boyd ed., 1950–1982).

<sup>30</sup> As a teenager Cicero fought in the Social Wars prior to the dictatorship of Sulla; as governor of Cilicia between 52 and 49 BC, he conducted military operations in his province and was accorded the honor of a triumphal procession on his return to Rome. *Cicero: Military Service*, SKIDMORE COLLEGE CLASSICS PROGRAM, <http://www.skidmore.edu/classics/cicero/military.html> (last visited July 20, 2014). Ulpian and Papinian both served as prefects associated with the imperial Praetorian Guard in the third century AD.

<sup>31</sup> Despite having initially opposed independence, Dickinson felt obliged to fight for the cause. His efforts, however, were soon frustrated:

within days after the Declaration of Independence was signed, and despite ill-health, Dickinson led his battalion on the New Jersey front. He served for only a short time; in the face of widespread desertions, which rendered his and other battalions useless, and because of his fears for his family as the British approached Philadelphia, he resigned his commission to move his family out of the city.

*John Dickinson Biography*, THE JOHN DICKINSON WRITINGS PROJECT, <http://dickinsonproject.rh.uky.edu/biography.php> (last visited January 15, 2015).

<sup>32</sup> On Henry’s military career, see *Biography of Patrick Henry*, RED HILL PATRICK HENRY NATIONAL MEMORIAL, PATRICK HENRY VOICE OF THE REVOLUTION, <http://>

failed.<sup>34</sup> Some committed unspeakable cruelties on the battlefield;<sup>35</sup> some died.<sup>36</sup> But military service, especially for young and up-and-coming Patriot lawyers and future Founding Fathers like Charles Pinckney and Richard Bassett (not to mention law students like Alexander Hamilton and John Marshall) unquestionably facilitated later professional and political success by publicly proving dedication, leadership, manliness, and virtue. Those lawyers who did not serve in military roles were not infrequently seized by anxiety and guilt.<sup>37</sup>

The victory of the Patriot forces in the Revolution helped push lawyers to the forefront of American leadership, largely in the absence of other competing elite or would-be elite groups. Members of the hitherto-ruling British colonial class and the Anglican clergy, their allies in the established church, had been expelled, removed from power, or constitutionally neutralized by the new separation of church and state. The new Constitution made military men subordinate to civilian control and helped prevent a class of purely military leaders from arising. As a result, partly by force of

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[www.redhill.org/biography.html](http://www.redhill.org/biography.html) (last visited January 15, 2015).

<sup>33</sup> See generally ROBERT K. WRIGHT & MORRIS J. MACGREGOR, *SOLDIER-STATESMEN OF THE CONSTITUTION* (2007).

<sup>34</sup> John Hancock of Massachusetts fared less well than he would have preferred: “Hancock was not a success as a major general of the Massachusetts militia, failing to take Newport in his one active campaign, but he tried.” ROGER G. KENNEDY, *BURR, HAMILTON AND JEFFERSON: A STUDY IN CHARACTER* 398 (2000).

<sup>35</sup> Given that most Revolutionary War history has been written by the victors, it is not surprising that the two most popularly-notorious lawyer-soldiers from the conflict are both Loyalists: Walter Butler, a New Yorker who led a company of rangers, and Christian Huck, a former real estate attorney from Pennsylvania.

<sup>36</sup> For example, Francis Nash, a Virginian lawyer who rose to the rank of Brigadier General in the Continental Army, was killed at the Battle of Germantown in October 1777.

<sup>37</sup> John Adams talked at one point of leaving the Continental Congress to enlist but never did, perhaps for health reasons. He was also somewhat over-age. He protested at one point in a letter to former student William Tudor, who later became Washington’s first Judge Advocate, that “Wearing a Uniform . . . is not all.” Adams did, however, end up on the Congress’s Board of War and Ordinance, becoming what one biographer termed a “*de facto* Secretary of War.” John E. Ferling, *Oh That I Was a Soldier’: John Adams and the Anguish of War*, 36 AM. Q. 258, 268 (1984).

circumstance and partly by their own design in vigorously attacking “standing armies,” lawyers in the post-Revolutionary period exercised overwhelming dominance of American state offices that directly supervised the military. Twelve of the first 16 presidents down to the time of the Civil War were lawyers (the other four were notably soldiers). Eighteen of the 27 Secretaries of War to the Civil War were lawyers. Seventeen of the 24 Secretaries of the Navy to 1861 were lawyers.

The achievement of American nationhood proved exceptionally favorable to the proliferation and collective ascendancy of martial lawyers in general. War had brought lawyers to power and the country into being, and martial lawyers had helped make those things happen. Lawyers were rewarded for their personal martiality with prestige and high positions.<sup>38</sup> Afterwards, a significant segment of the American legal community felt an understandable urge to fight for the country that they had created, that they now led, and that they were nurturing. Military service allowed American lawyers to demonstrate both their new cultural leadership and their ostensible worthiness for that role while providing them a critical and uniquely powerful instrument of social control. It was a convenient device for creating status in the face of their anxieties about their new cultural position and, perhaps, others’ doubts. It also afforded lawyers a(nother) way to consolidate their power by the kind of intense camaraderie that was only to be found in drill, discipline, and common combat.<sup>39</sup> In this context, the Republic’s successes, struggles, and strategies militarized American lawyers. Its battles were literally their battles. Its victories would be their victories.

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<sup>38</sup> For instance, five of the six Supreme Court justices appointed in the Adams and Jefferson administrations between 1797 and 1809 had prior military experience.

<sup>39</sup> “Individuals became a fraternity of manly citizen-soldiers as they participated in the practices of the civic militia.” R. CLAIRE SNYDER, *CITIZEN-SOLDIERS AND MANLY WARRIORS: MILITARY SERVICE AND GENDER IN THE CIVIC REPUBLIC TRADITION* 87 (1999).



The phenomenological distance from post-Revolutionary lawyering to active war-waging was only decreased by the predominant nature of American legal practice during the late eighteenth and early nineteenth centuries. Lawyers did most of their work in adversarial public settings that imposed high civic expectations on them while encouraging them to metaphorically combat their opponents in a never-ending professional tournament. As lawyers and litigation increased exponentially in the new American states from the 1780s on,<sup>40</sup> these settings and the confrontations that took place within them became central, norm-setting cultural institutions. Courtroom argument became the greatest American spectator sport of its time. Lawyers' rhetoric, an emotionally laden tool designed to uplift, inspire, and occasionally inflame the juries lawyers addressed, inevitably uplifted, inspired, and occasionally inflamed lawyers themselves. Loyalty, virtue, patriotism, and the great deeds of great men were not just their oratorical stocks in trade—they were also measures of lawyers' own manliness. Conceptually at least, it was but a small step from battle with an opponent in court to battle with an enemy on the field.<sup>41</sup> On a mass scale, robust and theatric adversarialism primed the militaristic pump of the legal community and helped set America on a warlike national course.

In the early years of the Republic, lawyers marched to war for causes that were notably very much their own. Even before the Philadelphia Convention, when Shays' Rebellion brought farmers and small debtors into conflict with local authorities in Massachusetts, leading to a spate of court closures and even to attacks on lawyers, members of the new state bar rushed to arms in what in retrospect was a striking martial demonstration

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<sup>40</sup> In Massachusetts, for example, the number of lawyers increased from 112 in 1790 to 200 in 1800 to 492 in 1810. See GERALD W. GEWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS, 1760–1840* 14 (1979).

<sup>41</sup> Several scholars have noted how high adversarialism makes lawyering and war-waging analogous. Thus, William F. May: “[N]o profession, save the military, defines its task as adversarially as the legal profession.” WILLIAM F. MAY, *BELEAGUERED RULERS: THE PUBLIC OBLIGATION OF THE PROFESSIONAL* 63 (2001).

not only of respect for order, but also of professional self-interest. Notably no lawyers stood with the rebels, but long established judges and lawyers like Maine's William Lithgow (a French and Indian War veteran) and Boston's Benjamin Hichborn (a Revolutionary War veteran) took up major commands of militia and volunteers and set out to quash the Shaysites. Newly minted attorney Harrison Gray Otis (grandnephew of James Otis Sr.) raised a regiment of light infantry and took up a captain's commission, and law students Timothy Bigelow and Royall Tyler rushed to arms.<sup>42</sup> In 1794, the Whiskey Rebellion in western Pennsylvania was not quite so professionally lopsided; one of the leaders of the rebellion—David Bradford—was a lawyer, and prominent Pittsburgh lawyer Hugh Henry Brackenridge was suspected of rebel sympathies. Eastern lawyers like Alexander Hamilton (notably the Secretary of the Treasury who had proposed the tax on whiskey that the rebels opposed) were, however, having none of it, and the weight of the American legal community as a whole was clearly opposed. At his own request Hamilton marched with President George Washington's army of federalized militia, which included older lawyer-veterans like General Joseph Bloomfield and Major General Frederick Frelinghuysen along with just-called young attorneys like Mahlon Dickerson, all from New Jersey. The force effectively overawed the rebels, occupying Pittsburgh and four surrounding counties.<sup>43</sup>

Rising tensions with the British Empire in the Napoleonic period seized the imaginations and martial ambitions of many American lawyers, especially those with some measure of military experience. Here was a potential opportunity to serve their country again in the highest capacity. After the *Leopard-Chesapeake* naval impressment incident off Norfolk in 1807, rising Virginia lawyer (and later Supreme Court advocate and US

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<sup>42</sup> See generally Sidney Kaplan, "Honestus" and the Annihilation of the Lawyers, 48 S. ATL. Q. 401, 417–18 (1949) (discussing the military role of various lawyers in suppressing Shays' Rebellion).

<sup>43</sup> See generally THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION (1988).

Attorney General) William Wirt, already a major in the state militia, suggested to his lawyer friends St. George Tucker and Dabney Carr—both veterans themselves—that he raise and lead a volunteer “Legion” (in the hands of the classically-smitten Wirt, the Roman allusion was no accident) that would support the United States in a war that he predicted “will probably give us Canada and Nova Scotia.” The step from lawyer to soldier was hardly traumatic. Wirt wrote to Carr:

In this event, I presume that our profession will be but of little importance to us. If so, what will you do yourself? Not sit idly at home, I presume. For my part, I am resolved. I shall yield back my wife to her father, *pro tempore*, to which the old gentleman has agreed, and I shall march.<sup>44</sup>

Although nothing ultimately came of the *Leopard-Chesapeake* incident and Wirt’s proposal of a “Legion” was not popularly embraced, the War of 1812 that followed five years later only made the practical linkage between American lawyering and war-waging more obvious. American lawyers from the frontier states (Kentucky and Tennessee in particular) flocked to the colors and took up leading positions in militia regiments and the federal forces. A lawyer in Philadelphia wrote to an acquaintance in Lancaster PA that legal business in the one-time federal capital had almost ceased as “many of our bar are volunteering under [fellow lawyer Thomas] Cadwalader[,]” who had been charged with forming a local militia brigade.<sup>45</sup> In Virginia, the now somewhat older and more established Wirt initially declined an army commission, but when Richmond came under threat from nearby British naval action he enthusiastically raised a corps of

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<sup>44</sup> 1 JOHN P. KENNEDY, *MEMOIRS OF THE LIFE OF WILLIAM WIRT, ATTORNEY-GENERAL OF THE UNITED STATES 97–99, 196–206* (1856) (describing Wirt’s prior military experience, his martial aspirations for himself and his Legion, and providing the full text of the various letters quoted *supra*).

<sup>45</sup> Quoted in ALBRECHT KOSCHNIK, “LET A COMMON INTEREST BIND US TOGETHER”: ASSOCIATIONS, PARTISANSHIP AND CULTURE IN PHILADELPHIA, 1775–1840 174 (2007).

“flying artillery” to assist in defense.<sup>46</sup> The war was the political making of Kentucky lawyer Richard Mentor Johnson (who went on to be Vice President under John Quincy Adams) and Tennessee lawyer Andrew Jackson (the one-time Indian fighter who was the “hero of New Orleans”). At the same time, the war also demonstrated the limitations of lawyers in a command capacity. Lawyer and Revolutionary War veteran William Hull was caught by surprise by the British siege of Detroit and surrendered without firing a shot. Lawyer generals Peter Porter and Alexander Smyth fought a duel (another violent lawyerly diversion of the period that appears to have been a symptom of the prevailing martial mentality) over disagreements relating to the failed invasion of Canada.<sup>47</sup> One dismayed historian later wrote: “Unfortunately, both missed.”<sup>48</sup>

*C. Martial Lawyers and Manifest Destiny: Indian Wars, Filibustering, and Mexico*

After gaining the White House in 1829, Andrew Jackson continued his personal war against Native Americans. Specifically invoking his commander-in-chief powers, he deployed the army to enforce the involuntary removal of the Creeks, Choktaws, Seminoles, Chickasaws, and finally Cherokees westward along what we refer to today as the Trail of Tears.<sup>49</sup> In Illinois, other frontier lawyers—among them, a young Abraham

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<sup>46</sup> *Id.* at 319.

<sup>47</sup> Porter accused Smyth of cowardice at the Battle of Queenston Heights, fought on the Canadian side of the Niagara River in October 1812. The British commander usually given credit for ultimately repelling the American invaders in that engagement is General Isaac Brock; when he was killed on the field he was succeeded in command by Lieutenant Colonel John McDonnell, who attacked the Americans a second time before being mortally wounded himself. McDonnell was notably a lawyer—in fact, at the time of this death, he was the Attorney General of Upper Canada. *See generally* ROBERT MALCOMSON, *A VERY BRILLIANT AFFAIR: THE BATTLE OF QUEENSTON HEIGHTS, 1812* (2003).

<sup>48</sup> JOHN R. ELTING, *AMATEURS, TO ARMS! A MILITARY HISTORY OF THE WAR OF 1812* 51 (1991).

<sup>49</sup> A recent work on the general subject is A.J. LANGGUTH, *ANDREW JACKSON AND THE TRAIL OF TEARS* (2010).

Lincoln—took up arms against local Indian bands in the so-called Black Hawk War of 1832 (Lincoln served and buried casualties, but never saw combat himself).<sup>50</sup> Jacksonian America was expansionist, and so was its legal profession. With many states loosening bar admission rules for lawyers, more attorneys entered the professional field than there was full-time work. By necessity, unemployed or underemployed young lawyers looked in other directions for work and wealth. Military service offered the prospect of pay, activity, social networking, and even land if things went well. At the end of his initial enlistment period in the Black Hawk War, Lincoln reenlisted. He later explained to his eventual law partner, “I was out of work and there being no danger of more fighting, I could do nothing better than enlist again.”<sup>51</sup> For his service Lincoln received 160 acres in what is now Tama County, Iowa.<sup>52</sup>

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<sup>50</sup> On Lincoln’s military service, see Harry E. Pratt, *Abraham Lincoln in the Black Hawk War*, in THE JOHN H. HAUBERG HISTORICAL ESSAYS 18 (O. Fritiof Ander ed., 1954).

<sup>51</sup> WILLIAM HENRY HERNDON & JESSE WILLIAM WEIK, HERNDON’S LINCOLN 73 (Douglas L. Wilson & Rodney O. Davis eds., 2006). Although Lincoln would later joke about his military experience in the Black Hawk War, he maintained a lifelong familiarity with weapons, personally testing the latest rifles, carbines, and even an early hand-cranked “coffee-mill” machine gun on the White House lawn during the Civil War. Henry J. Reske, *Abraham Lincoln: A Technology Leader of His Time*, US NEWS & WORLD REPORT, Feb. 11, 2009, <http://www.usnews.com/news/history/articles/2009/02/11/abraham-lincoln-a-technology-leader-of-his-time>.

<sup>52</sup> See generally *The Visit of Abraham Lincoln*, 4 ANNALS OF IOWA 3RD SERIES, Apr. 1899, at 462.

One day while talking to a friend in a confidential way about their lives in Illinois [Lincoln] drew from an inner side pocket an old parchment, wrapped in a newspaper, which proved to be an old United States land warrant for one hundred and sixty acres of land, issued to Abraham Lincoln, Captain in the Black Hawk War. His friend exclaimed chidingly: “Mr. Lincoln, why did you not years and years ago enter this in the Danville Land District as your friend Judge David Davis did, which was the foundation of his great wealth?” “I know you are right about this as a business proposition,” he answered, “but Davis always knew how to make money and I never did. I was so poor that I was afraid I could not pay the taxes on the land if I got it. So I put it and my discharge papers with other little souvenirs in Bob Irvin’s Bank Vault, where it has been until Hatch and I a month ago started on our junketing trip through Kansas, when I went and got it and put it in my pocket thinking I would like to have one hundred and sixty acres of land in free Iowa or Kansas.” He saw his reason was not satisfactory and added, with the emotion of the great father that he was: “When in after years (and the warrant was almost forgotten) my little

Other unemployed or underemployed lawyers went even further afield in an effort to secure a future for themselves while indulging their appetite for favored political causes. Many of their activities, unlike Lincoln's, were unsanctioned. They were "filibusters": in the original non-legislative sense of the term, men who engaged in private wars against neighboring states, hoping to seize land by force. In the 1830s, opportunities for filibustering existed both north and south of the existing United States. Lawyers (or ex-lawyers) were hardly the only filibustering professionals, but probably because of the prospect of land, lawyers seemed particularly drawn to the activity, even if their reach generally exceeded their grasp (in part because US law prohibited filibustering and American authorities sought to suppress it in the interest of international harmony).<sup>53</sup>

In the North, the unsuccessful Canadian rebellions of 1837 had destabilized the border and sent Canadian rebel leaders who had opposed British rule scrambling into the United States. There, American sympathizers embraced them and organized local private militias, surreptitiously called "Hunters' Lodges," to probe into Canadian/British territory.<sup>54</sup> At their height, the Hunters' Lodges inducted over 40,000 men.<sup>55</sup> The leaders of the self-styled "Patriot Movement" were notably lawyers with larger personal and political ambitions: Akron, Ohio, attorney Lucius Bierce was commander-in-chief of the Patriot Army in the Northeast, and

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boys Bob and Tad came, a great desire sprang up that I would give the boys the warrant, that they would always be reminded that their father was a soldier!"

*Id.* On the acquisition and eventual disposition of the land, and its current status, see *Lincoln Land in Iowa*, ABRAHAM LINCOLN ONLINE, <http://www.abrahamlincolnonline.org/lincoln/sites/iowaland.htm> (last visited July 20, 2014).

<sup>53</sup> See generally ROBERT E. MAY, *MANIFEST DESTINY'S UNDERWORLD: FILIBUSTERING IN ANTEBELLUM AMERICA* (2004) (discussing filibustering and official American policy reactions to the practice).

<sup>54</sup> See generally SHAUN J. MCLAUGHLIN, *THE PATRIOT WAR ALONG THE NEW YORK-CANADA BORDER: RAIDERS AND REBELS* (2012) (discussing the Hunters' Lodges and the so-called "Patriot War").

<sup>55</sup> *Id.* at 84.

Michigan attorney Henry Handy led the Patriot effort in the Northwest. All came to naught, however, in the face of opposition to the movement by both British troops and American state militia.

In the South, lawyers were also on the move in search of fees, land, and a future. One was Daniel Cloud, a young Kentucky attorney who set out southward in 1835. He described his journey with several other itinerant lawyers in a remarkably revealing letter:

The reasons which induced us to travel on, were briefly these: first our curiosity was unsatisfied; second, law dockets were not large, fees low, and Yankee lawyers numerous. . . . Our reasons for not stopping in Missouri were first, we were disappointed in the face of the country and the coldness of the climate, but most of all, the smallness of the docket. There is less litigation in this state than in any other in the union for its population . . . and what is going on redounds very little to the emolument of the practitioners. I was happy to find such a state of case existing, but while following the chase, like other hunters, wish to go where game is plentiful, fat and large.<sup>56</sup>

Cloud and other migratory lawyers like Sam Houston, Steven Austin, Thomas Jefferson Rusk, James Pinckney Henderson, and Felix Huston soon arrived in Texas, where they became entangled in confrontations with local Mexican authorities as well as resident Native American tribes. Once again the lawyers took up arms. Although their professional identity has been long forgotten (perhaps conveniently so for the purposes of American myth-making), six lawyers died at the Alamo in 1836.<sup>57</sup> One was the commander of the beleaguered garrison, William Travis, who had moved to Texas to

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<sup>56</sup> *Letter from Daniel William Cloud*, MY KINDRED.COM: FAMILY HISTORY RESEARCH, [http://mykindred.com/cloud/TX/histories/Daniel\\_W\\_Cloud%20letter.php](http://mykindred.com/cloud/TX/histories/Daniel_W_Cloud%20letter.php) (lasted visited July 20, 2014).

<sup>57</sup> *See generally* Gretchen Allen & Brad A. Allen, *Lawyers and the Alamo*, 37 DEC HOUS. LAW. 48 (1999) (providing brief biographies of lawyer casualties). On problems presented by their modern memorialization, see Scott Huddleston, *Lawyers Will Have to Be Remembered Elsewhere*, EXPRESS-NEWS, June 9, 2010, [http://www.mysanantonio.com/news/local\\_news/article/Lawyers-will-have-to-be-remembered-elsewhere-785139.php](http://www.mysanantonio.com/news/local_news/article/Lawyers-will-have-to-be-remembered-elsewhere-785139.php).

avoid debts incurred when he began a law practice in Alabama that quickly failed.<sup>58</sup> Another was Daniel Cloud, at 22, the youngest of the American defenders killed. For those lawyers who survived the war for Texas independence, however, the economic rewards were spectacular. Even apart from guaranteed professional prospects in a new country of their own, many received enormous tracts of land. Edward Tarrant, another southbound lawyer from Tennessee who had fought in the War of 1812, received over 4,500 acres.<sup>59</sup> James Reily, a lawyer from Ohio, received almost 1,300 acres.<sup>60</sup> Such bounties were not extraordinary.

Back in the United States, lawyers continued to play a dominant role in American military policy and war-waging. Following threatened or actual slave uprisings in the 1820s and 1830s that alarmed white populations in two major southern states, lawyers John T.L. Preston (in Virginia) and James Hamilton (in South Carolina) pressed for the establishment of local military academies; these would eventually become the famed Virginia Military Institute and The Citadel.<sup>61</sup> In 1841, Virginia lawyer and 1812 veteran Winfield Scott was appointed Commanding General of the United States Army—the country’s senior military officer. He would hold the post for 20 years. In 1844 another lawyer—this time a former militia cavalry colonel from Tennessee named James Polk—was elected president and began the aggressive pursuit of a westward expansion policy that was soon labeled “Manifest Destiny.” One of the first implementations of that was the war with Mexico in 1846–1847.

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<sup>58</sup> WILLIAM C. DAVIS, *LONE STAR RISING: THE REVOLUTIONARY BIRTH OF THE TEXAS REPUBLIC* 80 (2004).

<sup>59</sup> *Tarrant, Edward H[enry]*, in 6 *DICTIONARY OF NORTH CAROLINA BIOGRAPHY* 2 (William S. Powell ed., 1996).

<sup>60</sup> Thomas W. Cutrer, *Reily, James*, *THE HANDBOOK OF TEXAS*, <http://www.tshaonline.org/handbook/online/articles/fre26> (last visited Mar. 19, 2014).

<sup>61</sup> See JOHN H. FRANKLIN, *THE MILITANT SOUTH 1800–1861* 149–50 (1956) (on the formation of the Virginia Military Institute). Preston eventually joined the VMI faculty as a professor of language and literature. See JOHN P. THOMAS, *THE HISTORY OF THE SOUTH CAROLINA MILITARY ACADEMY* 12–19 (Walker, Evans & Cogswell eds., 1893) (on the circumstances behind the establishment of The Citadel).



Like 1812, the Mexican War was popular with lawyers, especially those from the frontier states. Including Winfield Scott, five of the seven American major generals taking the field in the conflict were lawyers.<sup>62</sup> Prominent or soon-to-be prominent lawyers like Franklin Pierce, Albert Pike, Caleb Cushing, and George Cadwalader took command of individual volunteer brigades. The timing of the conflict was again propitious. Kentucky lawyer and infantry captain Leander Cox wrote later, “I could not see what [*sic*] I would have done better at home as the business of my profession was very trifling, and I had involved myself greatly beyond my ability.”<sup>63</sup> After a successful campaign that culminated in the taking of Mexico City, other lawyers like Missourian Alexander Doniphan assisted in the administration of new American territory seized from the Mexicans. All campaign veterans benefited from post-war bounties that entitled them to 160 acres of land or \$100 in scrip (i.e. paper credit).<sup>64</sup> Polk was obviously proud of his army and their accomplishments, and was well aware of the contributions of his own professional colleagues. In his 1848 Farewell Address to Congress, he noted that “Our citizen soldiers are unlike those drawn from the population of any other country. They are composed indiscriminately of all professions and pursuits—of farmers, lawyers, physicians, merchants, manufacturers, mechanics, and laborers—and this not only among the officers, but the private soldiers in the ranks.”<sup>65</sup>

The Mexican campaign and its aftermath nonetheless left certain American lawyers wanting more. Some, especially from the Deep South, feared that slavery was still unduly confined and sought to carve out private

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<sup>62</sup> The others were William O. Butler, James P. Henderson, Gideon Pillow, and John A. Quitman. For a list of American commanders, see RICHARD B. WINDERS, *MR. POLK’S ARMY: THE AMERICAN MILITARY EXPERIENCE IN THE MEXICAN WAR* 37 (1997).

<sup>63</sup> *Id.* at 71.

<sup>64</sup> *Mexican War Veteran Research*, DESCENDANTS OF MEXICAN WAR VETERANS, <http://www.dmwv.org/mwvets/howto.htm> (last visited Sept. 12, 2014).

<sup>65</sup> James K. Polk, *Fourth Annual Message, December 5, 1948*, in *THE AMERICAN PRESIDENCY PROJECT*, <http://www.presidency.ucsb.edu/ws/?pid=29489> (last visited January 15, 2015).

Latin American empires for themselves. Of these lawyers—generally ones who had failed to make much headway in the profession—William Walker was the most infamous. The quintessential “filibuster,” he actually succeeded in invading Nicaragua with a small force and taking over its government for a brief period in 1856.<sup>66</sup> He was not alone, however—other notorious lawyer filibusters of the time included John Quitman, Chatham Wheat, and Parker French.<sup>67</sup> Ironically, they all embraced a willingness to take law into their own hands in an effort to achieve personal success.

*D. Martial Lawyers Turn on Each Other: The Civil War*

What might be called the “lawyerization” of American war reached its historical height only a few years later when the North and South came to blows in the bloodiest conflict the United States has ever known. Although virtually never described as such, the Civil War was a lawyers’ war. It was fought over interpretation of the Constitution, a legal document largely framed by lawyers, long touted by lawyers as the cornerstone of both the Republic and the American legal profession, and supposedly saved by lawyers in the famous (or infamous) Compromise of 1850. Now, with the Constitution and their country (not to mention their professional pride and self-respect) in danger, lawyers on both sides enthusiastically marched to war. They fought for what they believed in,<sup>68</sup> but they also fought to redeem themselves.

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<sup>66</sup> After his overthrow by an army of Guatemalans, Salvadorans, and Hondurans in 1857, he returned to the United States just long enough to write an account of his expedition and raise money and support for a new campaign. That effort was less successful—captured in Honduras, Walker was shot by a firing squad in 1860. *See generally* LAURENCE GREENE, *THE FILIBUSTER: THE CAREER OF WILLIAM WALKER* (1937).

<sup>67</sup> *See* MAY, *supra* note 53.

<sup>68</sup> Speaking at the dedication of a new law building at the University of Michigan in October 1863, Thomas Cooley noted:

The battle which our brothers are waging in Virginia, and Tennessee, and Arkansas, is one of constitutional law. The question at issue is one proper for the determination of courts, but it has been forcibly wrested from their control, and made the gage of bloody contest. Lawyers engaged in this strife are merely settling a point of national law.

Lawyers came into this conflict by the thousands. Although there is no specific record of Civil War lawyer enlistments, surviving Union statistics indicate that pre-war “professionals” made up roughly three percent of an army total of over 2,600,000;<sup>69</sup> even if only 25 percent of the “professionals” were lawyers—likely a low estimate—that would still make 20,000 lawyers under arms on the Union side alone, more lawyers than appear to have enlisted in the entire US Army in World War II,<sup>70</sup> when the United States had over 12,000,000 men and women under arms.<sup>71</sup> A number of states lost the majority of their bars to recruitment—in Tennessee, for example, somewhere between 60 and 85 percent of the legal community joined up,<sup>72</sup> a significant number being veterans of the Mexican War. The war impacted all segments of the American legal community—elite law school graduates as well as more “ordinary” men who had read law in offices, judges as well as practicing attorneys.<sup>73</sup> Some 326 Harvard Law

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ADDRESS BY HON. THOMAS M. COOLEY AND POEM BY D. BETHUNE DUFFIELD, ESQ. ON THE DEDICATION OF THE LAW LECTURE HALL OF MICHIGAN UNIVERSITY 15 (1863).

Other lawyers making the connection between lawyering and war-waging referred to the Civil War as a “trial by battle.” See generally Cynthia Nicoletti, *The American Civil War as a Trial by Battle*, 28 LAW AND HISTORY REVIEW 71 (2010).

<sup>69</sup> *Civil War Facts*, NATIONAL PARKS SERVICES, <http://www.nps.gov/civilwar/facts.htm> (last visited July 20, 2014).

<sup>70</sup> Kenneth C. Royall, *Lawyers in War: They Serve in the Pentagon and the Front*, 37 A.B.A. J. 505, 506 (1951).

<sup>71</sup> *By the Numbers: The US Military*, NATIONAL WORLD WAR II MUSEUM, NEW ORLEANS, <http://www.nationalww2museum.org/learn/education/for-students/ww2-history/ww2-by-the-numbers/us-military.html> (last visited Sept. 11, 2014).

<sup>72</sup> Sam Elliot, *Tennessee’s Confederate Courts*, TENNESSEE BAR ASSOCIATION (Jan. 2, 2012), <http://www.tba.org/journal/tennessee-s-confederate-courts>. By the same token, some lawyers did their best to avoid service altogether, even in the face of conscription. Prominent (and wealthy) New York lawyer George Templeton Strong paid a 20-year-old “Dutch boy” a sum of \$1,100 to take his place. Michael T. Meier, *Civil War Draft Records: Exemptions and Enrollments* 26 PROLOGUE: QUARTERLY OF THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION (1994), <http://www.archives.gov/publications/prologue/1994/winter/civil-war-draft-records.html> (last visited Jan. 19, 2015).

<sup>73</sup> Walt Whitman incidentally noted the influx of lawyers in *Drum-Taps*, which dramatized patriotic fervor in New York after the fall of Fort Sumter:

To the drum-taps prompt,  
The young men falling in and arming;

School alumni fought for the Union. Perhaps more surprising (until one accounts for Justice Joseph Story's Southern recruiting efforts in his tenure as Harvard's Dane Professor of Law between 1829 and 1843), at least 223 fought for the Confederacy.<sup>74</sup>

Some lawyers rose through the ranks, but more started at the top. Their civilian records as community stalwarts and their ability to speak in public and persuade other men to act made lawyers natural military leaders in the absence of a large professional officer corps. Of the 425 generals in the Confederate States Army, 129 were lawyers, giving members of the bar numerical precedence over all other occupational groups.<sup>75</sup> On the federal side, 126 of the 583 Union generals were lawyers.<sup>76</sup> Lawyers also

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The mechanics arming...  
 The lawyer leaving his office - the judge leaving court;  
 The driver deserting his wagon in the street, jumping down, throwing the reins abruptly  
 down on the horses' back;  
 The salesman leaving the store - the boss, book-keeper, porter, all leaving. .

WALT WHITMAN, *Drum-Taps*, in *LEAVES OF GRASS* (David McKay ed., 1900).

<sup>74</sup> Daniel Coquillette & Bruce A. Kimball, *The Republic of Merit: Harvard Law School, the First Century (1817-1910)* 6-7 (The Bicentennial History of Harvard Law School, Vol. I; early draft). The large number of lawyers in the ranks was still celebrated decades afterwards by leading members of the bar who remembered the Civil War years. Thus, New York railway lawyer Chauncey Depew, looking back while addressing the New York State Bar Association in 1896: "The lawyers did their best to bring about a peaceful settlement between the North and the South, but when the armed struggle came, they enlisted for the war in proportion to their number, in far greater ratio than any other profession, calling or vocation." Chauncey M. Depew, *Patriotism and Jingoism-The Lawyer's Duty*, 4 AM. LAW. 106, 107 (1986).

<sup>75</sup> EZRA J. WARNER, *GENERALS IN GRAY: LIVES OF THE CONFEDERATE COMMANDERS* xxi (1959). Next were professional soldiers, numbering 125.

<sup>76</sup> EZRA J. WARNER, *GENERALS IN BLUE: LIVES OF THE UNION COMMANDERS* xix (1964). Union lawyer-generals were only outnumbered by generals who had been professional soldiers, of which there were 194. Businessmen followed at 116 and farmers at 23. One Union lawyer-general, prominent German-American attorney and Lincoln loyalist Carl Schurz, notoriously went in a single day from civilian status to being a division commander in charge of about 6,000 men. The editors of the *New York Herald*, doubtless along with others, were wary of such instant lawyer promotions:

We could mention the names of several lawyers in New York who know as little of fighting as they do of shoemaking, who have been presumptuous

dominated the wartime governments of both sides that managed (or mismanaged) the conflict. In the South, 16 of the 18 initial cabinet secretaries were lawyers. In the North, all the members of lawyer-president Abraham Lincoln's wartime cabinet except two were also lawyers.<sup>77</sup>

On the field of battle, lawyers were involved from the outset of hostilities,<sup>78</sup> but despite (or perhaps in some instances because of) their martial enthusiasm, their record was mixed.<sup>79</sup> Henry Halleck, the California lawyer derisively nicknamed "Old Brains" who was Commanding General of the US Army between 1862 and 1864 (and the lawyer that Winfield Scott wanted to succeed him, although the distinction went briefly to non-lawyer George McClellan), was bureaucratically capable and can be credited for

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enough to put themselves forward for positions, only second to that to General Scott himself, and who confidently believe they will receive such appointment.

*Something Wrong in High Quarters*, NEW YORK HERALD, June 15, 1861.

<sup>77</sup> See generally Sigurd Anderson, *Lawyers in the Civil War*, 48 A.B.A. J. 457 (1962).

The exceptions were Simon Cameron, who served as Secretary of War in 1861–1862, and Gideon Welles, a newspaper publisher who was Secretary of the Navy.

<sup>78</sup> The first Union casualty of the war was actually a law student who had clerked with Abraham Lincoln in Illinois. Colonel Elmer Ellsworth was killed in a confrontation with a secessionist in Alexandria, Virginia on May 24, 1861. President Lincoln was personally devastated by Ellsworth's death; in a macabre foretelling of his own eventual fate, Lincoln arranged to have Ellsworth's body lie in state in the East Room of the White House. See *Ellsworth, Elmer*, in JOHN HOWARD BROWN, LAMB'S BIOGRAPHICAL DICTIONARY OF THE UNITED STATES 643 (1901).

<sup>79</sup> Some decided early on in their putative military careers that discretion was the better part of valor. In his memoirs, William Tecumseh Sherman told the story of his early encounter with a lawyer-turned-captain who declared after First Bull Run that he wanted to go back to lawyering again since his 90-day enlistment period was up. Sherman threatened to shoot him. The lawyer complained to President Lincoln, then visiting the Union encampment, but Lincoln cleverly demurred. Sherman recalled the exchange, initiated by the lawyer:

"Mr. President, I have a cause of grievance. This morning I went to speak to Colonel Sherman, and he threatened to shoot me.' Mr. Lincoln, who was still standing, said, 'Threatened to shoot you?'" "Yes, sir, he threatened to shoot me." Mr. Lincoln looked up at him, then at me, and stooping his tall, spare form toward the officer, said to him in a loud stage-whisper, easily heard from some yards around: "Well, if I were you, and he threatened to shoot, I would not trust him, for I believe he would do it."

WILLIAM T. SHERMAN, MEMOIRS OF GENERAL W.T. SHERMAN 176, 206–08 (2000) (1875).

encouraging both the creation and implementation of the innovative Lieber Code on the law of war.<sup>80</sup> Halleck was militarily indecisive, however, and was eventually replaced in the field by Ulysses S. Grant, a non-lawyer. On the Confederate side, legal skill similarly exceeded military prowess on more than a few occasions. In 1864, Confederate general A.P. Hill famously complained to his commander, fellow West Pointer Robert E. Lee, that General Ambrose Wright had bungled a maneuver and cost the army unnecessary losses; Hill wanted Wright court-martialed. Lee was more sanguine, and reportedly told Hill:

These men are not an army, they are citizens defending their country. General Wright is not a soldier; he's a lawyer. I cannot do many things that I could do with a trained army. . . . You understand all this, but if you humiliated General Wright, the people of Georgia would not understand. Besides, whom could you put in his place?<sup>81</sup>

At the same time, some lawyers succeeded brilliantly in field commands. On the Union side, boyish-looking Francis Barlow, who had graduated first in his class at Harvard Law School, gave up his legal work for the *New York Tribune* newspaper to enlist as a private. By the end of the war he was one of the most able and famous generals in the Army of the Potomac. Lawyer Lew Wallace, who had gained military experience in the Mexican War, enjoyed several military successes and a mercurial rise through the ranks

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<sup>80</sup> See JOHN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* (2012), *passim*.

<sup>81</sup> WILLIAM WOODS HASSLER, *A.P. HILL: LEE'S FORGOTTEN GENERAL* 203 (1995). It should be noted that, returning the favor, a number of lawyers in the course of the war openly disparaged the military skills of professional soldiers. In Congress, Lincoln stalwart and fellow lawyer Owen Lovejoy opined at one point that "men who have received a military education are more in the way of the success of our arms than anything else." 2 *AMERICAN ANNUAL CYCLOPEDIA AND REGISTER OF IMPORTANT EVENTS* 305 (1862). Despite lawyerly reverses in the field, a writer in an 1864 issue of the *Atlantic Monthly* persisted in suggesting that the average lawyer (or businessman), could "give the average army officer all the advantage of his special training, at the start, and yet beat him at his own trade in a year." Quoted in BILL HYDE, *THE UNION GENERALS SPEAK* 14–15 (2003).

before his reputation was perhaps undeservedly ruined at Shiloh (after the war, he went on to write the best-selling novel *Ben-Hur*). New York lawyer (and future Navy Secretary) Benjamin Tracy led his 109th New York regiment with such gallantry in the Wilderness Campaign that he was later awarded the Congressional Medal of Honor. For the South, lawyers like the frustratingly nimble infantry commander Jubal Early, cavalry commander John Moseby (the “Gray Ghost”), and naval commander Raphael Semmes (captain of the notorious raider CSS *Alabama*) were all militarily distinguished.

The Civil War, however, was more than just another war in which American lawyers fought, or even just one in which *more* American lawyers fought. Perhaps ironically, it was a major portent of decline for martial lawyers as a group. Despite appearances, the war was not a lawyers’ triumph but rather a lawyers’ failure—a failure of catastrophic proportion that revealed not lawyers’ collective strength as defenders of the Republic but rather their weakness, and arguably their ultimate unsuitability and unfitness for that self-appointed role.<sup>82</sup> For all lawyers’ hopes of constitutional redemption on the battlefield, the conflict was—among other things—the tragic by-product of an adversarial legal culture at the center of American life that had ultimately turned on itself in a national and professional *Gotterdammerung*. In a sense, American lawyers had argued themselves to death. Between 1861 and 1865, the legal community wore itself out rhetorically, physically, and psychologically, only to face symbolic disaster in the unprecedented assassination of perhaps its greatest

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<sup>82</sup> Walt Whitman recognized and subtly mocked the faith that had been placed in the bar—and the faith that the bar had placed in itself—as guardians of the Union and its integrity:

Were you looking to be held together by lawyers?  
Or by an agreement on a paper? or by arms?  
Nay, nor the world, nor any living thing, will so cohere.

Walt Whitman, *States!*, in *LEAVES OF GRASS*, *supra* note 73.

national leader, Abraham Lincoln. It would never recover; after the war, disheartened, disillusioned, and increasingly distrusted, lawyers turned inward to focus on their own professional concerns, institutions, and careers, effectively surrendering the positions of political, social, and military dominance in American society they had formerly enjoyed. Some (notably not deemed “the best men” by their more professionalized colleagues) would cling to leadership—or at least the trappings of leadership—until roughly the turn of the century, but after the Civil War lawyers’ days as the “American aristocracy” were numbered.

*E. Martial Lawyers Retreat: National Guard Service, World War I, and World War II*

In this environment, martial lawyers began a somewhat chastened retreat from the battlefield, gradually letting and even encouraging members of other American elites to take their place as American lawyers as a whole took stock of their new circumstances and reached towards new and perhaps more limited professional and personal goals. Their military competence had been called into question and their future purpose was unclear.<sup>83</sup> Already there were signs that modern warfare was too large-scale, too complex, and too demanding for lawyers’ skill set. It may also have been simply too awful. Previous American wars had notably cost far fewer lives<sup>84</sup>

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<sup>83</sup> In the North, after lawyers (supposedly) helped save the Union, military service for many may have become anticlimactic. In the South, with slavery ended by emancipation, martial lawyering arguably became less necessary as an *in terrorem* mechanism of social control. For a time it also became impossible as local state militias were eliminated in favor of direct federal military occupation of the Southern states during Reconstruction.

<sup>84</sup> Although official and unofficial estimates vary wildly in the absence of carefully amassed or preserved statistics, approximate American military deaths in the Revolution were 4,400; in the War of 1812, 2,200; and in the Mexican War, 13,000. *Fact Sheet: America’s Wars*, US DEP’T OF VETERANS AFFAIRS, [http://www.va.gov/opa/publications/factsheets/fs\\_americas\\_wars.pdf](http://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf) (last visited Jan. 15, 2015). In the Civil War the total number of Union and Confederate deaths was a staggering 750,000, over 2 percent of the total US population in 1861. Guy Gugliotta, *New Estimate Raises Civil War Death Toll*, N. Y. TIMES, Apr. 2, 2012, [http://www.nytimes.com/2012/04/03/science/civil-war-toll-up-by-20-percent-in-new-estimate.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2012/04/03/science/civil-war-toll-up-by-20-percent-in-new-estimate.html?pagewanted=all&_r=1&). To put Civil War



and destroyed much less property, and many lawyers writing in battlefield journals in this period reacted to the carnage with horror and revulsion.<sup>85</sup> Between Fort Sumter and Appomattox, the kind of “limited war” that moral lawyers and gentlemen might properly and feasibly have engaged in had become society-destroying “total war” better left in the hands of military experts.<sup>86</sup> In the aftermath of the Civil War it was therefore not surprising that the US military took a distinct turn in the direction of professionalization,<sup>87</sup> ironically prompted by a not-so-good lawyer who turned out to be a much better general, William Tecumseh Sherman.<sup>88</sup> Sherman encouraged military theorists like West Point commandant Emory Upton to draw up plans to put the US military on an entirely professional footing and bring it up to the level of European armies.<sup>89</sup>

In the meantime, American lawyers’ professional circumstances were changing in a way that would make the realization of Sherman’s ambitions

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mortality figures in perspective for the contemporary reader, this would be equivalent to over 6,000,000 military war dead out of the current US population base. World War II, the bloodiest US conflict of the twentieth century, caused slightly more than 400,000 US military deaths.

<sup>85</sup> The carnage, of course, extended to lawyers themselves. Although there are no Civil War casualty lists for lawyers as a group, some institutional records are grimly suggestive. Of the 543 Harvard Law School alumni who marched to war, over 100 died, an over 18 percent mortality rate. Coquillette & Kimball, *supra* note 74.

<sup>86</sup> See generally HARRY STOUT, *UPON THE ALTAR OF THE NATION: A MORAL HISTORY OF THE CIVIL WAR* (2006).

<sup>87</sup> See generally SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* (1957) (see especially chapter 9, *The Creation of the American Military Profession*).

<sup>88</sup> Sherman’s brief legal career is described in ROBERT O’CONNELL, *FIERCE PATRIOT: THE TANGLED LIVES OF WILLIAM TECUMSEH SHERMAN* 297 (2014): “He appeared in court exactly twice and lost both times—in the latter instance buried beneath an avalanche of precedents by his opponent.” Having no formal legal education or training, Sherman had been admitted to the Leavenworth County Kansas bar “on the grounds of general intelligence.” An 1858 letter from a friend in California informed him that on hearing news of his call, “[fellow lawyer and future superior officer Henry] Halleck and myself had a good laugh . . .”

<sup>89</sup> See generally Mark Grandstaff, *Preserving the “Habits and Usages of War”: William Tecumseh Sherman, Professional Reform, and the US Army Officer Corps, 1865-1881, Revisited*, 62 J. MIL. HIST. 521 (1998).

easier. As corporations grew and the American economy surged in the late nineteenth century—what came to be called the Gilded Age—more and more lawyers found themselves drawn into practice on a full-time basis, and more lawyers found themselves making more money from corporate fees, giving them prosperity and security that they were less willing to give up for military opportunity or fame. The nature of their work was also changing—instead of being mostly adversarial, rooted in rhetoric and argument, it was increasingly analytic, designed to facilitate transactions. Office lawyers were significantly less attuned to the siren song of combat; they were removed from even metaphorical battle to a much larger degree than their courtroom predecessors.

In all these contexts, the lure of commerce proved greater than the lure of glory, and military service became fundamentally less attractive to many lawyers. This was all the more true as the material rewards for the lawyers who had fought in the Civil War, or who proposed to fight afterwards, had grown noticeably more abstract. No longer were veterans awarded large tracts of land with which to make their fortunes. The frontier was closing,<sup>90</sup> and land was far too scarce and valuable to be parceled out to the 2,000,000 men who made up the victorious Grand Army of the Republic. There were certainly medals and pensions to be had,<sup>91</sup> but the value of these paled against the loss of income that many lawyers had suffered in four years of war. In this context of diminishing returns, the old-fashioned republican concept of the citizen-soldier had fewer and fewer material attractions for most lawyers; gradually, like the Cheshire Cat, the concept faded from their

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<sup>90</sup> The superintendent of the US Census opined in 1890 that “there can hardly be said to be a frontier line.” Gerald D. Nash, *The Census of 1890 and the Closing of the Frontier*, 71 PAC. NORTHWEST Q. 98, 98 (1980).

<sup>91</sup> On Civil War pensions as the historical foundation of the American social welfare system, see generally THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN UNITED STATES* (2009).

view,<sup>92</sup> leaving little but a vague nostalgia for simpler, perhaps more patriotic times.<sup>93</sup>

From the 1870s, lawyers with surviving pretensions to military roles found themselves increasingly isolated in the residual state militias that in 1903 would formally become the National Guard (although the name was

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<sup>92</sup> One group that may not altogether have lost sight of the earlier ideology was African-American lawyers, who during the late 1800s still seemed drawn to military service under the citizen-soldier model because it helped them vivify their newfound status as full-fledged American citizens. See generally BRUCE A. GLASRUDE, *BROTHERS TO THE BUFFALO SOLDIERS: PERSPECTIVES ON THE AFRICAN AMERICAN MILITIA AND VOLUNTEERS, 1865–1917* (2011). John L. Waller, an African-American lawyer in Kansas, was a prominent African-American militia leader who later fought in the Spanish American War. See ROGER D. CUNNINGHAM, *THE BLACK CITIZEN-SOLDIERS OF KANSAS 1864–1901* (2008), *passim*. Post-Civil War military service may also have provided a measure of supplementary employment for underemployed African-American lawyers who were victims of direct and indirect discrimination without and within their own racial communities, somewhat analogous to how military service had provided an economic cushion for underemployed white lawyers in the antebellum era. My thanks to Megan McKee for this intriguing suggestion.

<sup>93</sup> As a group, however, lawyers after the Civil War did show a somewhat perverse rhetorical fascination with their masculinity, as if that were somehow in question more than it had been previously. One wonders in passing if the demilitarization of the profession in the late nineteenth century precipitated something of an identity crisis for increasingly non-combatant lawyers, leading to “manly” compensations in professional posturing and even pedagogy. On the latter possibility, Michael Grossberg has noted James Barr Ames’s striking insistence on the “virility” of the post-1870 Harvard Law School case method, observing that “[i]n the postwar bar, even the classroom had to be made into a battlefield.” Michael Grossberg, *Institutionalizing Masculinity: The Law as a Masculine Profession*, in *MEANINGS FOR MANHOOD* 133, 144 (Mark C. Caines & Clyde Griffen eds., 1990). Under these conditions, American legal language took a somewhat more warlike turn, with metaphorical references to lawyering as combat rising in the late nineteenth century, even as lawyers’ personal connection with war weakened. Martial metaphors in medical language multiplied around the same time. See Dale Krieger, *Why Metaphor Matters*, *JOHNS HOPKINS MAGAZINE*, Feb. 1998, <http://pages.jh.edu/~jhumag/0298web/metaphor.html> (last visited Jan. 15, 2015). It is noteworthy that legal war metaphors prior to the Civil War are relatively difficult to find, suggesting that perhaps lawyers who personally knew something about war had little inclination to evoke it in their professional speech. A pre-Civil War exception that arguably proves the rule came from the pen of Justice Joseph Story, who famously likened lawyers to “sentinels upon the outposts of the constitution.” Unlike his idol John Marshall, Story had no personal military experience. *Progress of Jurisprudence*, in 3 *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 228 (William W. Story ed., 1852).

used earlier for militias in a variety of northern states). The Guard itself meanwhile became more culturally and professionally divisive as it was increasingly leveraged by state and national governments sympathetic to capital to discipline and control increasingly violent and desperate workers.<sup>94</sup> The incipient alliance drew in some lawyers who, perhaps because of their corporate clients, were more sympathetic to corporate leaders and more fearful of public unrest.<sup>95</sup> The lawyers associated with the flagship Seventh New York Militia Regiment (also derisively known as the “Silk Stocking” Regiment in reference to the social pedigree of many of its members), whose privately-funded Park Avenue Armory was more like an ornate New York gentleman’s club than a military facility, were a collective case in point.<sup>96</sup> The same phenomenon arguably repulsed other lawyers more sympathetic to labor from the Guard in particular and military service in general.

Inside the Guard, however, individual lawyers pressed their various military or militarist causes. In the North, Brooklyn attorney and Civil War veteran General George Wingate saw arms and military training as a

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<sup>94</sup> See generally JERRY M. COOPER, *THE ARMY AND CIVIL DISORDER: FEDERAL MILITARY INTERVENTION IN LABOR DISPUTES, 1877–1900* (1980); JOAN M. JENSEN, *ARMY SURVEILLANCE IN AMERICA, 1775–1980* (1991).

<sup>95</sup> Speaking to the graduating class at the University of Michigan Law School in 1867, D. Bethune Duffield had articulated the social and martial responsibility of lawyers in the face of disorder in these terms:

[W]hen any special and extraordinary excitement stirs the popular mind, like the School or Sunday law, or the Labor question, or any other topic springing out of the ever-changing character of our politics, over which the community has become roused, and riot and pillage threaten, like evil spirits, to break forth with flaming brand upon the city, then it is it that the high-minded and loyal Lawyer will cast himself into the breach. . . . It is to him, before all others, that the masses of the Citizens look for defence in such hours of peril; for he knows the Law, and how quickest and best to avail himself of its securities to the public. They do not; and so all eyes are turned to him as a kind of civic, and if needs be, military leader in a combat with the mob.

D. BETHUNE DUFFIELD, *THE LAWYER’S OATH: AN ADDRESS DELIVERED BEFORE THE CLASS OF 1867 OF THE LAW DEPARTMENT OF THE UNIVERSITY OF MICHIGAN* 20 (1867).

<sup>96</sup> On the Park Avenue Armory, see ROBERT L. FOGELSON, *AMERICA’S ARMORIES: ARCHITECTURE, SOCIETY AND PUBLIC ORDER* 1–3 (1989).

positive and perhaps necessary form of social control and personal discipline in an unstable era, and began to espouse a program of rifle practice in the New York schools. Ultimately he helped to organize a separate association to support these goals; he became its first secretary, and then for 25 years, its president. Today we know it as the NRA—the National Rifle Association.<sup>97</sup>

In the South, fellow Civil War veteran, state militia commander and railway lawyer Thomas Goode Jones was concerned about ethical and disciplinary standards in his local Alabama Bar. Traditional norms and mores were, he feared, no longer being enforced, and the legal profession was suffering as a result. Coming from a military environment that prized discipline but perhaps fearing that the disintegration of the martial ethos in the post-war South would make enforcement of legal standards through traditional community channels (including military service) problematic,<sup>98</sup> he came up with a draft of the first state bar ethics code<sup>99</sup> written in vaguely militaristic language (“judicial officers,” irresponsibility of “attacks” on

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<sup>97</sup> On Wingate and the foundations of the NRA, see *AMERICANS AND THEIR GUNS*, 30–35 (James E. Serven ed., 1967).

<sup>98</sup> Jones wrote later:

It was to be expected that the demoralization resulting from the war, would make itself felt in the legal profession as it did in all other institutions of our land, and while the Alabama Bar for honesty, ability and talent, equals that of any State in the Union, it has not yet returned to that state of purity, which distinguished it before the war.

THOMAS G. JONES ET AL., *PROCEEDINGS OF THE FIFTH ANNUAL MEETING OF THE ALABAMA STATE BAR ASSOCIATION* 7 (1883).

<sup>99</sup> See generally Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 *ALA. L. REV.* 471 (1998) (describing the drafting and implementation of this code).

other lawyers, concern for the “defenseless,” etc.),<sup>100</sup> which he offered as a new way of preserving the honor and standing of the profession.<sup>101</sup>

Notwithstanding Wingate’s proposals and Jones’s rhetoric, the American bar was “civilianizing.” A measure of how much lawyers’ attitudes toward war-waging could change in the course of 30 years was evident right at the end of the century when, in the wake of the Spanish American War, President William McKinley (a Civil War veteran who became a lawyer after war’s end) asked the leading “corporation lawyer” of his day, Elihu Root, to join his cabinet as Secretary of War. Of course many lawyers before Root had accepted that portfolio without much thought; Root, however, had no personal experience of the military and considered being bureaucratically in charge of it an unusual assignment for someone who considered himself a transactional specialist. Afterwards he described his exchange with McKinley as intermediated by the latest wonder of the age, the telephone:

I was called to the telephone and told by one speaking for President McKinley: “The President directs me to say to you that he wishes you to take the position of Secretary of War.” I answered, “Thank the President for me, but say that is quite

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<sup>100</sup> At one point Jones’s code insists on the importance of a lawyer’s loyalty to his client in terms that evoke the soldier’s responsibility on the battlefield: “No sacrifice or peril, even to loss of life itself, can absolve from the fearless discharge of this duty.” ALEXANDER TROY, PROCEEDINGS OF THE FORTY-FIFTH ANNUAL MEETING OF THE ALABAMA STATE BAR ASSOCIATION 248 (1922).

<sup>101</sup> In the South at least, Jones was hardly alone in his martial rhetoric. Addressing the Alabama State Bar Association in 1895, Samuel Meek, a Mississippi lawyer and former colonel in the Confederate army, declared that

Yes! The brave lawyer is ever at his post. Morning, noon and night, his watchful eye is ever awake, regardful, at all times, of the true interest of his fellow man, exposing error and vice, and when necessity demands, striking with Herculean power, at the Hydra-headed monster, whose filth and slime and unholy touch would paralyze, if not entirely destroy, the holiest instinct of individual virtue, as well as the loftiest aims of governmental policy.

This image of the lawyer in almost literal “St. George and the Dragon” terms is quoted in PETER W. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX AND THE LAW IN THE NINETEENTH-CENTURY SOUTH 220 (1996).

absurd. I know nothing about war. I know nothing about the army.” I was told to hold the wire, and in a moment there came back the reply, “President McKinley directs me to say that he is not looking for any one who knows anything about the army; he has got to have a lawyer to direct the government of these Spanish islands, and you are the lawyer he wants.”<sup>102</sup>

Even as they began to retreat from the battlefield, however, lawyers in general, and corporation lawyers in particular, were unwilling to completely disavow support for war-waging. On the eve of World War I, prominent corporate attorneys like Root, Grenville Clark, and Paul Cravath promoted the cause of “preparedness,” dedicated to priming American manpower for the war in Europe. Clark in particular led calls for the creation of so-called “businessmen’s camps” that would train potential officers (including lawyers) privately, even before war was declared or the government of lawyer-president Woodrow Wilson took concrete steps of its own to train an expanded army for European deployment.<sup>103</sup>

The businessmen’s camps established in Plattsburg, New York, and elsewhere turned out to be a success, eventually drawing thousands of lawyers, bankers, and other leading citizens into the lower reaches of the US Army officer corps.<sup>104</sup> This time, however, war would be different, and lawyers would take but a secondary role in the strategic leadership of the

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<sup>102</sup> WARREN ZIMMERMANN, *FIRST GREAT TRIUMPH: HOW FIVE AMERICANS MADE THEIR COUNTRY A WORLD POWER* 147–48 (2004).

<sup>103</sup> On the role of these lawyers in setting up and supporting these camps, see generally J. GARRY CLIFFORD, *THE CITIZEN SOLDIERS: THE PLATTSBURG TRAINING CAMP MOVEMENT, 1913–1920* (1972). For a contemporary account of the camps, see RALPH BARTON PERRY, *THE PLATTSBURG MOVEMENT: A CHAPTER OF AMERICA’S PARTICIPATION IN THE WORLD WAR* (1921).

<sup>104</sup> While serving as an officer himself at Camp Funston (Kansas) in 1918, Judge James Finley opined that “at least 20 per cent of the junior officers who have been commissioned in the Officers’ Reserve and the National Army from the first and second Officers’ Training Camps are lawyers by profession.” J. James Finley, *Lawyers as Warriors*, 86 CEN. L.J. 213, 214–15 (1918).

American Expeditionary Force.<sup>105</sup> Its commander, John Pershing, had a law degree he had earned at the University of Nebraska after his West Point education (he later claimed that it helped his military career), but his top generals and senior officers were virtually all professional military men.<sup>106</sup> The reforms championed by Sherman and Upton and endorsed by the quite unmilitary (even if militaristic) Root cast lawyers in World War I in a distinctly supporting role. On the field, their occasional leadership was marked more by failure than success—one of the biggest US military disasters (or near disasters) of the war was the cutting-off and decimation of the “Lost Battalion” behind German lines in the Argonne Forest in October 1918. Although celebrated later as a Dunkirk-esque “victory” with medals handed out all ‘round, military professionals at the time were well aware of the fact that both the battalion’s two leaders were not regular Army officers, but rather Harvard-educated lawyers.<sup>107</sup>

Meanwhile, the number of lawyers formally assigned to doing legal work in the military grew significantly. Faced with the legal complications of having over a million and a half men under arms, many of them far out of the reach of US domestic justice, the JAG corps (the origins of which dated back to the Revolution) mushroomed from a pre-war level of 17 lawyers to over 400.<sup>108</sup> Most were deployed in the United States, some were deployed

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<sup>105</sup> The lawyers who served in World War I seem to have been disproportionately drawn from the Northeast, as opposed to the South (Civil War) or the frontier Midwest (1812, Mexican War). One is tempted to see here a lingering Southern war-weariness perhaps reinforced by a relative lack of Southern or Midwestern economic interest in the conflict. Many Northeastern lawyers, especially those from elite law schools and practices, were acting consistent with the interest of their corporate clients with significant European connections.

<sup>106</sup> The exception was New York attorney and National Guardsman John F. Ryan, who commanded the 27th Division through the course of the war.

<sup>107</sup> On the Harvard backgrounds of Charles Whittlesey and George McMurtry, see RICHARD SLOTKIN, *LOST BATTALIONS: THE GREAT WAR AND THE CRISIS OF AMERICAN NATIONALITY* 77 (2013).

<sup>108</sup> JONATHAN LURIE, *MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775–1980* 28 (2001). The Army’s Judge Advocate office had been quiescent for several decades in the nineteenth century. Lawyers in the ranks did various



to Western Europe, and a few even ended up after the war attached to US forces supporting White Russians campaigning against Bolsheviks in Siberia. For these men, the military was notably no longer a cause—it was a client.

A variety of factors contributed to the further demilitarization of the bar before, during, and after World War I. Urbanization had drawn many lawyers from country to city in the decades after 1880. This made economic sense as legal business was increasingly concentrated in America's cities, but moving to town removed lawyers from rural environments where they had been more familiar with firearms for purposes of work, safety, and pastime. Meanwhile the rapid growth and development of military technology, which in this period brought the machine gun, the tank, and the airplane to the battlefield, meant that even rural lawyers were increasingly unfamiliar with the more sophisticated and deadly tools of the military trade (interestingly, a disproportionate number of high-end corporate lawyers in World War I appear to have joined the new Army Air Service, partly because they were among the few Americans who were wealthy enough to have had any peacetime familiarity with flying machines).<sup>109</sup>

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sorts of official and unofficial legal work as required by circumstance, but between 1821 and 1849, the Army actually had no official Judge Advocate. WITT, *supra* note 80, at 264.

<sup>109</sup> One of the best examples of this group is Raynal Bolling, a Harvard Law School graduate and former colleague of Paul Cravath's who rose to be general counsel of US Steel in 1913. In 1915, Bolling began to take flying lessons in the New York area with a group of businessmen; he later formed an aviation group within the National Guard. Picked to be chief of air service for the US II Corps in France, he was killed on the ground in March 1918 when his staff car was ambushed by oncoming German forces. For more on Bolling's legal career and death, see *Bolling Won Fame as a Young Lawyer*, N.Y. TIMES, Apr. 16, 1918; Carl White, *Colonel Raynal C. Bollwing*, HISTORICALLY SPEAKING, Nov. 15, 2011, [http://www.greenwichlibrary.org/blog/historically\\_speaking/2011/11/colonel-raynal-c-bolling.html](http://www.greenwichlibrary.org/blog/historically_speaking/2011/11/colonel-raynal-c-bolling.html). Corporate lawyers may also have been drawn to flying because airplanes were new high-tech machines; in the early decades of the twentieth century—the “machine age,” as it was dubbed by contemporaries—association with and mastery of flying machines conferred additional social status. My thanks for this suggestion go to Ron Schuler, currently completing a history of Allegheny County (Pennsylvania) lawyers tentatively entitled *The Steel Bar*.

In addition, the American legal profession itself had changed. Long gone from the American legal mind were the Roman role models whose martiality had helped inspire the Revolutionary generation, and who had still been held up as examples for college educated law students at least down to the 1870s; the demise of the classical educational curriculum and the broadening of the American bar's demographic base had seen to that. At the same time, the movement of lawyers from courtroom to boardroom accelerated in the early twentieth century, finding direct military expression in the shift of World War I lawyers from the front line to the back office. Transactional lawyers lost not only the opportunity but also much of the legal skill set and community standing that had previously allowed lawyers to be military leaders. Corporate "Wall Street" attorneys like Root, Clark, and Cravath still had the power and political influence to push others to war, but it is at least questionable whether they had the rhetorical skill and public presence required to successfully lead men into battle; the very suggestion strikes one today as vaguely pathetic, and even comical.

Of course they themselves had no interest in the option. They were satisfied with professional careers that gave them increasing personal wealth and status within their own specialized elite group. Legal practice was becoming more complex and challenging every year, with new forms of business organization and reorganization and a seemingly never-ending avalanche of case reports and treatises to master. Newly gathered in "big firms" (defined for a while as four or more lawyers, then ten or more lawyers), successful corporate attorneys moreover found that they now lacked the organizational flexibility to be American minutemen that their counterparts in solo practices or small two-partner offices had enjoyed decades before. To the extent that these lawyers had public service aspirations, those could be conveniently satisfied in other ways. In particular, the rise of legal aid societies provided a more professionally useful and socially acceptable form of demonstrative "public virtue." Legal aid itself was never entirely disconnected from public order—exponents

like Arthur von Briesen openly discussed it as a way to keep less favored elements in American society satisfied and in their place,<sup>110</sup> but at least it did not require its devotees to take up arms or expose themselves to personal danger.

Finally, the very personnel of American law were changing. Women were now entering legal practice in significant if still small numbers. American society in the early twentieth century was unwilling to let them vote, let alone send them off to war, and women lawyers themselves showed no interest in personal militarization. On the contrary, a number of women lawyers departed from professional tradition in coming out publicly for peace, anti-militarism, and even pacifism. These causes had notably lacked prominent male champions in the nineteenth century American bar, perhaps with the exception of radical abolitionists like William Jay (son of John) and Charles Sumner (at least prior to the Civil War). In this context, the strong anti-militarist stance of someone like Crystal Eastman stood out.<sup>111</sup> A bar that included her and others of her sex was less and less a bar that was willing to drop its practices and march off to war.

World War II demonstrated the extent of the change that had occurred in lawyers' context and military posture. As in World War I, thousands of

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<sup>110</sup> He explained:

It keeps the poor satisfied, because it establishes and protects their rights; it produces better workingmen and better workingwomen, better house servants; it antagonizes the tendency toward communism; it is the best argument against the socialist who cries that the poor have no rights which the rich are bound to respect.

*Quoted in* CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 59 (1998).

<sup>111</sup> A 1907 graduate of New York University Law School, Eastman initially made her mark by investigating working conditions of industrial laborers in the Pittsburgh area and helping to frame early workers' compensation laws in New York. During World War I, she was executive director of the American Union Against Militarism and later joined Roger Baldwin and others in the National Civil Liberties Bureau, which later became the ACLU. On Eastman's remarkable life and controversial legal career, see JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW*, 157–208 (2009).

lawyers enlisted or were drafted into service (some 20,000 by war's end),<sup>112</sup> but with an improved selective service system focused on younger draftees, the proportion of lawyer-recruits appears to have been much lower than in previous conflicts, and even fewer lawyers than before saw significant combat. Only one lawyer, National Guard Major General Leonard Wing, seems to have risen to the rank of commander of a combat division.<sup>113</sup> Lawyers were shifted in other directions, including the JAG Corps (which rose to a remarkable strength of almost 3,000 in 1945)<sup>114</sup> and increasingly, foreign and military intelligence, where Wall Street lawyers like "Wild Bill" Donovan set up the Office of Strategic Services.<sup>115</sup> In the Cold War, of course, that became the CIA.

There would of course be other American wars in the twentieth and twenty-first centuries, but after World War II, the modern pattern of military lawyering had been established. The role of lawyers in the American military would not be to fight, but to advise, to control, and to judge. It was a role that post-World War II American lawyers felt so

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<sup>112</sup> Royall, *supra* note 70.

<sup>113</sup> On Wing's career as a "lawyer turned general", see *Lawyers in War: The VBA and World War II*, 21-AUG VT. B.J. & L. DIG. 9 (1995); *In the Fall of 1945, Maj. Gen. Leonard Wing Came Marching Home*, RUTLAND HERALD, Nov. 24, 2005, <http://www.rutlandherald.com/apps/pbcs.dll/article?AID=/20051124/NEWS/511240320/1014>.

<sup>114</sup> Royall, *supra* note 70.

<sup>115</sup> On Donovan and his associates, see BURTON HERSH, *THE OLD BOYS: THE AMERICAN ELITE AND THE ORIGINS OF THE CIA* 30–52 (1992). The general lawyerly shift to intelligence work may actually have started during and after World War I. Major Ralph Van Deman, the "father of military intelligence" in these years, had attended Harvard Law School briefly in the early 1890s before going to medical school. From the 1920s on, lawyer J. Edgar Hoover (a devotee of Van Deman and his methods) aggressively recruited Catholic lawyers for domestic intelligence work with the still-relatively new FBI. See generally STEVE ROSSWURM, *THE FBI AND THE CATHOLIC CHURCH, 1935–1962* (2010). The connection between lawyering and the US intelligence services raises the larger question of American lawyers' connection with the general domestic police forces that arose in many cities from the late nineteenth century on, and whether some unreconstructed "martial lawyers" moved into senior positions there in the twentieth century as regular or Guard military service became less attractive or even possible. There is some incidental evidence of this, but for the moment it remains outside the scope of this paper.

comfortable with—and, in a world of nuclear weapons, perhaps so relieved about—that they (and we) conveniently forgot that it had ever been any other way. And this forgetfulness became even more all-encompassing as fewer and fewer lawyers over time had any contact with the military at all, becoming for the most part not just non-combatants, but incorrigible civilians. In the wake of “Don’t Ask/Don’t Tell” in the 1990s, military recruiters actually became *persona non grata* on most law school campuses.<sup>116</sup> Even in this environment, American lawyers never entirely lost their connection with war-waging (the current Commander-in-Chief—the man who ultimately authorizes drone strikes and figuratively keeps his finger on the nuclear button—is notably a lawyer), but apart from a perverse spike in their usage of martial metaphors for lawyering<sup>117</sup> they rarely thought about or even acknowledged the larger link.

### III. MARTIAL LAWYERING: TRUTH AND CONSEQUENCES

At the end of this article, I would like to ask two important and complementary questions. First, how did war-waging shape American lawyers, and second, how did American lawyers shape war-waging? My answers to both these queries are at this stage somewhat vague and speculative; I offer them here not as definitive responses, but as invitations to further thought and research.

War-waging arguably shaped American lawyers in a variety of ways, some perhaps obvious, and some not. First—most prosaically but in some sense most fundamentally—war shaped lawyers’ individual lives, careers,

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<sup>116</sup> On the roots, extent and implications of the recent disconnect between lawyers and the military, see Dennis G. Jacobs, *Lawyers at War*, 22 STAN. L. & POL’Y REV. 1 (2011).

<sup>117</sup> Again, the relationship between legal language and personal military experience seems to be inverse. See generally *supra* note 93. On the multiplication of martial metaphors in contemporary American legal discourse, especially from the 1980s onward, see generally Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports and Sex Shape the Adversary System*, 10 WIS. WOMEN’S L.J. 225 (1995); ROBERT TSAI, AM. U. –WASH. C. L., THREE ARGUMENTS ABOUT WAR (2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2457973](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2457973).

hearts, and minds. It was the making of some; it literally killed others. Emotionally, it inevitably drew many lawyers towards a level of devotion to cause and country that we can scarcely imagine today,<sup>118</sup> and it may help to explain some of the fervent devotion to “the Union” and “the Republic” reflected in early-to-mid-nineteenth century legal orations. One would think this would have substantially affected martial lawyers’ views of law itself, perhaps helping to elevate its perceived moral sense or making it in their eyes more compatible with (at least their vision of) the community good, as opposed to some set of abstract positivistic rules. In this context, one is tempted to juxtapose the vigorous natural law jurisprudence of Revolutionary War veteran John Marshall<sup>119</sup> with the cramped case-based approach of the bookish and extremely unmilitary Christopher Columbus Langdell, who, despite being of plausible enlistment age, managed to ignore the entire Civil War while squirreled away in his pre-Harvard New York law office.<sup>120</sup> By the same token, the personal experience of war must have

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<sup>118</sup> John Marshall later wrote that his military service made him a nationalist: “I was confirmed in the habit of considering America as my country and Congress as my government.” JOHN MARSHALL’S AUTOBIOGRAPHICAL LETTER, *available at* <http://friendsofthehollow.org/letter.htm> (last visited Oct. 21, 2014). Marshall wrote the letter to fellow Supreme Court justice Joseph Story at the latter’s request in 1827. In this context one wonders in passing whether the precipitous decline in lawyers’ military service in the decades since World War II (and especially after 1975 once veterans of that war began retiring from the profession in significant numbers) has helped to draw them away from championing federal power.

<sup>119</sup> Marshall fought in some of the bloodiest battles of the Revolution, including Brandywine and Germantown. JOHN MARSHALL’S AUTOBIOGRAPHICAL LETTER, *supra* note 118. On Marshall’s military experiences and their direct impact on his constitutional thought, see R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 21–27 (2001).

<sup>120</sup> Langdell was 35 in 1861; the upper cut-off for enlistment in the Civil War was 45. Langdell’s notoriously poor eyesight from childhood on would probably have compromised or disqualified him even if he had been inclined to join up, however. On Langdell’s already poor eyesight during his student days at Harvard Law School in the 1850s, see BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826–1906 35 (2009).

taken its psychological toll on some—perhaps many—lawyers.<sup>121</sup> We know that it undermined the youthful idealism of Civil War veteran Oliver Wendell Holmes, Jr.,<sup>122</sup> and by doing so laid the groundwork for later legal realism; it might be worthwhile in the future to track other lawyers' legal-philosophical arcs against their wartime experiences. Again as an aside, one wonders whether the sweeping positivism of post-Civil War American law to some extent reflected battle-weary lawyers' despair about even the possibility of a grander law based on timeless truths.

Second, war-waging actively encouraged American lawyers to seek and embrace public leadership and gave them public standing. It gave them a very obvious and potentially quite vulnerable public role as community leaders in the most extreme of circumstances that challenged them to perform or risk losing honor and reputation. In the process—especially in the confines of the militia and the National Guard—it forced them to pay close attention to local affairs and constituencies. If they did their duty well, they stood to be rewarded by enhanced social connections and political office. If they performed poorly, they stood to be shamed and disavowed in subtle and not-so-subtle ways that could even compromise their future professional success.

Third, war-waging implicitly and explicitly encouraged lawyers to build connections, with both other lawyers and non-lawyers. Most obviously, in the close confines of combat, lawyer-soldiers developed a habit of cooperating with (or deferring to) their professional peers more than they might have with each other in peacetime, especially when most lawyers tended to work alone or in very small firms. In this context, it is probably no

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<sup>121</sup> The psychological impact of the Civil War on its veterans—disorders that we would now classify as post-traumatic stress disorder (PTSD) and other related types of conflict-generated anxiety and depression—has been woefully understudied, especially given the mass number of these veterans and their prominent roles in post-war American life. For a beginning, see DAVID SILKENAT, *MOMENTS OF DESPAIR: SUICIDE, DIVORCE AND DEBT IN CIVIL WAR ERA NORTH CAROLINA* 23–51 (2011).

<sup>122</sup> See generally ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK AND LEGACY OF JUSTICE HOLMES* (2000).

accident that the greatest periods of lawyer integration in bar associations came in the wake of the Revolution, the Civil War, World War I, and World War II, each of which provided lawyers in command and even in the ranks with models of large-scale organizational integration. Certainly the precipitous decline of military service of any sort for lawyers in the post-Vietnam era corresponded not only with a decline in the strength and cohesion of American bar associations, but also with the loss of professional or firm-based “*esprit de corps*” in favor of personal career agendas that encouraged individual attorneys (particularly so-called “rainmakers”) to put their interests above those of their colleagues, up to and beyond the point of routinely abandoning their firms and their fellow partners for greener financial pastures. Even apart from this, however, military service brought lawyers into close and intimate contact with members of other social and occupational groups—businessmen, farmers, physicians, teachers, laborers, and so on—and did so outside the latter’s potential capacity as clients. In this environment, lawyers arguably became more familiar with other groups and more accustomed to working with them cooperatively, rather than in a strict business hierarchy. Military service subtly encouraged lawyers to remain connected to their communities even as they became more willing to organize their own professional associations. When lawyers no longer engaged in meaningful military service (and/or were largely limited to working with other lawyers in JAG environments), this sense of connection weakened, and it became easier for lawyers to regard other occupations adversely or pejoratively (and *vice versa*).

Fourth, war-waging sustained American lawyers by giving them economic support and benefits. In periods such as the early-to-mid nineteenth century when the supply of lawyers exceeded demand, especially in the Midwest, war-waging offered opportunities that allowed impecunious lawyers with little or no “social net” to survive and prosper. Some lawyers went to war for pay, some went to war for land. War, moreover, provided



an outwardly-directed “safety valve” for American society that focused these potentially dangerous lawyers (dangerous as much for their capacity to rally others as for their military skill) outward rather than inward—in times of personal and professional stress, they repeatedly chose (and had the opportunity) to become mercenaries rather than revolutionaries. If displaced and discontented lawyers like Sam Houston, Daniel Cloud, William Walker, and others had had nowhere to go in a closed America, what other politically-problematic causes—and what other forms of violence—might they have embraced in their fervor for fame and fortune?

Fifth, American lawyers’ strong historical connection with—indeed, their affection for—war-waging arguably inhibited them from promoting peace as a core professional value. Writing in 1814, for example, prominent Virginia lawyer-soldiers William Wirt, St. George Tucker, and Dabney Carr<sup>123</sup> were clearly of the opinion that war elevated and inspired the spirit of a people, while peace diminished and distracted them. “[I]t seems as if it were only amid the direful calamities of war that man can be seen to advantage[.]” they wrote, “as if all the trumpet’s clangor and the cannon’s roar were necessary, to keep his virtues and talents awake.”<sup>124</sup> Times, however, had changed. “That spirit of public virtue, of love of country, which extinguished every private feeling and glowed with such attractive lustre during the revolution is fled,” they pessimistically observed.<sup>125</sup>

We are all in pursuit of wealth, of places, of offices, of salaries, of honors—instead of being, as we were, during the last war, forgetful of ourselves, and looking around only for those who could do the most good to our common country. . . . [T]ogether

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<sup>123</sup> It will be recalled that Wirt had enthusiastically volunteered to form a “Legion” of four regiments during the war fever that broke out in Virginia and other parts of the United States after the *Chesapeake-Leopard* impressment incident of 1807; St. George Tucker had fought in the Revolutionary War; Carr also saw militia service.

<sup>124</sup> WILLIAM WIRT, ST. GEORGE TUCKER, DABNEY CARR, *THE OLD BACHELOR* 33 (1814).

<sup>125</sup> *Id.* at 35.

with public spirit, peace has extinguished the capacity for public service.<sup>126</sup>

Perhaps not surprisingly in this context of such musings, the leaders of the peace movement in antebellum America were ministers, religiously-oriented laymen, or abolitionists, not lawyers.<sup>127</sup> Only in the late nineteenth century when women started to enter the profession and labor-oriented lawyers who had witnessed strikes put down by force began to turn against the Army and the National Guard did a significant number of lawyers embrace pacifist or overtly anti-militarist causes. Over the course of the twentieth century, however, the affiliation of American lawyers with national and international peace grew as they became personally dissociated from war-waging and personally disconnected from the military altogether. Growing awareness of the horrors of modern warfare certainly facilitated

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<sup>126</sup> *Id.* In 1810, directly pressing for war with Britain, Midwestern lawyer-politician Henry Clay made a similar point:

Another effect of war will be the reproduction and cherishing of a martial spirit among us. Is there not danger that we shall become enervated by the spirit of avarice unfortunately so predominant? . . . [A] certain portion of military ardor . . . is essential to the protection of the country. The withered arm and wrinkled brow of the illustrious founders of our freedom are melancholy indications that they will shortly be removed from us. Their deeds of glory and renown will then be felt only through the cold medium of the historic page. We shall want the presence and living example of a new race of heroes to supply their place, and to animate us to preserve unviolated what they achieved.

Henry Clay, *Speech on the Proposed Repeal of the Non-Intercourse Act* (Feb. 22, 1810), in PAPERS OF HENRY CLAY 449 (John F. Hopkins ed., 1959).

<sup>127</sup> On the peace movement and its leadership before the Civil War, see generally VALARIE H. ZIEGLER, *THE ADVOCATES OF PEACE IN ANTEBELLUM AMERICA* (1992). Prior to the antebellum period, American pacifism was primarily confined to Quakers. Three prominent legal figures who spoke out powerfully for peace and against war prior to 1861—abolitionists Judge William Jay (son of John), Charles Sumner, and Simon Greenleaf (an evangelical)—were exceptional. All drew criticism and even derision within the American legal community for the positions they took. Taking direct issue with Sumner, his former student at Harvard Law School, Justice Joseph Story insisted that “war is under some (although I agree not many) circumstances, not only justifiable, but an indispensable part of public duty.” DAVID HERBERT DONALD, *CHARLES SUMNER AND THE COMING OF THE CIVIL WAR* 95 (2009). Greenleaf died in 1853, followed by Jay in 1858; Sumner lived into the Civil War years and ultimately supported the North’s military effort, but reverted to more pacifistic rhetoric again afterwards.

this professional change of heart, but it seems highly unlikely that (for example) the 1950s slogan of “world peace through world law”<sup>128</sup> would have been championed by lawyers who had led men into battle. Indeed, it never was.

Now we come to the second and perhaps even more difficult question: How did lawyers shape American war-waging? Here, I think the impact of lawyers changed significantly over time. Initially, lawyers limited American war-waging by consciously de-professionalizing the American military. In the Constitutional period, many lawyers’ suspicion of “standing armies” and their taking of military duties upon themselves helped to ensure that the incipient US military did not develop a class of highly-trained professional officers who could challenge lawyers for control of the state or readily utilize war as an efficient weapon (potentially against the populace and/or against its legal leadership as much as against an external enemy). On the battlefield, lawyers further limited American war-waging capacity by their own tactical failures and shortcomings. At a minimum, their restricted military abilities repeatedly compromised American land strategies in the War of 1812 and likely lengthened (and made more bloody) the Civil War.

At the same time, American lawyers legalized the war-waging process. In many respects, they shifted the focus of war-waging from fighting to organizing, developing a penchant for achieving legally-defined goals through legally-defined instruments and mechanisms. In their hands, command itself became an expression of law set down in rules even if, given the number of lawyers in regular military positions, the army did not at first require a heavily staffed legal administration to enforce those rules.<sup>129</sup>

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<sup>128</sup> Most famously echoed as a title in LOUIS B. SOHN & GRENVILLE CLARK, *WORLD PEACE THROUGH WORLD LAW* (1958). The book advocated revisions to the UN Charter.

<sup>129</sup> See WITT, *supra* note 80, at 264 (noting the absence of an Army Judge Advocate between 1821 and 1849). The Army only began to “lawyer up” in the Civil War, when new Judge Advocate General Joseph Holt recruited some 33 lawyers (mostly from the “northern antislavery elite”) to assist him. *Id.*

The legalization of American war was very much evident in the career of lawyer-general Winfield Scott. In 1821, Scott completed work on his General Regulations for the Army, which one of his biographers has called the army's "first, comprehensive, systematic set of military by-laws" covering army administration, instruction, service and police.<sup>130</sup> In 1835, he revised the army's tactical manual (and, like a good lawyer, later copyrighted it!).<sup>131</sup> He also exercised lawyerly persuasive and diplomatic skills to great advantage. To quote his biographer again:

On several occasions from 1838 to 1841 Scott helped prevent an Anglo-American war. Through skillful diplomacy, artful oratory and improvisation he defused numerous potential crises; and more important, he bought time for the two countries to begin talks that would settle most of the underlying problems. The Webster-Ashburton Treaty of 1842 resulted from these negotiations.<sup>132</sup>

Here was a lawyer at work. In the Mexican War, Scott drafted an innovative martial law order that applied prohibitions against rape, murder, assault, desecration, and destruction of property to Mexican citizens as well as American soldiers, and that put members of both groups under the jurisdiction of American military courts. His post-war administration of occupied Mexico was so effective that at one point, a Mexican delegation offered to make him interim president if he would prepare the country for annexation to the United States (Scott, being against annexation, declined).<sup>133</sup> Scott's wide-ranging personal abilities—especially those informed by his legal training and inclinations—proved particularly helpful in circumstances where senior commanders were not yet connected with

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<sup>130</sup> TIMOTHY J. JOHNSON, WINFIELD SCOTT: THE QUEST FOR MILITARY GLORY 76 (1998).

<sup>131</sup> See WINFIELD SCOTT, INFANTRY TACTICS; OR, RULES FOR THE EXERCISE AND MANOEUVRES OF THE UNITED STATES' INFANTRY 4 (1840).

<sup>132</sup> JOHNSON, *supra* note 130, at 135.

<sup>133</sup> *Id.* at 209.

legal or other advisors in Washington by omnipresent telegraph or telephone lines, or even (in Scott's case) railroads.

The ultimate legalization of American war was achieved in 1863 when the military, prompted by lawyer-commander Henry Halleck, adopted the Lieber Code on the laws of war.<sup>134</sup> Ironically, this was lawyers' "parting gift" to the military, a comprehensive attempt to both legally sanctify and constrain war that was made at precisely the time when lawyers, symbolically led by Halleck himself, were beginning to abandon the field. Why did lawyers show so little interest in developing specific legal rules for war-waging while they themselves were in charge? I do not have a good answer for that question at this point. Military evidence does not suggest that lawyer-led combat prior to 1863 was particularly gentle, gentlemanly, or self-policing, although the general scope of conventional war-waging prior to the Civil War was more limited than it was afterwards.<sup>135</sup> Maybe common-law trained lawyers felt there was no need to codify military legal practice across the board, and were happy to let it evolve on a case-by-case basis, incidentally leaving them with more individual discretion on and off the field. Only after codification became a trend in jurisdictions like New York and California (and Halleck was a California lawyer) did lawyers in the military embrace it.

Finally, however, lawyers gave back to the military as much as they at first took away. From the 1870s on, lawyers contributed to the professionalization of the American military indirectly by withdrawing to their own surging profession and directly by encouraging military professionalization initiatives (Sherman) and supporting the development of military organizational infrastructures (Root) that would support improved

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<sup>134</sup> Despite the subsequent eponymous identification of the code with Lieber, Halleck's own contribution to the work as both muse and editor should not be underestimated. In 1861, the accomplished Halleck had published a book of his own entitled "International law, or, Rules regulating the intercourse of states in peace and war."

<sup>135</sup> See generally WITT, *supra* note 80.

war-waging. If nothing else, they left the military—and American war-waging capacity—much stronger than they found it.

All this suggests that in a larger sense, at the end of the day, American lawyers made a double Faustian bargain. In the first place, their retreat from the field helped them concentrate their professional efforts so as to reach unprecedented economic heights, but in the process they surrendered a critical connection to their communities. They withdrew from a very public form of leadership and association into professional-organizational cocoons that largely cloistered them with each other and with other corporate and financial managers. This helped undermine their public spiritedness and their inclination to public service (however much self-promoting) at the same time as it reduced their public status by eliminating much of their perceived personal commitment to their country's success when the stakes were highest. Martial lawyers may never have been American paragons, but by risking their lives and reputations, they contributed to the social strength and standing of the legal profession as much as if not more than they contributed to the defense of the nation.

In the second place, returning to the theme with which I began this article, the demise of martial lawyers may have made it possible for members of the American legal community to craft and cultivate a new collective identity for themselves as peacemakers, but they only accomplished this by letting the American military genie out of the political and constitutional bottle in which lawyers had originally confined it. They gave themselves the moral and pacifistic high ground by handing their military leadership roles to specialized military professionals who made American war-waging much more efficient, more violent, more geographically wide-ranging, and more common than it had ever been. And it was not as if they simply looked the other way while all this was happening—in the War Department and elsewhere in the American military bureaucracy, lawyers like Elihu Root overtly directed and facilitated those developments even after they had rejected any thought of personal military

service. As a result, the self-congratulatory “pacification” of the American legal profession both domestically and on the world stage (the latter paraded most publicly in Root’s own pre-World War I campaign for international arbitration as a war substitute, a campaign that won him the Nobel Peace Prize in 1912) was purchased at the price of a radical American militarization that was only very marginally constrained by the proliferation of JAGs. Perhaps it is time for contemporary lawyers tempted to trumpet their dedication to peace and self-righteously decry the brutal excesses of the “warfare state” to take a good long look in the historical mirror and consider what they themselves have wrought.