

THE LAWS OF WAR AND THE STRUCTURE OF MASCULINE POWER

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The laws of war may well restrain what can be done in war, but in the process they also enable certain forms of power. This article seeks, drawing on the feminist critique of the laws of war and the study of men and masculinities, to analyse the project of humanising war as specifically a form of masculine domination. It argues that, despite the fact that men suffer in war and that the laws of war seek to protect non-men, the laws of war fundamentally articulate a form of hegemonic masculine power. This is primarily because restraint has always been woven into concepts of manliness as a precarious compromise between ruthless hyper-masculinity and femininity. As a result, the laws of war merely embody a longstanding masculine ideal; what is legal is what is virile and vice versa. In internationalising and legalising that ideal, they then seek to rescue masculinity from its never-ending crisis and, in the process, decide who can partake in the power of dominant masculinity. ‘Savages’ are typically excluded as both too masculine and too feminine. At a deeper level, the power of restraint is that it creates a debt of gratitude in its ‘feminine’ beneficiaries, imposes upon them a sort of ‘protection racket’ and coopts them into its enterprise of reifying masculine domination. This, then, raises complex questions for feminist engagements with the laws of war in a context where demands for reform can quickly lapse into a quiescent toleration of war.

CONTENTS

I	Introduction: The Paradoxes of Masculinity.....	200
II	Embodying Masculinity in War: Manliness as Restraint.....	205
III	Enabling Masculinity in War: Manliness as Universalising Exclusion.....	211
IV	Empowering Masculinity in War: Manliness as Protection Racket.....	216
V	Conclusion: The Risk of a Gendered Laundering of War	221

I INTRODUCTION: THE PARADOXES OF MASCULINITY

Of all manifestations of power, restraint impresses men the most.¹

What is the specific power of the laws of war and how is it asserted? I have previously argued that the laws of war manifest a reification of armed conflict and the dominance of a particular Western way of war.² This article revisits that intuition by suggesting that the Western domination of the laws of war must also be understood as a gendered and, more specifically, masculine form of domination. Where intersectional analysis typically seeks to diversify the grounds on which gendered discrimination operates, this article focuses on the intersectionality of *domination itself*.

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¹ Thucydides, *History of the Peloponnesian War* (Charles Forster Smith trans, Harvard University Press, 1928) vol 1, xviii.

² Frédéric Mégret, ‘From “Savages” to “Unlawful Combatants”’: A Postcolonial Look at International Humanitarian Law’s “Other” in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press, 2006).

Of course, it may seem at a certain level as if the laws of war are all about *restraining* power, limiting the means and methods of combat available on the battlefield and protecting civilians. Indeed, this is how the laws of war have been predominantly understood. But the fundamental intuition here is that *what restrains also fundamentally empowers*. One may only consent to restraining oneself against the background assumption that one is entitled to use a certain form of power in the first place. Moreover, restraint may make that exercise of power appear as something else than what it is; it may endow it with a particular form of virtue. The question, then, should not be ‘how do the laws of war restrain power?’, but ‘*how does restraint in war empower?*’

Over the last two decades, a rich and diversified set of feminist approaches to the laws of war has evolved. A considerable part of that writing has focused on the need for the laws of war generally and war crimes trials in particular to foreground the question of sexual violence against women.³ There has also been a recent upsurge of interest, notably by the International Committee of the Red Cross, in ‘problematic’ or ‘toxic’ masculinities in war.⁴ Although this is a welcome development on one level, it has tended to reproduce a familiar liberal trope (‘bad men’/‘good law’) that has typically portrayed the problem of sexual violence as somehow external to the laws of war, and therefore amenable to their regulation. Rather than focus only on toxic masculinities, this article suggests that we should pay more attention to the sort of hegemonic masculinity that is embedded in the law itself. The tendency to discuss sexual violence separately from the laws of war once led Judith Gardam to deplore that the field is being ‘consumed in recent years by the topic of sexual violence and its criminalisation and punishment’ but that there has been ‘only glimmerings of a broader appreciation of ... *the sense that perhaps we needed to cast a critical eye on IHL*’.⁵ The irony, then, is that, as Helen Kinsella puts it,

precisely at the moment that ... the laws of war [have] been ... specifically invested with new-found worth for the protection of women, the relationships among power, gender, and the laws of war are scarcely analyzed.⁶

A decisive intellectual break in that respect has come as a result of, precisely, the work of such authors as Judith Gardam,⁷ Helen Kinsella⁸ and Laura Sjoberg,⁹

³ See, eg, Nicola Henry, ‘Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence’ (2009) 3 *International Journal of Transitional Justice* 114; Fionnuala Ni Aolain, ‘Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War’ (1996) 60 *Albany Law Review* 883; Eileen Meier, ‘Prosecuting Sexual Violence Crimes during War and Conflict: New Possibilities for Progress’ (2004) 10 *International Legal Theory* 83; Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff, 1997).

⁴ Hugo Slim, ‘Masculinity and War — Let’s Talk about It’ on *Humanitarian Law & Policy* (15 March 2018) <<http://blogs.icrc.org/law-and-policy/2018/03/15/masculinity-and-war-let-s-talk-about-it-more/>> archived at <<https://perma.cc/N6UW-YWCS>>.

⁵ Judith Gardam, ‘A New Frontline for Feminism and International Humanitarian Law’ in Margaret Davies and Vanessa E Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate, 2013) 217–18 (emphasis added).

⁶ Helen M Kinsella, ‘Securing the Civilian: Sex and Gender in the Laws of War’ in Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (Cambridge University Press, 2005) 249.

who have put at the centre of their inquiry the more broadly productive nature of gender for the laws of war. Among more critical feminist approaches to the gendering role of the laws of war, many have focused on how the laws of war construct a 'feminine other' and often, as a result, reproduce problematic gendered stereotypes.¹⁰ This article draws on these feminist interventions, from which it derives the need to critically address the role of gender as pre-configuring the laws of war — rather than the laws of war simply addressing 'issues of gender'. Although these authors have more distinctly teased out the presence of the masculine in at least the shadow of that construction of gendered difference in war, however, they have typically been more interested in the production of problematic tropes about the 'feminine' than specifically in the question of masculine power.

Where the article hopes to add a dimension, therefore, is by focusing more explicitly on what it might mean to think about masculine power as central to the constitution of the laws of war. The risk of treating masculinity merely as a vaguely oppressive background is that one will fail to highlight both its contested and specifically productive character; at worst, it is that one will inadvertently reinforce its status as the implicit and unproblematic 'gender of reference'. This, in turn, risks blinding us to the many and complex ways in which masculine domination is produced as well as the historical and legal urgency of producing a critique of masculinity in war and law that takes seriously its own fluidity, paradoxicality and contestability; a critique, in short, that is *both* a critique of masculinity and of the laws of war, because it takes seriously the notion that law empowers masculinity at least as much as it 'civilises' it (and, as will be suggested, can only do one by doing the other).

In order to develop that argument, the article will draw, in addition to general feminist writings, on the study of 'men and masculinities'¹¹ and, more specifically, on the field of critical men studies¹² as an offshoot of feminist

⁷ See Judith Gail Gardam, 'The Law of Armed Conflict: A Gendered Regime' (1993) 25 *Studies in Transnational Legal Policy* 171; Judith Gardam, 'Gender and Non-Combatant Immunity' (1993) 3 *Transnational Law & Contemporary Problems* 345; Judith Gardam, 'A Feminist Analysis of Certain Aspects of International Humanitarian Law' (1992) 12 *Australian Yearbook of International Law* 265.

⁸ See Helen M Kinsella, 'Gendering Grotius: Sex and Sex Difference in the Laws of War' (2006) 34 *Political Theory* 161; Kinsella, above n 6; Helen M Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Cornell University Press, 2011).

⁹ See Laura Sjoberg, 'Gendered Realities of the Immunity Principle: Why Gender Analysis Needs Feminism' (2006) 50 *International Studies Quarterly* 889.

¹⁰ See Karen Engle, 'Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 99 *The American Journal of International Law* 778; Janet Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict' (2008) 9 *Melbourne Journal of International Law* 78; Janet Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law' (2008) 30 *Michigan Journal of International Law* 1.

¹¹ Michael S Kimmel, Jeff Hearn and Raewyn Connell, *Handbook of Studies on Men and Masculinities* (Sage, 2005); Chris Haywood and Maírtín Mac an Ghaill, *Men and Masculinities: Theory, Research and Social Practice* (Open University Press, 2003); Stephen M Whitehead, *Men and Masculinities: Key Themes and New Directions* (Polity Press, 2002); Eugene R August, *The New Men's Studies: A Selected and Annotated Interdisciplinary Bibliography* (Libraries Unlimited, 2nd ed, 1985).

¹² Rachel O'Neill, 'Whither Critical Masculinity Studies? Notes on Inclusive Masculinity Theory, Postfeminism, and Sexual Politics' (2015) 18 *Men and Masculinities* 100.

approaches to gender, which has increasingly sought to problematise and deconstruct masculinity.¹³ The idea is to detect processes of domination in the crucible of masculinity(ies), and not only as they express themselves on feminised bodies. Perhaps the main insight of the study of masculinity in that context is the idea that its construction involves the assertion by certain men of forms of ‘hegemonic masculinity’.¹⁴ The production of masculinity ‘in war, through law’, then, involves not only a simple opposition to the feminine but also the competition between different shades of the masculine, the domination by certain men of other men as a conduit for the oppression of women and the upholding of a certain form of virtuous masculinity as the linchpin of a deeply masculine order.

If there ever was a field that seemed susceptible to an analysis based on the concept of ‘masculinity’ then surely the laws of war, as the precarious attempt to assert masculine rule over masculine violence, would seem an interesting and plausible candidate. In exploring the question, then, this article *proposes to explore what it would mean to reconceptualise the power of the laws of war comprehensively from the point of view of a theory of masculine domination*. Specifically, the article proposes an exegesis of the power that lies in *the simultaneous authorisation and restriction of violence manifested in the laws of war*. As it happens, this equation has always been the central theoretical puzzle of restraint in war (and not only of gendered interrogations about law and war). Why should war be limited, and what power will consent to limitations in its pursuit?¹⁵ And what, if anything, is *masculine* about restraining violence? The article will argue that the continued expression of masculine power across state divides is, in fact, the crucial variable in explaining what might otherwise be a puzzling convention between sovereigns.

But before that argument proceeds, it is worth acknowledging at least three ways in which it might be counterintuitive and which nominally raise the bar of what this article must be able to argue. First, the organisation of war is on at least one relatively superficial level not directly beneficial to men. In at least some armed conflicts (many of which gave rise to the first efforts at codifying war), men represent the lion’s share of victims of war, and in most they represent significant victims. As has been noted, ‘men pay a price for privilege’ and ‘even the most privileged men exercise privilege at a cost’.¹⁶ Specifically, ‘it is men that we sacrifice in times of war’.¹⁷ The fact that ‘men are disproportionately the victims of violence at the hands of other men, violence that is integral to the very definition of masculinity’¹⁸ at least raises a theoretical quandary if one wants to simultaneously assert that men are net beneficiaries of war.

¹³ Michael S Kimmel, *The History of Men: Essays in the History of American and British Masculinities* (State University of New York Press, 2005).

¹⁴ R W Connell and James W Messerschmidt, ‘Hegemonic Masculinity: Rethinking the Concept’ (2005) 19 *Gender & Society* 829; Mike Donaldson, ‘What Is Hegemonic Masculinity?’ (1993) 22 *Theory and Society* 643.

¹⁵ See Michael Howard, ‘*Temperamenta Belli*: Can War Be Controlled?’ in Jean Bethke Elshtain (ed), *Just War Theory* (New York University Press, 1991).

¹⁶ Nancy E Dowd, *The Man Question: Male Subordination and Privilege* (New York University Press, 2010) 58.

¹⁷ *Ibid.*

¹⁸ *Ibid* 3.

Second, the laws of war have become markedly more humanitarian, shifting from an emphasis on combatants and the conduct of hostilities, to non-combatants and protection. More specifically, the laws of war have historically increasingly constituted themselves as claims made in favour of the protection of non-men, particularly women and, to a lesser extent, children. This is particularly true after the Second World War, as the *Geneva Conventions* shifted the emphasis away from the sole focus on the relationship of men to men, to the relationship of men to women and children. It is not for nothing that the laws of war are typically referred to in polite company as international *humanitarian* law. The current emphasis on sexual violence against women might appear as the apotheosis of concerns about how men affect others. Again, how this shift in emphasis might conceivably privilege men requires some explaining.

Third, if the very idea of the laws of war is to *curtail* what men might otherwise do in war and what at least under some view must be considered archetypically masculine (violence), then is the project of the laws of war to *tame* masculinity, perhaps even to *civilise it*? And if so, is masculinity in that story the active subject of its destiny or the passive object of an outside intervention? The very effort to regulate war may already represent what on the surface seems like a significant compromise to war's masculinity, a more effete approach to war than its ruthless and unmitigated pursuit might suggest. The ambition of the laws of war, in this context, can be understood as an effort to keep the harmful effects of war between men and perhaps even to 'feminise' the pursuit of war. What is specifically masculine about *that* project?

Of course, these paradoxes may only ever be half true: men may not kill that many men at all, and many armed conflicts are characterised by a high degree of harm provoked to civilians, most notably women. That the practice of war often falls short of the ideals of the laws of war is trite. What is interesting and less intuitive is the possibility that, even *if humanitarian restraints applied fully and as they are meant to* (ie if the laws of war did expose combatants, did protect civilians and did generally aspire to civilise war), *they could still empower masculinity*. Against a view of the practice of war being hyper-masculine *despite* the laws of war, therefore, this article will in fact suggest that it is all the more masculine *thanks to* the laws of war.

The article proceeds in three steps, each of which outlines a distinct aspect of how masculine domination can be seen as being asserted through the laws of war. The Part I argues that, in its simplest form, the laws of war *embody* a form of hegemonic masculinity identified with manly restraint: restraint, therefore, far from being anathema to the constitution of virility, is historically and conceptually central to it as a precarious but potent middle way between hyper-masculinity and femininity. The Part II seeks to show how the laws of war have further enabled that particular construct of masculinity by entrenching it, universalising it and excluding certain non-virile men from its benefits, thus ensuring that the quintessence of manliness is the preserve of a typically European warrior elite. The third part argues that the essence of restraint in war as a form of power, is that it creates a burden of gratitude in its feminised beneficiaries, puts them at the constant mercy of a reassertion of masculine violence and coopts them into supporting the masculine regulation of warfare.

The article concludes with some thoughts on how one should strategise about the regulation of war from a pro-feminist standpoint that takes the problematic construction of masculinity seriously.

II EMBODYING MASCULINITY IN WAR: MANLINESS AS RESTRAINT

There is no doubt that the laws of war, at heart, involve a legitimisation of a certain form of male-on-male violence. The laws of war authorise, legalise, even sanctify ruthlessness towards the enemy combatant. Indeed, the dispensability of men's lives and bodies is spectacularly illustrated as a result of the normal operation of the laws of war themselves, which condone the killing of men by other men. Whatever else one may think about the scandal of violence against non-men, it is at least prohibited in a way that violence against men is not. How then might a practice that is apparently so detrimental to men nonetheless be to the benefit of their structural power?

As I argue in this Part, it hardly follows from the fact that the laws of war licence violence against men, that they are therefore corrosive of masculine power. In specifically designating that which is largely legitimate in war and extolling the virtue of those who sacrifice themselves for it, the laws of war help shape a contest whose outcome is decided by qualities imagined as specifically masculine and that foreground physical force, resilience and wits in subjecting all energies to the pursuit of a goal. In making possible that contest, the laws of war thus indirectly partake in the glorification of male sacrifice. This in turn has historically been used to buttress the case for exclusive male citizenship and domination of political life and the attendant disenfranchisement of women.¹⁹ In fact, because war in the Western tradition is conceived of as a form of *public* violence, participation therein can be considered the highest form of (masculine) citizen duty and is distinguished from the unprivileged, brutish masculinity of pirates, brigands and terrorists.

What is harder to explain is the tendency of the laws of war to *limit* what men can do in war. Clearly, the laws of war also encompass a very significant humanitarian component that betrays, in fact, a willingness to neutralise hyper-masculinity. From that perspective, there may even be a considerable debt to the idea of the feminine in the genesis of humanitarianism. The rejection of the hyper-masculinity of Prussian *Kriegsraison*, a masculinity entirely instrumentalised by the need to pursue the state's goals, was a foundational moment for the humanitarian project.²⁰ The laws of war include many limitations on the sort of harm that can be inflicted on fellow combatants, including the specific prohibition on superfluous injury and unnecessary suffering;²¹

¹⁹ Joanna Bourke, *Dismembering the Male: Men's Bodies, Britain, and the Great War* (University of Chicago Press, 1996) 77–8.

²⁰ Michael N Schmitt, *Essays on Law and War at the Fault Lines* (TMC Asser Press, 2011) 89.

²¹ International Committee of the Red Cross, *Practice relating to Rule 70: Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering*, Customary IHL Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule70> archived at <<https://perma.cc/833L-9777>>.

succouring the wounded;²² treating prisoners of war with dignity,²³ etc. More importantly, precaution and judgement are to be exercised whenever civilians might be harmed.²⁴

The masculinity of the warrior is therefore meant to be a supple masculinity, one that, although certainly not ‘feminine’ as that gender has traditionally been construed, is not impervious to a certain gentility and grace. This may seem a strange mix at first, as if the gender of the laws of war were not fixed and stood at an awkward distance from popular expectations about muscular masculinity in war. Yet the paradox is only apparent if one realises that there is historically no contradiction between *restraining* masculinity and *the very idea of masculinity*. In fact, masculinity as a gendered construct *has in a sense always been about its own moderation*. Whilst this idea that a quality’s distinctiveness lies in its very moderation may strike one as odd, it encapsulates a long tradition of thinking about manliness.

In order to understand how this is so, it is necessary to go back to the Ancient Greeks and especially the Romans, probably the original articulators of the dominant ideas about masculinity that have shaped the Western canon up to the laws of war. Specifically, one needs to distinguish more precisely than has been the case so far between various gendered notions — maleness, masculinity, virility and manliness — that have tended to become merged in ways that obscure their differences. Perhaps because notions of men being ‘manly’ or ‘virile’ have a decisively *passé*, even unpleasant resonance, redolent of earlier forms of blatantly hegemonic masculinity, they have tended to be neglected as powerful intellectual constructs. Yet aside from continuing to, arguably, significantly shape our understandings of masculinity (if in subterranean ways), they may also represent a more complex understanding of it.

Maleness — the simple fact of being a biological man — in the Greco-Roman world was not the same thing as manliness or virility. The Greeks developed a notion of maleness (*andreia*) understood as courage and audacity in battle, but it is the Romans who refined the concept and took it to a different level, that of *virilitas*. *Virilitas* involved vigorous sexuality but it also depended, crucially, on radiating virtue and accomplishment. The virile man was he who, in addition to being sexually ‘assertive’, ‘powerfully built’ and ‘procreative’ was also ‘level-headed, vigorous yet deliberate, courageous yet restrained’ — in short, ‘an ideal of power and virtue, self-assurance and maturity, certitude and domination’.²⁵ ‘*Virilitas* was an *ethic of moderation*, in which strong or *vigorous* powers were

²² International Committee of the Red Cross, *Practice relating to Rule 109: Search for, Collection and Evacuation of the Wounded, Sick and Shipwrecked*, Customary IHL Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule109> archived at <<https://perma.cc/4GGA-4VJH>>.

²³ International Committee of the Red Cross, *Practice relating to Rule 87: Humane Treatment*, Customary IHL Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule87> archived at <<https://perma.cc/LEF2-QDET>>.

²⁴ International Committee of the Red Cross, *Practice relating to Rule 15: The Principle of Precautions in Attack*, Customary IHL Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule15> archived at <<https://perma.cc/72UY-JSUH>>.

²⁵ Alain Corbin, Jean-Jacques Courtine and Georges Vigarello, ‘Preface’ in Alain Corbin, Jean-Jacques Courtine and Georges Vigarello (eds), *A History of Virility* (Keith Cohen trans, Columbia University Press, 2016) xiii, xix.

kept deliberately reined in, *in the manner of a standing army*'.²⁶ In fact, for the Romans this entailed a certain form of abstinence that proved control of one's sexual impulses.²⁷

In these oppositions between mere maleness and virility/manliness, one can see the matrix of what would become the defining narrative of masculinity in Western modernity. Virility was a quality rather than an essence and was a term that was in a sense remarkably explicit in its dissociation of biological sex and gender. Although virility was arguably mostly reserved for men, not all men could claim to be virile: as Erasmus once put it, 'man certainly is not born but made man';²⁸ or rather: one may be born a man, but one becomes virile. In fact, it was not inconceivable that a woman would exhibit virility. Virility expressed a conquest over 'boyish' or 'pubescent' impetuosity, that of the 'semi-vir' (half-portion), an impetuosity whose deceptive hyper-masculinity hid an under-masculinity, understood as an unworthiness of masculinity.

In this context, virility could be lost and threatened not only by being too feminine (as in the case of he who is insufficiently brawny) but also, crucially, by being too brutishly masculine. In that respect, virility was contrasted with *mere* maleness, the masculinity of a man who is a slave to his instincts. Virility, instead, was to be earned, and represented a moral ideal, a discipline, albeit a very difficult one to maintain because of the tendency of even virile men to fall back into mere maleness. Notwithstanding, the ideal of virility as it expressed itself in the Roman world was an ideal of civilising men into higher forms of masculinity. Of course, that ideal might and often did quickly lapse into mere misogyny, but it included a degree of misandry as well, a disgust for 'mere men'.²⁹ In between the effete and the coarsely masculine, virility forged itself an especially elitist and precarious ambition.

This old idea of virility never entirely left the Western intellectual stage and continued to structure dominant ideas about masculinity. It foregrounded virile man as a creature of contrasts, the site of an impossible synthesis between violence and restraint. It formed the backbone of ideas about gallant chivalry in the Middle Ages that would prove so central to the formalisation of the modern laws of war. It produced powerful cultural archetypes that were narrated in countless tales of masculine heroism showcasing manly virtue. In the 18th century, for example, Adam Ferguson emphasised that

[t]he hero of modern romance professes a contempt of stratagem, as well as of danger, and unites in the same person, characters and dispositions seemingly

²⁶ Joshua Rothman, 'When Men Wanted to Be Virile', *The New Yorker* (online), 14 April 2016 <<http://www.newyorker.com/culture/cultural-comment/when-men-wanted-to-be-virile>> archived at <<https://perma.cc/TD99-JFUQ>> (emphasis added).

²⁷ See Jean-Paul Thuillier, 'Roman Virilities' in Alain Corbin, Jean-Jacques Courtine and Georges Vigarello (eds), *A History of Virility* (Keith Cohen trans, Columbia University Press, 2016) 44.

²⁸ Desiderius Erasmus, 'A Declamation on the Subject of Early Liberal Education for Children' in J K Sowards (ed), *Collected Works of Erasmus: Literary and Educational Writings 4, De Pueris Instituendis, De Recta Pronuntiatione* (Beert C Verstraete trans, University of Toronto Press, 1985) vol 26, 304.

²⁹ Rothman, above n 26.

opposite; ferocity with gentleness, and the love of blood with sentiments of tenderness and pity.³⁰

In that context, Ferguson emphasised, '[g]lory is more successfully obtained by saving and protecting, than by destroying the vanquished ... This is, perhaps, the principal characteristic, on which among modern nations, we bestow the epithets of *civilized* or of *polished*'.³¹

These ideas would provide the basis of dominant ideas about masculinity in the 19th century, culminating in the Victorian ideal of the 'gentleman'. Chivalrous masculinity had rested on a romantic and social basis. Restraint in the Middle Ages was fundamentally based on the mutual recognition of members of the warrior class. It was part of a culture of honour, in which one would not lower one's status by engaging in behaviour frowned upon by one's masculine peers and, indeed, by women themselves. But with the French Revolution and the rise of modernity, Edmund Burke deplored that 'the age of chivalry is gone ... and the glory of Europe is extinguished for ever. Never, never more, shall we behold that generous loyalty to rank and sex'.³² Furthermore, 19th century masculinity underwent significant changes as a result of industrialisation and, particularly, the rise of the working and middle class.³³ The breakdown of the older elitist solidarity created a gap in the regulation of both masculinity and war.³⁴

This gap was increasingly filled by a Victorian ethos that emphasised hardiness rather than romantic heroism as a form of masculine virtue. Restraint, then, was less a manifestation of honour than a mix of Christianity and gentility. It was nonetheless part of a discovery and reappropriation by middle class men of the earlier chivalrous ethos, even as it displaced its foundation.³⁵ The men who drafted the early instruments of the laws of war, aristocratic or upper middle class as they all were, could not have failed to be deeply influenced by contemporaneous concepts of manliness which they often personally and vigorously embodied. During the United States Civil War in particular, ideas coming from England about manliness were to deeply shape the military ethos.³⁶

In this context, the laws of war can be seen as a sort of apotheosis of then prevalent ideas about what it meant to be manly in war. It is therefore crucial to understand that the laws of war did not constrain men as much as they

³⁰ Adam Ferguson, *An Essay on the History of Civil Society* (T Cadell, W Creech and Bell and Bradfurte, Edinburgh, 6th ed, 1782) 337.

³¹ *Ibid* 335 (emphasis in original).

³² Edmund Burke, *Reflections on the Revolution in France and on the Proceedings in Certain Societies in London Relative to That Event, in a Letter Intended to Have Been Sent to a Gentleman in Paris* (J Dodsley, 1790) 113.

³³ See John Tosh, 'What Should Historians Do with Masculinity? Reflections on Nineteenth-Century Britain' (1994) 38 *History Workshop* 179.

³⁴ See Judith A Allen, 'Men Interminably in Crisis? Historians on Masculinity, Sexual Boundaries, and Manhood' (2002) 82 *Radical History Review* 191.

³⁵ See J A Mangan and James Walvin (eds) *Manliness and Morality: Middle-Class Masculinity in Britain and America, 1800–1940* (Manchester University Press, 1987); Gail Bederman, *Manliness and Civilization: A Cultural History of Gender and Race in the United States, 1880–1917* (University of Chicago Press, 2008).

³⁶ Donald J Mrozek, 'The Habit of Victory: The American Military and the Cult of Manliness' in J A Mangan and James Walvin (eds), *Manliness and Morality: Middle-Class Masculinity in Britain and America, 1800–1940* (Manchester University Press, 1987) 220.

‘performed’ a certain type of idealised masculinity. One finds at every turn in second half of the 19th century writings, the oscillation between violence and restraint as motifs in a narrative of idealised virility. When, for example, Gustave Rolin-Jaequemyns described his friend and mentor Francis Lieber, he emphasised his ‘virility and delicacy’.³⁷ Although General Butler is alleged to have claimed that he ‘did not carry on war with rose water’, he is also held to have ‘adequately met the high standards of 19th century restrained manhood’ so that ‘he in fact combined masculine vigor with manly restraint in a way that Civil War-era Americans of all classes could find most admirable’.³⁸ When Elihu Root described the US Philippine Army, he insisted that ‘[i]ts splendid virile energy has been accompanied by self-control, patience, and magnanimity’.³⁹ The origins of the modern laws of war are littered with references to this duality of manliness.

The tension between ruthlessness and restraint, then, is what defined the masculinity of the virile warrior. There is a fundamentally erotic dimension to normalised warfare, the ability to marry opposites in ways that highlight the warrior’s exercise of self-control, and to stand on the cusp of untrammelled violence whilst ultimately resisting its pull. In the contemporary era, Alison Howell and Julia Welland have spoken of the emergence of the ‘liberal warrior’ in a different, more *ad bellum* context, focusing on how troops have increasingly been asked, in addition to traditionally hyper-masculine fighting roles, to assume ‘softer’ roles such as peacekeeping or, even, counter-insurgency.⁴⁰ What is interesting about this umpteenth mutation on the same theme is the way it renews a central tension between the ability to simultaneously engage in momentous kinetic violence on the one hand, and the ability to exercise significant restraint on the other, as well as the degree to which this dual ability is a foundation for assertions of power.

More generally what this analysis reveals is that ‘masculinity and conflict may be connected as much by the *restraint* of violence as by its promotion’.⁴¹ It also aligns the warrior-type with a long line of masculine ‘role models’ going as far back, of course, as the paterfamilias but extending to the benevolent ruler, the fair headmaster, the generous factory boss, etc. These ideal-types share a set of eminently positive characteristics — willpower, honour, courage, compassion, *sang froid* and discipline — that George Mosse has described as constitutive of ‘normative masculinity’.⁴² They make it possible to conceptualise dominant masculinity as, in a sense, always arising against the background of — to use a

³⁷ Gustave Rolin-Jaequemyns, quoted in Ernest Nys, ‘Francis Lieber — His Life and His Work’ (1911) 5 *American Journal of International Law* 355, 360.

³⁸ Michael Thomas Smith, *The Enemy Within: Fears of Corruption in the Civil War North* (University of Virginia Press, 2011) 57–8.

³⁹ Elihu Root, ‘General Orders, No 66’ in Adjutant General’s Office (ed), *General Orders and Circulars, Adjutant General’s Office, 1902* (Government Printing Office, 1903) 279, 280.

⁴⁰ Julia Welland, ‘Liberal Warriors and the Violent Colonial Logics of “Partnering and Advising”’ (2015) 17 *International Feminist Journal of Politics* 289.

⁴¹ Paul Kirby and Marsha Henry, ‘Rethinking Masculinity and Practices of Violence in Conflict Settings’ (2012) 14 *International Feminist Journal of Politics* 445, 447 (emphasis in original).

⁴² George L Mosse, *The Image of Man: The Creation of Modern Masculinity* (Oxford University Press, 1996).

distinctly modern term — ‘toxic’ masculinity, a toxic masculinity whose relative abeyance is the key to the assertion of mainstream masculine power.

This is a paradoxical construct but one that can be seen as manifested through the times with remarkable regularity, and with peculiar intensity in military affairs. The recurrence of war did not, contrary to what is often thought, necessarily lead to the reassertion of hyper-masculine modes of behaviour. As Lorien Foote has argued in the related context of military justice:

men who valued gentility and domestic morality, no less than tougher and rougher men, found ample support for the values they cherished. Army rules and regulations usually reinforced rather than challenged their standards and gave such officers an opportunity to demand good morals and good manners. It was the hard-drinking, cursing and fighting men of the army who were on the defensive in the military justice system when they faced prosecution for conduct unbecoming a gentleman.⁴³

The officer, at least, incarnated the higher ideals of a certain concept of masculinity and gentility within the military thus cementing his power of life and death. This internal injunction was prolonged by the even more testing practice of restraint in war. Testing although it may have been, the laws of war also helpfully pointed in the direction that had in all likelihood always been the prevailing ideal among military men. Masculinity was both cause and consequence of the emergence of the laws of war and, through restraint, it relied on a very partial and controlled *feminisation* of war through law.

This explains, for all the reputation of the military as ‘hyper-masculine’, that its ‘macho’ character has been described as a ‘myth’.⁴⁴ In the end, neither macho ruthlessness nor feminine care for the wounded capture the essence of masculinity in war. Today it is not the Prussian advocates of *Kriegsraison* or the divine femininity of Florence Nightingale that are remembered but the much more equivocal figure of Henry Dunant and his invocation of ‘*tutti fratelli!*’ on the battlefield of Solferino.⁴⁵ In fact, it is in resisting their identification to both hyper-masculinity and femininity — by occupying a virile rather than androgynous space — that the laws of war ended up embodying a long lasting hegemonic masculine compromise.

The laws of war are therefore an inherent and central part of the continued cultural production of a particular form of hegemonic masculinity defined by certain men’s ability to restrain their violence and, in the process, expose their superior discipline and cool-headedness. This ability to embody a certain concept of masculinity is in itself a form of power. Although largely forgotten today, Francis Lieber, who is today mostly remembered as one of the founding fathers of the contemporary laws of war, penned a remarkable essay, based on a lecture given in 1846 to students of the University of Miami, on ‘the Character of the Gentleman’. In it, he insisted that officers ‘are everywhere expected to conduct

⁴³ Lorien Foote, *The Gentlemen and the Roughs: Manhood, Honor, and Violence in the Union Army* (New York University Press, 2010) 8.

⁴⁴ Regina F Titunik, ‘The Myth of the Macho Military’ (2008) 40 *Polity* 137.

⁴⁵ See, eg, Jean Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff, 1985) 25.

themselves as gentlemen towards one another'.⁴⁶ As part of a broader defence of gentlemanly conduct including in law and politics, Lieber asked:

If every stratagem is allowed ... in war ... if the officers of the army say, and they have done so in many countries, 'The soldier has no honor except absolute obedience to the king;' ... how can a gentlemanly conduct — and, still more, how can that holiness which is the stamp of the Christian religion, marking it from all others — be honoured without the deepest hypocrisy?⁴⁷

What is interesting about this quote is the extent to which it points to the fundamental basis for restraint in war as lying not in the protection of those who supposedly stand to benefit from it (as one might naively expect), but in the very perpetuation of an ideal of gentlemanly masculinity. There is in a sense nothing to the laws of war but this ideal. The laws of war are first and foremost an opportunity for men to show that they are honourable by exhibiting virile restraint, whatever else they may be. Offenses of 'conduct unbecoming' have their origin in this particular view of masculinity that every soldier — or at least officer — is asked to uphold. The ontological dimension of being the right sort of man in the military and in war are evident in a context where 'unbecoming is, literally, to "un-become" — to unmake, to reverse the process of coming into existence' and in particular to 'un-make the military'.⁴⁸ Honour, then, became the crucial element that ensured respect of the law of war, an honour 'that was as masculine as it was civilized'.⁴⁹

In short, therefore: the laws of war do not restrain the masculine; they are masculinity made law. This, then, is perhaps the key to the laws of war's surprising resilience, their ability through the ages to in advance articulate a form of masculinity that may be precarious but had already long been dominant. Contra a vision of the laws of war as 'civilising men', one can surmise a vision of the laws of war 'masculinising civilisation.'

III ENABLING MASCULINITY IN WAR: MANLINESS AS UNIVERSALISING EXCLUSION

One of the questions about the consecration of the 'modern' laws of war in international treaties must surely be, if masculinity was such a powerful trope, why did the *jus in bello* have to be legalised? What is the role of law in all of this, and what form of power does it crystallise? After all, restraint in war had survived as an idea and an ideal throughout the centuries without so much as the help of an international instrument. Were the Lieber Code and the *Hague Conventions* merely the projection of a universal and in-temporal hegemonic masculinity, or the attempt to safeguard a version of it through international law and institutions?

The reality is complex and involves the law both drawing on existing masculine stereotypes seeking to entrench masculine political capital, and excluding certain participants in war from partaking in the benefits of

⁴⁶ Francis Lieber, *The Character of the Gentleman* (J B Lippincott, 3rd ed, 1864) 86.

⁴⁷ *Ibid* 66–8.

⁴⁸ Elizabeth L Hillman, 'Gentlemen under Fire: The US Military and Conduct Unbecoming' (2008) 26 *Law and Inequality: A Journal of Theory and Practice* 1, 8.

⁴⁹ Kinsella, *The Image Before the Weapon*, above n 8, 87.

masculinity. On one level, masculine domination explains why over time law and war become indistinguishable:⁵⁰ the secret to their convergence is the fact that they are joined at the hip by overlapping masculinities, that of the ability to legislate certain forms of domination and that of restraint in violence. Yet the truth is also that the universal and in-temporal project implicit in restrained masculinity was always remarkably precarious. It had long been an ideal in crisis,⁵¹ at constant risk of collapsing into its imagined 'others' — hyper-masculinity and effeminacy. It was already significantly eroded by the time it crystallised into positive international law; in fact, it was arguably already eroded at the time Grotius sought to give the laws of war a firmer footing in natural law.⁵² If the high point of the early humanitarian project was the end of the 19th century, then the notion of manly restraint was significantly under threat from at least three directions.

It was under threat, first, from within as a result of competing models of masculinity. The elitism of chivalrous masculinity made it ill-fitting for the sort of mass wars that developed after the French revolution, conscription and the Napoleonic adventures — although no doubt it continued to survive in the minds and hearts of at least some. As Winston Churchill once put it, '[w]hen democracy forced itself upon the battlefield war ceased to be a gentleman's game'.⁵³ The democratisation of the military meant that polite virility could temporarily seek refuge in an exclusionary enclave, typically class, which it had always occupied and from which it has never entirely moved since. The officer and gentleman, as we have seen, would thus emerge as the repository of earlier ideas of virility from which they could be defended. Yet it was also evident that the vulgarising forces of massification made that *ancient regime* ideal quaint and somewhat difficult to sustain.

Second, as virility became instrumentalised for and in fact associated with the nation rather than men themselves, the *noblesse oblige* of the knight or the gentleman became suspect. Indeed, most modern armies would have frowned on the sort of virile gallantry that was once a hallmark of (relatively) polite warfare. For the state, absolute fidelity to one's side was clearly understood as more important than the transnational respect for other men. And if that meant that one should engage in hyper-masculine behaviour to achieve the right degree of ruthlessness in national designs, then so be it. Put differently, as virility or effeminacy became increasingly associated with entire nations, doing the 'masculine' thing as a country, for example, might be in tension with doing the 'masculine' thing as an individual and vice versa. This tension would eventually become evident particularly with the rise of Italian fascism and its rejection of bourgeois manliness on the battlefield as entirely inadequate to the task.

Third, virility was threatened by the modernisation of warfare. The trenches had left very little place for gallantry, in the midst of mustard gas and artillery

⁵⁰ See David Kennedy, *Of War and Law* (Princeton University Press, 2006).

⁵¹ Allen, above n 34.

⁵² M S Kimmel, 'The Contemporary "Crisis" of Masculinity in Historical Perspective' in Harry Brod (ed), *The Making of Masculinities: The New Men's Studies* (Allen & Unwin, 1987) 121.

⁵³ Quoted in Karma Nabulsi, 'Evolving Conceptions of Civilians and Belligerents: One Hundred Years after The Hague Peace Conference' in Simon Chesterman (ed), *Civilians in War* (Lynne Rienner Publishers, 2001) 9, 11.

barrages. Professionalism, discipline, centralisation replaced gentility, nobility and solidarity as organising principles. Whilst prisoners of war had once been released on parole, this increasingly seemed unrealistic given the decline of honour and the demands of patriotic allegiance.⁵⁴ The rise of the machine gun made heroic cavalry charges less appealing. The democratisation of warfare and the influence of human rights means that today engaging in ‘conduct unbecoming’ will often appear as the least grave thing that those guilty of war crimes have done.⁵⁵ Modernity tended to thoroughly disenchant the performance of masculinity as a motive to be excited about war.

The laws of war, in this context, far from embodying a glorious consensus about eternal virility, can be seen as having sought more modestly to save what could still be saved from an ethos that was, in fact, already well under threat. Rather than a forward-looking positive consecration of the chivalrous ethos (as they are often seen), they can be seen as a backward-looking, last ditch effort to rescue manly restraint in war. The sort of bleeding-heart sensitivity illustrated by Henry Dunant in Solferino had already showed that, however restrained armies on the field might be, the result was always likely to be unsightly and difficult to reconcile with the modern humanitarian conscience. In addition, the suspicion was that armies could not even any longer be held to a virile and restrained standard — or at least not for long.

The emergence of the contemporary laws of war can be located in the increased anxiety about masculinity in the 19th century. Amidst the rising tides of socialism, nationalism and pacifism, to save ‘war’ was to save it urgently from its most disreputable aspects. The newfound optimism about international law could be a crucial part of that puzzle: if men could not be relied upon to spontaneously rise up to the virile ideal, they could at least be disciplined by the state to exercise a legalised form of manly restraint. International law would be a ‘gentle civilizer’⁵⁶ in that respect too, specifically in that it would carry over virile archetypes well into the 20th century.

In fact, the right sort of masculinity was energetically touted as compatible with state interest and, under the right conditions, with the increasing social reach of modern militaries. The preface of the Oxford Laws of War on Land Manual published by the Institute of International Law in 1880 was quite clear that enlisting ‘manly virtues’ made perfect sense from the point of view of the state’s emerging needs, and that masculinity could still have a central place in war.⁵⁷ As the introduction put it:

Rash and extreme rules will not, furthermore, be found therein. The Institute has not sought innovations in drawing up the *Manual*; it has contented itself with stating clearly and codifying the accepted ideas of our age so far as this has

⁵⁴ See Gary D Brown, ‘Prisoner of War Parole: Ancient Concept, Modern Utility’ (1998) 156 *Military Law Review* 200.

⁵⁵ Orna Ben-Naftali and Noam Zamir, ‘Whose “Conduct Unbecoming”? The Shooting of a Handcuffed, Blindfolded Palestinian Demonstrator’ (2009) 7 *Journal of International Criminal Justice* 155.

⁵⁶ See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001).

⁵⁷ For a reproduction of the Manual, see Institute of International Law, ‘The Laws of War on Land’ in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents* (Martinus Nijhoff, 4th revised ed, 2004) 29.

appeared allowable and practicable. By so doing, it believes it is rendering a service to military men themselves. In fact so long as the demands of opinion remain indeterminate, belligerents are exposed to painful uncertainty and to endless accusations. A positive set of rules, on the contrary, if they are judicious, serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts — which battle always awakens, as much as it awakens courage and manly virtues, — it strengthens the discipline which is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity.⁵⁸

Perhaps the emergence of the laws of war in the 19th century, then, can be understood as precarious bridge thrown between the earlier manly ethos of chivalry and the merely masculine inclinations of a thoroughly disencharmed and mechanised ‘man’. In fact, the ideal of gentlemanly conduct in war was relatively short-lived, even though echoes of it no doubt continue to manifest themselves to this day. The promulgation of the laws of war at the 1864 Brussels Congress but principally the 1899 and 1907 Hague Conferences constituted an attempt to sublimate the chivalrous ideal by inscribing it within a broader liberal horizon of civilisation and humanity. The laws of war shed their aristocratic moorings to reflect a less heroic, more modern code of masculinity, in the hope of constituting and prolonging it through the civilising mission.

If the laws of war were thus a temporal bridge between an archaic virile past and modern man, they were also in their contemporary form part of an effort to geographically expand the ideal of manliness. Within the European world, the laws of war already marked a remarkable *social* emancipation of ideas about masculinity from chivalry, to middle class gentlemen, to an ethos meant to characterise the ordinary foot soldier in ‘proper’ armies. But they were also undeniably a vehicle for the *civilisational* expansion of a particular model of war, and therefore of the concept of masculinity that went with it. The ‘deprovincialisation’ of chivalrous masculinity means that its ideals have increasingly tended to be expressed in coded universalist terms, detaching the modern enterprise from its baggage of Western virtue ethics. As the more evidently masculine aspects of the laws of war receded, they did so for the benefit of a cosmopolitan and internationalist justification of the project. In the end, all were to remain, as the Martens Clause put it, under the ‘protection and empire of the principles of international law’.⁵⁹ In that respect, the ability of a certain European concept of being in war to piggyback on international law virtually ensured its diffusion.

This universal aspiration was simultaneously deployed to disqualify the exotic ‘other’ who was and continues to be defined by his eminently gendered incapacity to respect the laws of war. As Helen Kinsella points out, ‘[c]onformance with the laws of war distinguished individuals as restrained, moderate in their violence, making them ‘manly’ and distinguishing them from barbarians’.⁶⁰ In the process, the laws of war have been made into a cardinal

⁵⁸ Ibid 30 (emphasis in original).

⁵⁹ *International Convention with Respect to the Laws and Customs of War on Land*, opened for signature 29 July 1899, [1901] ATS 131 (entered into force 4 September 1900) Preamble.

⁶⁰ Kinsella, *The Image Before the Weapon*, above n 8, 109.

vector of the civilising mission, a mission to either make other men more like ‘real men’ or to subdue and denigrate those who could or would not. Indeed, the two extremes — the hyper and under-masculine — are oftentimes combined in the same rejection of the non-masculine and exotic ‘savage’. The strong association of lack of restraint in war and savagery was already present in Grotius’s writing when he deplored that ‘[t]hroughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of’.⁶¹ By contrast, it became obvious to observers that

... the foundation of what is now held to be the law of war, and of nations, was laid in the manners of Europe, ... [w]e have improved on the laws of war, and on the lenitives which have been devised to soften its rigours; we have mingled politeness with the use of the sword.⁶²

The earliest and classical target of virile/Western scorn, in this respect, was the ‘Indian’ of the Americas. The Indian was denigrated for only being able to engage in a ‘*petite guerre*’ implicitly associated with boyishness rather than manhood. In fact, Indian wars were lambasted as ‘*un véritable assassinat*’,⁶³ one in which on the path to war ‘*la ruse et les surprises sont leur moyen préféré. Ils cherchent le succès sans la moindre parade chevaleresque*’.⁶⁴ The ‘savage’ was sometimes portrayed as hyper-masculine in his ruthlessness, but also cunningly ‘feminine’. This is in line with a larger observation that, for example in US history,

[t]hese very groups that have ... been cast as less than manly were also, often simultaneously, cast as hypermasculine, as sexually aggressive, violent rapacious beasts, against whom ‘civilized’ men must take a decisive stand and thereby rescue civilization.⁶⁵

At times, the stereotypes were reversed as when ‘savages’ were seen to be savage because of their outsourcing of war to women, who turned out to be particularly unrestrained in their violence. For example one 19th century author points out with dread that ‘[t]out captif [*des Sioux*] y est abandonné aux femmes qui se montrent vis-à-vis de lui d’une cruauté révoltante, lui arrachent les yeux, la langue, les ongles, lui brûlent un jour une main, l’autre jour un pied’.⁶⁶ The suggestion here is that the savage man is not even capable of his own savagery since he must rely on women to engage in cruelty.

More often than not, as a result, the figure of the non-Western combatant was a toxic mix of hyper-masculine cruelty and feminine deviousness, that of

⁶¹ Hugo Grotius, *The Law of War and Peace (De Jure Belli ac Pacis)* (Louise Ropes Loomis trans, (Walter J Black, 1949) 5.

⁶² Ferguson, above n 30, 334–6.

⁶³ Joseph François Lafitau, *Mœurs des sauvages américains, comparées aux mœurs des premiers temps* [Customs of the American Savages, Compared to the Customs of the First Times] (Saugrain and Charles Estienne Hocheau, 1724) 169 [author’s trans].

⁶⁴ Alphonse Bertillon, *Ethnographie moderne: Les races sauvages* (G Masson, 1882) 101. ‘Trickery and surprises are their preferred method. They seek success without the slightest chivalrous display’ [author’s trans].

⁶⁵ Michael S Kimmel, *The Gender of Desire: Essays on Male Sexuality* (State University of New York Press, 2005) 38.

⁶⁶ Bertillon, above n 64, 101. ‘All prisoners [of the Sioux] are left to the women who show them revolting cruelty, tearing out their eyes, their tongues, their nails, one day burning their hand, the other day their foot’ [author’s trans].

'treacherous savages and merciless barbarians'.⁶⁷ In that respect, the cardinal sin of the savage was that, as Jefferson put it, his 'known rule of warfare is an undistinguished destruction of all ages, sexes and conditions'⁶⁸ and that, in failing to uphold these cardinal distinctions, he quite literally rendered himself incapable of sustaining his own masculinity.

The continuity of complaints about violent perfidiousness as a characteristic of barely civilised non-Western troops can be seen in frequent complaints about the franc-tireurs, which sometimes took on strong racial undertones. During the Belgian and French campaigns of 1940, for example, the Germans notably complained of the participation of black colonial troops in a context where '[n]otions of savage black warriors stood in close connection to an obsession with illegitimate, perfidious warfare'.⁶⁹ Evident traces of such perceptions are present to this day, for example in counterinsurgency warfare in Afghanistan, where it has been argued 'liberal warriors' constitute their masculinity in reaction to an Afghan 'other' perceived as simultaneously effete and hyper-masculine.⁷⁰ They are quite apparent in railings against the new asymmetrical wars:

Warriors usually stand and fight only when they know or believe they have an overwhelming advantage. Instead, they snipe, ambush, mislead and betray, attempting to fool the constrained soldiers confronting them into alienating the local population or allies, while otherwise simply hunkering down and trying to outlast the organized military forces pitted against them.⁷¹

The savage, then, is described as 'a loser with little education, no legal earning power, no abiding attractiveness to women, and no future'.⁷² Portrayed as 'nasty little men'⁷³, the new warriors are numerous and presented as not going away easily. The culmination of this hybrid figure in martial imaginaries is the 'child soldier' as a 'half-man' suspected of extreme cruelty and perfidiousness at the same time. The law thus not only expresses the traditional virile middle ground, but it evidently does so from the perspective of its ability to designate and excommunicate whatever it constructs as positions unworthy of masculinity. Virility has, in fact, never been able to shed its classist, racist and colonial undertones, because it was built on the back of classist, racist and colonial projects.

IV EMPOWERING MASCULINITY IN WAR: MANLINESS AS PROTECTION RACKET

What, however, of the possibility that for all its civilisational biases the laws of war at least manifested a welcome form of moderation towards non-

⁶⁷ Jochen S Arndt, 'Traacherous Savages & Merciless Barbarians: Knowledge, Discourse and Violence during the Cape Frontier Wars, 1834–1853' (2010) 74 *Journal of Military History* 709.

⁶⁸ Thomas Jefferson, 'Declaration of Independence (Draft)' in Paul Leicester Ford (ed), *The Works of Thomas Jefferson* (G P Putnam's Sons, 1904) vol 2, 209–10.

⁶⁹ Raffael Scheck, *Hitler's African Victims: The German Army Massacres of Black French Soldiers in 1940* (Cambridge University Press, 2006) 116.

⁷⁰ Welland, above n 40.

⁷¹ Ralph Peters, 'The New Warrior Class' (1994) 24 *Parameters* 16, 20.

⁷² *Ibid* 16.

⁷³ *Ibid* 23.

combatants? This final section seeks to shed light on the ambiguity of this project even on its own pragmatic terms. It suggests that restraint, in addition to manifesting a certain intrinsic superiority vis-a-vis other men is also, as a result of its very structure, a form of domination over its supposed beneficiaries. Restraint has in a sense never been gratuitous, but has always been part of the very fabric of patriarchy and civilisation. The ability to be both ruthless and benevolent also highlighted the fundamental domination of (white European) masculinity. It is because the warrior *could be* ruthless that his restraint was all the more becoming and the object of praise. The very definition of power, then, is not violence but the *possibility* of violence, a possibility that is neatly folded into and perhaps obscured by the limitation of violence. A ‘real’ man chooses to not use the whole range of his force because he can. He who *can only be* restrained because of his meekness, by contrast, makes no claim to our admiration because he is not forsaking anything as much as, as it were, exposing his inherent effete-ness.

In this context, every protective move for the benefit of a certain category is also deeply at risk of being an affirmation of power over such a category. It is certainly true that the laws of war have become more and more concerned with non-combatants and, in particular, women. This is no doubt on some level a marked improvement over licencing rape and pillage (if ever there was such a thing). But, aside from the implicit portrayal of the ‘feminine’ as weak and in need of help that feminists have emphasised, this protective move is also rich with its own patriarchal implications. In effect, as Susan Brownmiller put it, ‘[d]efense of women has long been a hallmark of masculine pride, as possession of women has been a hallmark of masculine success’.⁷⁴ In this context, masculine chivalric practices have been described as a form of ‘benevolent sexism’⁷⁵, one that ‘express[es] and enact[s] concern for the well-being of women, but ... do[es] so within a structure of superiority and subordination’.⁷⁶

Not only does the regulation of war objectify women and traditionally exclude them from the benefits of military profession, therefore, but it designates women’s place as the eternal debtors of their protectors. This fits with the findings that ‘hostile’ and ‘benevolent’ sexism are irredeemably tied,⁷⁷ even as the latter may make sexism more palatable or hard to spot.⁷⁸ This sense of taking on the burdens of one’s sex — just as one might take on the burdens of civilisation — is also part of an idealisation of masculine power that is evident in the peacetime military realm. For example, even though (traditionally male and, at any rate, ‘masculine’) officers subjected themselves to standards and scrutiny that went far beyond what was required in ordinary civilian democratic life, in

⁷⁴ Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Open Road Media, 2013).

⁷⁵ See René Moelker and Gerhard Kümmel, ‘Chivalry and Codes of Conduct: Can the Virtue of Chivalry Epitomize Guidelines for Interpersonal Conduct?’ (2007) 6 *Journal of Military Ethics* 292, 298–9.

⁷⁶ Iris Marion Young, ‘The Logic of Masculinist Protection: Reflections on the Current Security State’ (2003) 29 *Signs: Journal of Women in Culture and Society* 1, 19.

⁷⁷ See Peter Glick and Susan T Fiske, ‘An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications for Gender Inequality’ (2001) 56 *American Psychologist* 109.

⁷⁸ See Stephen E Kilianski and Laurie A Rudman, ‘Wanting It Both Ways: Do Women Approve of Benevolent Sexism?’ (1998) 39 *Sex Roles* 333.

doing so they also invoked a particular form of respect. Elizabeth Hilman has argued, in the context of a study of ‘conduct unbecoming’ in the US military code that ‘controlling the sexuality of officers [has] become a primary means of asserting the moral authority of the officer corps — and of the military itself’.⁷⁹ Similarly, one could argue that controlling how war is waged by the military serves to enhance the status of men, the military and war, even as it constrains what can be done in conflict.

This further explains the counterintuitively empowering nature of all restraint. One expects a certain recognition from the fact that one has not succumbed to one’s lower instincts; that one is not fully exhausting one’s appetite for raw physical power. Being protective of the ‘feminine’ is therefore, as feminists have long pointed out, not the opposite of male domination, but arguably one of its very definitions. The emergence of the ‘Victorian emphasis on manly restraint and control over one’s impulses’ has for example been recognised as part of a ‘critical assertion of authority over women, racial minorities and members of the lower class’.⁸⁰ Similarly, in detailing the operation of ‘masculinist protection’ for the ‘security state’, Iris Marion Young describes a ‘patriarchal logic’ in which ‘the role of the masculine protector puts those protected, paradigmatically women and children, in a subordinate position of dependence and obedience’.⁸¹

In the case of the laws of war, this is reinforced by the fact that protection is bestowed unilaterally as part of a form of masculine *noblesse oblige*. The feminine ‘other’ (women, but also children and ‘effete’ men who refuse to serve or surrender) is constituted as a pure beneficiary of a commitment — in effect, masculine *largesse* — she has no role in forging and which, by definition, she cannot directly solicit and could not possibly reciprocate. This absence of a quid pro quo puts her in debt of gratitude to military ‘men’ for eternity. It designates the place of women as silent beneficiaries of humanitarian restraint, and disenfranchises them more broadly from the governance of international law. Women, after all, should be ‘only too happy’ that men have consented to restrain their violence.

This scheme is what has sometimes been described as a typical ‘protection racket’, one in which, in essence, one is being *protected from one’s protector by that very protector*. Claudia Card, for example, has made much of the fact that rape, including war-time rape, involves such a racket whereby ‘good men’ offer themselves as protectors against the danger of ‘bad men’, a danger that ‘men’ themselves have of course arguably created.⁸² One of the implicit terms of this ‘racket’ is that women, in exchange, offer ‘service, loyalty and compliance’, and, notably, do not challenge rape culture as more deeply a feature of gendered oppression rather than the doing of toxic men.

One wonders, by analogy, whether, as suggested notably by Laura Sjoberg, a more general sort of ‘protection racket’ has not historically been involved in the

⁷⁹ Hillman, above n 48, 10.

⁸⁰ Aaron Belkin, *Bring Me Men: Military Masculinity and the Benign Façade of American Empire, 1898–2001* (Columbia University Press, 2012) 13.

⁸¹ Young, above n 76.

⁸² Claudia Card, ‘Rape as a Weapon of War’ (1996) 11 *Hypatia: A Journal of Feminist Philosophy* 5. The term is originally from Susan Rae Peterson. See Susan Rae Peterson, ‘Coercion and Rape: The State as a Male Protection Racket’ [1977] *Feminism and Philosophy* 360.

emergence and continued operation of the laws of war.⁸³ Male warriors, essentially, offer protection against a calamity that they themselves have brought about (even if they do not individually partake in it) as a result of the existence of war and perhaps even the operation of the laws of war themselves. Of course, the exact terms of the compromise may change: women may even get more protection over time. But this is less relevant than the fact that, from the perspective of the racketeers, more protection may also involve more disciplinary compliance with gendered roles, and at any rate not challenging the position of men as guarantors of protection. Every move to challenge the precise terms of the racket — less sexual violence, more attention to the particular needs of women, etc — still evidently constitutes it as a racket.

Looming beyond the benevolence of the restrained warrior and as a guarantee against its contestation, moreover, is the ominous threat of its contained violence. The beneficiaries of masculine restraint, in other words, are always held hostage to the possibility of a reassertion of masculine brutality. In fact, civilised masculinity has always played on the fear that it is a precarious but precious bulwark, not against the violence of others (against which it could do little, even if it wanted to), but against its primal self; that in not exalting virility and giving it its due credit, one may end up with nothing but untrammelled masculinity. Masculinity, in that reading, holds the world hostage to itself.

In a sense, the glorification of dominant men as the ultimate guarantors of restraint and therefore the guiding lights in war was always part of the humanitarian ‘deal’ and understood as such. As Francis Lieber put it in connection to the relations between superior and subordinates:

The practice of the high attribute of the gentleman, that he allows his subordinates or the weak to feel his power as little as is consistent with duty, is not only elevating to the officer, but, in a point of common expediency, highly profitable. Soldiers and sailors, *like all other human beings, honor, and, when the trial comes, cling to, the man who has habitually treated them in a gentlemanly way.*⁸⁴

One thus sees emerging a sort of compact of domination in which manly men promise restraint in order to better exact subservience, and thus crystallise the absolute supremacy of their position as guarantors of the humanitarian order.

This is liable, in turn, to raise awkward questions for those who simultaneously benefit from this predicament (it is better to be the object of a security racket than to have no security) and suffer from it (it would be better to not be under a security racket at all). In that respect, the fundamentally masculine character of the laws of war cannot easily be challenged by pointing to the fact that, in conditions of war, respect for the laws of war has the support of various ‘victims’ of war who stand to benefit from its protections, as if that support were conclusive. One notion worth retaining in the idea of ‘hegemonic masculinity’ is that it is hegemonic in the Gramscian sense; that is, that it becomes so embedded in the culture that the ‘oppressed’ cease to conceive of it as a form of power by

⁸³ Laura Sjöberg, ‘Witnessing the Protection Racket: Rethinking Justice in/of Wars through Gender Lenses’ (2016) 53 *International Politics* 361.

⁸⁴ Lieber, above n 46, 86–7 (emphasis added).

the masculine ‘ruling class’ (warriors) and its ‘organising intellectuals’ (here, perhaps humanitarian luminaries).⁸⁵

Hegemony may also, in fact, rely on rallying the dominated to the cause of their domination. It is not so much that there is alienation at work here (although it may be that there is), but that in conditions in which war has been made to seem inevitable by the very existence of the laws of war, then the best one may hope for is to be spared war’s worst indignities. This, then, becomes the gamble of the ‘weak’ (as constructed implicitly by the reification of war): to throw themselves at the mercy of the ‘strong.’ Although this has no doubt historically reinforced the status of the ‘gentleman soldier’ (who at least does not rape and does not condone rape), it hardly needs saying that in tactically investing one’s hopes in the wisdom and restraints of ‘better men’ in war, one also risks conceding a deeper point about the superiority of such men, and the inevitability of the violence from which they protect others, a violence that is deeply theirs as well.

Historically, the masculinity of the law of war has relied in part on feminine support; indeed, it is inconceivable without it. The laws of war had the success they elicited in the late 19th century not because they asserted a blatant form of masculine domination but precisely because they proposed a division of labour between the sexes that was in tune with the times.⁸⁶ On the one hand, men promised to restrain themselves in fighting even as they claimed the definitional upper hand on what fighting in war meant; on the other hand, women were called upon as nurses and humanitarians to bring feminine succour to the fallen in exchange for being protected and exalted. Indeed, ‘While in origin a masculine project (although not understood as such) with its attention on the male citizen-soldier, it found ardent support among women’.⁸⁷ Many (although not all) were willing to embody this newly active role for women in war, emulating the likes of Florence Nightingale, despite the role’s evident ambiguities.

Hence it does seem that over time some women and men at least may have been lured by the sort of benevolent sexism implicit in the laws of war and the sort of entitlement it promises.⁸⁸ The cost of this protection, real as it may be, is that women ‘know their place’ and not challenge the masculine pursuit of war too frontally. In this context, every demand for more protection is a recognition that there is something worth being protected from and that certain men will rise up to that role. The idea that women are hostages not just to the war that they are excluded from fighting, but also in a sense to the compassionate face of the laws of war might thus be seen as a crucial critical-masculine contribution to feminist

⁸⁵ John Tosh, ‘Hegemonic Masculinity and the History of Gender’ in Stefan Dudink, Karen Hagemann and John Tosh (eds), *Masculinities in Politics and War: Gendering Modern History* (Manchester University Press, 2004) 41, 43–4.

⁸⁶ See Leo van Bergen, ‘Duty Leads to Right, Right Leads to Duty: Dutch Red Cross, Nursing and War 1870–1918’ in Wolfgang U Eckhart and Osten Phillips (eds), *Schlachtschrecken — Konventionen* (Centaurus, 2011) 67.

⁸⁷ Jean H Quataert, *International Law and the Laws of War* (8 October 2014) International Encyclopedia of the First World War <https://encyclopedia.1914-1918-online.net/article/international_law_and_the_laws_of_war> archived at <<https://perma.cc/48E2-9J3F>>.

⁸⁸ Matthew D Hammond, Chris G Sibley and Nickola C Overall, ‘The Allure of Sexism: Psychological Entitlement Fosters Women’s Endorsement of Benevolent Sexism over Time’ (2014) 5 *Social Psychological and Personality Science* 422.

debates on the issue. To the critical feminist concern with liberal feminist's focus on wartime rape and its tendency to reproduce problematic gender biases about women, one might henceforth add the suggestion that every demand to reform the laws of war in order to better protect non-combatants and in particular women only reinforces the laws of war, the power of the men that control them and the concept of masculinity they embody.

V CONCLUSION: THE RISK OF A GENDERED LAUNDERING OF WAR

[T]hose who commit sexual assault are not only committing a crime, they threaten the trust and discipline that make our military strong. That's why we have to be determined to stop those crimes, because they've got no place in the greatest military on Earth.⁸⁹

The above quote by Barack Obama quite strikingly illustrates how the pacification of military masculinity can be, indeed is understood as part of the reinforcement and glorification of the military, and therefore of powerful masculinist tropes. Trust, discipline, strength and greatness, are all intimately correlated as part of a discourse of dominant restrained masculinity. Indeed we should not be misled into thinking that the more abated, restrained masculinity being continuously asserted in opposition to hyper-masculine flight is or has ever been less hegemonic; in fact it has been more hegemonic precisely because it is more normative.

As this article has sought to argue, there is nothing new or particularly progressive from a gender perspective about this discourse of masculine moderation: it merely repackages powerful stereotypes about masculinity that are dominant precisely because they are neither hyper-masculine caricatures, nor suspected of excessively diluting masculinity, and thus succeed in constructing an 'acceptable' version of masculine domination. The comparatively virile cool-headedness of the Obama Administration and the impact of its rule of law-embedded campaign of drone killing on women, children and men does not offer much succour. This conclusion will offer some thoughts on the intertwined destinies of masculinity and the laws of war and how they might connect to feminist debates. What can thinking of the laws of war as a form of masculine power tell us about the laws of war and masculine power?

First, among the more intriguing implications of this article is the possibility that if the laws of war are, in a very purposive sense, *about* expressing a certain idea of masculinity, then their success or failure may all along have hinged less on whatever other goals the laws of war may attain than on whether they effectively functioned as a valid conduit for that idea. The true power of the laws of war was never in itself the ability to humanise war but the ability to do so in ways that would safeguard a particular idea of manliness. This is why in humanitarian discourse the foregrounding of a theatrically restrained masculinity — a lawyer behind every combatant, smart bombs, rules of engagement — may

⁸⁹ Barack Obama, 'Remarks by the President at the United States Naval Academy Commencement' (Speech delivered at the US Naval Academy Commencement, Annapolis, Maryland, 24 May 2013) <<https://obamawhitehouse.archives.gov/the-press-office/2013/05/24/remarks-president-united-states-naval-academy-commencement>> archived at <<https://perma.cc/6BQ9-GEW8>>.

have always been more important than a deep engagement with the actual impact of war. The ideal is, in a sense, very much restrained masculinity itself.

Seen from that perspective, what may seem as the massive *humanitarian* failure of humanitarian law (expressed, for example, in the increasing number of civilian casualties even as the laws of war keep being reinforced), might seem less surprising if the laws of war were, in fact, all along about delivering on a certain concept of masculinity and masculine domination. The success of the laws of war as a vehicle for male domination might therefore be measured by the extent to which the laws of war continue to be massively dominant, even as their humanitarian claims at least seem open to doubt, as if the success of their formula for masculinity could survive the actual failure of the humanitarian facet of the project. On that score at least, the laws of war are an undeniable success, having served as a crucial barometer of masculinities for more than a century, even as they have only imperfectly subdued 'masculine' ferocity.

Second, perhaps the conventional way of presenting the law/compliance sequence gets it the wrong way round: it is not so much that men are restrained by the laws of war, than the fact that masculine ideals/prejudices have already been embedded into the laws of war's very foundation. In other words, if and when men exercise restraint in war, they do so because they seek to dominate by embodying qualities of virility, not because the law tells them to. But if the law, predictably given its masculine origin, does tell them to, then obviously so much the better since doing what is masculine also ends up being, predictably, what is legal. Unsurprisingly then, the 'right sort of men' always get the law right, whereas the 'wrong sort of men' always get it wrong. One should therefore at least recognise that the laws of war are set up to reward something that is already there, much more than to mould behaviour. One should also re-evaluate the view of the laws of war as being routinely violated in favour of a view of the laws of war as being constantly provided with opportunities for the reassertion of their implicit view of masculinity.

Third, as I have argued, the humanitarian *noblesse oblige* of the warrior, such as it may be, is precisely what constructs him as potent, and victims of war as its *obligés*. The success of the laws of war's masculine formula also depends on the laws of war being able to deliver on some of their goals, precisely because achieving these goals serves to cement the debt owed to manly warriors. Men must at least be seen to have acted in the sort of restrained ways that the laws of war posit as desirable and indeed obligatory, because that — rather than the law's violations — is what constitutes masculine power. This suggests that the entire discourse of masculine deviancy structured by and around international criminal law in the last 30 years, including as it applies to sexual violence, may only have gotten it half-right: to be sure 'ordinary' and 'genocidal' rapists express a particularly pathological form of masculine domination through the laws of war's *violations*. However, in the larger order of things, it would be wrong to think that the knight in white armour, the stern military lawyer, the officer and the gentleman or the drone operator do not partake to a comparable and probably even deeper degree in patriarchy, precisely as a result of the *operation* of the laws of war.

This raises potentially awkward questions about the project of war reform, in an age where the regulation of armed conflict is increasingly presented as the

dominant solution to violence; indeed, in an age when the ability of the laws of war to take on specifically feminist concerns has been touted as the key to a gentler, reformed masculinity in war. In that respect, the push to further criminalise war violence, especially ‘unmanly’ war violence (recruitment of child soldiers, sexual violence, etc) is much less novel and radical than it is thought to be, especially when it is deployed against racialised men. At a deeper level, the concern should be whether war reform is not constantly at risk of further reifying war, of whether every counter-hegemonic move does not contain the seeds of its own undermining. The legally embodied restraint of the warrior may serve to obscure and de-problematise the reasons for there being such a thing as a ‘warrior’ in the first place; it may further entrench the humanitarian project as one of adaptation to the masculine power of the combatant rather than questioning its very foundation.

One troubling suspicion in that context is that the attempt to reform the laws of war along more gender-sensitive lines may challenge masculine ‘excesses’ but only at the cost of stopping short of challenging war altogether as the ultimate manifestation of such excesses. The fear, to quote Janet Halley’s reprising of Foucault is that ‘governance feminists ... have not learned — they do not *want* to learn — how to cut off the head of the king. They seek to wield the sovereign’s sceptre and especially his sword’.⁹⁰ Indeed, feminists may fall into the trap of a long tradition of virile denigration of pacifism and anti-militarism as feminine and effete, inadequate to the tough tasks of the world that ‘men’ invariably set themselves up as more suited to tackle.

For what exactly is the net result of much liberal feminist focus on *civilising* war when it comes to women, if not a continuation of the old masculine liberal project of civilising war *tout court*? Is feminism not at risk of merely painting the waging of war under a slightly more palatable hue? What does it mean to want the laws of war to more actively prohibit sexual violence against women, and can it mean anything else than asking men to be restrained in war, to be manly in ways that ought to be troubling to the feminist project given a proper understanding of how central to masculine power assertions manliness has been? What of the possibility that feminists will have further secured the status of military men as *protectors* of women in war against sexual violence, even as they fail to challenge the fundamental incidence of war on women? What surrender is involved? Does one save women from sexual violence at the cost of accepting war and its ‘laws’, and therefore women as collateral and inevitable structural harm? Should we be grateful to the soldier who today has obligingly not raped or caused disproportionate collateral harm to civilians, but who invaded illegally yesterday and will kill combatants and non-combatants legally tomorrow? And what of gender solidarity with the men feminised by war, not to mention the risk of giving up on the fathers, spouses, sons and brothers in arms as the absolutely dispensable lives in battle?⁹¹

⁹⁰ Halley, ‘Rape at Rome’, above n 10, 4–5.

⁹¹ Attention to men as victims of war is on the rise both normatively and empirically. See, eg, Gabriella Blum, ‘The Dispensable Lives of Soldiers’ (2010) 2 *Journal of Legal Analysis* 115; Ross McGarry and Sandra Walklate, ‘The Soldier as Victim: Peering through the Looking Glass’ (2011) 51 *The British Journal of Criminology* 900. Nonetheless, it remains limited, arguably in part because the laws of war are largely blind to the idea that men at war can be victims of it, outside the narrow case of war crimes.

Such strategic debates have occurred in other contexts, such as, most notably, the relationship of feminism to penal repression and incarceration,⁹² and invoke the fear of feminism condoning some of the very things that it rises against. They invoke real concerns about cooptation, passivity and compromise that Nancy Huston evoked vividly in the context of contemporary warfare:

these real women cooperated, thirty centuries after the *Iliad*, in playing the roles handed out to them, the same old roles: weep for your dead men; moan; suffer; scream so as to consecrate their hero status; these women said yes ... It is men who have made war into the paradigm of all narratives, and it terrifies me to think that war and narrative have become identified to such an extent that women should renounce even attempting to invent other paradigms.⁹³

Closer to our topic, they are manifested domestically in the question of whether the fight to create more sex-equal militaries might not be a dangerous quest if it does not challenge the military institution itself, leading to illusory integration of women, their vulnerability to violence and the co-optation of feminity by the military institution for aggressive and domineering aims.⁹⁴ It seems that answers to such questions are as contingent as the definition of the masculine and the feminine, but there is also much risk of reinforcing androcentric biases.

The point is that neither a flight into brutishness nor, more interestingly, the patronising ideal of the virile combatant offer anything that might alleviate fundamental feminist or critical-masculine concerns about war because both are, in a sense, two facets of the same coin. In effect, the ‘perpetuation of the myth that certain people (usually gendered feminine) are being protected by certain others (always gendered masculine)’ is key to the ‘[l]egitimizing of war’.⁹⁵ In fact, it is not only that the ‘gendering of war’ suggests an ‘important moral reason for discounting or deriding the honor of warriors: it is irremediably sexist’.⁹⁶ Sexist it is, but this in a sense only begins to describe it. Its particular

⁹² Sune Sandbeck, ‘Towards an Understanding of Carceral Feminism as Neoliberal Biopower’ (Paper presented at Annual Conference of the Canadian Political Science Association, University of Alberta, June 2012) <<https://www.cpsa-acsp.ca/papers-2012/Sandbeck.pdf>> archived at <<https://perma.cc/U6SD-RL5M>>; Poulami Roychowdhury, ‘“The Delhi Gang Rape”: The Making of International Causes’ (2013) 39 *Feminist Studies* 282; Robyn Maynard, *Carceral Feminism: The Failure of Sex Work Prohibition* (2012) <<https://robynmaynard.com/writing/carceral-feminism-the-failure-of-sex-work-prohibition/>> archived at <<https://perma.cc/NAR3-RE3H>>; Victoria Law, ‘Against Carceral Feminism’, *Jacobin Magazine* (online), 17 October 2014 <<https://www.jacobinmag.com/2014/10/against-carceral-feminism/>> archived at <<https://perma.cc/8J3P-76Z8>>.

⁹³ Nancy Huston, ‘Tales of War and Tears of Women’ (1982) 5 *Women’s Studies International Forum* 271, 279, 280.

⁹⁴ Sara Ruddick, ‘Pacifying the Forces: Drafting Women in the Interests of Peace’ (1983) 8 *Signs: Journal of Women in Culture and Society* 471; Judith Wagner DeCew, ‘The Combat Exclusion and the Role of Women in the Military’ (1995) 10 *Hypatia: A Journal of Feminist Philosophy* 56; Sheila Jeffreys, ‘Double Jeopardy: Women, the US Military and the War in Iraq’ (2007) 30 *Women’s Studies International Forum* 16; Noya Rimalt, ‘Women in the Sphere of Masculinity: The Double-Edged Sword of Women’s Integration in the Military’ (2007) 14 *Duke Journal of Gender Law & Policy* 1097.

⁹⁵ J Ann Tickner, ‘Feminist Approaches to Issues of War and Peace Reconceiving Reality: Women and International Law’ (1993) 25 *Studies in Transnational Legal Policy* 267, 271.

⁹⁶ William Lad Sessions, *Honor for Us: A Philosophical Analysis, Interpretation and Defense* (Continuum International, 2010) 78.

sexism also lies in a degree of gender appropriation through which the 'masculine' seeks alliances with feminine enablers and portrays itself as the reformed face of maleness.

Rather than just being plainly and culturally 'sexist', the laws of war are thus dynamically sex-oppressive, to the point of being 'complicit in the cause of [its] own failure'.⁹⁷ Laura Sjoberg, for example, has argued that the non-combatant immunity principle's

use of and reliance on gendered tropes of political actors not only makes the principle ineffective — it encourages violence towards and violation of the very people the principle claims to (and indeed is meant to) protect — the marginalized, gendered feminine constitutive 'other' of war(s) and those whose gender is unclear or transgressive.⁹⁸

One might argue, by extension, that it is the same laws of war masculinity that creates the very possibility of war and thus spectacularly sets up the enterprise, taken as a whole, for failure.

In this light, the only emancipatory strategies may be truly gender-subversive ones rather than the opportunistic attempt to hide the potential for kinetic violence 'under a cloak of empathy and "tea parties"'.⁹⁹ The tendency of masculinity to constantly reinvent itself for the times, and occasionally to adopt a much softer facade, makes it an evasive target.¹⁰⁰ Yet strategies that disrupt the heteronormativity implicit in the laws of war (one is either masculine or feminine, and each has a distinct and recognisable role), may challenge the meaning of purportedly fixed categories. These could include an emphasis on men who refuse to serve in wars or the military, or on women who commit war crimes; but they may also include the queering of military life and its potential for introducing fluidity and contestation at the heart of how wars are pursued.

At the very least, however, the critique of sexual violence against women *in* war cannot and ought not to be distinguished from the critique of the sexual violence *of* war. In that respect, it is worth noting that earlier radical and pacifist feminists were much more adamant that engaging the laws of war was hard to square with their commitments. As Helena Swanwick (1864–1939) put it:

you can't regulate or civilize, or legalize war, any more than you can regulate vice. The vile things will escape your bonds and mock you. Suffocated babies, disembowelled animals, fields and forests sterilized, houses and churches in ruins, starving populations may then be pictured under the caption, 'International Law and Order'.¹⁰¹

In that respect, much of the modern feminist engagement with the laws of war notably in the context of sexual violence can be seen as a fraught exercise. This is not only because, as critical feminists have observed, it often tends to portray

⁹⁷ Sjoberg, 'Witnessing the Protection Racket', above n 83, 367.

⁹⁸ Ibid 362.

⁹⁹ Lauren Greenwood, 'Chameleon Masculinity: Developing the British "Population-Centred" Soldier' (2016) 2 *Critical Military Studies* 84, 97.

¹⁰⁰ Laleh Khalili, 'Gendered Practices of Counterinsurgency' (2011) 37 *Review of International Studies* 1471.

¹⁰¹ Helena M Swanwick, *New Wars for Old: A Reply to the Rt Hon Lord Davies and Others* (Women's International League, 1934) 44, cited in Brett Holman, *The Next War in the Air: Britain's Fear of the Bomber, 1908–1941* (Routledge, 2016) 116.

women as passive, thereby reproducing problematic gendered tropes. It is also because, even as it targets the perceived excesses of masculinity, it is constantly at risk of upholding a notion of masculine domination and, in the process, condoning and reifying war.