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Donald W. Jackson on Prisoners of America's Wars: From the Early Republic to Guantanamo. By Stephanie Carvin. New York: Columbia University Press, 2010. 336pp.

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Abstract

A review of:

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Keywords

Human rights, United States, War, Law, History, Reciprocity, International law, War crimes, National security

Prisoners of America's Wars: From the Early Republic to Guantanamo. By Stephanie Carvin. New York: Columbia University Press, 2010. 336pp.

The overall goal of this extensively annotated book is to tell the story of the United States' engagements with the laws of war. The laws of war are particularly important for the part they play in the training and discipline of military personnel. This book considers how the laws of war actually may have been implemented on the battlefield. Some implementations have recognized "failures and mistakes" (My Lai and Abu Ghraib are covered) and some are described as "successes" (citing the 1991 Gulf War for its relative legality). Carvin examines the "implementation of the laws of war in the post 9/11 War on Terror," and seeks to understand why the Bush II administration acted as it did, and why it claimed the extension of the powers of the president (3). It may seem shocking to readers, but it certainly is worth acknowledging, as Carvin does, "that the US has probably been the nation most embroiled in controversy regarding the laws of war since 1945" (8). The book asks a fundamental question about Bush II policy outcomes: "Do the arguments and justifications make sense? And if so, on what grounds?" (9).

Reciprocity has been a fundamental concept in U.S. history. This involves confidence that the rules to which the United States adheres will also be observed by enemies or opponents. Failure of reciprocity to be realized has contributed the "perfect justification" for unrestrained war (note especially the U.S.' historic conflicts with Native American "First Nations" (16).

The coverage of the chiefly nineteenth century "culture clash" with First Nations people is striking, whether it describes "scalping" or "cannibalism," or the tendency of newcomer settlers and their armies to engage in all out war, or to their need to adapt techniques of fighting in the forests and novel conditions in North America. Carvin concludes that "The evidence is quite clear that the laws of war were frequently violated by both the French and the British" during the Seven Years War (26). First Nations people sought to fight wars that prevented "unnecessary bloodshed," and their armed forces were more likely to "retreat in the face of hopeless odds" (23). Nonetheless, the First Nations tribes also killed and sometimes ate their prisoners.

Tactics possibly derived from First Nations people continued during the American Revolution. The revolutionaries sometimes fought guerilla-style battles, but these were on the fringes of the revolution, which more often was fought employing the more formalistic standards of European wars. Conventional European-style battles were fought at Valley Forge and at Yorktown (37). However, the British did not always "recognize their enemies as constituting a proper national force, but as a group of rag-tag rebels who did not deserve the protections traditionally afforded to prisoners of war" (38). This reluctance to recognize new conditions and to adapt the laws of war to deal with new realities obviously continues today when the United States tries to deal with non-state actors.

It is interesting that the idea of reciprocity also had significant outcomes in the U.S.' conflicts with Mexico in the 1830s and 1840s. Where the recognition of cultural similarity prevailed, restraint became more likely. Ideology also played a part. But where conflicts were seen as involving the keys to fundamental survival—or as essential for the preservation of security—the commitment to total conflict was more likely.

The American Civil War of the 1860s put reciprocity and common culture to their fundamental test, for how could people who had shared nationality for almost a century fail to understand their important common history? This may have been contradicted by the evolution of the weapons of war, which led to egregious violence and casualties. The presence of black troops on the Union side was another test of commonality. Carvin focuses on the sometimes miserable conditions for prisoners of war on both sides (65). The Civil War also led to what became known as the "Lieber Code" developed by Francis Lieber, a former Prussian soldier and later professor at Columbia University, published in the U.S. in 1863, shortly before the establishment of the International Committee of the Red Cross (ICRC) in Geneva later in 1863. Yet the "Lieber Code" contained guiding principles, rather than leading to routinely enforceable standards.

Although the United States signed and ratified humanitarian agreements before World War I, upon entering the war in 1917, it took the position that neither the provisions of the Geneva convention of 1906 or provisions of the Hague Convention X of 1907 were binding on it, a position that the ICRC found astonishing (86).

World War II was a turning point for the United States. Shortly after its entry into the war in 1941, Secretary of State Cordell Hull declared that the U.S. government would apply the 1929 Geneva Conventions to the conflict (89), but the treatment of American prisoners by the Japanese army (for example, the Bataan Death March) was yet a challenge, for the "Japanese military ethos which looked upon those who had surrendered as without honour or dignity," was a contraction to the then global laws of war (90).

One of the key precedents for the United States came in the 1942 case of *Ex parte Quirin*, in which President Franklin Roosevelt committed his government to the quick trial and execution of captured German saboteurs. This commitment was upheld by the Supreme Court, a precedent that was invoked by the Bush II administration (92). It is notable that the book does not cover the important U.S. role in developing the Nuremberg Principles that were applied to the leaders of National Socialist Germany. It is a recurrent concern that the Nuremberg precedent may represent victor's justice, rather than sustaining principles of international law regarding war crimes and crimes against humanity that also apply in full force to the United States.

Part II of Carvin's book begins with the Vietnam War from the early 1960s. My Lai is reviewed, and Carvin notes that the 1968 Report led by General William R. Peers gave a critical account of what happened, as well as recommendations to be implemented. The issue of adequate training about obligations under the laws of war was key. By the end of the Vietnam War it was clear that the Geneva Conventions needed to be updated. This led to the Geneva Diplomatic Conference of 1974-77 and the Additional Protocols of 1977. Protocol I on international armed conflicts and Protocol II on the protection of victims of non-international armed conflicts were adopted, but acceptance of these by the United States did not follow. Douglas Feith, then Deputy Assistant Secretary of Defense (1984-86), feared that the protocols might shield terrorists and protect their tactics. In 1987, President Reagan announced that Protocol I was fundamentally flawed and would not be submitted to the Senate for ratification (130).

Human Rights Watch and Greenpeace found that the U.S. had generally complied with the Geneva Accords during the first Persian Gulf War (134), and Carvin concludes that the First

Gulf War may have been the "most legalistic war in history" (139). The subsequent War on Terror, continuous since 2001 and still being fought, has been another matter, for there has been no declared sovereign enemy and it is a form of conflict with no clearly recognized end.

The most important part of the book is contained in Part II. In Chapter 4, Carvin discusses what has been described as the "New Sovereigntist Critique" of international law (140). This critique, which chiefly is concerned that international law might constrain presidential power as Commander in Chief, has led also to continuous U.S. opposition to the 1998 Rome Statute for the International Criminal Court (ICC), which now has 114 States-parties and sits at The Hague. However, so far the ICC's prosecutions have been for egregious violations allegedly committed by leaders of failed or failing state in Africa. So far there have been no prosecutions brought before the ICC against leaders of powerful states.

The New Sovereigntist view is linked by Carvin to "American Exceptionalism," which is understood in the U.S. as the view that it represents a "shining city on a hill" (146). The view that the United States is exceptionally gifted and divinely inspired to lead the world has been around for a long time. Woodrow Wilson's goal to make the world safe for democracy comes to mind. This morality has become especially problematic in our time, for New Sovereigntists sometimes believe that we are morally charged to defeat terrorism and are not bound by international law in that quest (see the section that begins on p. 148). Some Bush II leaders, notably John Yoo who served in the Department of Justice, hold that the president of the United States is vested with plenary executive power by Article II of the Constitution, so that the president's oath to protect and defend the country transcends most legal and constitutional constraints.

The New Sovereigntist position is grounded in the view that terrorism often may come from non-state actors (so that we cannot clearly define our enemies by their uniforms), and that we are engaged in a war that may have no clear end. Of course, this has contributed to U.S. policies on rendition, interrogation, and to the position that the U.S. is entitled to hold its captives indefinitely to the end of the war on terror, whenever that may come. Carvin hopes that the Obama administration will effectively revise U.S. policy towards the laws of war (219), but the record so far is mixed at best. The Obama administration has asserted the "state secrets privilege" to make suits against the U.S. government for rendition and torture effectively impossible. The state secrets privilege makes certain conduct of the U.S. government almost entirely beyond judicial review. This is not considered in Carvin's book. The origins of the state secrets privilege in the case of *Reynolds v. U.S.* (1953) have been carefully considered in Louis Fisher's book, *In the Name of National Security* (University Press of Kansas, 2006).

Carvin's short book is well worth reading and careful study. It should be required reading both in law schools and in international relations programs, if our students are to understand that the U.S. encounters with the laws of war have often been problematic. Indeed the war on terror and the rule of law in the United States now are locked in continuing conflict. If we are to have better future outcomes, we must have a better understanding of our past shortcoming.

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