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James Q. Whitman, *The Verdict of Battle: The Law of Victory and the Making of Modern War*. Cambridge: Harvard Univ. Press, 2012. Pp. vii, 323. ISBN 978–0–674–06714–1.

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In his classic, *On War*, Carl von Clausewitz, after defining war as "an act of force to compel our enemy to do our will," observes that "attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it."[1] James Whitman (Yale Law School) reminds historians that the laws of war cannot be so easily dismissed. *The Verdict of Battle* examines those that applied to eighteenth-century European land wars, while raising pertinent questions for present-day war planning. Whitman wants to show that "military historians have sometimes failed to do full justice to military history, because they have sometimes been slow to recognize that the pitched battles of the past were legal events as well as military ones—that they were fought in line with legal rules, not just in line with social considerations." His target audience, however, is not military historians but international lawyers who, aiming to humanize warfare, "have misunderstood much of the drama, and much of the tragedy, of the history of the law of war" (9).

Whitman asks three critical questions: "Why was it ever possible to limit warfare to the concentrated collective violence of pitched battle? Why did the classic pitched battle go into decline in the age of the American Civil War and the Franco-Prussian War? Is there anything we can still learn from the battle warfare of the past?" (8). He seeks their answers primarily as a legal scholar, analyzing the laws of war prevalent in eighteenth-century Europe, when battles were usually single-day events on confined battlefields, where infantry fired and were fired upon while standing in lines without cover. Whitman does not focus on the *jus ad bellum*—the laws relating to when a "just war" could be started—or the *jus in bello*—the laws defining how wars are fought.[2] Rather, he argues that during the eighteenth century, certain laws limited warfare and discriminated victors from the losers. When those rules ceased to apply in the latter half of the nineteenth century, wars became the unrestrained, violent spasms we know too well today. As Whitman Summarizes:

> Our pre-nineteenth-century ancestors perceived war differently, and in consequence they had a different conception of the task of the law of war.... But when they talked about the law of pitched battle, they adopted an alternative way of thinking, according to which war was not a plague on mankind but a legitimate means of settling disputes and resolving legal questions through violence. Under this alternative view, the law of war, instead of focusing on the jus ad bellum and the jus in bello, concerned itself with what I call the *jus victoriae*, the law of victory. The jus victoriae assumed that war was not a last resort used in self-defense and comparably dire circumstances, but a kind of acceptable legal procedure. Correspondingly, it aimed to answer two technical legal questions, both very different from the questions asked by the modern jus ad bellum and jus in bello and both quite often quite difficult to resolve: first, *how do we know who won?* and second, *what do you win by winning?* or, to put it differently, *what rights can the victor claim by virtue of victory?*... [This book] is the tale of the decline of a tradition of comparatively restrained warfare in which war was understood to yield a verdict of law and of the rise of a tradition of unbridled warfare in which war was understood to yield the verdict of history. It is the tale of the displacement of the rule of law by the rule of force. (10, 23–24)

Whitman argues that pitched battle in the eighteenth century was effectively a legal proceeding, a trial by combat in which two monarchs sought to settle some dispute. He shows in detail that legal scholars of

1. *On War*, ed. and trans. Michael Howard and Peter Paret (Princeton: Princeton U Pr, 1976) 75.

2. For more on these concepts, see Michael Howard, "Constraints on Warfare," in *The Laws of War: Constraints on Warfare in the Western World*, ed. Michael Howard et al. (New Haven: Yale U Pr, 1994) 1–11.

the era recognized war as a lawful, if perilous, means of deciding such disputes; sovereigns gambled on a war's outcome in hopes of gaining some profit. Battle was "a formal legal procedure" (50).

Whitman supports these contentions in a discussion of Frederick the Great's attack upon and seizure of Silesia in 1740–42. Triumphs over the Austrians at the battles of Mollwitz and Chotusitz gave Frederick control over Silesia and positioned Prussia as a middle-European power. Delving deeply into the jurisprudence of war at the time, Whitman maintains that Frederick's action was not the illegal land-grab it is typically considered today, but a legitimate roll of the dice based on legal claims that were valid at least on their face. Frederick's conquest was not judged unlawful at the time. His victories were simply the legally binding result of a game of chance.

How did the belligerents know that Frederick had prevailed in this quasi-legal proceeding? Whitman proposes a relatively simple answer: whoever forced his or her opponent to retreat—that is, controlled the battlefield after the action—was the victor. Casualties suffered by one side or the other really did not matter. (In fact, Frederick suffered more casualties than the Austrians at Chotusitz.) Nor was annihilation of the enemy necessary. (Frederick could have destroyed his opponents' forces at both Mollwitz and Chotusitz.) Once one side had ceded the ground of the pitched battle to the other, the diplomats could take over and negotiate a final resolution to the dispute.[3]

Victory in pitched battle conferred legally binding rights, whether to land, property, or succession. Whitman writes that medieval just war tradition had been "largely a concern for property rights. People went to war to seize goods and lands, and the law of war was concerned with giving sanction to the just claims of victors" (113). Thus, when Frederick forced the Austrians to retreat, his claim to Silesia was ipso facto a legally binding consequence. Wars were virtual legal actions in which the victor received some benefit or compensation from the loser.

Whitman points out that his "law of victory" did not have to be followed at all times. Laws in the modern sense facilitate and guide behavior; they do not prevent wrongful conduct. But the law of victory applied, in Whitman's view, until the rise of republics in the later nineteenth century. Wars then ceased to be the prerogative of monarchs. They no longer concerned property rights. The retreat rule also ceased to be recognized. Whitman identifies the American Civil War and the Franco-Prussian War as marking the demise of the law of victory. "Pitched battle, in short, lost its eighteenth-century juristic significance. No longer a wager turning on dynastic succession and property claims, it began to represent something much grander. It began to represent what Germans thought they had witnessed at Sedan: the verdict of history" (244). In this regard, Whitman challenges previous scholarship[4] that identifies technological change or the waning of aristocratic culture as ending the more restrained warfare of the eighteenth century.

These thought-provoking lessons of the demise of the law of victory undermine the position of those modern international lawyers who espouse increasingly idealistic norms of warfare. "The curse of modern warfare, and of the modern law of war, is not that we have abandoned chivalry on the field of battle. The curse of modern warfare, and of the modern law of war, is that ever since 1863 and 1870 our wars have consistently ended up raising basic, revolutionary questions about the organization of society and the legitimacy of states. We want to go to war only when there is something foul or evil or aggressive about the regime we fight" (251).

"Wars enter their most dangerous territory when they aim to remake the world, and the same is true of lawyers" (262), writes Whitman. In short, we need a law of victory that simply ends wars without insisting on some historic triumph. Wars should concern who gets what, when, and how, as they did in the eighteenth century.

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3. Whitman also cites the Battle of Malplaquet (1709), during the War of the Spanish Succession, as an example of the "retreat rule." The Allies suffered nearly twice the casualties of the French, who had won a strategic victory, but "the French counted as the losers … because they were the ones who retreated" (174).

4. See, e.g., David A. Bell, *The First Total War: Napoleon's Europe and the Birth of Warfare as We Know It* (Boston: Houghton Mifflin, 2007) 5–11.

From a purely military historical perspective, one may dispute Whitman's conclusion that eighteenth-century wars were acquisitive legal contests between monarchs. His blinkered focus on Frederick the Great's takeover of Silesia ignores many wars of the era that do not fit his model, including conflicts involving non-Western civilized nations and native peoples, as well as naval warfare. And his claim that the law of victory ended only in the last half of the nineteenth century elides the Napoleonic Wars, which portend a much earlier end to the law of victory and the retreat rule. But Whitman's salutary demonstration that modern states justify their wars on principles very unlike those of the past raises important issues for reflection in our own time. The long conflicts in Iraq and Afghanistan pose thorny questions about the valid causes of war and the best means of concluding them. Perhaps the eighteenth-century *jus victoriae* can provide needed guidance.