Gendering Grotius

Sex and Sex Difference in the Laws of War

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I construct a genealogy of the principle of distinction; the injunction to distinguish between combatants and civilians at all times during war. I outline the influence of a series of discourses—gender, innocence, and civilization—on these two categories. I focus on the emergence of the distinction in the seventeenth-century text *On the Law of War and Peace*, authored by Hugo Grotius, and trace it through the twentieth-century treaties of the laws of war—the 1949 Geneva Protocols and the 1977 Protocols Additional. I draw out how the practices of and referents for our current wars partially descend from and are governed by the binary logics of Christianity, barbarism, innocence, guilt, and sex difference articulated in Grotius’s text. These binaries are implicated in our contemporary distinction of “combatant” and “civilian,” troubling any facile notion of what “humanitarian” law is or what “humanitarian” law does, and posing distinct challenges to theorizations of the laws said to regulate war.

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In 2001, a Judge Advocate General for the United States military advised against a military strike on a Taliban convoy, concerned that such a strike would violate international humanitarian law. She based her decision on “indications that women and children might be in the convoy.” In June of 2002, U.S. Central Command apologized for the bombing of an Afghan wedding party. Partially justification and partially explanation, the apology noted that it was impossible to tell “women from men, children from adults.” Immediately before its 2004 offensive in Fallujah, the U.S. military turned...
back scores of men who attempted to flee the city. At that time, U.S. military rules of engagement allowed only women, children, and the elderly to leave.

Each of these incidents refers to the distinction between a permissible target or object of violence, named as a combatant, and an impermissible target or object of violence, named as a civilian. In international humanitarian law, the corpus of law governing armed conflict, this is known as the principle of distinction: combatants and civilians are to be distinguished at all times during armed conflicts and attacks may be directed only toward the former. As explained in the eminent commentary on international humanitarian law, authored by the International Committee of the Red Cross, transgressions of this principle are impermissible because they are at once illegitimate and unlawful. They are illegitimate because the only “legitimate object” of war is to “weaken” the military forces of the enemy. They are unlawful because they violate the distinction of combatant and civilian, the “foundation on which the codification of the laws and customs of war rests.”

Thus, in international humanitarian law, the distinction of combatant and civilian determines the difference between impermissible and permissible, legitimate and illegitimate, lawful and unlawful acts of war. To be identified as combatant or as civilian is to be privy to the rights, respect, and protection offered to each under international humanitarian law. And, as the controversies over the extension of prisoner-of-war status to those detained at Camp X-Ray and over the effects of military strikes in Afghanistan and Iraq both demonstrate, these rights and protections are consequential.

However, even as this distinction is referred to as the fundamental tenet of international humanitarian law, forming the basis for the “entire regulation of war,” it is a distinction recognized as indeterminate—what some refer to as a “term of art.” As one legal scholar observes, “there is no doubt that there is still confusion as to who is a combatant and who is a civilian.” A U.S. soldier confirmed, “[t]here is always a moment of uncertainty that some Iraqi would be passing by, giving us the thumbs up and the next minute he’d fire an AK-47 at us.” Although it is tempting to attribute the indeterminacy of the principle only to the strategies of current wars—in which the battlefield and the backyard are one and the same, and combatancy is now evaluated according to whether “you are with us or against us”—it would be a mistake to do so. The empirical and juridical categories of combatant and civilian are “not quite so neatly separable” as we presume and were rarely so. In fact, international humanitarian law explicitly admits of the difficulties of distinction, decreeing, “in case of doubt whether a person is a civilian, that person shall be considered a civilian.” As the current wars so brutally evince, doubt not only provides the grounds for extending the category of the civilian but is also an integral attribute of the distinction itself. Thus, while we may speak of
the “combatant” and “civilian” as if the distinction were unmistakable and sure—a seemingly self-evident categorization in which one is either one or the other, combatant or civilian—it is precisely the distinction that cannot be taken as self-evident or secure. This is one reason why scholars and historians of the laws of war agree that while the principle of distinction is a “fundamental principle” of the laws of war, it is also “the most fragile.”

If the concepts and categories of “combatant” and “civilian,” and the distinction to be drawn between the two, cannot be taken as self-evident within armed conflicts or in the laws said to govern them, then doubt and indeterminacy do not only pose problems to the empirics of regulation, but also to the substance and formulation of the distinction itself. If neither are empirically or conceptually determinate entities, how then are the meanings of “combatant” and “civilian” established? Who is a civilian? Who is a combatant? How do we tell? Who is to judge and upon what grounds? To gain purchase on these questions, I propose to take seriously Hannah Arendt’s admonition to listen to “popular language . . . in which words are daily used as political clichés and misused as catchwords.” If we do, the invocation of women, children, and elderly men that marks the conduct of our contemporary war may resonate quite differently.

We are accustomed to thinking of this invocation of women, children, and elderly men as descriptive of military practice and humanitarian priorities. But, it would be in error to accept it as only a descriptive claim, for it accomplishes more than that. This invocation of women, children, and elderly men also identifies and rationalizes the difference of combatant and civilian that, in turn, marks the distinction of permissible and impermissible acts of war. Furthermore, it also intimates that the difference of combatant and civilian, otherwise indeterminate, is constituted through terms of age and of sex. Without this ground for difference there is, as one Marine officer put it, “nothing that distinguishes an insurgent from a civilian . . . you can’t tell who’s who.” In fact, what I shall demonstrate is that it is discourses of gender that produce the distinction of combatant and civilian upon which the laws of war depend. The explicit regulation of the difference of combatant and civilian is enabled by, and occurs through, the regulation of sex and sex difference.

To make this claim, I begin a genealogy of the principle of distinction analyzing two crucial moments in its articulation as captured in the work of the Dutch diplomat and lawyer Hugo Grotius and in the codification of the 1949 IV Geneva Convention Relative to the Protection of Civilian Persons in Times of War and its Additional Protocol I. I argue that by following the complex histories of this distinction, inquiring into the construction of the difference between permissible and impermissible objects of violence—the
difference between who shall be spared and who shall not—we may begin to understand how this distinction so fragile comes to found law and practice. In this sense, the spirit with which I proceed is genealogy in its simplest sense—that is, the development of a given into a question. In the course of this reading, I draw out how the practices of and referents for our current wars partially descend from, are governed by, the binary logics of, most immediately, Christianity, barbarism, innocence, guilt, and sex difference articulated in Grotius’s text. These binaries are implicated in our contemporary distinction of “combatant” and “civilian,” troubling any facile notion of what “humanitarian” law is or what “humanitarian” law does, and posing distinct challenges to theorizations of war and the laws taken to govern it. More specifically, my reading tenders a particular challenge to feminist scholarship. While rightly underscoring the use of “women-and-children” as a synecdoche for the civilian, this scholarship has neglected to fully pursue its implications.

II.

Scholars and activists have long commented upon the contrived roles of women during armed conflicts: “soldiers, saints, or sacrificial lambs” who are “enlisted with or without consent” to wage and witness war.13 Political theorist Jean Bethke Elshtain invoked the perennial images of a “Just Warrior,” the male protector of home and hearth, and a “Beautiful Soul,” the female innocent whose purity is to be defended, in order to represent the symbolic and actual gendering of narratives and practices of war.14 Judith Stiehm introduced the now-canonical terms of Protector and Protected to capture the fraught and sexed dynamic among those who wield the power of destruction and those dependent upon them to desist or defend from its expression. Women as conscripts or combatants are only provisionally, and frequently at great cost, granted an introduction to the fraternity of fighters within the militarization of masculinity—what Michael Ignatieff describes as an incitement of “toxic testosterone.”15 Participation in war, within these analyses, is structured according to a dyad wherein men are regularly positioned as combatants and protectors during war and women as civilians and protected. Indeed, the putative self-evidence of this remains sufficiently powerful that the very recognition of women as active and committed participants/combatants within war requires explicit recognition and, frequently, draws explicit condemnation. This is most clearly captured by the very need to continually establish that women can also be combatants and should also be allowed to do so.
Resistance to considering women as combatants certainly affects their participation and acceptance—a consequence well articulated by the representative of Jamaica to the United Nations Security Council who noted, during a 2000 discussion on women, peace, and armed conflict, “a narrow definition of who is a soldier or fighter often discriminated against women and girls involved in fighting.” And, as many have documented, such discrimination prevents demobilized female combatants from receiving appropriate resources post conflict and often hinders their successful reintegration within society. Further, scholars of nationalisms and revolutions call our attention to one of the contradictions of female participation. Depicted as militant virgins simultaneously birthing and defending a nation that may or may not imagine itself male, women are frequently caught within the paradox of forging a new nation and reproducing the old. Consistently, then, the participation of women in war is conceived of and interpreted primarily in terms of sex and sex difference—the most brutal manifestation of which is the kidnapping of young girls and women for forced sexual and domestic servitude in national militias.

These analyses definitively document the way in which gender acts to demarcate combatants and civilians, but they do not necessarily displace an understanding of sex as a prior materiality upon which gender acts. Indeed, in their account of armed conflict and the law, international humanitarian scholars Judith Gardam and Michelle Jarvis define gender as “the socially constructed roles of women and men ascribed to them on the basis of their sex . . . (which) . . . refers to biological and physical characteristics.” Gender is here taken as derivative of sex as a binary difference, rather than generative of it. Gender, in essence, is the cultural interpretation of sex. The balance of scholarship attending to the laws of war accepts this definition. This lends itself to a focus on sexual violence (primarily rape) as the paradigmatic expression of both the construction of women within the law (as symbols of family honor; as property of their male relatives) and, conversely, of the relative dismissal of women’s experiences during war (as rape, for example, was accepted as a traditional and inevitable strategy of war).

Such analyses and corresponding advocacy on the part of feminist scholars and practitioners led to historic shifts in the prosecution of perpetrators, an improvement of protection for women, as well as a reinterpretation of the laws of war to more adequately respond to women’s experiences of rape. These are laudable achievements. Nonetheless, it behooves us to reconsider the premise upon which such success is gained. If sex and sex difference is understood as an ontological referent for the social or cultural understandings of gender, then sex becomes an incontroversible ground and reason for the necessity of increased protection of women, while gender is said to
explain the paucity or neglect of protection of women. This explanation runs the substantial risk of reifying a conception of women as “always already” victims who are subject to the benevolence or malevolence of their benefactors for presumably immutable anatomical differences. Yet, as Judith Butler has so precisely detailed, these ostensibly natural facts of sex which are taken to explain displays of protection or predation are themselves produced through discourses of gender which give sex and sex difference meaning. As she explains, “gender is not to culture as sex is to nature, gender is also the discursive/cultural means by which ‘sexed nature’ or ‘a natural sex’ is produced and established as prediscursive . . . a politically neutral surface on which culture acts.”17

Nevertheless, the scholarship on gender, armed conflict, and international humanitarian law has not addressed her claim. Instead, the emphasis remains on documenting how the law “operates in a discriminatory fashion in relation to women” and on challenging humanitarian law to be “more sensitive” to gender issues.18 Efforts such these may fulfill a necessary and laudable role in the immediate expansion of the formal dictate of nondiscrimination. But that is only one effect.

An understanding of gender that accepts the sex/gender distinction as one of nature/culture equally accommodates itself to interpreting the distinction of combatant and civilian as essentially a matter of sex, whereby biological and physical characteristics are taken to explain and legitimate the difference of combatants and civilians. This reifies a dualism of combatant/civilian and protector/protected, whose meaning is constructed as and through opposition, as if it were not only the true or only relation of each pair, but a natural analogy to each pair, in which an asymmetry of power is rendered intelligible and inevitable in a discourse of gender. It aids the primary and customary assignation of women as the paradigmatic “victims” of armed conflict (in particular, of its sexual violence) and not its agents, while also re-inscribing the binary logic of either one (victims/civilians) or the other (agents/combatant). Ironically, if one of the emphases is to alter the laws of war to accord more accurately and responsibly with women’s experiences of war, maintaining a binary which is founded on women’s exclusion from the primary term and vulnerability and relative lack of power in the second will be most difficult. In this respect, advocating for the recognition of women as combatants or men as civilians does not dismantle the binary logic; it simply reconfigures it.

Put another way, because this series of binary oppositions is accepted as given, and their prior existence presumed, they become points of origin for these analyses rather than their subject. This is made utterly apparent when Gardam and Jarvis conclude, “it is not . . . the distinction between combatants
and civilians per se that warrants criticism.” In contrast, I argue that it is precisely the distinction between combatant and civilian that warrants critique: discourses of gender do not simply denote the difference of combatant and civilian, but produce that difference—one that lies at the foundation of the laws of war. It is for this reason that I turn to a genealogy of the distinction, undertaking a close critical rereading of one of the key works accepted by international scholars and practitioners as pivotal to international humanitarian law, De Jure Belli ac Pacis Libri Tres (On the Law of War and Peace, 1625) written by the Dutch lawyer and diplomat Hugo Grotius. As the respected historian of the laws of war, Geoffrey Best states, “no writing has been more determinant of the consideration given to the noncombatant in the modern history of the law of war than Grotius’s early seventeenth-century masterwork, the Laws of War.”

At first glance it might seem contradictory to the spirit of critical analysis to accept the importance of this text as assessed by the narrative it supports, but I do so precisely for this reason. The conventional narrative of international humanitarian law, authored by scholars and practitioners of international law, as well as just war theorists, is explicitly self-referential, citing past texts, such as The Law of War and Peace, not only as a primary source but also as the justification for the contemporary codification of the laws of war. This history (a jurisprudence of citation) constructs the objects of “combatant” and “civilian” defining the difference between them that contemporary laws are then said to codify and regulate. For example, the training manual provided to U.S. Judge Advocate Generals (lawyers in the military tasked with evaluating the legality of military operations) identifies the work of Grotius as the “starting point for the development of law of war,” that extends through the most recent formal treaty on the international humanitarian law, the 1977 Protocols Additional. Scholars of international law, specifically humanitarian law, identify these works, magnificent in their breadth and depth, as formative to the very possibility and substance of international humanitarian law. Legal and international relations scholars contend that “the issues that Grotius addressed, the concepts and language he used, even the propositions he advanced, have become part of the common currency of international debate about war in general.”

To reread the work of Grotius in light of the questions posed by the indeterminacy and uncertainty of the distinction may, in the end, not completely displace its central institutional status. But, even if this is not a result, this rereading will transform its significance. It will, I suspect, require us to rethink the meaning of the conventional history of the difference between “combatant” and “civilian,” and the distinctions it allows. Thus, to be clear, I am not making the argument that The Law of War and Peace is the origin of
international humanitarian law or that it should be considered as such; nor would I suggest that there is but a singular origin of the laws. Rather, my desire is to trace the logic that informs his text, identifying the ways in which sex and sex difference is pivotal to its main arguments; and, in turn, to show how this logic is incorporated, or not, in the contemporary codification of international humanitarian law, namely the 1949 IV Geneva Convention and its 1977 Protocol Additional I.

III.

The Law of War and Peace (hereafter LWP) shares in the broad political and theoretical purpose of Grotius’s earlier work, which is establishing and regulating international commerce and order by developing and systematizing the laws of nations among distinct nations. But the emphasis of LWP is placed on the formation, through a synthesis of divine law, natural law, and the jus gentium, of a legal order that should, and could, serve to moderate and restrain the ways and means of waging war—“a common law among nations, which is valid alike for war and in war.” This common law, said to regulate war, relies on a threefold distinction among potential sovereign entities and individuals engaged in war. LWP contrasts what is permissible for Christians to that which is permissible for non-Christians and, in turn, this contrast has as its ultimate comparison, that which is permissible for barbarians.

As James Turner Johnson explains, the difference among these entities lies in their capacity and exercise of moderation in war and, for Christians, the practice of moderation is facilitated by their familiarity with the concept of charity toward others. Johnson writes, “Grotius notes that in spite of the comparative license granted in natural law and the law of nations, Christian countries proceed more mildly against their enemies because of the force of charity.” As a result, however possible it is for sovereign entities and individuals to conclude the necessary requisites of moderation through the exercise of reason, it is Christian sovereigns and individuals who are, by virtue of this identity, most able to discern such restrictions and to act in accordance with the tempering influence of charity or, as LWP often refers, of love. Thus, LWP is predicated on a hierarchy of moderation which is mapped upon a hierarchy of religions; a mapping which iterates a common formulation of barbarians as absent reason and control, thus lacking in the self-discipline and self-mastery intrinsic to non-barbaric peoples. According to LWP, barbarians are “more animals than human beings.” A syllogism emerges where moderation is to charity is to Christians, while excess is to barbarians is to barbarism, with “better nations,” presumably neither barbarous nor Chris-
tian, existing in between. Significantly, LWP does not argue that Christians or even these better nations must or will display moderation when confronted with barbarians, and it is certainly possible to war against those who so “offend against Nature” by practicing cannibalism, piracy, or parricide—as indigenous peoples were consistently described doing by their more enlightened brethren. Therefore, LWP quite “neatly legitimated a great deal of European action against native people around the world.” But this exclusion, and the violations it legitimates, is not its only result.

As LWP argues for moderation and temperance as both imagined and implemented in accordance to the distinctions among Christian, better, and barbarous entities, those distinctions must be evident. Yet even as the argument of LWP presupposes those distinctions, taking them as proof of the possibility of moderation, it presents these distinctions as without a meaningful difference. The imperative to moderate and temper war directly arises from LWP’s condemnation of the conduct marking the wars of Grotius’s time. Yet, what is most notable about these wars is that they were primarily waged among and by Christians. As Grotius most famously decries “throughout the Christian world I observed a lack of constraint in relation to war, such as even barbarous races should be ashamed of.” I agree with the many scholars who argue that opposition between Christian and barbarian is a sign of its central presence in LWP and its influence on his conception of social order. However, what should hold our interest is not only the appeal to this difference, but also the lamentation of its erasure. Christians are acting like, or, even more horrific, worse than barbarians—acting with “such utter ruthlessness” that it tempts one to despair. Consequently, the fundamental distinction—between Christians and barbarians—on which the argument for moderation and temperance rests cannot be taken as given. Indeed, the atrocities of the wars proved it false. Thus, the LWP begins with a conundrum. Law is still possible and desirable, made more so because it will provide the means to ensure a more peaceable order by establishing an order within war. However, its potential is grounded in the distinctions rendered counterfeit by the wars of his time. How, then, is order to be accomplished? It is here that an analysis of discourses of gender finds its own imperative.

Opening the discussion of the law, LWP first sets forth the distribution and acquisition of rights and obligations that inform and maintain social order. It proclaims “[b]y generation parents acquire a right over children—both parents, I mean, the father and mother. But, if there is a variance in the exercise of these rights the right of the father is given preference on account of the superiority of sex.” Additionally, it is “deservedly the woman . . . [who] . . . is made subject for the male for equality in rank produces strife.” The superiority of the male sex is posited as self-evident. Although there is an
acknowledged potential that both sexes may very well be equal, and thus the
considered possibility of strife, asserting woman as subject avoids such an
outcome. As translated, woman is made subject for the male, not to the male,
one again suggesting that to be made male is to have another made subject.
Essential to the peace and order of domestic society is the proper distinction
and distribution of power between the sexes.

It is not only domestic order that is founded upon and arises from these
hierarchical and gendered relations of power, but also international order.
After all, *LWP* sets the rights of individuals and the rights of states to be com-
parable and, specifically, “defined the power of the head of household as
essentially similar to the power of the state.”35 For the seventeenth-century
Dutch, “[h]ome . . . was both a microcosm and a permitting condition of a
properly governed commonwealth.”36 Indeed, *LWP* further develops this
analogy in reference to consent and rights (imperium or dominium) over per-
sons. It is far too lengthy to discuss in this essay, but in discussing marriage,
*LWP* collapses the fundamental distinction between rights derived from
association and those derived from subjection. Men possess rights over
women not only because marriage is, in Grotius’s words, “the most natural
association” but also because women submit through a “vow which binds
herself to the man.” The act of binding (in marriage) finds its parallel in the
binding of men to a sovereign power: as by “the law of marriage” the hus-
band is “superior,” so by the law of nations is the sovereign superior. But by
its own terms, association becomes subjection, for according to natural law,
women are without the necessary reason to conclude a contract. Although
the binding power of their vow derives from its voluntarily commission, in
fact women possess no capacity, no authority, to actually do so. As I shall
point out, this has immediate effects on the conception of sovereignty and
rights in war.

*LWP* also holds that the “maintenance of social order . . . is the source of
law properly so called,” and, indeed, “no association of men can be main-
tained without law.”37 Therefore, both the source and purpose of the law is to
be found in the preservation of the proper social order that, as we saw above,
has as its foundation and as its model this arrangement between the sexes.
Reasoning from this recursive relationship, it is fair to say that the peculiar
position of women as both subject to and property of men is not simply
reflected and regulated in the social order, but forms an integral dimension of
the source and purpose of the law which is taken to govern that (domestic and
international) social order. As *LWP* sets forth, the ideal order to which inter-
national and national entities should aspire was modeled by Christian
nations.
There is a particularly illustrative example of the intersection of these multifarious hierarchies of relations, although, ironically, it is one for which *LWP* is frequently lauded. It is touted as evidence of its enlightened sensibility and, subsequently, the progressive potential of the laws of war it is said to found. In deciding whether “rape is contrary to the law of nations,” *LWP* declares there is an agreement among nations. First, those nations that find the raping of women in war permissible reason that an injury done to another person, to the person of the enemy, is not “inconsistent with the law of war that everything which belongs to the enemy should be at the disposition of the victor.” However, among the better nations, the rape of women in war is considered not solely on the premise of rightful acts of conquest. Better nations judge the rape of women according to two other principles: the “unrestrained lust of the act; also the fact that such acts do not contribute to safety or to punishment.” As one historian noted, “Grotius leans towards prohibition on the grounds that it could never contribute to attaining the purpose of war.” Since *LWP* holds that a hallmark of enlightened nations is to exercise restraint and moderation and to practice judgment and reason, transparent displays of sheer physicality, prurient excitement, and poor judgment indicate barbarity. Thus, better nations conclude, “rape should not go unpunished in war.” In other words, it may be permissible, but it is unlawful. However, among Christian nations the prohibition against rape is not merely punitive, but shall also have the prescriptive authority of law: “[A]mong Christians it is right that the view just presented shall be enforced not only as a law of military discipline, but also as a part of the law of nations.” Here, rape is not only impermissible and unlawful, but also corrosive of the identity of Christian entities.

Notice how the practice of and the response to rape distinguish nations according to a social hierarchy of reason, judgment, and comportment that, in turn, indexes barbarity. The capacity to define rape as an error of strategic judgment and unappeasable appetites demarcates the better and, presumably, better-than-better Christian nations from each and all others. A discourse of gender animates and regulates the evaluation of intercourse among and identity of specific nations and, insofar as this carries with it presumptions of heterosexuality, it regulates a particular form of sex in the service of Christian nations. Indeed, a fundamental irony of the invocation of *LWP* as an enlightened or progressive source of the prohibition against the rape of women in war is that the *LWP* is not at all concerned with the fate of women. It is foremost concerned with creating and regulating a particular hierarchy of relations among nations in accordance with the modalities (the divine, natural, and jus gentium) of law. Therefore, although it is tempting to also paint *LWP* as defending women, such strokes are too sweeping.
LWP admittedly acknowledges that rape is an “injury” done to another person, yet the actual person to whom that injury is done is unclear. If women are subordinate to men and categorized as possessions of the family, rape as causing an “injury to the person of another” could well be interpreted as injury to the family, to the husband, and, as it was the father and family which formed the nucleus of the commonwealth, to the commonwealth.\(^4\) Certainly, this interpretation is strengthened by the contention that rape is easily understood as sanctioned by the laws of war for everything which “belongs to the enemy should be at the disposition of the victor.”\(^4\) Women, then, are clearly of the enemy, property and possession, but are not clearly the enemy. In this sense, the formulation and understanding of war as a battle waged between and among men is produced and maintained within a very specific discourse of gender that takes the rape of women as its expression. Moreover, the comportment of men in war divides among that commonality.

The Law of War and Peace does not dispute the basic definition of the injury done but identifies it as insufficient. It is not that rape qua rape is wrong—impermissible, unlawful, or unjust. Instead, it is the characteristic and the intent of the act that renders it unlawful—it is an aberration of appetite, and it is not an efficient or rational strategy of war (or of conjugal sex). Moreover, I suggest that rape is also to be punished and prohibited because it injures not only those against whom it is committed but those who commit it. Most significantly, it denatures and dehumanizes men, preventing their ascension into progressively more civilized relations. The distinction of barbarism and civilization takes hold, is given substance, through this analysis of the effect of rape on men’s capacity to govern themselves—in surrendering to their appetite, men surrender their “humanity,” becoming beast. For man, unlike animals, has the capacity “to follow the direction of a well-tempered judgement, being neither led astray by fear or the allurement of immediate pleasure, nor carried away by rash impulse . . . whatever is clearly at variance with such judgement is understood to be contrary also to the law of nature, that is, to the nature of man.”\(^4\) Or, as also phrased, “lest by imitating wild beasts too much, we forget to be human.”\(^4\) LWP deems rape impermissible because it degrades the differences of men and animals, Christians and barbarians—differences and distinctions integral to the creation and maintenance of social order. Consequently, rape equally corrupts the strategic purpose of war—to seek and maintain an ever more progressive, Christian, social order. Although it may, in the gross sense, be permissible, it is destructive.\(^4\)

We misread the power of this discourse if we read it only or as primarily a discourse of gender, one that is concerned with the treatment and protection of women. Rather, discourses of gender and barbarism converge, whereby
the practice and prohibition of rape intimately constitutes a particular international order by regulating intercourse among and identification of sovereign entities and individuals as enlightened, Christian, men. The disavowal of rape by Christians cites an authority to mediate temptation and transgression. Furthermore, the gradation of the permissibility of rape underscores the complex relations among the capacity for judgment, the potential to moderate actions in war—which, in turn, is intimately associated with Christianity and masculinity—and an understanding of what it means to be “human.”

**Remedies of War**

Ever careful to parse the degree of differences within the desired social order, and cognizant of the desirability of peace and the persistence of war, *LWP* remains intent upon limiting the authority and right to wage war to those entities identified as public and sovereign. This is the first step toward instituting temperance and moderation and ordering war. War, in his view, while possibly still taking the form of a “duel” or private feud, should be more or less emphasized as a contention by force among those who “hold the sovereign power in the state.” Or, as Karma Nabulsi argues, “the thrust of Grotius’s writings was to concentrate the legitimate recourse to war in public hands.”

As a result, (as it was with his predecessors), the relationship imagined between the right of war and the rights of sovereignty is mutually constitutive. And, although it is tempting to deduce from this that the actual pursuit and practice of war should be limited to and by militaries, armies, and recognizable vested representatives of that sovereign power—it is difficult to find a consistent definition of belligerents or combatants within his work. For one, while the law of nations might so restrict the pool of combatants to the above, the law of nature (the dictate of right reason) holds that “no-one is enjoined from waging war.” In other words, sovereign authority may indeed be the marker for legitimate recourse to war, but who may wage war and upon whose behalf remains enigmatic.

This ambiguity is complicated by the position, in accordance with the contemporary customs of warfare and of natural law, that all inhabitants of a country against whom war is made may be warred against: “not only to those who actually bear arms, or are the subjects of him that stirs up war, but in addition to all persons who are in the enemy’s territory.” The logic of this assertion is premised upon the simple fact that “injury may be feared from such persons,” consequently they may be defended against. *LWP* states, “how far this right to inflict injury extends may be perceived from the fact that the slaughter even of infants and of women is made with impunity and
that this is included in the law of war." Thus, as sketched out herein, there is no clear differentiation among those who may kill and those who may be killed—to the degree, as Grotius indicates, "neither sex nor age found mercy." Consider for a moment the contrast between acceptance of this right, which passes without comment, and that of rape. Why is it acceptable that "[n]either sex nor age found mercy?" For what reasons would it be that rape is condemned, but the slaughter of women and children is not? What distinguishes slaughter from rape as an appropriate response to fear of injury from "such persons?" Could it, following the criteria set by \textit{LWP}, be because the killing of women and children contributes to the safety and punishment of enemies? Or, is it that the killing of women and children displays no unrestrained lust, no unreasoned appetite? Suffice it to say this contrast underscores how sex and sexuality inflects the proper governance of violence that, we might say, reflects the proper governance of the civilized soul.

\textit{LWP} begins the task of developing a “remedy” to the unchecked virulence and “frenzy” of contemporary wars by establishing a mean between “nothing is allowable” and “everything is.”\textsuperscript{56} Moderation and temperance in war demarcated by the limitation of killing—the limitation of that fundamental right of war—establish the crucial mean through which war may continue to be waged. Significantly, when shifting from a discussion of the brutality of war, its random and excessive violence, to its potential moderation, the discussion shifts from the conduct of war allowed by the laws of nations (those customary agreements between sovereign entities) to the law of nature (the dictate of right reason) and, as it is variously called, the law of love, mercy, and charity (a specifically divine, and fundamentally Christian law). What, then, underpins the potential for temperance is not the actions, or history of actions, among sovereign entities, but the desire and belief in a higher, perhaps more ephemeral but certainly more demanding law—that is, divine law.\textsuperscript{57} Thus, temperance in war evolves from distinguishing and discriminating between acts of war and individuals at war in accordance to precepts and principles best exemplified and articulated in Christianity. It requires, in essence, distinguishing between what is permitted and what is right.\textsuperscript{58}

Introduced within the category of permissibility, then, are further distinctions of what is right or what is just. \textit{LWP} calls upon both natural and divine law to discern the difference, to demarcate the boundaries, between acts done in war which are permissible—done with impunity under the law of nations—and acts which, while perhaps still permissible within the law of nations, are “devoid of moral justice.”\textsuperscript{59} This distinction of what is permissible and what is right also cites that which is “honourable.” The right of killing enemies is not simply a right, in the way that an individual possesses the lawful authority to do so, but must also be rightly done: “Consider not what you
may do, but that of which the doing will honor bring. Equally formative to distinctions of permissible and right violence is the concept of honor, what is just and good. This concept of honor is intimately associated, as it was within the chivalric codes of war, with the identification of masculinity, for it is the honor of men that restrains them from lawful, yet dishonorable, acts.

**Sex and Innocence**

*LWP* specifies the particular acts that fall under the rubric of lawful, yet devoid of moral justice, concluding that it is the “bidding of mercy, if not of justice, that, except for reasons that are weighty and will affect the safety of many, no action should be attempted whereby innocent persons may be threatened with destruction.” Immediately after positing this principle, one which attests to the existence of and obedience to a “more just and better” law, *LWP* begins to outline “special cases.” *LWP* employs a particular form of reasoning where the rule is illustrated through example. A general principle is posited from which its proof is deduced through an analysis of specific, particular cases. The move to “special cases” is a move upon which the validity of the entire principle—that is that no innocent person can be threatened with destruction—rests. Accordingly, these special cases, through which and by which the principle is exemplified and defined, illustrate the verity and legitimacy of the principle. What are the special cases, then, upon which the principle rests? “That children should always be spared; women, unless they have been guilty of an extremely serious offense; and old men.” With this, *LWP* contravenes the laws of nature and the laws of nations, for each, as I stated above, allows for the killing of children, women, and old men for all pose a potential harm and all may claim a potential right of self-defense. How does he reason his transgression? He does so in three ways. First, quoting Seneca, *LWP* straightforwardly states, “let the child be excused by his age, the woman by her sex.” At first, it seems that the sex of the woman refers literally to the sex had by a woman for it is not all women who are to be spared; it is only virgins. Here *LWP* refers to the trial of the Midianites, arguing that even in a war so just as to be ordained by God, all were not slaughtered. The virgins, “32,000 persons in all, who had not known a man by sleeping with him,” were left alive, to be distributed among the Israelites. All others, every man and every woman who had known a man, were killed as was the way in the wars against Canaanites; for these were wars in which there “was not a single survivor left,” and the practice was to “utterly” destroy “men, women, and children.” Virgins were excused because they, unlike other women, were innocent: they could not be accused of “seducing” the Israelites.
Second, continuing to trace this reasoning, one discovers that it is not simply the lack of sex that sets certain women apart, to be spared among their kind. Sparing of women during wars is equally grounded in the belief that women cannot “devise wars.” Recollect, “on account of the difference in sex the authority is not held in common but the husband is in the head of the wife . . . [t]he woman under the eye of the man and under his guardianship.”

Compare this with the contention, by no means unique among Grotius’s interlocutors, that recourse to war should be employed primarily as a form of recompense against a violation of a right (and thus, to recover property or to punish) or in the exercise of self-defense. As LWP forwards, there is “no other just cause for undertaking war can there be excepting injury received.”

Now, as marriage is said to be “the most natural association” in which the husband rules over his wife, then especially within natural law the rights of the husband trump those of the woman. If husbands and fathers possess rights over their wives and daughters, as both property and subject, and if, furthermore, wives are said to cede their rights first to their husbands and then through him to the sovereign, how, exactly, are women able to register a violation of rights? Finally, since “that power is called sovereign whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will, “the least that can be said is that women are without sovereignty necessary to register a violation of rights and a resort to self-defense.”

In essence, women lack the authority and sovereignty necessary to devise war within a theory in which “the principle author of war is one whose right has been violated.”

Third, LWP holds that wars are to be waged solely for just cause and for just purposes. As formulated, this contention erects another barrier against women as able to authorize or devise wars, for women are among those who are constitutionally unable to adjudicate between “just and unjust, lawful and unlawful.” Drawing from Aristotle, LWP explains, “alike children, women and men of dull intellect and bad education are not well able to appreciate the distinction.” In this phrase, “women” are a problematic middle term—either like children or stupid and poorly educated men or somewhat akin to both. Therefore, although the exact analogue may be inconsistent, the consequences are not. Women are incapable of devising war.

Therefore, the substantiation of the first principle is as follows. Absent deliberative and sovereign authority, unable to tell just from unjust or to receive injury, women are to be spared for they are constitutionally and constitutionally incapable of waging war. In addition to these definitional deficiencies, derived from the matter of sex, women may be spared if they have not experienced sex itself outside of the proper boundaries of family and nation. We also now see how the earlier discussion of rape foreshadows this recur-
sive relation among injury, rights, property and sovereignty, made possible by the presupposition of heterosexual hierarchies of rule.

The power of this configuration of sex, in which differences attributed to materiality of the body are presumed as evident and natural foundations for the apparent opposition of sex, is made visible in the central role that material difference plays in the construction of the innocence of children and old men. I already suggested that *LWP* develops an analogue developed between children and women in which absence of reason, authority, and capacity joins the two. Furthermore, children and women are without sovereignty. Innocence, then, is entangled with these absences and lack. Yet, whereas children may grow out of, develop, and transform their inadequacies—either through education or by simply maturing—and old men may begin to fail, women are forever marked deficient in these regards. Here, the influence of Aristotle, present throughout the text, truly comes to the fore. Differences of sex are translated into moral, social, and political distinctions that, in turn, are taken as legitimating, and demonstrating the existence of, biological differences upon which these putative distinctions are premised. The result is that innocence is not a descriptive characteristic borne by women, children, and old men equally, or as corollary of occupational duties such as the clergy, merchants, farmers of those “concerned with letters.” Rather, innocence is inextricable from the female sex.

While we have grown accustomed to thinking of children as “natural” civilians, it is in fact women who are made civilians as if by nature. It is only women whose innocence is not derived from the sequential and variable attribute of age, choice of religious, pastoral or artistic occupation, or defined by a range of intellect and education—one grows in and out of these categories, the cycle of birth, maturity, senility, and death frame their span. Furthermore, it is the very matter of their sex, this particular inscription of the meaning of sex and sex difference, which renders them innocent and ‘excused’—an understanding that we have now accepted as natural when, as a reading of *LWP* reveals, it is decidedly unnatural. The governing discourses of gender do exactly what Judith Butler claims they do. Not only reflecting and reifying differences in sex, marking each as distinct, discourses of gender are “also the discursive/cultural means by which ‘sexed nature’ or ‘a natural sex’ is produced and established.” Discourses of gender stabilize the difference of those who shall be spared and those who shall not. It is this difference upon which the hierarchies of moderation depend, and consequently it is in “women” that innocence is insubstantiated.

This comes particularly clear when we follow the attribution of guilt, for women are innocent “unless they have been guilty of an extremely serious offense.” Elaborating on this prior claim, *LWP* states that women should not
be spared from war if “they commit a crime which ought to be punished in a special manner or unless they take the place of men.” This is a radical and disruptive claim for a text that equally holds that women are the “sex which is spared wars.” What, then, are the crimes for which women ought to be punished in a special manner? For one, acts of seduction could qualify as such, for acts of seduction are not only serious offenses but insofar as women act it could be said that they took the place of men. And, among those who write before Grotius and upon whom LWP relies, the serious crime for which women would be specifically punished is taking the place of men.

For example, one of Grotius’s most favored and honored predecessors, to whom he acknowledges a specific debt, is the Italian jurist Alberico Gentili. Gentili argues that as a rule the “age of childhood is weak, and so is the sex of women, so that to both an indulgence may be shown,” yet he, like Grotius, makes “an exception of those women who perform duties of men which are beyond the power of the sex in general.” What is the substance of this crime that makes its commission so exceptional?

For one, as both authors intone, men are “not accustomed to wage war” against women. Quoting the same Roman authorities, both works underscore that women are a “sex untrained and inexperienced in war.” Due to this, there is little honor to be gained in fighting against such callow foes. Instead, those who do fight women gain only the epitaphs of cruelty and savagery, the reputation for inhumanity and impiety, as well as the scorn of those to whom the difference between what is permissible and what is just is both apparent and applicable. Recollect, that a guiding principle of LWP’s argument is that “among good men even war has certain laws,” while “it becomes good men not to wage a war of annihilation.”

Consider, further, however how this distinction among men founded upon the pursuit and practice of honor, secured in the sparing of women, differentiates among the commonality of men who wage war. Again, this differentiation is not simply scored by differences of barbarism and Christianity, but draws equally from the concept of honor. As with the chivalric tradition which precedes Grotius, a tradition he is by no means unfamiliar with, the honor of men is intimately linked to their identity as men. Honor is not merely an elaboration of masculinity, but its defining and distinguishing element. It may become good men to respect the strictures on war, but it is also the primary means by which men become good. For this reason, women engaging in war confuse and contradict the assignation of men as men, and men as good men, just men, among men. Women in war disrupt the order of things.

Thus, the crimes that so degrade the defense of women—both seduction and taking the part of a man—violate the regulation of sexuality, sex, and sex
difference, as constructed in and through a heteronormative hierarchy presumed integral to the proper order. Significantly, these acts destabilize social order not only through their transgression of its boundaries, but because they require and make manifest women’s potential for agency—which, in the complicated logic of LWP, calls upon and makes manifest sovereignty, a capacity that women are said not to possess. Consequently, the act of taking the place of men must be punished.

Yet, notice how these works propose to do so. LWP simply states that “When Nero in the tragedy calls Octavia a foe, the prefect replies: Does a Woman receive this name?” Likewise, Gentili, also quoting Seneca, writes, “a woman does not take the name of the enemy,” continuing, in his own words, “for in so far as women play the part of men they are men and not women.” Therefore, he concludes, “if women are guilty, then it will be said that the guilt is destroyed rather than woman.” Or, as he elaborates, it will be the “abomination” which is destroyed—not the woman, but her crime. Quite noticeably, both attempt to foreclose the potential disruption of the constitutive dichotomy of sex. In so doing, each defends the difference that founds the social order and betrays anxiety regarding its constitutive instability. For even when women transgress the boundaries of sex, it is they who are rendered suspect and not that boundary itself. It is not woman who receives the name of foe, it is not women who play the part of men, and it is not women who are destroyed—it is the “guilt” and the “abomination” which is so destroyed. Thus, LWP attempts to defend the essential opposition that girds its argument even as that opposition proliferates beyond its bounds.

What is fascinating to follow is how LWP reaches this conclusion after beginning from the premise that women are entitled, like all beings, to wage war in self-defense. Grotius writes that: “we shall hold to this principle, that by nature every one is the defender of his own rights; that is why hands were given to us.” This claim is taken as self-evident, for it is found in natural law, defined as that which reveals itself as “manifest and clear.” Additionally, the law of nations has not acted to distinguish between ages and sexes in the waging of war. For these reasons, LWP turns to divine law—to the commanding sentiments of love, justice, and charity—to produce reason and justification for a distinction among those against whom war waged, while sex and sex difference are naturalized as the referents on the basis of which LWP measures the mean between “nothing is allowable” and “everything is,” while simultaneously marking a distinction between what is permitted and what is right. Moderation in war is explicitly as an act of mercy and of charity, an act that refers to the compassion of God, and it is introduced through the sparing of those who are indelibly innocent—women.
(It is no small wonder that the participation of women in war posed a threat of such degree.) Sex and sex difference found the fragile edifice of the laws of war. It is through the naturalization of those differences that the distinction between who shall be spared and who shall not, otherwise not found in the laws of nature or in the law of nations, can be instantiated.

IV.

Thus far I have begun to untangle the multifarious discourses of Christianity, barbarism, innocence, guilt, sexuality, and sex, to trace how discourses of gender make possible distinctions of violence by distinguishing permissible, just, and lawful acts of war from all others. In particular, I drew out the recursive relations among definitions of innocence—as sexual purity, sexual conformity, absence of reason, lack of sovereignty, incapacity to distinguish—and sex and sex difference. The articulation of the “natural” determinacy of sex and sex difference permits, indeed provides, clarity and distinctiveness that can, in turn, support a series of other differences. Although I do not suppose that the meanings of sex and sex difference are the same from the 17th to the 20th century, I contend these relations inflect our contemporary distinction of combatant and civilian. That is, discourses of gender continue to operate in the terms and assumptions that govern the theory and practice of the laws of war. These discourses produce differences of sex as natural and normal, differences that are the clearest if not primary or exclusive point of reference for the concept of innocence, that are taken as paradigmatic for legislating and legitimating distinctions of violence. Let me start to sketch this out by examining the construction of the principle of distinction, that is, the injunction to distinguish between combatant and civilian at all times during armed conflict—an injunction which, as I introduced at the start of this essay, is taken to demarcate lawful and legitimate violence.

It is in the 1977 Protocols Additional to the 1949 Geneva Conventions that the principle of distinction is first codified in international humanitarian law, and the first formal definition of the “civilian” is established. What is striking is that this occurred even as the possibility of a distinction between combatant and civilian was considered suspect, primarily but not solely as a result of the wars of national liberation dominating international politics at that time. In wars involving the entire population—a population whose loyalty was a prize worth securing and whose participation was purposefully solicited—the difference of “combatant” and “civilian” was, and not for the first time or only for this reason, indeterminate. An expert commented in 1972 on the draft of the Additional Protocols to the 1949 Conventions, that it was
“extremely difficult, in practice, to distinguish between civilians and combatants,” while another went so far as to say that the principle been emptied “of substance.”

In 1974, the Organization of African Unity, composed of liberation movements, argued that the line between “combatant” and “civilian” is consistently “blurred” if not erased—a statement most recently repeated by the Secretary-General in 1999 and 2002. In 1977, David Forsythe expressed a common view, that “the innocent civilian may in fact be part of the enemy, or in any event, indistinguishable from the enemy,” while another argued that this very “fluidity” between “combatants” and “civilians” rendered such distinctions suspect. Therefore, the fundamental question was not how to distinguish between combatant and civilian, in a “fog of war” that threatened to blur an otherwise clear distinction, but how to produce the difference between the two when civilian and combatant were indiscernible. How was this accomplished?

In the 1977 Protocol Additional I, Article 50, the civilian is defined as anyone who is not a member of the armed forces. The civilian, then, is that which a combatant is not. As the ICRC commentary on Additional Protocol I explains, combatants and civilians are “only conceived in opposition to each other,” while the definition of the civilian is of a “negative character.” It is here, in 1977, that the exact binary opposition of combatant and civilian is made a formal dimension of international humanitarian law. Although the governing presumption was that the concept of the civilian is so clear that “everyone has an understanding of its meaning,” the introduction of an explicit binary is said to more precisely specify its substance. The definition of the “civilian” derives from that which the combatant is not. According to this logic, the precision of the “civilian” relies upon an exact definition of the latter, and the “civilian” works out of the dominant terms of “combatant,” such that the two are always in synchronous opposition.

However, in Additional Protocol I, specifically Articles 44, paragraph 4, the definition of armed forces, that is of combatants, is broadened and changed from the more restrictive definition found in the 1949 III Convention, introducing a temporal consideration into the definition. The 1949 III Convention defines requirements for combatants (also known as the qualifications of belligerents) as the following: (1) they are commanded by a person responsible for his subordinates; (2) they have a fixed recognizable sign visible from a distance; (3) they carry arms openly and; (4) they conduct operations in accordance with the laws and customs of war. But, as now outlined in Additional Protocol I, combatants no longer had to carry arms openly or distinguish themselves from the civilian population unless and only for such time that these combatants were militarily engaged. “Formulated as an unambiguous exception” to the fundamental obligation of combatants to dis-
tistinguish themselves at all times from civilians—allowable only in particular forms of conflict—this alteration nevertheless arguably confuses the determination of who is a combatant and who is a civilian.\textsuperscript{95} Compounding matters, Protocol I simultaneously withdraws the protection of civilians during and for such time as civilians participate in “hostilities,” a term left purposefully vague. In other words, what we learn is that according to the law, a combatant may or may not act or appear as such, while a civilian may or may not act or appear as such for imprecisely, if at all, defined periods of time. Nevertheless, a distinction between them must and can be made at all times. Yet, how can this distinction, only “conceived in opposition to each other,” be but empirically and conceptually obscure?

Delegates to the conference attempted to resolve this conundrum of their own making in two ways. First, as noted in the 1973 ICRC commentary on the Draft Additional Protocols, the injunction to extend the rights and protections is “only valid in so far as the appearance and behavior are such as might be generally expected of persons claiming to be civilians.”\textsuperscript{98} “Uncertainty about the true character of the civilian,” which governed the earliest discussions of the draft protocols, is dispelled if one looks and acts accordingly.\textsuperscript{99} The desire for visibility is repeated in the preparatory conferences by delegates who wished for a “fixed, permanent, and clearly visible” means of distinction, one that would be physically observable.\textsuperscript{100} As the ICRC commentary on Protocol I outlines, combatants carrying arms openly when in the “range of the natural vision of his adversary,” or when “visible to the naked eye” will avoid the “confusion” of combatant and civilian and make the “distinction between an armed combatant and an innocuous civilian . . . perfectly clear.”\textsuperscript{101} But, carrying arms openly, when visible to the adversary, only momentarily resolves the confusion. It does nothing to address the situation of a “civilian” who does not look or act accordingly, especially as what a civilian looks like is never discussed. Thus, bearing arms openly does not make it the distinction between the two “perfectly clear,” nor does it provide a permanent or fixed means to distinguish between the two.

Instead, the answer lay in the imposition of permanence, a stable and secure substrate, from and to which combatants and civilians will always return. For what we learn is that civilians who lose their civilian status while participating in hostilities resume that status upon cessation of participation. While a guerrilla combatant can wear “purely civilian dress if the nature of hostilities requires it,” this does not mean that he has the “status of combatant while he is in action, and the status of a civilian at other times.”\textsuperscript{102} Rather, once a combatant, always a combatant. There is a strange perpetuity, an inalienability, of “combatant” and “civilian” that is otherwise not found in the laws
or practice of war. It is as if the difference is, in its essence, self-evident—there to be seen even if neither the combatant nor the civilian, as Additional Protocol I accepts, are acting as such. It is at this juncture that discourses of gender return to the fore.

After observing that “there is no doubt that there is still confusion as to who is a combatant and who is a civilian,” one scholar concludes there must be a “heavy presumption that women and children are protected civilians.” Another echoes her assessment, but suggests we can still identify the “clearly innocent” or, what he also describes as the “indelibly innocent” by reasons of age, sex, and capability.

However, these are more than simple presumptions, for although Additional Protocol I introduces a “negative” definition of the civilian, there is already a substantive understanding and definition of the civilian at work in the formal body of law, one that emerges from the regulation of sex and sex difference. As the very definition of the “civilian” in Protocol I draws directly from this, specifically Article 13 of the 1949 IV Convention, and as each treaty is responsive, such that every “new instrument can only have a purely cumulative or supplementary (but no destructive) effect,” then by its own terms it would be impossible to negate the continuing influence of discourses of gender.

We learn from the ICRC commentaries on the IV Convention that there are “certain categories of the population who, by definition, take no part in the fighting”: Civilians are identifiable because their “shared suffering, distress, or weakness” makes them incapable of bearing arms, fighting, or taking an active part in the hostilities. Those whose “shared suffering, distress or weakness” identifies them as civilians are “children, women, old people, the wounded and the sick.” Significantly, suffering, distress and weakness is now the index and proof of innocence. Moreover, suffering, distress, and weakness establish children, women, old people, the wounded, and the sick as harmless, worthy of the protection and benevolence of the combatant and of the law.

As was evident in LWP, the commentaries create a resemblance, or equivalence, among these disparate categories of individuals. And, similar to LWP, out of these categories it is only women who are said to always already possess these varied attributes (not bearing arms; outside of the fighting; weak, suffering or in distress) as matter of sex. The others—children, old people, wounded and sick—all bear these necessary attributes as a result of unfortunate circumstances and transient conditions, that is, temporally or chronologically. And, in fact, the debates in the preparatory conferences for the 1949 Conventions were on the precise ages by which the categories of
children and old people would be known and their faculties of judgment and strength could be assessed. There were no corresponding inquiries into the exact criteria by which the innocence of women would be known; it is their sex alone—and it is only women who appear to have a sex—which is sufficient to determine innocence.

The salient characteristics of sex and sex difference highlighted in the commentaries are sexual vulnerability and reproductive capability and not, as in \textit{LWP}, diminished reasoning or deficient judgment. Nevertheless, the conclusion is the same.

It is only women out of these other distinct categories that both materialize and stabilize the distinction of combatant and civilian. Put a different way, women—like children, old people, and the wounded and sick—are harmless, but unlike children, old men, and the wounded and sick, women pose no potential harm. It is only women whose suffering, distress, and weakness, derived from her reproductive capability and sexual vulnerability, is a constant and natural marker of their very sex and, in turn, of the “civilian.”

It is this logic of sex and sex difference that repeats itself in the debates and discussions for Additional Protocol I, although the emphasis now falls on reproductive capability—not unsurprising as discourses of war promulgated by national liberation movements interwove family and nation, whereby the future viability of the nation rests upon the reproductive capability and heterosexual proclivity of the \textit{woman}. \footnote{108}

In the words of Franz Fanon, the “couple is no longer an accident, but something rediscovered, willed, built. It is, as we can see, the very foundation of the sexual encounter that we are concerned with here.”\footnote{109} With this knowledge, the desire of the delegates for a fixed, permanent means of distinction, one that would be perfectly visible, begins to become intelligible. Not only does sex and sex difference function as that substrate, but also, as Donna Haraway reminds us, “motherhood is known on sight.”\footnote{110} In other words, the presumption of the visibility, materiality, and determinacy of maternity, within a particular matrix of sex and sex difference, makes possible the distinction of combatant and civilian at a particular time when no distinction is discernible. Thus, just as sex and sex difference ensures the self-evidence of the combatant and civilian distinction, so too does the distinction reassert the naturalness of sex and sex difference, both of which recite and reaffirm a heteronormative political order that, simultaneously, confirms itself as civilized. After all, in the words of a delegate who opened the preparatory conferences for Additional Protocol I, “the distinction between armed forces and civilians was a basic element of the law of armed conflict and an essential principle of civilization,” without which “there would be a return to barbarism.”\footnote{111}
In these theorizations of the laws and practice of war, complicated sets of relations and overlapping or crosscutting discourses of difference emerge in which sex and sex difference seem to be decisively implicated at each turn. For example, the female body in relation to rape and property which is, at the same time, also in relation to female reproductivity and maternity that is, itself, in relation to children, all of which express and organize relations of violence, construction of masculinity, attributions of innocence, and a proper Christian, civilized, political order. If we begin, as I have argued feminist scholarship does, with an acceptance of the distinction of combatant and civilian, we risk ignoring its emergence from these entanglements, and the marks that this distinction continues to bear. Let me conclude more broadly by highlighting what may be at stake.

To be innocent in war, in the terms set by the laws of war, is to be deficient or lacking in a multitude of ways that in the end, implicitly, if not explicitly, cites an incapacity for politics. Indeed, the “harmlessness” of the civilian in the 1949 IV Convention and Additional Protocol I continues to cite this incapacity if, attending to Carl Schmitt, we identify harmlessness with nonpolitical. Accordingly, the rights and protections offered cannot be, as Jacques Rancière refers in regard to human rights, “experienced as political capacities.” Indeed, what I illustrated is that it is not political capacities which inform the extension of rights and protections of international humanitarian law, but is instead a celebration of Christian mercy, charity, and love, and a valorization of suffering, distress, and weakness. Equally significant, an incapacity for politics is also, at least for Aristotle, an incapacity to become fully human. This is not benign, for it shows how the rights and protections of international humanitarian law are genealogically derived from or grounded in what some might call “subhumanity.” What this portends is that international humanitarian law requires and produces “subhumanity” as the predicate for extending recognition of its rights or offering its protections. Insofar as this is true, then international humanitarian law must also promulgate particular understandings of what it is to be “barbarian” and to be “woman,” continually citing their incapacity to be fully constituted as human and as political.

Therefore, as we seek to understand and to respond to the current configurations of war—in which distinctions of civilization and definitions of “humanity” abound, and the liberation of women in blue burkas designates a putative U.S. triumph while demarcating the difference of combatant and civilian—it is to this inheritance that we must turn if we are to think what we are doing.
NOTES


3. This principle is formally codified in Article 48 of the *Protocol Additional to the Geneva Conventions of 12 August 1949 (Additional Protocol I)* of the 1949 *IV Geneva Convention*: “In order to ensure respect for and protection of the civilian population and civilian objects the Parties to the conflict shall at all times distinguish between the civilian population and combatants, and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”


9. Additional Protocol I, Article 50 (1).


14. This construction is eerily echoed by the envoy from the Russian Federation during the October 24, 2000 Security Council debate (S/PV.4208). He states that “the words ‘women, peace, and security’ were a harmonious and natural combination. An unnatural combination was ‘women and war’ as was ‘women and armed conflict.’”


19. Gardam and Jarvis, 118.


21. Scholars of international law and international relations have engaged in detailed documentation and refutation of varying assessments of the contributions Grotius made to the found-
ing of international relations and international law. Wearing thin, this debate over the proper fathering of international law and relations has been mostly discarded in current discussion. I, too, am uninterested in pursuing the now hackneyed argument as to whom paternity can be legitimately granted, but the presence and power of this debate indicates the pivotal influence Grotius had upon the development of international relations and international law. In this sense, I am engaging in an exercise similar to that undertaken by Foucault in his rereading of Hobbes. Michel Foucault, *Society Must be Defended: Lectures at the Collège de France 1975-1976* (Picador Press: New York, 2003).

24. Jacqueline Stevens has pointed out that the analysis of origins, while eschewed by Foucault, is exactly what Nietzsche promotes. However, she gives short shrift to Foucault’s later loosening of such restrictions, perhaps best captured in his move to problematization, his theorization of “beginnings,” and his interest in the temporality of continuities and discontinuities. The balance struck here is one that seeks to understand the use to which such citing of origins is put, while not re-inscribing an origin from which a strictly evolutionary narrative can be read; see Jacqueline Stevens, “On the Morals of Genealogy,” *Political Theory* 31, no. 4 (2003).
29. Tuck, 103.
30. As Grotius himself reveals, it is the “The New Testament I use in order to explain—and this cannot be learned from any other source—what is permissible to Christians.” Moreover, in writing his treatise on war his wish is to “inscribe these teachings on the hearts of those who hold sway over the Christian world.” “Prolegomena,” 27; Book III. Chp. XXV para VIII, 862.
33. Grotius, Book II, Chp. V. para I, 231. “The right of the father” is a plangent phrase, perhaps evoking in some sense the supremacy of the father in Roman law, and one that implies that the laws of war have roots far deeper and more tangled than the conventional acceptance of LWP indicates.
34. Grotius, 231.
35. Richard Tuck, 1999. Yasuaki Onuma, “War” noting that “the basic constituent unit of society was the household, with its head (*paterfamilias*) having governing power over his wife, children, and slaves” in *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius*, ed. Yasuaki, Onuma,(Oxford: Clarendon Press: 1993), 57-121, 60; see also Simon Schama, *The Embarrassment of Riches: An Interpretation of Dutch Culture in the Golden Age* (New York: Vintage, 1997), Chp. 6.; Grotius, Book II, Chp V. para XII, 240. As feminist theorists have oft underscored, consent to the formation and formulation of the sovereign power of the state is predicated solely upon the association and subjection of men and, yet, fundamentally relies upon the prior (heteronormative) relation so imagined and naturalized between husbands and wives. For a classic analysis of this see Carole Pateman, *The Sexual Contract* (Stanford: Stanford Press,

36. Schama, 386.
37. Grotius, “Prolegomena.” This maintenance of the social order, which we have roughly sketched and which is consonant with human intelligence, is the source of law properly called.” 12, 17.
40. Grotius, 656-57.
41. Kasai Naoya, “The Laws of War” in Onuma, 244-72, 260.
42. Grotius, 657.
43. Grotius, 657.
44. Grotius, 657. Feminist scholars have commented upon the power and persistence of this framing, wherein the injury of rape is translated and interpreted as an injury done to the family, community, or the nation rather than to the person so violated. Indeed, the strategy of public rape, in common areas or in communities, is specifically intended to violate that community through violation of the female body, while the interpretation of rape as a crime against (familial) honor, rather than a war crime, evinced this construction.
45. Grotius, 657.
46. Grotius, 13.
47. Grotius, Book III. Chap XXV para II, 861.
48. The formation of an “ethical” self, its imbrication in the proper governance of sexual relations, desire, and the soul, precedes a specifically Christian theology, as laid out in the Use of Pleasure, but its appearance here cites these relations, a form of an “art of the self.” The shift said to occur in the seventeenth century from the “woman” to the “body” as the locus for “moral reflection on sexual pleasure” as Foucault describes it, is not yet visible in LWP. Rather, it would seem that the workings of power, at least as captured within the concepts of dietetics and economics, is identifiable in LWP. See Michel Foucault, The Use of Pleasure (New York: Vintage Books, 1986), 250-52.
49. Although I discuss it at length elsewhere, suffice it to say that the relations between the laws of war and the definition of what it means to be “human” structure contemporary accounts and justifications of the laws as well. Often—all too often—this relationship is explicitly, if not implicitly, theorized in and through the figures of “women” and the “barbarian.” Michael Walzer, in Just and Unjust Wars (New York, Basic Books, 1977), seeks to establish a theory of rights that defends the immunity of noncombatants—which he also describes as “bystanders” and “civilians”—or those who, by the terms of “our moral discourse” are called “innocent” (30,146) However, to discover those rights, their existence and implementation, he relies first on the trope of a family feud (conjuring not only an implicit homology between the two, but re-establishing a relationship between family and state reminiscent of Aristotle), in which women and children embody immunity. He then continues to premise his argument for the protection of innocents on the disavowal of rape—both through the rape of the Sabine women and his discussion of Deuteronomy 21. Each of these, so he argues, illustrates the distinctly human capacity to restrain utter violence and to decide immunity in war. Indeed, he intimates that to become a “moral monster” is to be convinced that “old men, and women and children are . . . enemies” (195). Walzer, no less than Grotius, is deeply entangled in overlapping discourses of gender, innocence, and barbarism as he attempts to distinguish what is right in war.
50. Grotius, Book I, Chap IV, para IV, 97.
52. Grotius, Book I, Chap. X, para IV, 165. Grotius has no doubt that by nature “all subjects may be used for purposes of war.” And, although certain classes may be exempt from doing so, it is by “special enactment” (165). For it is “[i]n the first principles of nature, there is nothing which is opposed to war; rather, all points are in its favor. The end and aim of war being the preservation of life and limb, and the keeping or acquiring of things useful to life, war is in perfect accord.” Book I, Chap III, para IV, 52.
53. Grotius, Book III, Chap IV, para VI, 646.
54. Grotius, 646.
55. Grotius, Book III, Chap IV, para IX, 648. emphasis added.
57. Divine law is drawn both from the Gospel and the Old Testament, as well as the law of nature, and corresponds but is not limited to the duty of Christians. See Tanaka Tadashi, “Grotius’s Concept of Law” in Onuma, 276-304; see also James Turner Johnson, 1975; note however that Grotius also derives the law of nature, in part, from the practice of civilized, Christian nations. See Book III, Chap X., 716.
60. Grotius, Book III, 634.
63. “Just as mathematicians customarily prefix to any concrete demonstration a preliminary statement of certain broad axioms on which all persons are easily agreed, in order that there may be some fixed point from which to trace the proof of what follows, so shall we point out certain rules and laws of the most general nature, presenting them as preliminary assumptions which need to be recalled rather than learned . . . with the purpose of laying a foundation upon which other conclusions may safely rest.” Grotius, De Jure Pradae, quoted in Martin Van Geldren, “The Challenge of Colonialism: Grotius and Vitoria,” Grotiana, New Series. Vol 14/15. (1993/94): 3-37.
64. Grotius, Book III, Chap. IX, para I, 734.
69. Grotius, Book II, Chap I, para 1,170 .
70. Grotius, Book I, Chap III, para I, 102.
71. Onuma, 99. Let me be clear, it is both in private and public war that women, if even considered in the latter, would be barred from waging war. In natural law, women possess at best the limited rights due the most natural form of association, marriage. And, as women are configured primarily as a form of property, it would seem difficult for women to wage a war to regain property, while finally, in the law of nations for public war, it is “essential that it should have the support of the sovereign power.” Grotius, Book III, Chap III, para IV, 633.
72. Grotius, Book II, Chap XX, para XXXI, 497. The power of discrimination is one of the fundamental distinguishing characteristics of men from animals, as Grotius discusses in the “Prolegomena”.
73. Grotius, 497.
74. “Again, that which is always the rule in respect to children who have not yet attained to the use of reason is in the most case valid with regard to women.” Grotius, Book III, Para IX, 735.
The third group which Grotius focuses upon are those who “also should be spared” because their occupations are solely religious or “concerned with letters,” those whose occupations are farming or mercantile and, finally, prisoners of war. Note, here this is occupational protection, a protection that does not determine an absolute difference—as does sex and sex difference.

Butler, 7.

Grotius, Book III, Chap XI, para IX, 734.

Grotius, 735.

Grotius, 736.

It bears further development, but crimes of perfidy (of disguise) were consistently decried within the larger “tradition” of theorizing on war. Specifically, the cross-dressing of the sexes was to be frowned upon. In this, think only of the treatment and speculation regarding Joan of Arc and the crime for which she was killed—that of dressing as a man. In fact, the difference between an acceptable ruse of war and the crime of perfidy pivots on an understanding of honor for while it may be honorable to trick in war (ruse), it is not honorable to deceive.

For Grotius’s acknowledgement of his debt, his “profit” from “the painstaking” of Gentili, see “Prolegomena,” 22. Subject to great discussion, the relationship between the two scholars is discussed in Gesina van der Molen, 2nd ed., Alberico Gentili (Leyden: A.W. Sijthoff, 1968); Peter Borschberg, Hugo Grotius: Commentarius in Theses XI (Berlin: Peter Lang, 1994); Meron, 1998, 120-30.

Alberico Gentili, De Jure Belli Libri Tres, trans. John C. Rolfe (Oxford: Clarendon Press, 1933), 252. Similarly, Francisco de Vitoria suggests that there are crimes for which individual women should be explicitly punished, although all women should be presumed innocent. The nearest de Vitoria defines such a crime is fighting in the war. Francisco de Vitoria, Political Writings, eds. Anthony Pagden and Jeremy Lawrance, (Cambridge, Cambridge University Press, 1991).

Grotius, Book III, Chap XI, para IX, 735.

Grotius, 735, 734.

Grotius, 735.

Gentili, Book II. Chap. XXI, 253.

Gentili, Book II. Chap. XXI, 256.

Grotius, Book II. Chap V, para I, 164.

Grotius, 23.

“Total war” of the twentieth century as practiced by both Allied and Axis powers, concentration camps of the nineteenth and twentieth centuries, and nuclear weapons are all predicated on, while ensuring the meaninglessness of, the distinction.


Pilloud, 610.

Pilloud, 610.

It is this debate over the requirement for combatant status that occupies the military tribunals for those detained at Camp X-Ray, while the position of President Bush and his administra-
tion relies, formally at least, upon their claim that both the Taliban and Al-Qaeda failed to meet those standards.


102. Pilloud, 516.


107. Uhler, 119, 118.

108. Men of reproductive age were not specifically and especially protected for their role in procreation, while the introduction of particular articles or discussions that suggested these protections should equally apply to others who might care for children, fathers or other family members, were dropped without further discussion. CDDH/III/SR.44, 57.


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