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ON THE CIVIL-NESS OF CIVIL WAR: A COMMENT ON DAVID ARMITAGE'S *CIVIL WAR TIME*

MARY L. DUDZIAK*

It is a pleasure and an honor to comment on the work of David Armitage, a historian of unparalleled reach and impact. His topic could not be more important. “Civil war has gradually become the most widespread, the most destructive, and the most characteristic form of organized human violence,” he writes in his elegant and masterful recent book *Civil Wars: A History in Ideas*.¹ Examining the history of the idea of “civil war” is not simply an academic enterprise. Understanding its history, he explains, “reveals the contingency of the phenomenon, contradicting those who claim its permanence and durability.”² Armitage’s purpose is “to show that what humans have invented, they may yet dismantle . . . what intellectual will has enshrined, an equal effort of imaginative determination can dethrone.”³

Armitage’s illuminating Grotius Lecture generates a set of questions about the relationship between armed conflict and what we conceptualize as “civil” in war. He also critically reflects on how to think about civil war in time.⁴ A conventional starting point for temporal analysis of war is the idea that war breaks time into the categories of “wartime” and “peacetime.” The initiation of war thereby launches a society into a time period during which a normal

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1. DAVID ARMITAGE, *CIVIL WARS: A HISTORY IN IDEAS* 5 (2017).

2. *Id.* at 11.

3. *Id.*

4. David Armitage, Lloyd C. Blankfein Professor of History, Harvard Univ., Nineteenth Annual Grotius Lecture: *Civil War Time: From Grotius to the Global War on Terror*, 111 AM. SOC’Y INT’L L. PROC. (forthcoming 2017) (finding that common views of the relationship between war and time are “deceptively straightforward” and oversimplified).

rule of law is suspended.⁵ In practice, however, starting and ending points are fluid, and forms of time overlap. From this temporal perspective, the importance of civil war's time relates to when international humanitarian law might apply. Civil war has another temporality: its periodization. Armitage traces the way international law initially excluded civil wars, but then incorporated them through the concept of noninternational armed conflict.⁶

In this comment, I will expand on the idea of the "civil" in civil war, focusing on the American Civil War experience and its implications for later American wars. I will also consider the idea of peace—usually imagined as existing outside of war—to understand what peace might be in a world torn by violence.

The very idea of "civil war" breaks war into categories. Civil war is interesting as a matter of intellectual history, as Armitage shows, because it was an aberration from what were thought of as "normal" or classic wars: interstate wars.⁷ Recognizing civil wars enables Armitage to examine violence in the world during the post-1945 years—an era that some have called "the long peace."⁸ George Orwell anticipated that this era, shaped by the introduction of nuclear arms, might be framed as peace.⁹ He argued that it would be "a peace that is no peace," a peace in name only.¹⁰ It is curious that persistent, post-1945 violence might end up in categories that are other than

5. See MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* 11 (2012) (discussing the idea that wartime is a "state of exception" where time is suspended and "rule of law . . . bends in favor of the security of the state").

6. Armitage, *supra* note 4 (noting that civil wars were not "valued" under international law until after World War II when the Geneva Conventions were revised in 1949).

7. *Id.* (discussing how the three-hundred-year span from 1648 to 1945 was dominated by interstate wars, but after 1989 intrastate civil wars became the most prevalent form of war).

8. ARMITAGE, *supra* note 1, at 3-4 (recalling the post-World War II period characterized by enduring peace in Europe, North America, and wealthy countries such as Australia and Japan).

9. See George Orwell, *You and the Atomic Bomb*, in *FIFTY ORWELL ESSAYS* (2003) (ebook), at <http://gutenberg.net.au/ebooks03/0300011h.html#part33> (contemplating the idea that powerful nations might tacitly agree to refrain from using atomic bombs against one another).

10. *Id.*

“real war.” In that way peace may exist not through the absence of violence but from the emptiness of one category: war’s ideal type, or big, interstate war.

All violence in the world is not contained within these categories, of course. The emergence of these categories in law enables certain kinds of conflicts to be recognized, legitimized, and subject to rules, making them appear to be contained within a rule of law, rather than outside of law. If civil war was a new operative category of legitimized war, what does the category leave out, and what are the consequences? To think about this, I would like to take you back to the 1860s when U.S. armed forces fought “the” Civil War and also fought wars against Native Americans.

In the history of American wars, the Civil War is treated as legitimate war not just because civil wars can be categorized as “real war.” In American legal scholarship it instead became, in essence, the classic American war—the war against which to compare all others. In scholarship examining American war powers, the Civil War is not treated as different from interstate wars but instead as one of the most important examples of how American war powers work in any context called war.¹¹ It has received more attention in the legal literature than has the Cold War, in spite of the fact that the Cold War was the occasion for development of the modern national security state—a governmental framework that continues to structure the U.S. government’s war and security work.¹² Structural differences between a war within a polity and an international war are sometimes lost in the process.

The history of the American Civil War illuminates the nature of the “civil” in civil war. “To call a war ‘civil’ is to acknowledge the

11. See, e.g., WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 3-26 (1998) (discussing civil liberties in wartime and focusing most chapters on the example of the Civil War).

12. See Mary L. Dudziak, *Toward a Geopolitics of the History of International Law in the Supreme Court*, 105 *ASIL PROC.* 532 (2011) (noting the great overrepresentation of references to the Civil War, compared to very few references to the Cold War, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011)). *But see* STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013) (detailing the impact of the Cold War on presidential war power).

familiarity of the enemies as members of the same community,” Armitage writes.¹³ They are “not foreigners but fellow citizens.”¹⁴ The principal character of the American Civil War’s civil-ness was its constitutive character. It was not just that at the end of the war the United States was preserved as a single country through defeat of the Confederacy, and it was not just the abolition of slavery—though both results were of great importance.¹⁵ The violence itself constituted the polity in a new way. That idea is at the heart of an especially important work on the American Civil War: Drew Gilpin Faust’s “*This Republic of Suffering: Death and the American Civil War*.”¹⁶ Enduring divisions survived the war, of course, but Faust argues that the war’s carnage generated a shared cultural experience and produced a broader public.¹⁷ The war’s carnage was so great—over six hundred thousand military deaths—that the state and society had to respond to it.¹⁸ Names had to be attached to the bodies and then recorded and remembered. Families searched battlefields for remains, disinterring the bones of others along the way.¹⁹

13. ARMITAGE, *supra* note 1, at 12.

14. *Id.*

15. See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877 11-34 (1988) (noting that the American Civil War redrew the economic and political map of both the North and South and accelerated the industrialization of the North).

16. See DREW GILPIN FAUST, THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR xiii (2008) (asserting that the United States was transformed by the American Civil War as sacrifice and military struggle came to define the nation and its purpose).

17. *Id.* at xv-xvi (arguing that the American Civil War created a “republic of shared suffering” in which people in both the North and the South had experienced sacrifice and loss). On the limits of postwar reconciliation, see CAROLINE E. JANNEY, REMEMBERING THE CIVIL WAR: REUNION AND THE LIMITS OF RECONCILIATION (2013).

18. See *generally id.* at 211-49 (highlighting the nation’s response to the loss, including calls for society to not let the war-time deaths pass in vain, and to repay the sacrifices of soldiers, be it collecting and burying bodies or caring for the injured and survivors).

19. See *id.* at 61-136 (describing how the sheer scale of the death tolls after battles in the American Civil War defied administrative predictions and capacity); see also DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 68 (2003) (noting the difficulty of interring the American Civil War’s dead and specifically discussing how only one-third of the Union dead were interred in identifiable graves after the Battle of Appomattox).

The idea of a republic constituted through war death is perhaps best illustrated by the quote in Faust's title. It is from Frederick Law Olmstead, who is most well known for his path-breaking landscape architecture.²⁰ Olmstead was still in search of a satisfying career path when the Civil War broke out, and he was working on a hospital transport ship. He noticed a sense of community among injured and dying soldiers. They called out to each other and supported each other, telling the staff to go and help another soldier who needed them more urgently. The Civil War's civil-ness—its constitutive character—was on display on the hospital ship, though all around were broken bones, open wounds, the dead and the dying.²¹ Suffering produced a community, and in the nation as a whole Civil War death was central to constituting a polity.²²

The dead do cultural work for the living, historian Thomas Laqueur argues.²³ Politics exist within cultural contexts, so if the dead do cultural work, they must also do political work. The political work of the dead and their role in constituting a polity were on display when Lincoln commemorated civil war dead at Gettysburg, urging that the living were to be dedicated to uphold the principles for which soldiers had given their lives.²⁴

20. See FAUST, *supra* note 16, at xiii-xiv; see also FREDERICK LAW OLMSTED, *HOSPITAL TRANSPORTS* 115 (1863) (describing the scene of wounded soldiers as a "republic of suffering").

21. See OLMSTED, *supra* note 20, at 115-18 (describing the community among the wounded and dying soldiers on his hospital boat).

22. See FAUST, *supra* note 16, at xii-xiv (highlighting how the American Civil War impacted national policy, such as the establishment of national cemeteries and pensions, and created a sense of union and community through shared sacrifice); see also BLIGHT, *supra* note 19, at 18 (citing Frederick Douglass's argument that the American Civil War would reorganize the country and bring about "national regeneration"); MARK S. SCHANTZ, *AWAITING THE HEAVENLY COUNTRY: CIVIL WAR AND THE CULTURE OF DEATH* 61-63 (2008) (illustrating how the American Civil War was the first in American history where many young men died far from home, and it resulted in a growing national belief in restoration, both bodily and communally, in heaven).

23. See THOMAS W. LAQUEUR, *THE WORK OF THE DEAD: A CULTURAL HISTORY OF MORTAL REMAINS* 1-27 (2015) (arguing that the dead do "cultural work for the living").

24. See Abraham Lincoln, U.S. President, Gettysburg Address (Nov. 19, 1863) (urging that the living must carry out the unfinished work of the dead, ensuring that the nation "shall have a new birth of freedom"); see also Mary L. Dudziak, *Death*

During the Civil War, Lincoln commissioned Francis Lieber to draft a code of war to set the legal boundaries of armed conflict.²⁵ As John Fabian Witt shows, the Lieber Code was intended not just as a means to constrain war, but also as a tool to achieve Union aims.²⁶ Armitage emphasizes Lieber's ambivalence about how the American conflict was best defined and how well it fit the new Code's terms.²⁷ Ultimately its political objective was most important. Lieber wrote: "To save the country . . . is paramount to all other considerations."²⁸ All forms of political community were not protected by the Code, however. It was intended as a code of civilized men, and its rule of law was in service of civilization.²⁹

Every political community has an outside. We can better understand the nature of the Civil War's civil-ness by examining the outside of the Civil War-era polity.³⁰ There was death and suffering at the hands of American military forces in the 1860s that fell outside of Faust's republic of suffering.³¹ It helped to constitute that republic nevertheless by showing its outside, and a border of "civilization" between the deaths widely mourned and the others forgotten.³²

and the War Power Y. J. L. & HUM., (forthcoming 2018) (developing further the idea of the political work of the dead).

25. See ARMITAGE, *supra* note 1, at 183 (stating that the Lieber Code was the first attempt to codify the laws of war).

26. JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 1-4* (2012) (noting that the Lieber Code endorsed Emancipation in addition to setting out rules for the treatment of enemy soldiers).

27. See ARMITAGE, *supra* note 1, at 163 (arguing that Lieber's conception of civil war was inapplicable to the conflict at hand, the American Civil War).

28. WITT, *supra* note 26, at 4.

29. See HELEN KINSELLA, *THE IMAGE BEFORE THE WEAPON: A CRITICAL HISTORY OF THE DISTINCTION BETWEEN COMBATANT AND CIVILIAN*, 82-83 (2011) (explaining that there were mutually agreed limits on violence when it came to civilians during the Civil War, but that such limits were not applied during the U.S.-Indian wars).

30. FONER, *supra* note 15, at 590 (explaining that the most obvious fracture of the post-Civil War polity was the continuing subjugation and disenfranchisement of African Americans); ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 299 (1997).

31. See generally PETER COZZENS, *THE EARTH IS WEeping: THE EPIC STORY OF THE INDIAN WARS FOR THE AMERICAN WEST* (2016) (emphasizing the brutality of American forces in the Indian Wars).

32. KINSELLA, *supra* note 29, at 96-97 ("The polyvalent dimensions of civilization invoked—of civilized to savage, of civilized warfare against the

This is illustrated by a rather brutal story from armed conflict in Colorado in 1864. Norms were shifting regarding the protection or the elimination of peaceful communities of Native Americans.³³ Colorado Governor John Evans first told the Cheyenne and Arapahoe that if they were loyal and peaceful, and if they registered with his government, they would not be attacked but would be protected.³⁴ A Cheyenne village at Sand Creek took him up on his offer. Two months later, however, Governor Evans changed his mind.³⁵ How, after all, could one tell between loyal and disloyal Indians? As human beings, they were thought to be of a different character than the white Northerners and Southerners fighting the Civil War.³⁶ They were the kind of barbarians that, thanks to the Lieber Code, the Union Army could distinguish itself from through honorable combat.³⁷ The Code's limits did not apply to conflict with people thought of as savages. The Indian Wars were not treated like the Civil War as battles between peoples for sovereignty—although that is what, in part, they were. They were conceptualized by U.S. military leaders as battles on behalf of civilization against the savage threat.³⁸ Lieber himself wrote in 1863: “Protection was, and still is, with uncivilized peoples, the exception.”³⁹

Before American troops descended on the peaceful village at Sand Creek, Colonel John Chivington told his men to “‘kill and scalp all, little and big,’ for ‘nits make lice.’”⁴⁰ The result was an orgy of violence. Women were not spared but were raped and chopped into pieces. Babies were shot at point blank range. The Cheyenne at Sand Creek were brutally eliminated in the name of upholding

warfare of savages, and of civilized men against savages—censured the military while simultaneously upholding the differences between civilized Christian men and the savages they desired to mutilate.”).

33. *Id.* at 97-99.

34. *Id.* at 98.

35. *Id.* at 99.

36. *Id.* at 101-02.

37. *Id.* at 96-97.

38. KINSELLA, *supra* note 29, at 97.

39. *See id.* at 82; *see also* Clara Altman, Courtroom Colonialism: Philippine Law and U.S. Rule, 1898-1935 87 (Aug. 2014) (unpublished Ph.D. dissertation, Brandeis University) (detailing the way protections of the law of war were not extended to Filipinos thought of as “savages”).

40. KINSELLA, *supra* note 29, at 99.

civilization.⁴¹

There was no Gettysburg address delivered at Sand Creek. This was not only because the casualties were Native Americans rather than U.S. military. This was not a sacrifice shared through mourning that transcended political boundaries.⁴² The entire point was an exclusion from the polity, after all. The logic of murdering babies was to perpetuate the excision across generations.⁴³ Sand Creek is remembered and mourned by Native Americans.⁴⁴ Otherwise, it remains at the boundary of American memory.⁴⁵ Unlike the Civil War's generative political character, the Indian Wars more often constitute American political identity through their exclusion.

The point of telling this story is not to show that the code of war the Civil War produced did not end atrocity, for of course it could not do that. Instead, the story shows the borders of the civic community and civil society that the Civil War's fighters and commanders thought the war was about. Community was borne out of the war's carnage, as Faust argues, but the republic of suffering had an outside, a border between the deaths to be mourned and those to be forgotten.⁴⁶ This brings a ragged edge to the civil-ness of the American Civil War. It also sheds an important light on the character of the kind of "peace" we might find in its aftermath.

If—drawing from Faust and Laqueur—death in war has a politics, and if the polity has been shaped by the shared experience of suffering and death, what happens to the polity when war is far away and a warring people do not themselves suffer? Can Kant's peace, which Professor Armitage hopes for, exist in a world where the United States can go to war without most Americans experiencing any suffering?⁴⁷

41. *Id.* at 99-101.

42. See ARI KELMAN, A MISPLACED MASSACRE: STRUGGLING OVER THE MEMORY OF SAND CREEK 31 (2013).

43. KINSELLA, *supra* note 29, at 99-101.

44. See KELMAN, *supra* note 42, at 93-98.

45. *Id.*

46. FAUST, *supra* note 16 (discussing a "republic of suffering" among Northerners and Southerners, but not discussing Native American deaths).

47. See generally Dudziak, *supra* note 25 (examining the impact of physical distance on American war politics).

If there has been a “long peace” since 1945, as some have argued, for whom has this “peace” existed? Not for those killed in battles between armed troops, those living in carpet-bombed territory, or those whose farms and villages were napalmed.⁴⁸ Nowadays, the precision of contemporary weapons does not produce more peace simply because the blast radius from a drone strike can be smaller. The sound of the drone has become part of the ambient environment in some parts of the world—a world now shaped by the watchful eye of surveillance and, in some regimes, an ever-present threat of annihilation.⁴⁹ When military ordinance encounters the human body, the categorization of resulting death as lawful “collateral damage” matters only to those left to categorize. The dead body can be argued about but cannot itself complain.

We might, along with Armitage, long for Kant’s idea of a perpetual peace, but in the twenty-first century world, peace is not a time. There is no widely shared “peacetime,” especially for the United States, which is engaged in endless armed conflict.⁵⁰ Instead, peace is an identity for those peoples privileged to experience it.⁵¹

For most Americans, peace exists as an absence of conceptualization. Leaving war fighting to others, and far from the

48. See JOHN TIRMAN, *THE DEATHS OF OTHERS: THE FATE OF CIVILIANS IN AMERICA’S WARS* 3-5 (2012); Yuki Tanaka, *Introduction*, in *BOMBING CIVILIANS: A TWENTIETH-CENTURY HISTORY* 4-7 (Yuki Tanaka & Marilyn B. Young eds., 2009).

49. See Nasser Hussain, *The Sound of Terror: Phenomenology of a Drone Strike*, BOSTON REVIEW, October 16, 2013, available at <http://bostonreview.net/world/hussain-drone-phenomenology>; SCOTT SHANE, *OBJECTIVE TROY: A TERRORIST, A PRESIDENT, AND THE RISE OF THE DRONE* 6 (2015); *UNDER THE DRONES: MODERN LIVES IN THE AFGHANISTAN-PAKISTAN BORDERLANDS* (Shahzad Bashir & Robert D. Crews eds., 2012) (discussing the regions affected by drone warfare).

50. See ANDREW BACEVICH, *Introduction*, in *THE LONG WAR: A NEW HISTORY OF U.S. NATIONAL SECURITY POLICY SINCE WORLD WAR II* 4 (Bacevich ed., 2007); ROSA BROOKS, *HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING* (2016) (discussing ongoing U.S. armed conflict); Marilyn B. Young, “*I Was Thinking, as I Often Do These Days, of War*”: *The United States in the First Century*, 36 *DIPLOMATIC HIST.* 1 (2012) (noting the way U.S. war is continuous and comes to be normalized).

51. Mary Dudziak, *War and Peace in Time and Space*, 13 *SEATTLE J. SOC. JUST.* 381 (2015) (arguing that the persistence of conflicts means that the experience of “peace” depends on class, race, and location).

battlefield, it rarely crosses their minds⁵²—unless a particularly disturbing photograph of dead children appears in their social media. They might tweet in outrage and be satisfied to have had their say.⁵³ There is an absence of the collective suffering that Olmsted encountered on the hospital transport ship and that Faust argued helped shape the United States in war's aftermath.

The American Civil War would become “the test case for the legitimacy of secessionist civil war everywhere,” Professor Armitage writes.⁵⁴ It would not, however, be the defining model for other conflicts between the American whole and its parts, like the Filipinos who sought independence after the Spanish-American War, but instead fought American occupiers.⁵⁵ The Philippine-American War was a conflict not only excluded from the panoply of great wars but also from American memory itself, as wartime for Filipinos came to be remembered as an American “peacetime.”⁵⁶ This shows that peace, at its core, is not a time, but a failure of memory.

Perhaps the peace we seek should be experienced more expansively, as the suffering of the Civil War was. We know that violence and its aftereffects can draw people together. If only a political community could be constituted in relation to peacefulness rather than violence.

52. See Pew Research Center, *The Military Civilian Gap: Fewer Family Connections*, PEW SOCIAL TRENDS (Nov. 23, 2011), at <http://www.pewsocialtrends.org/2011/11/23/the-military-civilian-gap-fewer-family-connections/#fnref-9923-1>.

53. See Rick Gladstone, *Report Confirms That Chemical Arms Were Used on Syrian Villagers*, N.Y. TIMES (June 29, 2017), available at <https://www.nytimes.com/2017/06/29/world/middleeast/syria-sarin-chemical-weapons-united-nations.html> (noting worldwide revulsion to images of dead Syrian children); see also SUSAN SONTAG, REGARDING THE PAIN OF OTHERS 14-17 (2003) (discussing the experience of viewing photographs of catastrophes).

54. ARMITAGE, *supra* note 1, at 166.

55. See PAUL A. KRAMER, BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, AND THE PHILIPPINES (2006) (describing the brutal U.S. war against Philippine independence fighters).

56. DUDZIAK, *supra* note 5, at 28.