Enemy Women and the Laws of War in the American Civil War

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"We do not make war on women and children"
Illinois Private, 1862 [1]

I

One of the most important legacies of the American Civil War, not just in the re-united States of America but also in the nineteenth and twentieth century world, were the new laws of war that the conflict introduced. "Lieber's Code," named after the man who authored it for the Lincoln administration, was a set of instructions written and issued in April 1863 to govern the conduct of "the armies of the United States in the field." It became a template for all subsequent codes, including the Hague and Geneva conventions.[2] Widely understood as a radical revision of the

1. Quoted in Michael Fellman, *Inside War: The Guerilla Conflict in Missouri During the American Civil War* (New York: Oxford University Press, 1989), 203.

2. General Orders No. 100, "Instructions for the Government of Armies of the United States in the Field," prepared by Francis Lieber, LL.D., War Department, Adj. General's Office, Washington, April 24, 1863, in United States War Department, *The War of the*

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laws of war and a complete break with the Enlightenment tradition, the code, like the war that gave rise to it, reflected the new post-Napoleonic age of "people's wars." As such, it pointed forward, if not as the expression of the first total war, then at least as an expression of the first modern one, with all the blurring of boundaries that involved.[3]

In no area was Lieber's code more significant than in its meaning for the distinction between combatants and civilians, "the distinction" (as it is referred to in international law) that has constituted the foundational concept in the laws of war since at least the sixteenth century. "Upon the distinction between the civilian and combatant. . .the whole idea of the law of war depends," Geoffrey Best wrote in his classic study *Humanity in Warfare*.[4] Lieber fundamentally rewrote the distinction, breaking down the wall between soldiers and noncombatants including the assumption of women's innocence on which the identity of the civilian was (and is) premised.[5] Among other things, Lieber's code—and the laws of war—thus responded to the challenge posed by enemy women in the American Civil War.

This is an argument not yet appreciated in the literature on the American Civil War, Lieber's Code, or the laws of war as historically understood. It is in the convergence of gender and the laws of war on the terrain of history, and the particularity of Civil War developments, that the promise of new knowledge lies. One entirely unexpected element of that war was the way in which the Union military's experience with women in the path of their armies unsettled longstanding assumptions about women's political

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Rebellion: A Compilation of the Official Records of the Union and Confederate Armies (Washington, DC, 1880–1901) (hereafter cited as *O.R.*), ser. 3, vol. 3, 148–164, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/124/0148 (June 15, 2015); and Geoffrey Best, *Humanity in* Warfare (New York: Columbia University Press, 1980), 171; see also Frank Freidel, *Francis Lieber: Nineteenth Century Liberal* (1947; reprint, Gloucester, MA: P. Smith, 1968), 387–417.

3. On Lieber's Code in the history of the laws of war, see Best, *Humanity in Warfare*, 206–11; Helen M. Kinsella, *The Image Before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Ithaca: Cornell University Press, 2011); and John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012). The Germans called it "*Volkskrieg,*" war of peoples. On Napoleonic War as inaugurating the age of "total war," see David Bell, *The First Total War: Napoleon's Europe and the Birth of Warfare as We Know It* (Boston: Houghton Mifflin Co., 2007). On debate about the American Civil War, see Mark Grimsley, *The Hard Hand of War: Union Military Policy Toward Southern Civilians, 1861–1865* (New York: Cambridge University Press, 1995); and Mark E. Neely, Jr., *The Civil War and the Limits of Destruction* (Cambridge, MA: Harvard University Press, 2007).

4. Best, *Humanity in Warfare*, 265; and Kinsella, *The Image Before the Weapon*, 2, 3.

5. Witt, *Lincoln's Code*, 233. Witt deals with the distinction, but not with its embedded assumptions about gender.

identity and status, and provoked a profound reassessment of the protections accorded noncombatants. The problem of enemy women emerged as a critical issue in the conduct of the Civil War itself and in the creation of new laws of war that lived on long after it was over. Far from being a matter of significance only to women's history, the issue bears directly on the matter of humanity in war.

The idea of women as the essential noncombatants has a long history. It goes back at least to Francisca de Vitoria in the early sixteenth century. It was central to Hugo Grotius in the seventeenth century, to Emer de Vattel in the eighteenth, and to Lieber in the nineteenth. It remains in the Hague and Geneva conventions. The principle was laid out clearly in Grotius's text *The Laws of War and Peace*. "One must take care, so far as possible, to prevent the death of innocent persons, even by accident" he wrote, listing women and children as those who should be spared. It was also laid out in Emer de Vattel's *The Laws of Nations,* in which he distinguished between those enemies who composed the state's human means of making war, and those beyond the power of arms bearing who did not. "Women and children" did not. They were enemies, he acknowledged, but that did not mean that they could be treated "like men who bear arms, or are capable of bearing them."[6] The definition of noncombatant therefore starts with those (women) who do not bear arms, and moves out to encompass others like them (children, feeble old men, sick persons, and all unarmed people). It is a matter widely acknowledged by scholars, although one rarely subject to analysis. Thus Best recognizes the way discourses of "gender and innocence" work in defining humanity in warfare; however, the assumptions about women that undergird that pairing are taken as facts of nature or culture, stable over time.[7] But there is nothing self-evident about these assumptions as the political theorist, Helen Kinsella, has recently argued. Although central to international law, "'the distinction' has always

6. Francisco De Vitoria, "On the Law of War," in *Political Writings*, ed. Anthony Pagden and Jeremy Lawrance (New York: Cambridge University Press, 1991), 293–327, esp. Question 3, 314–17; Hugo Grotius (trans. Francis W. Kelsey), *De jure belli ac pacis libri tres (The Laws of War and Peace),* reprinted in *Classics of International Law* (Oxford: Clarendon Press, 1925), vol. 2, bk. 3, ch. 11, 733–35 (quotation at 733); and Emer de Vattel, *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin of Nature and Natural Law and on Luxury*, 1797. (quotation bk. 3, chap. 8, S72) http://oll.libertyfund.org/title/2246 (September 15, 2011), bk. 3, chap. 8, S145, S147; Vattel writes of "women, children, feeble old men, and sick persons" that "we have no right to . . .use any violence against them," a principle he says of all "civilized" nations; Lieber, General Orders No. 100, *O.R.,* ser. 3, vol. 3, art. 19, and especially art. 37.

7. The term "gender and innocence" comes from Kinsella, *The Image Before the Weapon*, 54. Best, *Humanity in Warfare*, 55.

been frail," she insists, in no small measure because of the instability of the gender categories and discourses on which it rests. Certainly it is not safe to assume that women's "inviolability" follows from their physical weakness and incapacity to wage war. In the fifteenth century, Christine de Pizan reminded her readers that women not only waged war but possessed attributes (above all intelligence) that made them worth "ten soldiers." The logic of sex difference changed over time—in Vitoria it was because they lacked reason, for example—but it always owed a great deal to the institution of marriage and the idea that women did not "devise wars," subject as they were to the guardianship of husbands. Women and children were innocents because they "were outside war."[8]

If women have always been the essential noncombatants, however, their immunity was never absolute. As part of the population with whom the state was at war, women were recognized as the enemy, as Grotius put it in the seventeenth century, because "injury may be feared from such persons also." Major General Henry Halleck certainly came to that view during his stint as commander of the Department of the Missouri during the American Civil War. "If the women wish to be spared altogether," Vattel wrote in the eighteenth century, "they must confine themselves to the occupations peculiar to their own sex, and not meddle with those of men by taking up arms." The possibility that they would—and already had—hovered ever in the background, at once marked and obscured in the written codes of war. Women's immunity was contingent. To preserve it they had to be "enemies who make no resistance." Each publicist up to and including Lieber thus advanced the general principle of women's immunity or "inviolability" as noncombatants, while preserving their other identity as potentially dangerous enemies.[9]

For Francis Lieber, this dual view of women was no abstraction, as the archival record confirms. The character of the American Civil War as a modern people's war ensured that. "Our war differs from European wars," William Tecumseh Sherman once explained to Henry Halleck in

8. Kinsella, *The Image Before the Weapon*, 3, 83, on self–evidence, at 22; and Christine de Pizan, *The Book of Deeds of Arms and of Chivalry* (cited in Kinsella, *The Image Before the Weapon*, 47). Grotius, *De jure belli*, vol. 2, bk. 3, ch. 11, 734–35.

9. Vattel, *The Law of Nations,* bk. 3, ch. 8, S145; Grotius, *De jure belli,* bk. 3, ch. 6, 646, ch. 11, 734, 735; Henry W. Halleck, *International Law; Or, Rules Regulating the Intercourse of States in Peace and War* (San Francisco: H.H. Bancroft & Co., 1861), 428; Article 37, in General Orders No. 100, *O.R.*, ser. 3, vol. 3, 152, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/124/0152 (June 22, 2015); and Article 102, in General Orders No. 100, *O.R.*, ser. 3, vol. 3, 159, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/124/0159 (June 22, 2015. Women are innocents to be spared in war, Grotius wrote, "unless they have been guilty of an extremely serious offence" or "take the place of men."

that "We are not only fighting armies but a hostile people," and must make them "feel the hard hand of war, as well as their organized armies." As early as 1862, he was convinced that "the entire South, man, woman and child is against us, armed and determined."[10] Like Sherman, Lieber was an advocate of hard war. "The shorter war is, the better; and the more intensively it is carried on, the shorter it will be," he wrote in 1861. "It must never be forgotten that the whole country is always at war with the enemy . . . and there is in the case of war—especially in a free country where no 'cabinet wars' are carried on—by no means that distinction between soldiers and citizens which many people either believe to exist or desire to."[11] Lieber's code proved such a radical historical break precisely because it responded to the conditions of modern war. In advance of the total wars of the twentieth century, it confronted the obvious difficulty of observing the distinction between combatants and civilians in an era in which women were part of "the people"—the population—waging war. With Lieber, the protections accorded civilians in war were eroded, even eviscerated, and the balance between immunity and accountability shifted radically.

The focus on this particular element of the new laws of war makes this a different argument than the one offered by John Fabian Witt in his recent book on Lieber's code. Titled, revealingly, *Lincoln's Code: The Laws of War in American History,* Witt brilliantly locates Lieber's code at a crucial moment in the prosecution of the war (January 1863) with Lincoln's adoption of the hard war policy of uncompensated slave emancipation. Witt points to the articles on slavery as the "most original" of Lieber's entire code, in that they constituted a total reversal of all previous United States policy on the protection of property (that is chattel property/slaves) in war, as was now required by the new role and composition of the Union as an army of liberation.[12] And viewed in the tradition of the *American* law of war, Witt is undoubtedly right. But something important is lost in the

10. Major-General William Tecumseh Sherman to Major-General Henry Wager Halleck, December 24, 1864, *O.R.,* ser. 1, vol. 44, 799, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/092/0799 (June 15, 2015); William T. Sherman to John Sherman, September 22, 1862, in *The Sherman Letters: Correspondence between General and Senator Sherman from 1837 to 1891*, ed. Rachel Thorndike (New York: C. Scribner's Sons, 1894), 162.

11. Lieber quoted in Witt, *Lincoln's Code*, 170; Lieber to Halleck, October 3, 1863, Box 28, Francis Lieber Papers, 1815–1888, Huntington Library (hereafter FLP, HL,); Lieber to Halleck, June 13, 1864, Box 28, FLP, HL; and Richard Shelly Hartigan, ed., *Lieber's Code and the Law of War* (Chicago: Precedent, 1983), 77. Lieber himself makes the distinction between "*Volkskrieg*" or war of peoples, and war of cabinets. David Bell describes "cabinet wars" as set piece battles between standing professional armies. See Bell, *The First Total War*.

12. Witt, *Lincoln's Code*, 4, 241, and throughout.

alignment of the code's hard war logic so fully with Lincoln's emancipation policy. In the *international* law tradition the most radical innovation of the code was not the parts on slavery, which were quickly dated, but those on irregular war and especially civil war—Section X—and their authorization of an awesome use of force unconstrained by any limits aside from "military necessity." It was also the most immediately relevant part of the code, as European states in the mid-1860s and 1870s increasingly confronted the problem of people's war and irregular soldiers who posed the most difficult questions for jurists engaged in laws of war debates. In terms of law and its relationship to power, Lieber's Code forged a new path. The question of what an army can legitimately do to noncombatants or civilians in war, and the broad scope for violence thereby established, were fundamental to the origins, drafting, and revision of Lieber's code in 1863 and to its enduring significance in the international laws of war. Best calls it the "arch-occupiers" code.[13]

What this has to do with enemy women—or with women of any sort—does not figure in the historical literature on Lieber's code, the laws of war, or the American Civil War. For Kinsella, on the other hand, it is impossible to grasp the matter of "the distinction" without grappling fundamentally with the matter of women and gender. Her book brilliantly lays out the fundamental merging of the concept of woman and civilian (or noncombatant) and the discourse of gender, innocence, and civilization that underwrote the category. And yet, even as Kinsella fully appreciates the significance of Lieber's Code in redefining civilians—and weakening the protections accorded them—she misses the particular gender history behind the introduction of the new terms. As will be discussed, the two sections of the code that she identifies as crucial—S155 and S156—were not only added by Lieber at Major General Halleck's insistence; they were, lifted virtually verbatim from a set of field instructions that Halleck issued in March 1863 urging harsh measures against women insurgents in Tennessee. Thus, Kinsella concludes, the "principle of distinction held for the great majority of

13. Best, *Humanity in Warfare*, 180. For discussions about the necessity for the code, citing a wide range of issues, see Lieber to Halleck, February 7, 1862 November 13, 1862, December 31, 1862, Box 27, and Halleck to Lieber, November 15, 1862, Box 9, FLP, HL. Lieber had already prepared two memoranda at the request of War Department on guerilla warfare and on the use of free blacks and fugitive slaves in the Union Army. See Lieber to Halleck, n.d. [in response to letter of August 6, 1862], *O.R.*, ser. 3, vol. 2, 301–9, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/123/0301 (June 16, 2015); and "A Memoir to Mr. Secretary Stanton," enclosed in Lieber to Halleck, August 10, 1862, Box 27, FLP, HL. Witt acknowledges that "the warrant for violence was daunting" but the implications for the distinction is not his concern; Witt, *Lincoln's Code*, 234, 241.

the American Civil War," even with respect to the protection of white women and children in guerilla warfare.[14] But it did not.

In the American Civil War, the Union army already faced a situation common in the wars of the twentieth century, in which it was impossible to distinguish between combatants and civilians on the basis of gender alone. Seen in the long view, in the arc of war that extends between the Napoleonic and Algerian wars, the harsh measures that the Union called for against enemy women suggest that the recognition of women as enemy combatants or resistance fighters, which eventually rendered the distinction "immaterial," did not await the world wars of the twentieth century or the post-1945 wars of national liberation, but was already a crucial feature of the American Civil War in the mid-nineteenth century.[15] The disruption of the pairing of women and innocence, and the subsequent erosion of civilian immunity represented by Lieber's code, has a particular Civil War history: a women's history and a gender history with material effect on the modern laws of war.

II

The idea that women were outside war is an old one in Western civilization, as old, at least, as *Antigone*. Antigone, the heroine of Sophocles's play from the fifth century BCE, was a powerful representation of women's primal commitment to the family, of their belonging to the realm of kinship not citizenship, household not polity, family not state. It is an idea with great resilience, including in modern American culture. Union soldiers were committed to it: "We do not make war on women and children," an Illinois soldier assured his wife in 1862.[16] At the outset of the conflict, it was an assumption evident in military policy, the conduct of the war, and the laws of war; as much as slave emancipation, its abandonment marked the turn to hard war.[17]

14. Kinsella, *The Image Before the Weapon*, 84, 88–89. Where it gave way, she argues, was where discourses of civilization trumped those of gender, as in the indiscriminate massacre of Cheyenne and Arapaho women and children by the Union Army at Sand Creek, Colorado in November 1864; Kinsella, *Image Before the Weapon*, 82–104.

15. Kinsella, *The Image Before the Weapon*, 136. On the Algerian War as prototype of wars of decolonization, see Alistair Horne, *A Savage War of Peace: Algeria 1954–1962* (New York: Viking Press, 1977).

16. Sophocles (Robert Fagles, trans.) *The Three Theban Plays: Antigone*, *Oedipus the King, Oedipus at Colonus* (New York: Viking Press, 1982); and Fellman, *Inside War*, 203.

17. The phrase "hard war" is Sherman's. See Sherman to Halleck, December 24, 1864, *O.R.*, ser. 1, vol. 44, 799, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/092/0799 (June 15, 2015).

One finds expressed in many cultures a deep human reluctance to see women as parties to war. The United States was no exception. As war reached shocking proportions, parties to the conflict on both sides retained, and only partially and reluctantly surrendered, assumptions about women's innocence. Women were inscribed by law and custom as victims of war, not perpetrators of it. In the American Civil War, as in other wars, that assumption was about imposing limits on war's destructiveness. Given the human capacity for violence, the need was urgently felt. "It is the men with arms in their hands upon whom we make war. The women are entitled to protection even if they are the wives and daughters of rebels," the Illinois soldier explained.[18]

This was a principle deeply tied to an understanding of women's normative status as wives, and under the law of coverture, as persons subject to the guardianship of their husbands. Coverture was a legal arrangement of great antiquity—the law of Baron and Feme (or Lord and Woman) as it was called—inherited from English common law that survived the revolution intact, and it was one with profound implications for women's political status and identity as citizens.[19] The law put women under their husbands' authority in the interests of marital unity. As the legal historian Hendrik Hartog put it, in marriage the husband and wife became one and that one was the husband. Matrimony established a domestic relationship of power and dependency between husband and wife, not least of all by awarding him exclusive control of her body and ownership of any property she brought into the marriage.[20] After marriage, a wife did not own her body, its labor or the wages earned by it, the children produced of it, or any property in her own name. Marriage was itself a form of governance,

18. Fellman, *Inside War*, 203.

19. Linda Kerber, *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998); Kerber, "The Paradox of Women's Citizenship in the Early Republic: The Case of Martin vs. Massachusetts, 1805," in *Toward an Intellectual History of Women,* ed. Linda Kerber, (Chapel Hill: University of North Carolina Press, 1997), 261–302; and Kerber, "A Constitutional Right to Be Treated Like American Ladies: Women and the Obligations of Citizenship," in *U.S. History as Women's History*, ed. Linda Kerber, Alice Kessler-Harris, and Kathryn Kish Sklar (Chapel Hill: University of North Carolina Press, 1995), 17–35. On the normative status of adult women as wives—even those who were unmarried (widows, for example)—see Ariela R. Dubler, "In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State," *The Yale Law Journal* 112 (2003): 1641–1715. On the contradiction of the citizen-wife see the review essay by Stephanie McCurry, *Signs: Journal of Women in Culture and Society* 30 (2005): 1659–70.

20. Hendrik Hartog, *Man and Wife in America: A History* (Cambridge, MA: Harvard University Press, 2000), quotation at 263.

and one in which the state was greatly invested.[21] It established husbands as household heads for purposes of taxation and political representation, while relegating women to the realm of virtual representation. After marriage, a woman's husband became her legal and political representative. The "transformation of woman into wife made 'citizenship'—a public identity as a participant in public life—something close to a contradiction in terms for a married woman," Hartog argues.[22] Citizenship has been gendered since its origin, shaping rights and obligations differently for men and women, as historian Linda Kerber has made abundantly clear. Adult white women were citizens in a constitutional sense, but nobody thought of them as such. They possessed few of the political rights that increasingly defined their male counterparts' standing in the new republic as free men and voters, and they assumed few of the attendant obligations of citizens, including military service in defense of the state.

There was one notable exception to women's submersion in the political identity of their husbands. As citizens, even married women had an individual obligation to refrain from treason. The conflict between this principle and every other tenet of the law of marriage was not often put to the test. In 1861, on the eve of the Civil War, the issue stood very much where it had been left by the key postrevolutionary case of *Martin v Commonwealth of Massachusetts*, which concerned the state's confiscation of the dower property of a loyalist wife. The case, which was heard in 1805, tested whether Anna Martin's adherence to England in the Revolutionary War was an act of treason punishable by confiscation of her dower property because Martin's husband was an officer in the British army. Her son sought the return of her property. The case and verdict revealed vividly the divergent priorities of societies in war and in peace. In a strictly legal sense, the case should have been straightforward. The Massachusetts treason statute had been carefully written to explicitly include women, and the radical lawyer James Sullivan believed that it should be enforced. "Cannot a feme-covert levy war?" he asked. To him the answer was clearly yes. Women were sovereign beings, accountable to their government for their own political choices, including that of loyalty and treason, but the plaintiff's lawyer, George Blake, found that claim

21. A point developed powerfully by Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2000), 7 and throughout; and Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002), 4 and throughout. See also, Dubler, "In the Shadow of Marriage." Lawmakers, she says, look "to marriage as a public policy tool capable of privatizing women's economic dependency," at 1654.

22. Hartog, *Man and Wife*, 100.

preposterous. "What aid can they give to the enemy," he asked contemptuously. Married women may have been citizens, but not citizens whose loyalty mattered. As a *feme covert*, a woman "had no political relation to the state any more than an alien." Anna Martin was a married woman and, as such, her paramount obligation was to her husband. If he "commanded it, she was duty bound to obey him, by a law paramount to all other laws—the law of God." Blake's proved the winning argument, repeated virtually verbatim in the decision for Martin. Is one to believe that the government really intended to encourage a woman "in violation of her marriage vows, to rebel against the will of her husband?" Judge Theodore Sedgewick wrote. Can a *feme covert* levy war? In 1805, with the din of war safely behind them, the answer to the question of whether a married woman could levy war in *Martin v. Commonwealth* was a firm Thermidorean no.[23] At the dawn of the American Republic, John Adams had justified women's exclusion from political life on these same grounds. The government, he said, was indifferent to the matter of loyalty and treason in women.[24]

In ways we have not always appreciated, marriage was a foundational institution of political life, structuring both the domestic polity and the rules governing the international order. Vitoria and Grotius both reasoned from that basis, and so too, much later, would Francis Lieber. It was a tenet of Lieber's liberal faith that "property and marriage" were the "first two elements of all progress and civilization," as he once explained to John C. Calhoun. The family is crucial to the "essential order of things" and it "cannot exist without marriage." In 1838, already disturbed by the emancipationist claims of Mary Wollstonecraft and Angelina Grimke, he laid out his views about the difference of the sexes and marital unity in his text, *Manual of Political Ethics*. Woman's "true sphere is in the family" in her role as wife and mother, he declared; by the "laws of nature" she is "excluded from political life." The "woman cannot defend the state," as he put it in an echo of Adams. Lieber was no naïf. As a Prussian émigré and survivor of the

23. Linda K. Kerber has revisited the Martin case repeatedly since she first treated it in *Women of the Republic: Intellect and Ideology in Revolutionary America* (Chapel Hill: UNC Press, 1980), 133–36. The fullest account is in *No Constitutional Right to be Ladies*, Chapter 1, but she also offers a sharp account in "The Paradox of Women's Citizenship." For the Sullivan quote see "Paradox," 292; for Sedgwick, see "Paradox," 294 ("Was she considered a criminal because. . .she did not, in violation of her marriage vows, rebel against the will of her husband?"); "Paradox," 301; "Paradox," 289 ("What *aid* can they give to an enemy?"). "The story of Martin vs. Massachusetts suggests that the early national period was Thermidorean," "Paradox," 301. *Shanks v Dupont* in 1830 rendered a different decision, but was quickly reversed. See Kerber, "Paradox," 298–301.

24. John Adams to James Sullivan, May 26, 1786, in *The Feminist Papers: From Adams to de Beauvoir*, ed. Alice S. Rossi (Boston: Northeastern University Press, 1988), 13–14.

battle of Waterloo and the Greek wars of independence, he knew that there were exceptions to the rule: the women of Saragosa, Spain, who, in the resistance to the Napoleonic invasion, "abide[d] by their fighting husbands unto death," and the many other women who "in periods of extremity . . . could suddenly step upon the wall and look into the enemy's face." It was a startlingly vivid image, especially for 1838; but these women, Lieber insisted, acted simply as wives. Anything else would have been a transgression of nature itself.[25]

The feminist legal scholar Reva Siegel has noted that in the nineteenth century, the common law "established the family as a kind of gendered jurisdiction." Marriage rendered women's citizenship virtually meaningless and vitiated their identity as sovereign individuals. The law of coverture was not static. In the antebellum period, legal reformers pushed through married women's property rights in a few states and the right of divorce in others. A small minority of women's rights activists pushed for more radical political change, including women's right to vote. As Siegel has observed, statutes such as married women's property rights did not so much destroy coverture as modernize it. Marriage served a series of crucial public functions, not least of which was to "privatiz[e] women's economic dependency," which thus relieved the government of the burden of public welfare. In that respect, its importance only increased with the emancipation of 4,000,000 enslaved men, women, and children. Throughout the first republic and even beyond,

25. Lieber to Senator John C. Calhoun in *The Life and Letters of Francis Lieber*, ed. Thomas Sergeant Perry (Boston: James R. Osgood and Co., 1882), 230; Francis Lieber, *Manual of Political Ethics, Designed Chiefly for the Use of Colleges and Students at Law*, vol. 1, ed. Theodore D. Woolsey (1838; reprint, Philadelphia: J. B. Lippincott & Co., 1911), 138–40; and Francis Lieber, *Manual of Political Ethics, Designed Chiefly for the Use of Colleges and Students at Law,* Vol. II (1838; reprint, Boston: C. C. Little and J. Brown, 1911), 253, 269–270, 254, 259–60. See also clippings and notes in folder "Women's Suffrage," FLP, HL. For references to Mary Wollstonecraft (named in the text) and Angelina Grimke (unnamed) see Lieber, *Manual of Political Ethics,* II:267. The reference is clearly to Grimke, *Letters to Catherine Beecher*, Letter XII. See also Lieber's 1867 article on the New York State Constitution about how men and women established the family "whence the state arise, not only in primeval time, but every day anew": Francis Lieber, "Reflections on the Changes Which May Seem Necessary in the Present Constitution of the State of New York, Elicited and Published by the New York Union League Club, May, 1867," in *The Miscellaneous Writings of Francis Lieber, Vol. II: Contributions to Political Science, Including Lectures on the Constitution of the United States and Other Papers*, ed. Daniel Coit Gilman (Philadelphia: J. B. Lippincott & Co., 1881), 181–219. On "the family as the social institution prior to all states," 208. On Lieber's biography see Freidel, *Francis Lieber*. Grotius's views are particularly interesting. The parts of Book II where they are laid out are often excised from modern editions. Grotius, *De jure belli*, bk. 2, ch. 5, 231–53.

the parameters of female citizenship were set by the perceived necessity of marriage and its gender asymmetries between man and wife, and by the state's commitment to upholding marriage, the law of coverture, and husbands' authority over their wives. Women had a particular kind of citizenship and a second-hand relationship to the state.[26]

At the beginning of the American Civil War, such views governed military policy. However, the limits of that customary respect for coverture and women's distance from the state were severely challenged as the demands on citizens intensified, and both sides, Union and Confederate, geared up for a war that tested the loyalty of every man, woman, and child, enslaved and free.[27] As it turned out, the tension between marriage and citizenship, between women as dependents (or innocents) requiring protection and women as the enemy accountable for treason, would run like a leitmotif through Union military policy and the new laws of war written to guide it.

III

For Union armies, the battle with enemy women started early. Such fundamental challenges to the gender order as faced commanders in places such as Missouri, New Orleans, and the Shenandoah Valley were difficult to confront. Confederate women quickly earned a reputation for violent secessionism. And yet, even as prominent women spies were arrested and

26. Reva B. Siegel, "She the People: The Nineteenth Amendment, Sex Equality, Federalism and the Family," *Harvard Law Review* 116 (2002): 982; and "The Modernization of Marital Status Law: Adjudicating Wives' Right to Earnings, 1860–1930," (1995). *Faculty Scholarship Series*, Paper 1093, 2127–30 and throughout. See also Hartog, *Man and Wife in America*; and Dubler, "In the Shadow of Marriage," 1654. Kristin Collins has demonstrated how women's legal status changed in the antebellum period, "while leaving the basic principles of coverture intact." See Collins, "'Petitions without Number:' Widows' Petitions and the Early Nineteenth Century Origins of Public Marriage-Based Entitlement." *Law and History* Review 31 (2013): 1–60. On divorce, see Norma Basch, *Framing American Divorce: From the Revolutionary Generation to the Victorians* (Berkeley: University of California Press, 1999); on married women's property rights, see Suzanne Lebsock, "Radical Reconstruction and the Property Rights of Southern Women," *Journal of Southern History* 43 (1977): 195–216; and Carole Shammas, "Re-Assessing the Married Women's Property Acts," *Journal of Women's History* 6 (1994): 9–30; and for one document suggesting the extent of radical demands for women's political rights, see "Declaration of Sentiments," in *The Feminist Papers,* 413–20. The literature on the woman's rights movement is substantial but for one excellent account, see Christine Stansell, *The Feminist Promise*: *1792 to the Present* (New York: Modern Library, 2010), ch. 4.

27. An issue developed in Stephanie McCurry, *Confederate Reckoning: Power and Politics in the Civil War South* (Cambridge, MA: Harvard University Press, 2010).

imprisoned and officers in command of the advance armies of invasion struggled to assert control over pro-Confederate populations, the right of white women to protection was observed as a fundamental element of the social compact.[28] Confederate women in the path of Union armies routinely applied for and received official "orders of protection," which detailed guards to protect their persons and property. At least two women, Mary Greenhow Lee and Cornelia Peake McDonald, who were later expelled for treasonous activities, received these protections in Winchester, Virginia in early 1862. One soldier called the women's "brazen secessionism … intense, bitter and unbearable."[29] The pattern of restraint and forbearance was evident all over the South in 1861 and 1862. The treatment of Southern white women was striking, especially in contrast to that meted out to other women by Union armies: the indiscriminate slaughter of Cheyenne and Arapaho women at Sand Creek, Colorado in late 1864, and the complete lack of regard for human life regularly displayed toward the columns of African-American refugee women and children—who were not enemies but allies—following the armies. Clearly, Southern white women were given the benefit of the doubt, their innocence and status as civilians assumed even as evidence to the contrary mounted.[30]

Like the obligation to return slave property, the commitment to protect the persons and property of Confederate civilians was a key element of the Lincoln administration's initial soft war policy designed to restore Southerners' loyalty to the Union. In February 1862, that policy was reiterated to the troops in the Department of the Missouri about to move south into

28. For the term "violent secessionism" see G. Mott Williams, "Letters of General Thomas Williams, 1862," *American Historical Review* 14 (1909): 320. On women's reputation, see also Stephen V. Ash, *When the Yankees Came: Conflict and Chaos in the Occupied South, 1861–1865* (Chapel Hill: The University of North Carolina Press, 1995), 42–43; Charles Royster, *The Destructive War: William Tecumseh Sherman, Stonewall Jackson, and the Americans* (New York: Vintage Books, 1993), 86–87; Drew Gilpin Faust, *Mothers of Invention: Women of the Slaveholding South in the American Civil War* (Chapel Hill: The University of North Carolina Press, 1996); and Women's Loyal National League, *Proceedings of the Meeting of the Loyal Women of the Republic, Held in New York, May 14, 1863* (New York: Phair and Co., 1863). For a fuller treatment of the issue of women spies and the protection accorded Confederate women see McCurry, *Confederate Reckoning*, ch. 3.

29. Quoted in Royster, *Destructive War*, 86–87.

30. On race, civilization, and the distinction in the American Civil War, see Kinsella, *The Image Before the Weapon*, 82–103. On the Sand Creek massacres see also Ari Kelman, *A Misplaced Massacre: Struggling Over the Memory of Sand Creek* (Cambridge, MA: Harvard University Press, 2013). My comments on African-American refugees draw on the forthcoming book by Thavolia Glymph (manuscript in possession of the author).

Tennessee. "Let us show to our fellow-citizens of these States that we come merely to crush out rebellion and to restore them to peace," the orders read. "They have been told that we come to oppress and plunder. By our acts we will undeceive them." There was to be no pillaging or destruction of private property, no concealment or stealing of slaves, and no admission of fugitive slaves into Union lines or camps except when ordered by the commanding general. And then, directly invoking the laws of war, the orders reiterated the principle that "women and children, merchants, farmers, mechanics, and all persons not in arms are regarded as non-combatants, and are not to be molested either in their persons or property." The usual condition was appended: "if, however, they aid and assist the enemy they become belligerents and will be treated as such. If they violate the laws of war, they will be made to suffer the penalties."[31]

It is one of those fantastic coincidences of history that the man under whose command the orders were issued, Major General Henry Halleck, was himself a main authority on the law of war referenced, widely recognized as such at the beginning of the war. Halleck's text, *International Law: or, Rules Regulating the Intercourse of States in Peace and War*, had been published only in 1861, and as such, stands as an important statement of the status quo ante bellum in international law. Lieber certainly consulted it. By the time it was published, Halleck was serving as commander of the Department of the Missouri, an arena of war so challenging in its irregularity that it provoked a fundamental reassessment of the category of the civilian. Halleck would go on to serve as general-in-chief of the Union Armies, a position he held in 1863 when he collaborated with Lieber in the writing of a radical new code. In the 1861 text, however, Halleck hewed pretty closely to the conventional position of Grotius and Vattel that women constituted the quintessential noncombatants, people "exempt from military duty" because they are "incapable of handling arms or supporting the fatigues of military service." Especially now, Halleck wrote, when wars were being conducted by regular troops, noncombatants—"persons who take no part in the war and make no resistance to our arms"—have nothing to fear from the sword of the enemy. For women and children especially, he emphasized, the presumption of innocence was strong; commanders violated it at their peril.[32] But Halleck was different from his predecessors, and prescient, in one respect. Far

31. General Orders No. 46, Department of the Missouri, St. Louis, February 22, 1862, *O.R.,* ser. 1, vol. 8, 563–64, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/008/0563 (June 15, 2015).

32. Halleck, *International Law*, 73–74, 375–79, 427–28. On Halleck, see John F. Marszalek, *Commander of All Lincoln's Armies: A Life of General Henry W. Halleck* (Cambridge, MA: Harvard University Press, 2004), 98 and throughout.

more than Vattel, he was alert to the dangers noncombatants could pose to armies of occupation: "It *often* happens," [emphasis mine] he wrote, "in cases of invasions," that all kinds of people, even women and children, "take up arms and render good service in the common defense." Halleck anticipated many of the circumstances that would attend a war of rebellion or civil war, including the scope that would have to be allowed to martial law. In this way, he contested Vattel's claim that each party to civil war was equally entitled to the protections of international law. He saw that as "a direct violation of the rights of sovereignty and independence."[33] Halleck's text thus registers the weight of knowledge of the Napoleonic Wars, especially the Peninsular War, famously depicted in Francisco de Goya's *Desastres,* (finally printed in 1861), with its riveting images of Madrilenas and peasant women rising in armed defense of their country. It also registered his own experience in the Mexican War.[34] Halleck knew that in cases of invasion, women could be expected to step upon the wall and look the enemy in the face. Commanders would respond; there would be no immunity.

By the spring of 1862, a cordon of federal power already rimmed the Confederacy, and the belligerent population to be controlled was growing fast. Events in the Union border states and occupied parts of Confederate states were crucial in terms of policy and law. In those places officers and soldiers rapidly accrued a bitter experience not just, as anticipated, with the Confederate army, but also with enemy civilians. Confederate women posed an especially difficult challenge, and events in 1862 drove commanders to question foundational principles, including the previously strict gender distinction between combatants and noncombatants, men and women, that set limits on the destructiveness of war.

The struggle played out in numerous places simultaneously, most famously in New Orleans, where Major General Benjamin Butler's attempt to defuse the threat facing his troops by forcing elite women off the streets using municipal prostitution laws, incited a transatlantic fracas about the protection of women in war.[35] But if New Orleans garnered all the press

33. Halleck, *International Law,* 73–74, 375–79, 427–28.

34. *Desastres*, collection of originals held at Bellas Artes Museum, Madrid (consulted Summer 2014). For publication history see Ronald Fraser, *Napoleon's Cursed War: Popular Resistance in the Spanish Peninsular War, 1808–1814* (New York: Verso, 2008).

35. General Orders No. 28, Department of the Gulf, New Orleans, May 15, 1862, *O.R.,* ser. 1, vol. 15, 426, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/021/0426 (accessed Jun. 15, 2015). Butler vowed to treat offenders as he would any "woman of the town plying her avocation;" Benjamin F. Butler, *Butler's Book: Autobiography and Personal Reminiscences of Major-General Benj. F. Butler*

(then and now), it was not much different in Winchester, Virginia, a town that changed hands more than seventy times during the war. There Union commanders, Nathaniel Banks and Robert H. Milroy, faced similar challenges from women such as Mary Greenhow Lee, whose "soldier work," as she called it, included stockpiling weapons and conveying military intelligence to rebel officers in the valley, Stonewall Jackson among them. All over the occupied South, Union officers were confronted with the evidence of women's treasonous activity. They stepped up surveillance and abandoned chivalrous notions of protection.[36]

The uproar over Butler's treatment of the women of New Orleans was an early indication of what was to come with the publication of Lieber's code. This is becoming "a savage war," Jefferson Davis wrote Robert E. Lee right after Butler's order, in which "no quarter is to be given and no sex to be spared."[37] Davis exaggerated, but by the summer of 1862 a landmark of sorts had been reached. Union occupying authorities in New Orleans, Winchester, and elsewhere required that, like men, women ("heretofore citizens of the United States,") would have to swear a formal oath of allegiance to claim the protection of the United States government and the privilege to reside, work, travel, or trade in Union territory. It was an effort to identify and expel those intent on "rebellious or traitorous acts."[38] It was

(Boston: A. M. Thayer, 1892), 418. On the military threat, see Butler to J.G. Carney, July 2, 1862, in Benjamin F. Butler, *Letters of Butler* (Norwood: Plimpton Press, 1917), 2:35–36; Williams, "Letters of General Thomas Williams," 320–32. Sherman had the same view of elite women from his time in St. Louis; see Michael Fellman, *Citizen Sherman: A Life of William Tecumseh Sherman* (New York: Random House, 1995).

36. Sheila Phipps, *Genteel Rebel: the life of Mary Greenhow Lee* (Baton Rouge: Louisiana State University Press, 2004), 159 and throughout. Michael G. Mahon, ed. *Winchester Divided: The Civil War Diaries of Julia Chase and Laura Lee* (Mechanicsburg, PA: Stackpole Books, 2002).

37. Davis to Lee, July 31, 1862, in *The Papers of Jefferson Davis, vol. 8: 1862*, ed. Lynda L. Crist, Mary S. Dix, and Kenneth H. Williams (Baton Rouge: Louisiana State University Press, 1995), 310.

38. General Orders No. 41, Department of the Gulf, New Orleans, June 10, 1862, *O.R.*, ser. 1, vol. 15, 483–84, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/021/0483 (June 15, 2015); Major-General Benjamin F. Butler to Secretary of War Edwin M. Stanton, June 17, 1862, *O.R.*, ser. 3, vol. 2, 159, eHistory at The Ohio State University, http://ehistory.osu.edu/books/official-records/123/0159 (June 15, 2015) ("rebellious or traitorous acts" quote is in Inclosure No. 4, Butler to Messrs. Cte. Mejan, French Consul; Juan Callejon, Consul de España; Joseph Deynoodt, Consul of Belgium; N. M. Benachhi, Greek Consul; Joseph Lanata, Consul of Italy; B. Teryaghi, Vice-Consul; Al. Piaget, Swiss Consul, Jun. 16, 1862). By August, oaths had been administered to more than 11,000 citizens. For the numbers in New Orleans, see James Parton, *General Butler in New Orleans* (New York: Mason Brothers, 1864). On Winchester, see Cornelia Peake McDonald, *A Woman's Civil War: a Diary with Reminiscences of the*

also a way to force them to acknowledge defeat.[39] By the time the provost marshal general in Louisiana issued General Order No. 76 in September 1862, women were explicitly identified as among those "enemies of the state" required to register and take the oath. John Adams was wrong. The government was not indifferent to the matter of loyalty and treason in women after all. Requiring women to take the oath represented an important shift in Union war policy and an entirely new estimation of women's political significance and standing in relation to the state.[40] For officers and men in the occupied South, one thing was clear: It was not just "the whole manhood of a nation" that was mobilizing against them.[41] The presumption of women's innocence was proving difficult to sustain.

Union military men faced a particular challenge in fighting treasonous activity whether of men or women: they had no way to punish it. In the United States, treason was a very particular crime purposely defined in the Constitution in such a way as to restrict its application. Treason against the United States consisted "only in levying war against them, or in adhering to their enemies, giving them aid and comfort." It purposely excluded any treasonous speech or plans that were not manifest in explicit acts. It also set a high bar for proof requiring the testimony of two witnesses in open court to secure conviction. Awarded the power to set the punishment for treason, Congress declared it a capital offense and stipulated that cases were to be tried only in federal court and in the original jurisdiction of the criminal act. As the historian William Blair has recently confirmed, the difficulties of bringing such cases were so great that only forty cases have been prosecuted over the course of United States history. At the beginning of the Civil War, when fear of traitors within the federal government and in the Union states was at its height, indictments for treason were brought regularly. "[B]ut while the indictments were many," he notes, "the trials were few." Convictions were very difficult to secure. For Union army officers in

War from March 1862 (Madison: University of Wisconsin Press, 1992), 126; and Phipps, *Genteel Rebel*, 177. For the text of the oath, see General Orders No. 30, Department of the Missouri, St. Louis, April 22, 1863, *O.R.*, ser. 1, vol. 22, pt. 2, 243, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/033/0243 (June 15, 2015).

39. Ash, *When the Yankees Came*, 60.

40. Linda Kerber notes that oaths of allegiance were not imposed on women during the Revolutionary War. "Although framed in terms of all residents, oaths seem almost always to have been selectively imposed on men." Kerber, "Paradox," 274.

41. William Blair, *With Malice Toward Some: Treason and Loyalty in the Civil War Era* (Chapel Hill: University of North Carolina Press, 2014), 144; and Best, *Humanity in Warfare*, 114.

the border states or occupied South, however, it was not only difficult but functionally impossible to punish treason. For one thing, the variety of treasonable activity they faced did not all rise to the level required by the Constitution. But the bigger problem was one of jurisdiction; either no cases could be filed because the civil courts were not functioning (as in areas governed under military law), or, where courts remained open, the cases would go to trial before juries of Southern, often openly pro-Confederate, men. It was precisely because treason could not be punished under military law that officers like Halleck gradually built up a parallel body of law to try a wide variety of "military offenses" that they deemed to be of "a treasonable character."[42]

IV

Policy changes emerged from the particulars of military operations all over the terrain of war, but the key developments in noncombatant protections in the laws of war came in response to the guerilla warfare in the border states of Missouri, Kentucky, Tennessee, and Arkansas. By mid-1862, women there were routinely surfacing in Union military reports on Confederate guerillas.[43] In those places, conditions of warfare were so murky, relentless, and challenging, and distinctions between enemy soldiers and hostile civilians were so impossibly ambiguous, that officers demanded a policy statement to guide the Union response. It is deeply relevant that the request went to Major General Henry Halleck who himself had served in a similar position from November 1861 until his appointment

42. *Constitution of the United States*, Article III, Section 3, Archives.gov (July 22, 2016); Blair, *With Malice Toward Some,* 16, 52, 56 and throughout. In General Orders No. 1 issued November 25, 1861, Halleck authorized the use of military commissions to try "military offenses" of a treasonable character; he did not yet talk of "military treason." Blair makes the important point that popular understandings of treason far exceeded constitutional limits and definitions, and that attempts to punish it were pursued by all three branches of government, state governments, local authorities, and the United States Army. On treason, see also Willard Hurst, *Treason in the United States*, reprinted from the *Harvard Law Review* 58, Nos. 2,3, and 6 (1945), 226–272, 395–444, 806–857; Witt, *Lincoln's Code*, ch. 9 and 10; and Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (Chapel Hill: University of North Carolina Press, 2011).

43. See, for example, Report of Major Emory S. Foster, June 17, 1862, *O.R.,* ser. 1, vol. 13, 124–25, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/019/0124 (accessed June 15, 2015). For an excellent comprehensive treatment of guerilla warfare in the Civil War, see Daniel E. Sutherland, *A Savage Conflict: The Decisive Role of Guerrillas in the American Civil War* (Chapel Hill: The University of North Carolina Press, 2009). Michael Fellman's study of guerilla warfare in Missouri is still valuable, not least for its attention to gender matters. See Fellman, *Inside War*.

as general-in-chief of the Union Army in July 1862. Halleck, therefore, knew events in the border states intimately. As early as December 1861, Halleck had authorized the use of military commissions to try treasonous activity by civilians in Missouri. However, there was a great deal of confusion about military tribunals, and it is hardly surprising that Halleck, a devotee of the law, sought something more than an ad hoc solution.[44] It was in this context that in July 1862 he turned for the first time to Francis Lieber, then professor of law at Columbia College and a known expert on the laws of war. The immediate problem, Halleck explained, was that the "rebel authorities claim the right to send men in the garb of peaceful citizens, to waylay and attack our troops, to burn bridges and houses, and to destroy property and persons within our lines," while insisting that they be accorded the same protections of prisoners of war as "ordinary belligerents."[45] He wanted Lieber to establish clear rules on the matter.

In setting Union policy, Halleck's experience in Missouri in the winter of 1861–62 proved crucial. He began the war as an expert in the law of war, and was firm in his belief that guerillas were brigands outside its protections. Nonetheless, he was disturbed by the nature of the war in the border states, and especially by the difficulties he faced in distinguishing guerillas from the surrounding civilian population. He came to believe that he was operating in a hostile country no less so than when in Mexico. Faced with hundreds, perhaps thousands, of guerillas, tired of being shot at and harassed from the woods, of wasting energy and men in fruitless pursuit of a phantom enemy, and of the drain on troops

44. On Halleck's demand for "written authority . . . to declare and enforce martial law in this department" (St. Louis) see Louis S. Gerteis, *Civil War St. Louis* (Lawrence: University Press of Kansas, 2001), 172–74, quotation at 172. Provost marshals were already operating in St. Louis when he took command. He vowed "to enforce the 'laws of war"—but increasingly found those laws insufficient for the task.

45. Lieber to Halleck, July 23, 1862, Box 27, FLP, HL, and Halleck to Lieber, August 6, 1862, Box 9, FLP, HL; and Lieber to Halleck, August 6, 1862, *O.R.,* ser. 3, vol. 2, 301, eHistory at The Ohio State University, http://ehistory.osu.edu/books/official-records/123/0301 (June 16, 2015). Halleck had known Lieber since early 1862, when Lieber wrote to him about the series of lectures on the law of war he was delivering at Columbia College Law School. See Lieber to Halleck, January 30, 1862, Box 27, FLP, HL. They became personally acquainted in difficult circumstances soon thereafter, when Lieber sought Halleck's help in finding his son, Hamilton, wounded at the battle of Fort Donelson while serving under Halleck's command. Lieber to Halleck, February 19, 1862, Box 27, FLP, HL. The term "enemy civilians and hostile citizens" is from Ash, *When the Yankees Came*, 51. Blair notes that it was in Missouri that military commanders learned the lesson about "the problems of combatting treason through courts." Blair, *With Malice Toward Some*, 55. On the confusion, see Witt, *Lincoln's Code*, 270.

to guard railroad bridges and lines, Halleck abandoned any pretense of conciliation and hit back hard against irregulars and their support networks. Halleck had learned that guerillas' ability to operate depended crucially on the support of the local population. To fight guerillas, one had to go after the people—often networks of kinfolk—who aided and abetted them. When one did, one ended up fighting not just the men but the women as well. Matters would get much worse. Already by the time Halleck had solicited the memorandum from Lieber, Union officers under his command were arresting and imprisoning women for their participation in guerilla war.[46] But if this was already a known and troubling element of irregular war none of it was evident in the document Lieber produced. In August 1862 conventional gender assumptions held.

Lieber's response to Halleck's request, his guerilla paper, broke new ground in the laws of war. It deployed a functional distinction between those who fought like regular soldiers and those who did not, regardless of their official standing and the wearing of uniforms. Therefore, unlike Halleck in *International Law*, Lieber made a distinction between partisans and guerillas. Authorized partisans were *always* to be extended the protections of the law of war, he insisted, and treated as prisoners of war when captured. In addition, people who rose up to repel invasion were also entitled them to the full benefits of the laws of war as long as they did so in respectable numbers "and in the yet un-invaded or unconquered portions of the hostile country," a crucial distinction, it is worth noting, in reference to the border states of the Upper South which were already under Union military occupation.

Guerillas, however, were a more complicated case, because they moved between "occasional fighting and peaceful habits" and used the absence of uniforms to disguise their aims. Therefore, Lieber recommended that the "rule be laid down" that guerillas come under the protections of the laws of war when "captured in a fair fight and open warfare." Lieber knew the significance of guerilla war in the border states, where rebel bands worked separately *and* in cooperation with regular Confederate troops. He was willing to extend the protection of law to guerillas who fought

46. Quoted in Sutherland, *A Savage Conflict*, 58. On Halleck's experience in Missouri, see Marszalek, *Commander of All Lincoln's Armies*, 110–11; Sutherland, *A Savage Conflict*, 58–65; and Fellman, *Inside War*, 88 and ch. 3. For an excellent account of women's centrality to guerilla war and a discussion of Ewing's order, see LeeAnn Whites, "Forty Shirts and a Wagonload of Wheat: Women, the Domestic Supply Line, and the Civil War on the Western Border," *Journal of the Civil War* Era 1 (2011): 56–78. On Confederates' response to the same problem, see McCurry, *Confederate Reckoning*, ch. 3.

openly, but he was merciless when it came to "the spy, the rebel and the conspirator," people particularly dangerous, he said, because they made hostile use of the protections afforded by the modern law of war. These "renewers of war in occupied territory," people who cut telegraph lines, burned bridges, engaged in secret communication across the lines, conveyed military intelligence to the enemy, or supported brigands—all routine activities for women rebels—would find no mercy. So even as Lieber introduced new categories to the laws of war, he was confident that he knew whom he was dealing with: "The war rebel, as we might term *him*" (emphasis mine).[47] In August 1862, in the law if not in the war on the ground, enemy women were still irrelevant, a protected class perhaps, but certainly outside war.

There is another striking thing about Lieber's first revision of the laws of war: His guerilla paper purported only to summarize the law with respect to *international* war, which is to say, between sovereign states. "I do not enter upon a consideration of their application to the civil war in which we are engaged," he said. "The application of the laws of war and usages of wars to wars of insurrection or rebellion is always undefined," he insisted stubbornly, and it was not for him to define it.[48] That reluctance to confront the issue directly in front of him would persist in the writing of his famous code 4 months later and require the decisive intervention of Henry Halleck, general-in-chief of the Union Armies.

In the 6 months following the publication of Lieber's memorandum, the challenge of guerilla warfare and the associated problem of enemy women in the occupied South escalated dangerously. Radical innovations on the ground to counter guerilla operations made their way into Union policy and, almost immediately, into Lieber's code. The mode of transmission was a particular order that Halleck issued on March 5, 1863, which Lieber, under pressure, would "weave" into the new code of laws.[49] The consequences were enormous for "the distinction,"

47. "Guerilla Parties Considered with Reference to the Laws and Usages of War," in Lieber to Halleck, n.d. (in response to letter of Halleck to Lieber, August 6, 1862), *O.R.*, ser. 3, vol. 2, 304–5, 308–9, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/123/0304 (June 16, 2015).

48. Lieber to Halleck, n.d. (in response to letter of August 6, 1862), *O.R.,* ser. 3, vol. 2, 309, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/123/0309 (June 16, 2015).

49. Halleck to Major-General William S. Rosecrans, March 5, 1863, *O.R.,* ser. 1, vol. 23, pt. 2, 107–9, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/035/0107 (June 16, 2015); and Lieber to Halleck, March 17, 1863, Box 27, FLP, HL.

by which I mean its erosion, beginning with the presumption of female innocence.

V

Halleck's instructions of March 5, 1863 introduced pregnant new terms to the laws of war by insisting on distinctions *among* enemy civilians on the basis of loyalty. Whereas in 1861 he had talked loosely of "treasonous activity," now he talked specifically of "military treason," a new crime punishable under military law. The March orders represented the culmination of a host of particular recommendations issued by commanders in the theater of war; Union policy responded first to local conditions. In Missouri, Kentucky, and Tennessee, the pressing issue was "the reign of terror" that Confederate guerillas visited upon loyal people, and Confederates' deadly coordination of regular and guerilla campaigns. By November 1862, Halleck rejected the too- soft "milk and water" policy against rebels in Kentucky and urged "an iron hand" against "domestic traitors." In February 1863, with the Emancipation Proclamation allegedly destroying Union sentiment in Kentucky, and parties of guerillas burning bridges and tearing up railroad lines in support of a Confederate invasion, the fear of cooperation between regular and irregular troops peaked. Then Major General Horatio, he of the "milk and water" approach, adopted a hard line, abandoning the "regular system of warfare" to meet rebel guerrilla parties "with their own tactics."[50]

Things were bad in Kentucky and Missouri, but Halleck's instructions emanated most directly from conditions in the area around Murfreesborough, Tennessee, under military occupation by December 1862. There, officers in Major General William Rosecrans's command, men like Major General Joseph Reynolds of the 14th Army Corps, 5th Division, operated with Confederate cavalry officer, John Hunt Morgan,

50. Halleck quoted in Marszalek, *Commander of All Lincoln's Armies,* 168, and original: Halleck to Major-General Horatio G. Wright, November 18, 1862, *O.R.,* ser. 1, vol. 20, pt. 2, 67–68, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/030/0067_ (June 16, 2015); on the Missouri executions, see Hartigan, *Lieber's Code and the Law of War*, 87; Wright to Brigadier General Julius White, February 14, 1863, *O.R.*, ser. 1, vol. 23, pt. 2, 69–70, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/035/0069 (June 16, 2015); and Governor James F. Robinson to Wright, March 1, 1863, *O.R.*, ser. 1, vol. 23, pt. 2, 96–97, eHistory at The Ohio State University, http://ehistory.osu.edu/books/official-records/035/0096 (June 16, 2015). On the effect of the Emancipation Proclamation in Kentucky see Aaron Astor, *Rebels on the Border: The Civil War, Emancipation, and the Reconstruction of Kentucky and Missouri* (Baton Rouge: Louisiana State University Press, 2012).

raiding supply lines in their rear and amidst the constant danger of coordinated attacks by rebel guerillas. In February 1863, Reynolds filed a report describing a typical expedition of his troops through a patchwork of territory, Union and Confederate. His men were in great danger, as were the loyal people of Tennessee who tried to attach themselves to his columns seeking protection. Reynolds had had enough. Conditions, he said, called for the opening of a two-front war against the Confederate military *and* rebel civilians: "The only effectual mode of suppressing the rebellion must be such a one as will conquer the rebellious individuals now at home as well as defeat their armies in the field; either accomplished without the other leaves the rebellion unsubdued." Talk of rebel "inhabitants" and "rebellious individuals," involved Union officers and men in struggles not just with enemy men but with women as well, as the new orders would confirm.[51]

In contrast to Lieber's guerilla paper, Reynolds's call for harsher treatment of rebel civilians generated a policy response notably explicit in its gender terms. The officer who forwarded it up the chain of command was clear: "The conciliatory has failed," he told Rosecrans, and a far more rigid policy was called for. "[H]owever much we may regret the necessity, we shall be compelled to send disloyal people of *all ages and sexes* to the South, or beyond our lines." Rosencrans added his endorsement and sent the report to the War Department. Two weeks later, General-in-Chief Halleck issued a lengthy response that would prove decisive in the new laws of war that Francis Lieber was already drafting.[52] Behind the explicit identification of enemy women as a policy issue lay the general problem as encountered in the border states, but also, the record suggests, one particularly troubling case: that of the woman smuggler and spy, Clara Judd. Judd's case was weaving its way through the military justice system under Rosecrans's command at precisely the moment that he called on Halleck for instructions. In places such as Tennessee it had become a matter of survival for soldiers to make distinctions between civilians, between those who posed a danger and those who did not. Women, they had learned, could pose a clear military danger.

Whatever Union soldiers had once thought, Confederate women left no room for doubt that this was their war. By March 1863, the evidence had

51. Major-General Joseph J. Reynolds to Rosecrans, February 10, 1863, *O.R.*, ser. 1, vol. 23, pt. 2, 54–57, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/035/0054 (June 16, 2015).

52. Major-General George H. Thomas to Rosecrans, February 11, 1863 and Rosecrans to War Department, February 18, 1863, both *O.R.*, ser. 1, vol. 23, pt. 2, 54–57, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/035/0054 (June 16, 2015). Lieber started drafting General Orders No. 100 in late December 1862.

dangerously accrued. In the Department of the Missouri alone, large numbers had been arrested for war crimes, most commonly for disloyal speech, forging permits, sewing rebel flags and uniforms, and running illegal Confederate mail networks.[53] Amidst the steady drip of covert activity behind the lines, women's resistance veered ominously into military espionage. Women smugglers and spies posed a particular danger. Significant numbers were arrested for passing contraband military goods to the enemy: 50,000 percussion caps, enough opium allegedly to treat the diarrhea of half of the Confederate army, and 200 yards of uniform cloth bound for use by rebel officers.[54] There were so many smugglers arrested that at the beginning of 1863, the Union started to employ female detectives to work as informants and search the bodies of women at check points.

Women were also conveying military intelligence. They were caught running rebel spy networks all over the district, including inside Union refugee camps. Numbers of them were arrested for clandestinely collecting and reporting information on military installations. One, Anna Johnson, claimed, not implausibly, to have official rank and pay as a colonel in the Confederate army for her services as a spy. Another, Jane Ferguson, was also arrested as a spy, accused of conducting a mission for a rebel captain scouting troop numbers at three different Union camps. When apprehended, she was still wearing her disguise of a Union soldier's uniform, a particular war crime already outlined by Lieber in his guerilla code.[55] It appears that the frequency of the arrest of women smugglers

53. In St. Louis on March 5, one officer reported his discovery of "a large number of women . . . actively concerned in both secret correspondence and in carrying on the business of collecting and distribution of rebel letters." They are the wives and daughters of officers in the rebel service, he emphasized, "avowed and abusive enemies of the government." See Lieutenant-Colonel and Provost-Marshal-General Franklin A. Dick to Colonel William Hoffman, March 5, 1863, *O.R.,* ser. 2, vol. 5, 319–21, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/118/0319_(June 16, 2015). For the broader context, see Kristen L. Streater, "'They Have Five Ladies at Alton': The Politics of Imprisoning Confederate Women During the Civil War," (unpublished paper in possession of author); Kristen L. Streater, "'She-Rebels' on the Supply Line: Gender Conventions in Civil War Kentucky," in *Occupied Women: Gender, Military Occupation, and the American Civil War*, ed. LeeAnn Whites and Alecia P. Long (Baton Rouge: Louisiana State University Press, 2009), 88–102; and Thomas P. Lowry, *Confederate Heroines: 120 Southern Women Convicted by Union Military Justice* (Baton Rouge: Louisiana State University Press, 2006). The latter is useful but interpretively unreliable. On St. Louis see also Gerteis, *Civil War St. Louis*.

54. Lowry, *Confederate Heroines*, 104, 150; and Streater, "They Have Five Ladies," 26.

55. On the use of female detectives, see, for example, Colonel A. C. Harding and Colonel Sanders D. Bruce to Rosecrans, February 5, 1863, and Chief of Police Sam Truesdail to Rosecrans, February 13, 1863, *O.R.* ser. 1, vol. 23, pt. 2, 46, 64, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/035/0046 and

and spies, and the confusion about how to handle such treasonous acts in areas under military occupation—the usual penalty for spies would be execution—was one proximate cause of Halleck's harsh new instructions.

In the kind of people's war waged in the border states, assumptions of women's innocence could prove deadly. It did not take many examples to make the point. In the border states, Union officers routinely targeted women who played essential roles in rebel guerilla networks. There is no evidence that the Union used torture to extract intelligence as the Confederate army did, but they did take increasingly harsh measures, subjecting women to trial by military commissions and lengthy terms of imprisonment for harboring guerillas and deserters. In August 1863, after a summer of closely monitoring and making arrests among the mostly female households of guerilla fighters around Independence, Missouri, Brigadier General Thomas Ewing ordered the forced removal of the entire (and mostly female) population of three counties. Many commanding officers concluded, as did Ewing before his harsh expulsion order, that "one of the greatest difficulties" the military faced was "the constant and correct information which the families of bushwhackers give of every movement the troops make." Women were filling a crucial, even systemic, role in guerilla action not just by providing the domestic supply line, as historian LeeAnn Whites insists, but as scouts and spies as well, turning their households into key outposts in the war.[56] Union officers also arrested women

http://ehistory.osu.edu/books/official-records/035/0064 (June 16, 2015); and Lowry, *Confederate Heroines* (Anna Johnson), 98–101, (Jane Ferguson), 147–50. On networks in refugee camps, see Fellman, *Inside War*, 71–72. For the spy claiming Confederate rank, see Lowry, *Confederate Heroines*, 99–100; for evidence of women spies on Confederate government payrolls, see Edward P. Alexander to Jefferson Davis, September 11, 1861, in *The Papers of Jefferson Davis,* vol. *7: 1861*, eds. Lynda L. Crist and Mary S. Dix (Baton Rouge: Louisiana State University Press, 1992), 356; and McCurry, *Confederate Reckoning*, 105.

56. Whites, "Forty Shirts and a Wagonload of Wheat," 63. According to the Index Project, nineteen women were subject to military commission trials for harboring guerillas and deserters. Others were tried for encouraging desertion. For a description of the military commission and court martial records, see Thomas P. Lowry, "Research Note: New Access to a Civil War Resource," *Civil War History* 49 (2003): 52–63. The numbers quoted here are based on a summary of the cases of women tried provided by The Index Project. On the torture of Confederate women, see McCurry, *Confederate Reckoning*, 124–32; Phillip Shaw Paludan, *Victims: A True Story of The Civil War* (Knoxville: University of Tennessee Press, 1981); and Victoria E. Bynum, *Unruly Women: The Politics of Social and Sexual Control in the Old South* (Chapel Hill: The University of North Carolina Press, 1992). Lieber was shocked much later to uncover evidence in Confederate archives of violence of Confederate troops toward women in North Carolina. Lieber to Halleck, March 20, 1866, FLP, HL. For Halleck's explanation of the use of "military tribunals" and procedures for military commission trials, see Halleck to Rosecrans, March 20, 1863,

who had gone beyond the provision of logistical support to engage in direct acts of sabotage. More than a few women were caught cutting telegraph wires, an activity that had plagued the Union war effort since the outset of the war, and one usually conducted in conjunction with the operations of regular Confederate troops. Sarah Jane Smith, a 19-year-old, was caught, arrested, and released twice for cutting telegraph wires in the area around Rolla, Missouri. The third time she was sentenced to hang. Her sentence was commuted by order of Rosecrans to imprisonment for the duration of the war. For the entire length of her imprisonment, Smith refused to divulge the names of her collaborators. As in other wars, those kinds of dangerous military activities tended to be the preserve of young women. In Missouri, Union men were forced to conduct a manhunt for Kate Beattie who had launched a raid to free a Confederate officer from a St. Louis prison. Beattie was held in leg irons in solitary confinement before trial. Women also acted routinely as decoys, deploying their gender as a disguise. Three men in Captain James A. Ewing's cavalry troop were killed when they were lured into an ambush by a woman working with a Confederate guerilla band. Yet other women simply rode out with guerillas as full-fledged members. One such woman, a member of William Callahan's notorious band, dressed in male attire and, disguised as "a negro man," participated in armed robberies on Union soldiers and attacks on Union families.[57]

By March 1863, in areas under military occupation and defined by people's war, assumptions of women's innocence virtually collapsed. Neither womanhood nor whiteness was sufficient protection, and that policy crumbled in the face of women's ongoing military activity. By 1863, even racial privilege had reached its limits as Union commanders confronted women's systemic role in the conflict and attempted to meet the challenge of peoples' war.

The abandonment of women's inviolability marked the turn to hard war, just as surely as the emancipation of the enslaved. The turn to hard war encoded the palpable danger posed by enemy civilians, among whom

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O.R., ser. 3, vol. 3, pt. 1, 77–78, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/124/0077 (June 16, 2015).

57. On Smith and Callahan's band, see Streater, "They Have Five Ladies," 27–29. On Beattie, see Rosecrans to President Abraham Lincoln, November 11, 1864, *O.R.,* ser. 2, vol. 7, 1118–19, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/120/1118 (June 16, 2015); and Lowry, *Confederate Heroines*, 8–11. On the ambush, see Fellman, *Inside War*, 201. The examples of women guerillas are constant but scattered throughout the literature. For another example of Nancy Hart, a known "rebel leader" in West Virginia, see Sutherland, *A Savage Conflict*, 31. For a fictional account, see Paulette Jiles, *Enemy Women: A Novel* (New York: William Morrow, 2002).

soldiers now routinely included women. Union headquarters and field offices responded in increasingly harsh terms. Union prisons filled up with rebels, among them increasing numbers of women. By the time the war was over, almost 200 women had been subjected to military commission trials for violations of the laws of war.[58] Many more faced justice in the provost marshal system, the Union occupation's military police. Most of those women were never tried or imprisoned (thus mostly eluding the archival net); they were just arrested, held, and then ordered out of the lines. There is no definitive count or study, but 360 women were arrested and imprisoned by the Provost Marshal in the St. Louis area alone.[59] The numbers of women arrested, tried, or imprisoned for treason during the war were not huge in the scheme of things, but the steady encounter with women operating in a military capacity was enough to undermine confidence in their irrelevance or innocence.[60] As Halleck had warned, in the American Civil War as in other cases of invasion, all kinds of people, even women, took up arms and rendered service in the common defense.

The idea that men make history, mostly by making war, is not only generally accepted but re-taught every generation. "Warfare," the military historian John Keegan says, "is the one human activity from which women, with the most insignificant exceptions, have always and everywhere stood apart." Women, he says categorically "do not fight."[61] In that erroneous assumption, the Civil War, like the scholarship about war, was no different. Ideas about women's innocence ran deep in military culture and were difficult to renounce. Lingering ambivalence materially shaped events. As civilized soldiers bound by the laws of war, men in the

58. The total number of military commission trials are provided in Lowry, "Research Note," 52–63. The number tried specifically for violations of the law of war are derived from summaries of case files from The Index Project. Overall, approximately 200 women were tried by military commissions and 120 were convicted; several were sentenced to death. See Lowry, "Research Note," 58–59. For Halleck's justification of "military tribunals" by the common usages of the laws of war and explanation of procedures for military commissions tribunals, see Halleck to Rosecrans, March 20, 1863, *O.R.*, ser. 3, vol. 3, 77–78, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/124/0077 (June 16, 2015). Lieber explains the difference between military commission trials and court martials in Article 13 of General Orders No. 100, *O.R.*, ser. 3, vol. 3, 149, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/124/0149 (accessed Jun. 16, 2015).

59. For the numbers in St. Louis, see Streater, "They Have Five Ladies," 7, fn. 16. On the Provost Marshal system, its many levels, and its disorganized nature, see Blair, *With Malice Toward Some*, ch. 4.

60. Women's cases represented 3.6% of the military commission trials conducted by the Union army during the war. Numbers calculated based on totals included in Lowry, "Research Note," 54, 58.

61. John Keegan, *A History of Warfare* (New York: Alfred A. Knopf, 1993), 76.

Union Army proved anxiously vulnerable to the charge that they were "making war on women." "The embarrassment is knowing what to do with them," one officer bluntly confessed. Women spies were banished repeatedly beyond the lines only to be picked up again engaged in the same act; prison sentences were commuted and dangerous women released. In the people's war of the border states, many fit Lieber's definition of the "war rebel," renewers of war in occupied territory, yet the ultimate penalty for treason was never exacted during the war. Death sentences were handed down to women spies and saboteurs but never executed.[62] Among those who escaped was Clara Judd.

The case of Clara Judd is buried in the voluminous official records of the Civil War, and like so much else that involves women, relegated to the margins if it was noticed at all.[63] Yet there is reason to believe that it was "one of the little pivots on which the fortunes of a campaign or fate of an army turn," as the arresting officer said.[64] The file of her particularly troubling case landed on Major General Rosecrans's desk at precisely the moment he turned to Halleck for a tougher policy against disloyal civilians of both sexes; therefore, there is also reason to believe that it materially informed the policy change requested in early February of 1863. Rosecrans was personally troubled by the case. Judd was remanded to prison by his orders, and after she was released in August 1863 (without his

62. Quoted in Streater, "They Have Five Ladies," 32; Dick to Hoffman, March 5, 1863, *O.R.*, ser. 2, vol. 5, 319–21, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/118/0319 (June 16, 2015); and Kinsella, *The Image Before the Weapon*, 79–80. According to Lowry, several death sentences were handed down but there is no evidence that any, other than that of Mary Surratt, were executed. See Lowry, *Confederate Heroines*. On Surratt, see Witt, *Lincoln's* Code, 289–94. Men find little honor in waging war against women, Kinsella says: *The Image Before the Weapon*, 79–80. Grotius made the same point. On the reaction of German soldiers to engagement with Soviet women in combat roles, see Isabel V. Hull, *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany* (Ithaca: Cornell University Press, 2005).

63. See Major T. Hendrickson to Hoffman (with enclosure), May 15, 1863, *O.R.,* ser. 2, vol. 5, 619–24, eHistory at The Ohio State University, http://ehistory.osu.edu/books/official-records/118/0619 (June 17, 2015); Colonel J. Hildebrand to Hoffman, February 16, 1863, *O.R.*, ser. 2, vol. 5, 277–78, eHistory at The Ohio State University, http://ehistory.osu.edu/books/official-records/118/0277 (June 17, 2015); and Hendrickson to Hoffman, *O.R.,* ser. 2, vol. 6, 149–50 (with indorsements), eHistory at The Ohio State University, http://ehistory.osu.edu/books/official-records/119/0149 (June 17, 2015). I was alerted to the case by Streater, "They Have Five Ladies" The same observation could be made about the secondary literature on the Civil War.

64. John Fitch, *Annals of the Army of the Cumberland* (Philadelphia: J.B. Lippincott & Co., 1863), 501–7.

consent), he continued to track her for the duration of the war, convinced that she was "a spy of the worst description."[65] The Judd case is, therefore, a small but critical historical convergence of the problem of enemy women and the laws of war in the American Civil War.

Mrs. Judd was arrested by army police 50 miles outside Gallatin, Tennessee on the Monday before Christmas 1862 on charges of being a "a spy as well as a smuggler." Judd was believed to be working for John Hunt Morgan, a charge seemingly confirmed by the suspicious coordination of their movements. Her arrival in Gallatin coincided precisely with Morgan's strike on Union railroad communications above the town. Judd had aroused suspicion by passing frequently through the lines between Confederate and Union territory. She was arrested in part on the testimony of a Union informant assigned to follow her, to whom she had positively identified herself as a spy. Judd was arrested by the army police and her case remanded to the provost judge of the 14th Army Corps.[66]

In the counterinsurgency struggle waged by Rosecrans's command, Judd's was not an isolated case. Other women were later sent to prison by his orders, but the Judd case acquired outsize significance. It "created not a little excitement in army circles," Provost Judge John Fitch noted in his memoirs, and was "personally examined by the general commanding and his staff." "The crime was the highest known to military law," the only "adequate punishment was death," "but the person implicit was a woman and the reverence for the sex which brave men ever feel," meant that it could not be executed. Still, Fitch said, "cases of this kind being of frequent occurrence by females," examples had to be made.[67] On January 13, 1863 Judd was sent to the military prison at Alton, Illinois "by command of Major General Rosecrans" to be confined "during the present war or until tried." Judd's proclamations of innocence involved the same strategy of deploying gender innocence that showed up in many women's

65. Indorsement of Captain and Provost-Marshal-General William M. Wiles (included in military correspondence on the Judd case), January 13, 1863, *O.R.*, ser. 2, vol. 5, 621, eHistory at The Ohio State University, http://ehistory.osu.edu/books/official-records/118/0621 (accessed Jun. 17, 2015); Hildebrand to Hoffman, February 16, 1863, *O.R.,* ser. 2, vol. 5, 277–78, eHistory at The Ohio State University, http://ehistory.osu.edu/books/official-records/118/0277 (accessed Jun. 17, 2015); and Rosecrans ("spy of worst description") quoted in Streater, "They Have Five Ladies," 35. Judd was rearrested and confined to a female military prison in Louisville. For the full story, see Streater, "They Have Five Ladies."

66. Provost-Judge John Fitch to Wiles, January 13, 1863, *O.R.*, ser. 2, vol. 5, 620–21, eHistory at The Ohio State University, http://ehistory.osu.edu/books/official-records/118/0620 (June 17, 2015); and Fitch, *Annals of the Army of the Cumberland*, 502.

67. Fitch, *Annals of the Army of the Cumberland*, 501–7.

court martial records as well. "I never had anything to do with political affairs, neither do I wish to have," she said, but her words were belied by her movements after she left prison and her rearrest in November 1863 on direct orders of Rosecrans.[68] Judd seems a classic case of what Lieber had warned of in his definition of the war rebel; noncombatants who employ their protection under the law of war as a dangerous disguise. Although this time the noncombatant was a woman.

The call for a harsh policy in response to the military danger posed by disloyal civilians arose from a convergence of events, but the explicit inclusion of women—and the danger to the distinction it posed—seems to have been entangled specifically with the arrest and imprisonment of Clara Judd. Certainly her case was the escalation point, the moment between January and March 1863, when local conditions in Tennessee materially informed the new laws of war on which Lieber was beginning to work. On February 18, 1863, Rosecrans sent the reports of his subordinates to General-in-Chief Henry Halleck. Two weeks later came the response.

Halleck's March 5 orders took direct aim at the matter of the distinction and its predicate assumptions of gender and innocence. Throughout, Halleck spoke explicitly in terms of the "laws and usages of war," amending them radically even as he claimed only to deploy their extant forms. In those instructions, Halleck not only approved the "more rigid treatment of all disloyal persons within the lines"; he further urged the adoption of strict distinctions between noncombatants on the basis of loyalty, thus separating the "truly loyal . . .who favor or assist the Union forces. . .[and] should receive the protection of our arms," from the rest of the "class known in military law as non-combatants," who in "a civil war like that now waged" should be assumed "to sympathize with the rebellion rather than with the Government." The assumption of innocence thus jettisoned, Halleck moved decisively against the corequisite entitlement of

68. Wiles, January 13, 1863, *O.R.*, ser. 2, vol. 5, 621, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/118/0621 (June 17, 2015); and Hildebrand to Hoffman, February 16, 1863, *O.R.,* ser. 2, vol. 5, 277–78, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/118/0277 (June 17, 2015). For Clara Judd's statement (dated May 11, 1863) see *O.R.,* ser. 2, vol. 5, 621–24, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/118/0621 (June 17, 2015). For the debate about her release, see Major T. Hendrickson to Hoffman, May 15, 1863 (with enclosures from And. Wall to T. Hendrickson, May 12, 1863), *O.R.,* ser. 2, vol. 5, 619–20, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/118/0619 (accessed Jun. 17, 2015); and Hendrickson to Hoffman (with indorsements), July 25, 1863, *O.R.*, ser. 2, vol. 6, 149–50, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/119/0149 (June 17, 2015). See *O.R.*, ser. 2, vol. 6, 150, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/119/0150 (June 17, 2015).

noncombatant protection. Here he broke new ground in the laws of war instructing officers in the United States Army to pursue as "war rebels," (a term already used by Lieber in the guerilla code) and "military traitors"—an entirely new category—those noncombatants in occupied territory caught rising in arms or giving information to the enemy. Such people, he said, incur the penalty of death. Halleck left no doubt that he meant to include women. Someone found to be engaged in "military treason," he instructed, "not only forfeits all claim to protection, but subjects *himself or herself* to be punished either as a spy or military traitor, according to the character of the particular offense." The particular dangers posed by enemy women had, finally, become manifest and explicit. When it came to military treason, there would be no distinction of sex. In explicitly gendered language, the ominous category of military treason or "war traitor" was introduced. Appearing first in field orders, it would, almost immediately, be woven into the new, official laws of war that the Union government adopted.[69]

It was a momentous development. The idea that noncombatant protections were never absolute, that even women could surrender immunities, had been part of the laws of war for centuries. But Halleck's instructions of March 5, 1863 radically amended the law by introducing troubling new categories that worked to erode the crucial distinction between combatant and civilian and the associations of gender and innocence on which the laws of war rested. It is worth noting, given how explicit Halleck was about women's accountability for treason, that he did so based on precisely the idea of "war treason" that historians and theorists have long assumed to be the creation of Lieber and his famous Code.[70] The turn to hard war and the new laws of war that came with it encoded

69. Halleck to Rosecrans, March 5, 1863, *O.R.*, ser. 1, vol. 23, pt. 2, 107–9, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/035/0107 (June 17, 2015). The term "military traitor" does not appear in the *O.R.* before this date, and it appear again later only in reference to Halleck's instructions of March 5, 1863. "War rebel" had been used by Lieber in the guerilla memorandum. See Lieber to Halleck, n.d. (in response to letter of August 6, 1862), *O.R.*, ser. 3, vol. 2, 301–9, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/123/0301 (June 16, 2015). Halleck's letter was reprinted in the *New York Times* on March 15, 1863. See "The Conduct of the War.; Letter from Gen. Halleck to Gen. Rosecrans on the Treatment of Disloyal Persons Within our Lines. The Case of Gen. Stoughton—Note from. . .," *New York Times*, March 15, 1863 http://www.nytimes.com/1863/03/16/news/conduct-war-letter-gen-halleck-gen-rosecrans-treatment-disloyal-persons-within.html (June 17, 2015).

70. See Kinsella, *The Image Before the Weapon*, 88–89, and ch. 4.

a particular history with enemy women.[71] Even as Lieber was writing his code, gender had proven an unreliable material basis of the distinction, and the scope of allowable violence had expanded dangerously.

VI

On December 17, 1862, Francis Lieber had received official orders that appointed him to a board to write a new code of war.[72] The code was published on April 24, 1863, and widely distributed quickly thereafter, including in a pocket-sized version. It entered history as General Orders No. 100, "Instructions for the Government of Armies of the United States in the Field." It was a code perfectly expressing the new Union resolve to wage hard war: The decision to take the war directly to slaveholders by the emancipation and military enlistment of their slaves, and to civilians by revoking the immunity of those whose treason sustained the Confederate cause. It was a philosophy succinctly expressed in Article 29, "The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief." And in Articles 14 and 15, which offered a definition of "military necessity" so permissive that it authorized virtually any action "indispensable for securing the ends of the war," including those against traditionally protected parties. This was the first definition of military necessity ever offered in the laws of war. Hence, although the code embraced the principle of noncombatant protection "in modern regular wars," and accepted and even extended the conventional idea of women as a specially protected class in war (most famously in Article 37, which

71. After Halleck's first use on March 5, 1863, the term "military treason" appeared a few times before its adoption in Lieber's Code. See Halleck to Major-General E. V. Sumner, March 17, 1863, *O.R.,* ser. 1, vol. 22, pt. 2, 158–59, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/033/0158 (June 17, 2015); and General Orders No. 30, Department of the Missouri, St. Louis, April 22, 1863, *O.R.,* ser. 1, vol. 22, pt. 2, 237–44, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/033/0237 (June 17, 2015). On March 31, Halleck wrote Major-General Ulysses S. Grant expressing his view that "the character of the war has very much changed within the last year. There is now no hope of reconciliation. . .We must conquer the rebels or be conquered by them." He had used almost identical words in a letter to Lieber. He now advocated the turn to hard war, by which he meant a policy of slave emancipation and of bringing war to disloyal civilians. See Halleck to Grant, March 31, 1863, Box 9, FLP, HL.

72. Special Orders No. 399, War Department, Adjutant General's Office, Washington, *O. R.*, ser. 3, vol. 2, 951, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/123/0951 (June 17, 2015). He had previously been informed by telegraph from Halleck. See Lieber to Halleck, December 7, 1862, Box 27, FLP, HL.

prohibited rape), it also gave wide latitude to commanders about the extent and kind of violence allowable in pursuit of military advantage. Generations of international lawyers have seen it as a great humanitarian document, but as John Witt has argued, "Its warrant for violence was daunting,"[73] And there is little quarrel among historians either about the historical significance of the code or its most radical features.

Lieber's code is widely recognized as a landmark in the history of international law precisely because it fundamentally redefined the distinction between combatant and civilian on which the whole body of law is founded. Geoffrey Best says it introduced the idea of "The Civilian as Enemy." John Witt says that Lieber's code "tore down the wall between soldiers and non-combatants that Enlightenment jurists had tried to build." In every instance, what historians point to is the definition of military necessity offered in Section V, and, especially, they point to Section X, "Insurrection–Civil War–Rebellion," which introduced a fundamental distinction between loyal and disloyal civilians, and instructed commanders to throw the full burden of war on the disloyal. It is in Section X that the idea of "war treason"—a new concept in the laws of war—gets full expression: "Armed or unarmed resistance by citizens of the United States against the lawful movement of their troops is levying war against the United States, and is therefore treason." Helen Kinsella points specifically to two parts of Section X, Articles 155 and 156, in which the condition of loyalty of the noncombatant appears, as key to the radical erosion of civilian immunity the code represented. "General Orders 100 invokes gender and civilization to serve the distinction in ways familiar from the past," she concludes, but "the referents of *innocence* now also include loyalty as well as inoffensiveness or ignorance evident in prior uses."[74]

The various drafts of Lieber's code are available in his personal papers, and if, as these scholars argue, Section X and Articles 155 and 156 bear the weight of historical significance more than any other in Lieber's code, it is

73. Article 15, in General Orders No. 100, *O.R.*, ser. 3, vol. 3, 150, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/124/0150 (June 22, 2015); and Article 29, in General Orders No. 100, *O.R.*, ser. 3, vol. 3, 151, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/124/0151 (June 22, 2015). Witt, *Lincoln's Code*, 234. The text of Article 37 reads as follows: "The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women: and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished." Article 37, in General Orders No. 100, *O.R.*, ser. 3, vol. 3, 152, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/124/0152 (June 22, 2015).

74. Best, *Humanity in War*, 200; Witt, *Lincoln's Code*, 233; and Kinsella, *The Image Before the Weapon*, 88–89.

highly relevant that the document as originally written by him included neither of those articles. Indeed it contained no section on Civil War at all.

The idea for the code originated with Lieber himself. He lobbied Halleck about the need for a "set of rules and definitions, providing for the most urgent cases, occurring under the law and Usages of War and on which Articles of War are silent." Even as Halleck secured Lieber's appointment, their underlying policy motives were never the same. Lieber tried to address Halleck "the jurist, no less than the soldier" about the need for a code on matters as diverse as the "Spy, Paroling, Capitulation, Prisoners of War etc." Lieber was ambitious, and his concerns were largely professional and focused on rules governing war between sovereign states as was conventional in international law. He was determined to challenge the dominance of Vattel and the American Henry Wheaton, so often cited as an expert on international law. But Halleck responded less as a jurist than as a soldier, or, rather, as the general-in-chief, far more concerned with the particular civil war he was fighting than with international war. In tapping Lieber to write the code, Halleck's main concern was to obtain a legal structure that legitimized the use of military courts and martial law in the occupied South. He wanted to force Congress to recognize that there was a "common law of war" so that he could obtain "tribunals" and punish offenses, including treason, under it. That "is all we want," he wrote his friend. As it turned out, he got much more—and much less—than he asked for.[75]

Lieber started on the document toward the end of December 1862. By February 20, 1863, he had completed a first draft, which he had printed and sent to a number of people including Halleck. "[N]othing of the kind exists in any language," he wrote to the general. "I had no guide, no ground work, no text book" but was "laying down, for the first time such a code, where nearly everything was floating."[76] But if all was amorphous and free floating, Lieber nonetheless brought to the task some fundamental beliefs, none more passionately held than the unity and sovereignty of the nation. It was one of Lieber's core principles that "the

75. Lieber to Halleck, November 13, 1862, Box 27, FLP, HL; and Halleck to Lieber, November 15, 1862, Box 9, FLP, HL. Trial by military commissions had been authorized since the beginning of the war, most surprisingly in the case of the Dakota War of 1862. These trials became more common after the adoption of General Orders No. 100. On the case of the Dakota trials, see Maeve Herbert, "Explaining the Sioux Military Commission of 1862," *Columbia Human Rights Law Review* 40 (2009): 743–98; Carol Chomsky, "The United States–Dakota War Trials: A Study in Military Injustice," *Stanford Law Review* 43 (1990): 13–98.

76. Lieber to Halleck, June 21, 1863, Box 27, FLP, HL; Lieber to Halleck, October 3, 1863, Box 28, FLP, HL; and Lieber to Halleck, February 20, 1863, Box 27, FLP, HL.

National type is the *normal* type of Government of our race in modern times." It was a statement he made virtually verbatim throughout his long life. It goes some way toward explaining why the first draft of his code treated only international war. For Lieber, international law governed war only between sovereign states. To him, sovereignty had meaning exclusively in the international sense. "The United States are sovereign with reference to other independent or sovereign States, and that is all," he once explained. To him there could be no such thing as sovereignty of individual American states (South Carolina, for example,) as was claimed in the Confederate Constitution; he denounced the very idea of it as a species of "hype-Calhounistic remarks" and a relic of the barbarism of slavery.[77]

There was much that was new in Lieber's first draft of the code. It already included the expansive definition of military necessity mandated by hard war, and it included the many crucial articles on emancipation and black soldiers.[78] But, strikingly, as with the guerilla pamphlet 6 months before, Lieber avoided entirely the issue immediately in front of him: the code as first drafted contained no Section X on civil war. "I have said nothing on Rebellion and Invasion of our country with reference to the Treatment of our own citizens by the command Genl," he told Halleck in the letter accompanying the first draft. It fell, he said, outside the charge of "our board."[79]

Halleck was not amused. The general-in-chief's response is preserved in Lieber's papers, and his notes and emendations were decisive in shaping the final form of the code and its historical significance for the distinction as now understood. Across draft article 19 (what became Article 37) which accorded amplified protections for noncombatants and "especially women," Halleck wrote this: "I think it would be well to point out the

77. Lieber to Halleck November 25, 1862, Box 27, FLP, HL; Lieber to Judge Amos M. Thayer, February 3, 1864, in *Life and Letters of Francis Lieber*, 339–41, quote at 341. To Lieber, the American Civil War was a war of national unification like that of Italy or, later, Germany; he talked of "the national side" and the "southern side" in the American Civil War. Lieber to Senator Charles Sumner, June 16, 1864 and Lieber to Dr. S. Tyler, January 14, 1867, in *Life and Letters of Francis Lieber,* 348, 367. Lieber's views of national sovereignty and state unity were of transnational interest. See his communications with Johann Kaspar Blunctshli and Édouard Laboulaye in the Huntington Library correspondence; and Stephen W. Sawyer and William J. Novak, "Emancipation and the Creation of Modern Liberal States in America and France," *Journal of the Civil War Era* 3 (2013): 466–500.

78. Lieber insisted that slavery had legal standing only as a municipal institution; that the institution had no standing in international law. General Orders No. 100, Art. 42. On that, see also the recent argument of James Oakes, *The Scorpion's Sting: Antislavery and the Coming of the Civil* War (New York: W. W. Norton and Co., 2014), 158–59.

79. Lieber to Halleck, February 20, 1863, Box 27, FLP, HL.

military status of different classes, *vide my letter to General Rosecrans, March 5*" (emphasis mine). The damage to the distinction was done right there. The reference to his orders embedded war as it was waged against enemy civilians and enemy women in Tennessee in the laws of war thereafter. The position of Halleck's note on Lieber's text is weighted with meaning. It indicates beyond a doubt that he understood his orders, and the condition of loyalty (or innocence) that they introduced, as an explicit limit on noncombatant protections and a rejection of the a priori conjunction of women and innocence on which they were usually based. Halleck's dissatisfaction with the draft code was evident. On the back cover of the printed draft, he wrote this preemptory note: "The Code, to be complete and to be more useful at the present time should embrace civil war as well as war between states or distinct sovereignties. The attention of Dr. Lieber & the Board is particularly called to this subject." Just in case there was any confusion, he added this: "I would respectfully suggest that the question of risings en masse be more fully discussed. Risings en masse not authorized by the law of the land, or by special military authority are not deemed lawful by European juris consults." In seeking a code for the war that they were actually fighting, the practical needs of the military man informed those of the scholar of international law. Witt says that Lieber sought to write a new code for the age of democracy, mass armies, and people's wars. To the extent that he did, it is clear that he was forced to the task by Halleck.[80]

Francis Lieber would eventually write a code of war for civil wars as well as international ones, but he was never comfortable with the task. The prolix version that he ultimately drafted—cut to the nub in the final document—included a preamble full of disclaimers about shoehorning civil war into the law of nations. Still, after he received Halleck's response, he immediately obtained a copy of Halleck's orders of March 5, 1863 and incorporated them into the revised code, including the radically new idea of war treason. "The contents of your letter to Genl Rosecrans came in much better at the end where I, now, speak of Civil War, than where you point to it by marginal note," he informed Halleck as he was rewriting. On March 23, he sent Halleck a new draft explicitly acknowledging his debt: "I have added some sections to the portion of the Code which treats of insurrection, Rebellions etc – sections in which I have been motivé by your letter to Gen Rosecrans." Halleck whittled that draft back considerably, but the crucial

80. LI 182B (photostat of Halleck copy), FLP, HL; Draft article 19 stated "The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; unmixed private property. . .the persons of the inhabitants, especially those of women; and the sacredness of domestic relations." The edited draft was sent near March 13, 1863. See Halleck to Lieber, March 13, 1863, Box 9, FLP, HL; and Witt, *Lincoln's Code*, 231. Halleck's invitation to Lieber at 229. Witt says "age of democratic nations and mass armies."

articles remained: concrete material traces of his original orders in the new laws of war.[81]

In the end, Halleck's orders of March 5, 1863—its terms of loyalty as a condition of civilian immunity and the crime of military treason on which they were based—became permanent in General Orders No. 100. But even as the debt of the first document to the second was marked, the unity of those concepts and historical context was lost, including the particular challenge of enemy women that was so evident in Halleck's formulation. That is because in the final version of the code, Lieber split the orders into two parts, embedding the definition of war treason in Section V, and the distinction between civilians on the basis of loyalty at the end of Section X. Thus Section V, Articles 90, 91, and 92 defined the war traitor and specified the punishment: "If the citizen or subject of a country. . .invaded or conquered gives information to his own government. . .or to the army of his government, he is a war traitor and death is the penalty of his offense." And Section X, Articles 155 and 156, set the new terms of the distinction, at least as it applied in civil wars. Article 155 repeated the conventional distinction between combatants and noncombatants ("unarmed citizens of the hostile country") and then proceeded, per Halleck, to eviscerate it: The military commander of the legitimate government in a war of rebellion distinguished "between the loyal citizen . . .and the disloyal citizen," and further among the disloyal between those who simply sympathized and those who "without taking up arms," gave "aid and comfort" to the enemy. Article 156 codified the protection of the persons and property of those known to be loyal while instructing the commander to "throw the burden of the war . . .on the disloyal citizens" and to subject "noncombatant enemies" to a "stricter police" than they have "to suffer in regular war." What remains of the distinction after Article 157 is difficult to discern: "Armed or unarmed resistance by citizens of the United States against the lawful movement of their troops is levying war against the United States, and is therefore treason." The sentence in Halleck's orders that explicitly included enemy women in the scope of the law—the pointed use of the male and female pronouns "himself and herself"— was dropped. Substantively, women's accountability as war traitors was already provided for: Article 102 (Section V) stated that "the law of war like the criminal law regarding other offenses, makes no difference on account of the difference of sexes, concerning the spy, the war-traitor or the war-rebel." The question of what that had to do with the Civil War or new conditions of loyalty or

81. Lieber to Halleck, March 4, 1863, March 17, 1863, March 23, 1863 [n.d. on letter], Box 27, FLP, HL; and Halleck to Lieber, April 8, 1863, Box 9, FLP, HL. The long version referenced here is LI 182A, FLP, HL.

innocence imposed on civilians was no longer discernible from the text. In splitting the orders and excising the particular reference to women, Lieber did something that changed our reading of the code.[82]

The problem of defining military necessity runs through the law of war from the sixteenth century to the late twentieth century, and as is so often the case, in Lieber's Code, the conduct of the army toward women is seen to epitomize the problem. In its reference to them the scope of violence that the law allows and the imperative of restraint it must enact are defined. In 1863, in the context of the American Civil War, we see in the code that Lieber wrote the pull of the same two forces evident in Union policy on the ground: Are women innocent parties to be protected in war, or are they the enemy? To put it another way, who are to be recognized as noncombatants and what protections must be accorded to them? What Lieber added to the laws of war is not in doubt. His code changed the answer to the question about what armies can legitimately do to noncombatants in war, and the broad scope of violence thereby established. Behind his reformulation lay the experience of the American Civil War and the bitter lessons it taught, including that women are not simply victims or booty in war. In any rising en masse, they are part of the people who militarily resist. Women do fight, especially (but not only) when their country is invaded. In the Spanish Peninsular War (the touchstone of all thinking about modern people's war), in the American Civil War, in the Italian Wars of Unification, in the Spanish Civil War, and in the Algerian War, the same lessons are taught, reluctantly learned, and promptly forgotten.[83] Women are not outside of war. They are not passive witnesses to their people's struggles.

This focus on enemy women is, admittedly, counterintuitive. The great preponderance of feminist scholarship on women and war, international law, and human rights reflects a deep commitment to the principle of

82. Articles 90, 91, 92, 155, 156, and 157, in General Orders No. 100, *O.R.*, ser. 3, vol. 3, 158, 163, 164, eHistory at The Ohio State University http://ehistory.osu.edu/books/official-records/124/01508 (June 22, 2015).

83. It seems too obvious a point to require documentation, but on the Peninsular war in which women's role became part of national mythology, see Fraser, *Napoleon's Cursed War*; on the Italian wars of unification, see the example of the "Garibaldiennes" (noted but treated as an absurdity) in Best, *Humanity in Warfar*e, 197–98; on the Spanish Civil War, see Paul Preston, *The Spanish Holocaust: Inquisition and Extermination in Twentieth-Century Spain* (London: Harper Press, 2012), and Paul Preston, *The Spanish Civil War: Reaction, Revolution, and Revenge* (New York: W. W. Norton & Co., 2007); and on Algeria, where women's role was prominently featured in Gillo Pontecorvo's famous 1966 film *The Battle of Algiers,* see Horne, *A Savage War of Peace.* It would require a collective effort to assemble the master list.

protection and, as such, mostly focuses on the adoption and enforcement of protective measures and resolutions, particularly with respect to sexual violence in war. Lieber's code figures centrally in this literature as well, particularly Article 37, the "first 'modern' effort to prohibit rape in war." The way women participate in conflicts as active combatants, fighters, or members of military resistance movements figures far less prominently although it is a critical dimension of the related histories, not least because of its implications for "the distinction."[84]

By 1863, it was impossible to distinguish between combatants and civilians on the basis of gender alone. Loyalty was now a key condition for men and women alike. The damage to the distinction—the disruption of the pairing of women and innocence and the related erosion of civilian immunity—had roots in the struggle of the Union army with enemy women. The collapse of the gender assumption that had long undergirded the category of the civilian therefore was a cause, and not just a consequence, of the weakening of the distinction in Lieber's code. It was a gendered history obscured but manifest in the laws of war.

VII

The publication of General Orders No. 100 was only the beginning of the controversy over it. The code had a long life at home and abroad. Its harsh formulations on war rebels and military traitors were used by United States Army officers against Filipino resistance fighters in the guerilla warfare of the Spanish–American war. It was not replaced as the standard set of instructions for the United States Army until 1914.[85] Lieber's influence

84. For the quote and an excellent statement of the state of the field from a historical perspective, see Elizabeth D. Heineman, ed. *Sexual Violence in Conflict Zones: from the Ancient World to the Era of Human Rights* (Philadelphia: University of Pennsylvania Press, 2011), 18. For a more contemporary perspective emphasizing the need to move beyond simplistic dualities (men as perpetrators and women as victims) including in scholarship and development policies, see Caroline O. N. Moser and Fiona C. Clark, *Victims, Perpetrators or Actors: Gender, Armed Conflict and Political Violence* (London: Zed Books, 2001); and Kathleen Kuehnast, Chantal de Jonge Oudraat, and Helga Hernes, eds. *Women and War: Power and Protection in the 21st Century* (Washington, DC: United States Institute of Peace Press, 2011), 1–18. For one fascinating early grappling with the issue focusing on women terrorists, see Julia Kristeva (trans. Alice Jardine and Harry Blake), "Women's Time," *Signs* 7 (1981): 13–35, esp. 28.

85. On the Philippines, see Witt, *Lincoln's* code, 353–65; and Paul Kramer, *The Blood of Government: Race, Empire, the United States, and the Philippines* (Chapel Hill: The University of North Carolina Press, 2006). Kramer seems unaware of the earlier history of guerilla war that shaped the powers accorded the United States Army in wars of occupation by General Orders No. 100.

on the international law of war was even more long lasting, not least through its adaptation by European jurists such as Johann Bluntschli and the Russian Fedor Frederick Martens. General Orders 100 became the template for the resolutions adopted by the Brussels Conference in 1874 and the Hague Conventions of 1899 and 1907.[86] International lawyers might continue to celebrate the code as a great humanitarian document, but that was a view that took hold in places far removed in time and place from its original field of operation. In 1870, when Lieber's French correspondent, the political theorist Édouard Laboulaye, wrote an introduction to a French edition of Lieber's Code, it was the powerful new scope of state power that he celebrated, not its humanitarianism. "These instructions are a masterpiece," he wrote. "It is no small accomplishment to have established right within the empire of force by placing the uses and even the excesses of war under yoke of the law." Laboulaye had watched with great interest as Lieber hammered out the code, convinced of its importance to France's "new liberals." What it offered, he thought, was a project of democratic imperium so new that it served as a model of modern governance for liberal European colonial powers such as the French in Algeria. By marrying national sovereignty to the advancement of individual liberty and rights, it gave France all the moral authority of the republic *and* the power necessary to govern its colonies.[87]

86. Frank Freidel, Lieber's biographer, says that Bluntschli's 1866 treatise was "little more than a translation." See Friedel, *Francis Lieber*, 340, 402–3. On the "Hague track" and the overlooked nineteenth century German and Russian lineage of the law of war and international humanitarian law, see Peter Holquist, "'Crimes Against Humanity': Genealogy of a Concept (1815–1945)," unpublished paper in the author's possession. Since delivered as a lecture: Peter Holquist, "'Crimes Against Humanity': Genealogy of a Concept (1815–1945)," (presented at the Russian, East European, and Eurasian Center [REEEC], University of Illinois, Champaign, IL, February 5, 2015). Lieber's correspondence with Bluntschli, Édouard Laboulaye (who translated the code into French) and the Belgian scholar and jurist Gustave Rolin-Jaequemyns is in his papers at the Huntington Library. In April 1872, he was officially consulted by the International Committee of Geneva. See *Life and Letters of Francis Lieber*, 422. Lieber died in 1873 just before the first Brussels meeting, but nonetheless, Martti Koskenniemi counts him as one of founders of the field of international law. See Martti Kosenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (New York: Cambridge University Press, 2002), 92.

87. Quoted in Sawyer and Novak, "Emancipation and the Creation of Modern Liberal States in America and France," 492; Édouard Laboulaye to Francis Lieber, July 31, 1863, Box 16, FLP, HL, (term is "*nouveaux liberaux*"). Laboulaye wrote articles on the Civil War for the French press including one on the election of 1864 emphasizing its significance not just to the United States, but also to France and Europe. He continued to follow Lieber's work on Reconstruction and on black suffrage as being meaningful for French efforts in democracy and self-government. Laboulaye to Lieber, October 4, 1864, September 28, 1865, Box 16, FLP, HL.

Lieber's code was at once a testament to the American political tradition of using law to constrain state power and to expand it. The code was a set of instructions written to govern the operations of armies in the midst of a brutal civil war for the nation's existence. But if that was one posited relationship between law and power, the code's transnational and enduring utility and relevance followed from another, equally important part of the American political tradition: the tendency to make law a means of claiming new powers. For the strong states of Europe waging their own wars of occupation in the 1870s, Lieber's code was a brilliant model because of how he used law not to constrain power but to *create* it; to make unprecedented claims of military power lawful for the states who chose to use them. Section X with its harsh occupiers code was especially salient.[88]

In the United States and the Confederate States of America, the damage to the distinction was recognized immediately. Questions of what humanity was owed in war and what the laws of war required of armies emerged immediately upon the code's adoption, and focused precisely, and predictably, on the protection of women and children. That issue was the substance of the Confederate response to the code itself, and it erupted again and repeatedly over the legality of Major General William Tecumseh Sherman's actions in his military campaign in Georgia and South Carolina in 1864 and 1865.[89] The recognition of women as the enemy might have been necessary in war, but notwithstanding the new laws of war, the distinction, and, therefore, the assumption of women's

88. John Witt says the American code "had made the laws of war safe for the powerful states of late nineteenth century Europe, just as it had for the Indian wars in the American west," but that argument follows far more directly from Section X of the code than the emancipation articles on which his thesis turns. Witt, *Lincoln's Code*, 345–46.

89. For the Confederate response, see, particularly, the comments of the Secretary of War, James A. Seddon in Seddon to Colonel Robert Ould, June 24, 1863, *O.*R., ser. 2, vol. 6, 41–47, ehistory at the Ohio State University http://ehistory.osu.edu/books/official records/119/0041 (June 17, 2015). Seddon focused particularly on the way that the code authorized acts of violence "against non-combatants, and especially the women and children." He also denounced Lieber's concept of war treason: "The words war-traitor, war rebel are not words of an American vocabulary" but could be embraced only by one "alien by nativity to the Constitution, laws and institutions of the United States" like the "German Professor" who was, he said, more familiar with the ways of "imperial or military despots on the continent of Europe." On Sherman's actions in Atlanta, see the remarkable real time exchange across the lines between General Sherman and General John Bell Hood, C.S.A. Hood said that Sherman would answer to the civilized world for his abuse of the common laws of war and abandonment of his obligation to protect innocent women and children. General John Bell Hood to Sherman (enclosure), September 9, 1864, *O.R.*, ser. 1, vol. 39, pt. 2, 415, ehistory at The Ohio State University http://ehistory.osu.edu/books/official-records/078/0415 (June 17, 2015).

innocence which grounded the category of the civilian, proved to be essential.

In the American Civil War, as in other regular wars and rebellions of the nineteenth and twentieth centuries, women could and did make war and armies had to deal with them. In 1863, amidst a brutal people's war that started to show the scope of modern warfare, the Lincoln administration rewrote the laws of war in accordance with that new reality. But even so, the cultural power of the distinction and its gender referents of women and innocence were not easily abandoned. For parties on both sides of the conflict, the protection of women continued to set the standard of a civilized army and a civilized cause. However fragile it was, the distinction, and the assumption of women's innocence, was always rehabilitated.[90]

There is much at stake in the idea of women's innocence and of noncombatant protection in war. It represents an investment in the gender order itself (in marriage and its desirable hierarchies) as a necessary basis of the public order and in the desire to limit the destructiveness of war. It helps explain the deep reluctance to confront the role of women as participants in war, and the need to forget once the war is over. When it comes to women, the lessons of war, once taught, are promptly and officially forgotten. As was the case after the American Revolution, after the Civil War, on matters of gender, Thermidor set in.

Frances Lieber embodied the pattern, including the rush back to orthodoxy. Notwithstanding all he knew about war in the nineteenth century—about the Spanish women fighters celebrated by their nation and forever associated with the peninsular war; about the women partisans and guerillas in European wars of national liberation and unification; and, not least, about the women guerillas, soldiers, spies, rebels and war traitors targeted by the Union and his own code of war—Lieber obscured as much as he revealed in the code itself. And in the postwar period, appalled at the demand for women's suffrage in his own state of New York, he stuck willfully to the view that women had played no part in the war except as patriotic "mothers and sisters and daughters." That "there are exceptions" in moments of national emergency, he was willing to admit, but by nature, he insisted still, women belonged to the realm of marriage and the family, not politics or the state.[91]

90. An argument made by Kinsella, *The Image Before the Weapon*.

91. Lieber, "Reflections on the Changes Which May Seem Necessary," 181–219, quotations at 207, 209. For more on Lieber's views on women's nature and his opposition to suffrage, see the draft fragments and notes in his papers at the Huntington Library: Lecture on Woman Suffrage, and folder of clippings (which includes the text of a brilliant response by a woman published in *The Nation*) L1 114, FLP, HL.

However, neither Lieber nor anyone else could restore the antebellum gender order. Battles over the legal and political status of women only intensified in the postwar years. With a women's rights movement behind them, activists, such as Elizabeth Cady Stanton and Susan B. Anthony, harbored real hope that they could convert a new public rationale of service and sacrifice into the vote or some concretely expanded set of women's rights. They failed, but it was not an entirely unreasonable thought. Slave emancipation provoked a process of constitutional revision so fundamental that it was difficult to constrain its meanings for marriage. In the eyes of the law, Amy Dru Stanley has said, slavery and marriage "were symmetrical bonds, categorized together as relations of domestic dependency." Slavery and marriage had been linked for so long as the twin pillars of the social and political order that conservatives feared—and radicals hoped—that the dissolution of one would work change on the other. Charles Sumner's draft of the Thirteenth Amendment wedged open that possibility. "All persons are equal before the law," it read, affirming all persons as rights-bearing individuals, prompting one senator to observe in horror that "Before the law a woman would be equal to a man, a woman would be as free as a man." And that was precisely the problem. Advocates of the amendment scrambled back to narrower free soil ground, issuing assurances that the legal abolition of a master's right of property in his slave would not diminish a man's property in the service of his wife.[92]

As so often before, in the Civil War era radical political change ran aground on the shoals of gender. If anything, the emancipation of 4,000,000 men, women, and children only intensified the value of marriage as a tool of public policy. How else could the federal government absolve itself of responsibility for the welfare of all those dependents? It was virtually a condition of emancipation that slave husbands would assume the responsibility. War breathed new life into the old republican paradigm of the citizen-soldier. African-American men, so it was said, earned freedom, citizenship, and, temporarily at least, the right to vote by virtue of their military service to the nation. Among the freedman's new rights was the right to a wife and the powers of a husband and a father. Freed into coverture, African-American women were henceforth to be protected and governed

92. The literature on these subjects is now significant, but for an introduction see the following: On the dangers of the Thirteenth Amendment for the rights of husbands, see Cott, *Public Vows*, ch. 4, quotation 80; and Amy Dru Stanley, "Instead of Waiting for the Thirteenth Amendment: The War Power, Slave Marriage, and Inviolate Human Rights," *American Historical Review* 115 (2010): 732–65. On the long proslavery usage of marriage to legitimize slavery, see Stephanie McCurry, *Masters of Small Worlds: Yeoman Households, Gender Relations and the Political Culture of the South Carolina Low Country* (New York: Oxford University Press, 1997).

under the laws of marriage like all adult women. If the emancipation and enfranchisement of freedmen pointed to a new conception of the citizen and of American democracy itself, it was not one that reached women of any race. The American Civil War did not just advance the struggle for women's rights; it erected powerful new impediments to any serious reconceptualization of women's political identity and standing in the nation.[93]

The case of enemy women and the laws of war in the American Civil War thus compels us to contend with the larger historical problem of women and war: about how much of that past is disowned—or rendered exceptional—when it is in fact foundational. In the face of all the evidence, Lieber reconstructed the liberal idea of women as passive witnesses to a history made by men. That makes it all the more important to insist on the other history of women, the one he would not own up to, but which materially shaped the laws of war into the twenty-first century.

93. As late as March 1865, Congress passed legislation extending freedom to enslaved women in Kentucky (a Union slave state) as the wives of Union soldiers. See Stanley, "Instead of Waiting for the Thirteenth Amendment," 732–65. The idea that all slave women were wives was of course a fiction (especially given the illegality of marriage for slaves in the United States), but it was an important one in policy terms. On marriage and emancipation, see Stephanie McCurry, "War, Gender and Emancipation in the Civil War South," in *Lincoln's Proclamation: Emancipation Reconsidered*, ed. William Blair and Karen Younger (Chapel Hill: University of North Carolina Press, 2009), 120–50; and the recent book by Katherine Franke, *Wedlocked: The Perils of Marriage Equality* (New York: New York University Press, 2015). On the meaning for women's suffrage, see Stansell, *Feminist Promise*, ch. 4; and Ellen Carol DuBois, *Feminism and Suffrage: The Emergence of An Independent Women's Movement in America, 1838–1869* (Ithaca: Cornell University Press, 1978).