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Rape in the American Civil War: The Effect of the Lieber Code Court Martial Trials

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RAPE IN THE AMERICAN CIVIL WAR
THE EFFECT OF THE LIEBER CODE COURT MARTIAL TRIALS

By

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DEDICATION

Without the endless love, encouragement, and support of one woman, none of this work would have been possible. I dedicate this thesis to Cassi McAllister, my wife.

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ABSTRACT

Rape had been a much feared, but rarely prosecuted consequence of war in the early history of the United States. Since America was relatively isolated from its enemies, and its soldiers usually interacted with non-Americans, this horrible consequence of war typically seemed distant or othered. When civil war broke out on American soil, it resulted in massive armies of young American men occupying cities populated by women and African-Americans. The consequences of this interaction made the Civil War an important time for the US Federal government to reconsider the rules of war. Public sentiment regarding the treatment of civilians – in particular women, and the legal status of African-Americans had been shifting towards one of increased protection and recognition, while at the same time the military shifted from a policy of conciliation to one of subjugation. The Lieber Code of 1863, which replaced the Articles of War from 1806, was the result of this shift in sentiment. The new code provided rules for court martial trials of soldiers accused of rape or sexual assault, regardless of the victim's race, and allowed for more vigorous military action with protections for civilians. These trials produced many results beyond strengthening the legal recognition of women and African-Americans. The Union and Confederate governments used the trials as propaganda for their own purposes. When the military governorship of Confederate states ended, many new pathways to power for African-American women ended as well.

CHAPTER ONE

INTRODUCTION

Prior to the Civil War, Manchester was a suburb just south of Richmond, Virginia, where merchants imported slaves and exported tobacco. For the nine months from June 1864 to March 1865, the Army of the Potomac laid siege to the 30-mile stretch of land from Richmond south to Petersburg in an attempt to take the Confederate capital. By the end of the campaign, Grant's army had grown to over 125,000 men, and the casualties of both sides neared 70,000. The battle would serve as a grim warning for the future of warfare. After the siege, Richmond looked more like Western Europe in 1918 than the green landscape of Gettysburg. Trenches, embankments, craters, and the dead scarred the ground. Throughout the ordeal Grant's army made many attempts to starve Richmond by destroying the Petersburg and the South Side Railroads, which both fed the city.¹ In April, the Confederate army abandoned Richmond and fired the city to deny the Union soldiers any comfort. When Union forces marched into the city, they saved much of it by extinguishing the fires. The African-American population of Richmond greeted them as liberators while the white residents who had been left behind hid in fear.² Tens of thousands of enslaved people gained their freedom on that day, joining the nearly 5,000 free black people who already lived in the area. In July, just a few months later, one could still see the burned shells of brick buildings in the former Confederate capital from the surrounding hills along with the now-empty Union and Confederate trenches which surrounded the city for miles to the north, east,

¹ Ulysses S. Grant, *The Papers of Ulysses S. Grant, vol. 14*, ed. David L. Wilson (Carbondale: Southern Illinois University Press, 1967), 326.

² Cornelia Hancock, *South After Gettysburg: Letters of Cornelia Hancock, 1863-1868*, ed. Henrietta Stratton Jaquette (New York: Thomas Y. Crowell Company, 1956), 178-79.

and south.³ The Union army had quickly gotten back to work repairing the railroads between Petersburg and Richmond to resume trade and facilitate the rehabilitation of the city and its people.

Though the army of the United States had helped enslaved people gain their freedom, some Union soldiers would also perpetuate a familiar war crime upon the people they were ostensibly fighting to free. Former slaves initially hailed the Armies from the North as liberators and saviors but also learned to fear some of them. Virginia Quatles, a “colored woman,” was walking up a hill near the Petersburg Railroad line carrying a load of wood in her arms on a hot July morning in 1865. Robert L. Merrill, a private in the 1st District of Columbia Cavalry, approached Virginia from behind to inquire if she washed clothes for soldiers. Virginia replied that she did but kept walking away from Robert and up the hill near the rail line. Robert asked where she lived, and, while still walking, she replied that she lived in Manchester. Robert told Virginia to stop, but she continued on her way. He mumbled something to Virginia, but she did not have time to ask what he said because when it became clear she would not stop to talk, Robert ran up behind Virginia, grabbed her, and threw her to the ground into some tall weeds. There Robert attempted to rape her. Virginia fought back and yelled for help so loudly that it could be heard from half a mile away. Robert threatened to beat her with a piece of her wood if she would not be quiet and consent to sex. Another white soldier standing at the top of hill, Alex Smith, a corporal in the 8th Connecticut, saw Robert assaulting Virginia but thought it none of his business to intervene since he was not on guard duty. Prior to the Civil War most stories involving a white man attempting to rape an African-American woman in the south would have ended there; however, a third soldier who was on guard duty heard the assault and arrested

³ James McPherson, *Battle Cry of Freedom* (Oxford: Oxford University Press, 1988), 756-60, 845-46.

Robert. What happened after the arrest would have been shocking to most residents of Virginia white or black. Robert was tried in a court martial for attempted rape under Article 44 of General Order 100, which stated, “All wanton violence committed against persons in the invaded country... all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death.”⁴ The United States did not readmit Virginia into the Union until 1870; therefore, even though the war was over in late 1865, the state of Virginia was still part of Military District Number One. Virginia Quatles was therefore a person of the invaded (though legally ambiguous) nation of the Confederacy, and General Order 100 protected her. The General Order provided an avenue for Virginia, a poor woman of African-American descent who had lived in the Confederacy, to defy the establishment’s expectations. In one of the first trials of its kind, Virginia took the stand and testified at a court martial to an assembly of white officers against her white male assailant.⁵

General Order 100, also known as the Lieber Code, codified the crime of rape when committed by a soldier as a military crime for a court martial to try. It also prescribed the punishment for it no matter the circumstance as death; though, the military executed few soldiers for rape during the American Civil War. Robert Merrill never faced execution. He escaped from his confines and was never seen or heard from again, and as a result the court martial ended with no legal decision. Unlike many courts today, the military had neither the time nor inclination to try a person *in absentia*. They were primarily interested in maintaining order. If there was, no soldier present to discipline then the court martial did not serve a purpose. The court martial

⁴ *Lieber Code*, art. 44.

⁵ National Archives Record Group 153 [RG 153], Record of the Judge Advocate General’s Office (Army, entry 15, Court-Martial Case File, file MM3009) National Archives, Washington, DC. Hereafter, court martial and military commission trial records will be referred to by their file number.

trials did serve many other purposes. The court martial was originally designed to maintain unit order but grew in the course of the Civil War to a way to prosecute soldiers who broke civil laws in places where there was no civil law. The trials also served as a way to impose federal law upon seceded states and bring them back under the control of the federal government by suppressing racialized laws regarding who could testify in court, and who could sue for rape.

A paper addressing the topic of wartime rape requires a carefully constructed framework. This paper is not as concerned with the consequences of the trials on an individual basis. Each woman and court martial that brought military personnel to trial has its own interesting story. The individual circumstances surrounding each case breathe life into a group of people that Civil War historians ignored for decades: female non-soldiers. This paper also avoids delineating between combatants and non-combatants in a conflict that saw non-soldiers intentionally suffer so greatly at the hands of hostile armies. By delving into every one of the hundreds of cases it would be easy to highlight how many of the trials were unfair in their treatment of the victim or the accused and lament the many pardons for what appear to be guilty soldiers. Reexamining and trying each soldier and victim 150 years later is not the objective of this work and would be a great disservice to their memory. Instead, the focus of the paper is the reaction of people in court and politics to rape and the rape trials. Similarly, the effect the trials had on the American public's perception of race, sex, and legal justice is also of importance. Thus, this work does not overly focus on the legal outcome of individual trials but instead on the effects they produced in totality. In addition, while this work deals with hundreds of trials, dozens of court case precedents, state and federal laws, as well as many diaries and letters, it does not use a quantitative approach.

The focus on quantifying the amount of rape perpetrated by soldiers in the American Civil War has tended to shift the focus from society or the victims to the actions of the soldiers. LeeAnn Whites and Alecia P. Long write that, “In most military histories of the war, women really appear only twice in the conventional battlefield narrative,” in New Orleans in May 1862 when General Butler issues his “Woman Order” and during Sherman’s March to the Sea.⁶ This paper shows the prevalence of rape and other atrocities during the entire duration of the American Civil War not just in isolated incidents in New Orleans or Georgia. By sweeping away the idea of isolated instances of rape the discussion of rape in the American Civil War may become more accessible for future scholars. Historians have already discussed the actions of soldiers in quite some depth to varying degrees of success, while the victims of their crimes have not received the same attention. The victims of crimes often lack agency in writing and appear only to react to the actions of perpetrators or courts instead of acting on their own volition. By bringing their own writing into focus, as in Chapter 4, we gain insight into the female victim’s motivations into bringing or not bringing a case to trial. The court records themselves show that female rape victims in the American Civil War often acted in surprising ways in reaction to their situation. Some women tracked an attacker down and pressed charges against him in his regiment while others refused to testify against their attackers.

Finally, this paper by necessity addresses primarily the rape of Southern women by Union soldiers. Few records remain of the Confederate military’s court martial trials. The Confederate government burned most of their documents while fleeing Richmond in hopes of erasing evidence in case the US government held trials for Confederate politicians in the post-

⁶ LeeAnn Whites and Alecia P. Long, “Introduction,” in *Occupied Women: Gender, Military Occupation, and the American Civil War*, ed. LeeAnn Whites and Alecia P. Long (Baton Rouge: Louisiana State University Press, 2009), 9-10.

war period. The Confederate military and government was also reluctant to prosecute soldiers and citizens at a federal level due to the belief in the primacy of states' rights. This reluctance to prosecute soldiers was especially true for soldiers from one state who committed a crime in a different state. Furthermore, when someone raped an enslaved person, it was a crime of property, and crimes against free black people had almost no chance of a court hearing it. Taken together, this resulted in the creation of far fewer records of rape, even fewer of which survived the war.

Many courts attempted to keep women and African-Americans in a weak legal position by referring to them by their first names or by titles like "the widow" or "a slave." In a further attempt to level the historic field of power between male soldiers and female victims I follow in the footsteps of Sharon Block and use first names after an introduction of the full name and titles used in the record. An implied hierarchy of power in the participants of the courts would appear without this name standardization. The record has an implied hierarchy in place that enshrines the soldiers and officers with ranks and family names at the top. Next in the court's hierarchy were the titles and last names of white men, then white women with their father or husband's name, and finally, slaves or free African-American people whom records often only refer to by their first name, if at all. This paper minimizes the power imbalance somewhat by using first names when possible.⁷

This story of rape in the American Civil War is more than just an examination of the conduct of soldiers during the war and the actions of the parties. It encompasses both the legal evolution of rape prior to the war and the perspective of authors after the war. This examination begins with the chronological end, with the perspective of authors after the fact. Chapter Two of this paper is an extended historiography of rape during the Civil War beginning with the

⁷ Sharon Block, *Rape and Sexual Power in Early America* (Chapel Hill: University of North Carolina Press, 2006), 14.

scholarship from the 1880s through the 1950s and then in greater depth with more recent writings on the topic. The historiography shows how authors' perspectives changed over the decades regarding assigning blame for wartime atrocities. The seemingly long-held belief in a war of restraint is not borne out by the facts of the war, nor was it always the perspective of historians.

The way historians viewed rape in the American Civil War is a reflection on how historians saw the United States of their time. In the 1880s, authors subscribing to the ideology of the Lost Cause viewed Union Generals as despoilers of Southern honor. In the post-World War II era scholars wrote that no rape occurred by either side during the Civil War since accusing American soldiers of rape was to tarnish the history of America's triumphant military. Finally, during the Civil Rights movement and in the post-Vietnam era historians and social scientists acknowledged that even a low-rape war was possible. The highly visible and highly questionable actions of the American military and police forces during this era opened Civil War soldiers up to scrutiny. Thus, this paper demonstrates that the belief in rape in the Civil War changed over time as society changed, disrupting the idea of exceptionally noble soldiers fighting in the Civil War. The chapter ends with an examination of modern scholars who recognize rape on both sides of the war and who move beyond quantification. While quantification plays an important role in the study of crime in the war, each instance of rape is important and demands examination. By examining how historians across time viewed wartime atrocities like rape, this paper will also increase other historians' awareness of possible biases when studying other historical topics.

Following an analysis of the literature surrounding rape in the Civil War, the paper moves back to the time before the war, and examine the evolution of law and medicine leading

up to and through the American Civil War. Legal and non-legal authorities often have differing perspectives regarding rape and other crimes. Seeing how perspectives of law and medicine evolved is important to understanding the effects of the trials. Chapter Three begins with rape as a crime of property but quickly transitions into a crime against a person by the nineteenth century. The legal evolution of rape and the actions of politicians and generals holding court martial hearings obviously did not occur within a vacuum of great men acting alone. Public sentiment had been shifting towards greater rights and protections for women and people of color. Still, legal and medical scholars often created and guided the dialogue and belief system regarding what constituted rape and the general treatment of women. Public opinion moved slowly, and publishers issued new editions of old books that contained outdated law and medical opinions without revision. Law enforcement officers and attorneys used these books to prosecute crimes based on disproven ideas of law and medicine. Due to these outdated materials, and the relatively new status of women as legal agents, most people in this time believed that women were less trustworthy than men, especially white men. The long series of tests which women were required to pass in order to establish their credibility in court reflected white male stakeholders' lack of trust in them. Courts rarely subjected men to tests of credibility. The few men whom courts viewed as equally fickle to women were African-American men, former slaves, and children, who, like women, all had to pass tests of credibility.

As the south moved towards secession, rape regressed in many states to a lesser crime when committed by white men while becoming increasingly serious when committed by any other group, leading to a racialization of rape.⁸ Chapter Four reflects on the racialization of rape laws and the way in which the Civil War allowed the federal government to deracialize state rape

⁸ Sharon Block, *Rape and Sexual Power in Early America* (Chapel Hill: University of North Carolina Press, 2006), 14.

law and impose federal power. When the war began in 1861, the courts reexamined wartime rape as the conflict changed from one of conciliation and respect to the “hard war” of Sherman and Grant.⁹ Parallel to the courts, politicians and generals became involved in the reexamination, especially in 1863, with the issuance of the Emancipation Proclamation and the Lieber Codes. When the Union military occupied Confederate states, they often imposed federal laws regarding punishment and standards for rape that contained no racial distinction. Rape perpetrated against women of color and rape committed by soldiers in Colored Regiments presented new challenges for courts to grapple with after Lincoln freed many slaves and granted them greater protections in Union courts. The increasing racialization of rape prior to the American Civil War and the way in which military court martial trials deracialized the crime in former Confederate states during their occupation presents a new geographical and temporal way to observe the social and legal changes of the war. Military officers used women and African-American people to enforce their military code of behavior on their troops as well as their ideals regarding the treatment of African-American people on the Confederate states. The provost marshal was often the initiating body in a court martial trial for rape and not the female victim. Beyond the slim chance of justice, the women gained little from the trials. The court martial might withhold pay from the soldier but they did not pass on monetary compensation to the female victims as a modern civil trial might.

The court martial records of the Union army were not comprehensive of all the rape perpetuated by soldiers in the war. Many other records exist in newspapers, letters, and diaries. The people of antebellum America engaged in open dialogue regarding sex and sexuality prior to

⁹ George C. Bradley and Richard L. Dahlen, *From Conciliation to Conquest: The Sack of Athens and the Court-Martial of Colonel John B. Turchin* (Tuscaloosa: University of Alabama Press, 2006).

the war. Chapter Five shows the open discussion surrounding rape during the antebellum period and the Civil War itself. The more commonly held belief that people did not discuss sex and rape during the Victorian era and the war itself does not hold up to scrutiny. Through an examination of newspapers, contemporary books, journals, and letters, this paper shows the multitude of avenues and authors involved in the discussion of sexuality as a way to show the broad knowledge of sexual assault during the war. The interaction between the role of writers of popular fiction and published private diaries shows the power of non-military and non-expert authorities in the formation of society's views on when a man rapes a woman. This chapter also serves to demonstrate how open-ended the investigation into wartime rape during the American Civil War is. Far more occurrences of rape are likely to emerge from the written record as other historians delve into them.

This paper will repeat two questions surrounding rape during the Civil War and answer them in many different, sometimes unsatisfying ways. The first: was rape rare in the American Civil War? Many historians have answered this question and come to differing conclusions depending on their methodology. This paper seeks only to show that soldiers and civilians did rape people, and that people talked about it, wrote about it, and legislated around it widely. Attempts at quantification would produce a false impression about the behavior of soldiers in the war. Court martial records are too sparse and propaganda was too wide spread. The second question: what effect did the court martial trials have upon the military and society? The court martial trials had far-reaching consequences on the people alive during the American Civil War. The most obvious physical outcome was the effect it had on the rapists themselves. The Union army imprisoned people for rape, executed them, or branded and whipped them. Other

consequences of the trials were subtle ranging from new legal power for women and African-Americans to expanded power of the federal government over states.

CHAPTER TWO

HISTORIOGRAPHY AND GENEALOGY

On the whole, civilians were safe; there were crimes against property but few against persons, and women everywhere were respected.

Douglass Southall Freeman

The general assumption regarding rape in the American Civil War today is that it largely did not happen except in a few isolated incidents like during Sherman's March to the Sea or was threatened in New Orleans. In reality, this belief varied over the decades from there being huge numbers of rape, to no rape, to little rape, to shifting the blame from one commander to another. Later chapters of this paper will disprove the long held belief, expressed in the quote above, of a war where noble soldiers honored women and rarely engaged in sexual misconduct. No one hid the military records of rape in the war from authors and scholars. The records were in the National Archives as well as in journals, diaries, newspapers, and other collections, all of which have been extensively picked through. Assuming historians in the past were as diligent as they are today; the conclusion of this paper is that historians had their own reasons for differing interpretations of wartime rape during the American Civil War. By exploring why historians presented rape in the war in different ways at different times in American history, this paper will show how society reflects upon the work of historians and how historians reflected the state of society. As society changes so too does the literature about rape in the war, yet, the records remained the same as they ever were. The readers have changed. Thus, this paper disrupts our

belief of the American Civil War as a conflict of honorable restraint by showing that people behaved in the Civil War as they do today: often badly.

The topic of wartime rape in the American Civil War played an important role in the developing post-war national narrative. After the two warring nations had signed peace treaties and Reconstruction came and went, white Americans still struggled to reunite Northern and Southern culture and politics. Many white Americans sought to create a new narrative for the North and South after many divisive decades. What emerged was the “Lost Cause of the Confederacy.” The Lost Cause sought to highlight the honor of the Confederacy and their states’ rights to secede rather than the issue of slavery as the cause for the conflict. Along with the recasting of the Confederacy’s motives, the Union became the antagonist who despoiled the people and honor of the South, and northerners, surprisingly, were content with this arrangement. The Lost Cause helped to reconcile white Northerners and Southerners by refocusing the cause of the war from slavery, which few people supported anymore, to that of states’ rights. By sidestepping the issue of slavery both the North and South could move together in support of white supremacy in the United States and blame the low economic status of poor white Americans on African Americans. Within this narrative soldiers under Union General W. T. Sherman became pillagers, murderers of children, and rapists of helpless women. Union regiments, especially Colored regiments, according to authors of the time, engaged in massed wartime rape of white and enslaved women. Southern authors from the 1880s through the 1940s called upon the South’s collective folk-knowledge of the rape of southern civilians, yet rarely substantiated assertions of rape with documented facts.¹⁰ There is a long historiography of

¹⁰ For a general history of the Lost Cause, see: Gaines M. Foster, *Ghosts of the Confederacy: Defeat, the Lost Cause, and the Emergence of the New South, 1865 to 1913* (New York: Oxford University Press, 1987) and *The Myth of the Lost Cause and Civil War History*,

authors who are still celebrated to this day, who promoted Lost Cause ideology. These authors often heaped the crime of rape upon the Union and attributed only honorable restraint to the Confederacy. This historiography does not engage in a battle with those authors as their literature holds little value to refute on the topic of rape in the American Civil War, and others have already discredited much of that movement. It is important, however, to show the origins of thought on the presence of rape in the Civil War.¹¹ Jefferson Davis, president of the Confederate states, for instance, stated that he believed that the war was not started because of the issue of slavery but because a conspiracy of northern demagogues had “seized upon it as a means to acquire power.”¹² Others would latch on to these ideas.

Authors and historians did not blame unverified atrocities exclusively upon the Union army forever. World War II became an important crossroad that allowed for a reexamination of the Union’s actions. The Axis powers engaged in many of the practices like slavery that the Union fought to end, and at the same time the American military publically engaged in morally

Ed. Gary W. Gallagher and Alan T. Nolan (Bloomington: Indiana University Press, 2000); for the use of white supremacy in reuniting America, see: David Blight, *Race and Reunion: The Civil War in American Memory* (Cambridge: Belknap Press of Harvard University Press, 2001); for the use of unverified instances of rape by the Lost Cause historians, see: Mark Grimsley, *The Hard Hand of War, Union Military Policy Toward Southern Civilians 1861-1865* (Cambridge: Cambridge University Press, 1995), 219-22; for the creation of memory regarding Sherman, see: Anne Sarah Robin, *Through the Heart of Dixie: Sherman's March and American Memory*. (Chapel Hill: University of North Carolina Press, 2014).

¹¹ For the origins of the phrase “Lost Cause of the Confederacy” see: Edward A. Pollard, *The Lost Cause* (New York: E. B. Treat, 1866); selected prominent works in the historiography of the Lost Cause include; Thomas Dixon, *The Clansman: An Historical Romance of the Ku Klux Klan* (New York: Grosset & Dunlap, 1905); and Douglas Southall Freeman, *R. E. Lee: A Biography* (New York: C. Scribner’s Sons, 1934-1935); for a reassessment of Lee, see: Thomas Connelly, *The Marble Man: Robert E. Lee and His Image in American Society* (Baton Rouge: Louisiana State University Press, 1977).

¹² Jefferson Davis, *The Rise and Fall of the Confederate Government* (New York: D. Appleton and Co., 1881), preface.

culpable actions such as the carpet-bombing of cities and nuclear warfare. Many Americans began to view the Union army again as the Army of the United States and the liberation of Europe from fascism as similar to the liberation of the South from slavery. Continued dialogue regarding the Union army's wartime rape was difficult to sustain during and after the war since this would dishonor the memory of the United States army and as a result, there is little writing regarding rape in the post-World War II period. Clarence Poe, editor of *True Tales of the South at War*, noted that of the hundreds of letters he read while compiling his book not a single one even mentioned rape actually occurring. From the absence of rape in letters he apparently concluded that it did not happen.¹³ The US military, during and after the war was above moral reproach. The feeling of the moral superiority of World War II soldiers lingers even today.¹⁴ Within that context, the actions of so-called despoilers like Sherman, accused of the razing of Atlanta and Columbia, seemed to require a more careful judgment. Not only were his actions arguably similar to Allied actions in Europe but the motivations for doing so were similarly based on freeing people from tyranny and oppression. Further, if they were to accept that American soldiers had committed rape against Americans in the Civil War, historians would have to acknowledge that they might be doing the same in Europe and Asia.

After World War II and during the Civil Rights Movement scholars began to reexamine the record surrounding rape in the American Civil War. Most found little documented evidence of rape and came to a different conclusion than earlier Lost Cause historians: Rape simply did not happen in the American Civil War. Historians projected this idealized version of the

¹³ *True Tales of the South at War: How Soldiers Fought and Families Lived, 1861-1865*, ed. Clarence Poe (Chapel Hill: The University of North Carolina Press, 1961), 70.

¹⁴ For a look at the behavior of American soldiers in World War II, including rape, see: Mary Louise Roberts, *What Soldiers Do: Sex and the American GI in World War II France* (Chicago: University of Chicago Press, 2013).

“Greatest Generation” onto the American Civil War veterans.¹⁵ This projection white-washed the actions of both generations creating the belief that they fought because it was the right thing to do and not for personal gain, glory, or politics. Pulitzer Prize winning historian Douglas Southall Freeman wrote the introduction to the 1950 book *The Blue and the Gray*. The book itself is a collection of letters and reports from the war but contains little discussion of the baser aspects of life including any discussion of sex. Despite this, in the introduction, Freeman wrote, “There were plenty of atrocity stories, but few atrocities... On the whole, civilians were safe; there were crimes against property but few against persons, and women everywhere were respected.”¹⁶ Freeman’s view of rape and sex in the war became widespread in the post-World War II period. It should be added that while it is expected for authors of the time to not address sex in their book in an era with active censorship, it is absolutely unacceptable to deny that rape happened in the war. The venerable Freeman set the tone for the discussion of the conduct of soldiers in war for a generation, and his fervent denial of rape in the face of evidence is damning.

The Civil Rights Movement gripped the nation through the 1950s and 1960s, reigniting questions of race and splitting parts of white society again. Many historians in this era still believed that Civil War was devoid of sexual assault, but a few began to chip away at this belief. Bell Irvin Wiley, who wrote *The Life of Billy Yank* in 1951, acknowledged both the court martial trials resulting from soldiers raping civilians, and utilized the soldiers’ own recollections of sexual depravity as documented in their diaries and letters.¹⁷ Wiley’s writing represented the

¹⁵ For the origins of the term “Greatest Generation,” see: Tom Brokaw, *The Greatest Generation* (New York: Random House, 1998).

¹⁶ Douglas Southall Freeman, forward to *The Blue and the Gray: The Story of the Civil War as told by Participants*, by Henry Stelle Commager (Indianapolis: Bobbs-Merrill, 1950), xiv.

¹⁷ Bell Irvin Wiley, *The Life of Billy Yank: The Common Soldier of the Union*, updated edition (Baton Rouge: Louisiana State University Press, 2008), 114, 205.

minority while the view of scholars like Freeman, who espoused Victorian restraint, represented a majority viewpoint. The absence of rape continued as the common narrative of rape in the Civil War. In 1966, Mary Elizabeth Massey published *Women in the Civil War*, a groundbreaking look at women in the war. Books like *Women in the Civil War* subscribed to Freeman's ideas that sex and rape did not happen. The book danced around discussions of sex outside of prostitution which Massey seemingly only mentions to shame women who violated Victorian social norms.

¹⁸ While historians began writing about sex in the Victorian age, the idea of a Civil War largely devoid of rape persisted until the 1980s. Historian Robert K. Krick recounted how, at a lecture in the late 1970s, an unnamed prominent historian stated, "Rape... was unheard of in [the Civil War]." ¹⁹ These views became outdated as belief surrounding the actions of soldiers in the American Civil War shifted from no rape to a war with low amounts of rape.

Sex of any kind in war was not a prominent topic of general scholarly discourse in the post-World War II era unless it was about distant long ago rape in the Crusades or by foreign others like invading Mongol armies. However, as the decades rolled into the 1970s, historians and feminists began to see sex and rape as legitimate topics of inquiry. The Vietnam War in particular was the inspiration for new scholarship on rape in war and forced the American public to confront the possibility of illegal acts of American soldiers in war through highly publicized incidents. New modes of near instantaneous media transmission resulted in awareness of incidents like the Mỹ Lai Massacre in which American soldiers murdered hundreds of

¹⁸ Mary Elizabeth Massey, *Women in the Civil War* (Lincoln: University of Nebraska Press, 1966).

¹⁹ Robert K. Krick, introduction to *The Story the Soldiers Wouldn't Tell: Sex in the Civil War*, (Mechanicsburg: Stackpole Books, 2012). Thomas P. Lowrey echoes this sentiment through that book, and in *Sexual Misbehavior in the Civil War: A Compendium* (Xlibris, 2006).

Vietnamese civilians and gang raped scores of women.²⁰ While the Vietnam War did not destroy the image of the American soldier operating with Victorian restraint it created many cracks in the façade. Parallel to the Vietnam War, and in part because of it, the feminist movement produced a profound reexamination of the topic of wartime rape. Susan Brownmiller's highly influential but highly criticized work on rape *Against Our Will*, reexamined the crime of rape as one rooted solely in power and drew heavily upon the Vietnam War in her discussion of wartime rape.

Earlier discussion of rape had centered on how it was a crime of uncontrolled passion.

Brownmiller's analysis of rape in the American Civil War largely extrapolates patterns of sexual violence from the Vietnam War. As a result, she misses many of the nuances regarding the motivations of American Civil War soldiers and repeats the errors of those who projected the image of the Greatest Generation back onto Civil War soldiers. In particular, Brownmiller ignores that soldiers of different races, states of origin, or social class may have had different reasons for committing or not committing rape. Her analysis of the war was path breaking in that it did acknowledge that at least some soldiers raped during the Civil War. Brownmiller's most enduring legacy regarding rape in the American Civil War is the coining of the term "low rape war," which Civil War historians used as their rallying cry regarding Civil War rape for decades.

²¹ Donald Symons' chapter on rape in *The Evolution of Human Sexuality*, published just a few years later in part as a response to Brownmiller, articulates that both sexual pleasure and opportunity played a role alongside power relationships between men and women.²² Subsequent

²⁰ For an account of the Mỹ Lai Massacre, see: Seymore M. Hersh, *My Lai 4: A Report on the Massacre and its Aftermath* (New York: Random House, 1970).

²¹ Susan Brownmiller, *Against Our Will: Men Women, and Rape*. (New York: Simon and Schuster, 1975), 88-9.

²² Donald Symon, *The Evolution of Human Sexuality* (New York: Oxford University Press, 1979).

analyses of rape records from the Civil War have shown Symon's analysis of rape in the Civil War to be a stronger thesis. In opposition to Brownmiller's thesis, the records show instances of rape stemming from opportunity and pleasure in addition to what she saw as attempts to enforce social norms and power.

Parallel to Brownmiller's and Symons's writing on rape, but within the context of decolonization, Michel Foucault wrote several books examining power relationships in sex and punishment. *Discipline and Punish*, written in 1975, focuses on why states changed from chaotic systems of violent and public punishment to bureaucratic systems operating away from the public's gaze. Though the thesis of *Discipline and Punish* hinges on capricious punishments meted out by aristocrats and clergy, it has relevance to the power relationships between soldiers and commanders in the American Civil War as well as between the rebellious states and the Federal government.²³ In the beginning of the Civil War, due to reasons explored in Chapter Three, regimental commanders and generals often used their own judgment to create appropriate punishments for crimes like wartime rape. By late in the war there existed a single legal standard of punishments originating with the executive office, mirroring Foucault's ideas. Other parallels exist in the forced participation of soldiers in executions. This could come from witnessing the execution in parade formation to form an implied tacit approval of the sentence or via direct methods like firing squads. His other key work relevant to this study is *The History of Sexuality*. Part one and two of the first volume of *The History of Sexuality* addresses the repression hypothesis of sexuality which sought to refute the idea that western society had repressed the

²³ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon Books, 1977).

discussion of sexuality from the 17th century up until the 1970s.²⁴ Foucault's theories are foundational to the parts of this paper that examine discussion of sexuality for antebellum and Civil War era Americans. The growth of new sex crimes in courts and the constant weighing in of law and media journals shows a growing legal, scientific, and political fascination with sex, not Victorian suppression. Legal and medical authorities created an ever-growing vocabulary regarding human sexuality and rape as a means to control the actions of soldiers and citizens. While rape may have started as "the carnal knowledge of a woman forcibly and against her will," it became more and more nuanced as the decades of the nineteenth century progressed.²⁵ Courts and society racialized rape by creating different punishments for different races and social classes of people and differing punishments based on the age of the victim. Courts created new types of rape, such as when rape was committed with the aid of newly invented anesthesia. Rape began as a crime described in a single sentence in the nineteenth century but often occupied several pages of law by the end of the century. The public generally never grew tired of discussing sex in newspapers, journals, diaries, and letters, as well.

The presence of rape in the American Civil War slowly returned from the repressed depths through historians who, perhaps working from Wiley and Brownmiller rather than the likes of Freeman, at least acknowledge the reports of rape. The cracks in the concept of the low rape war were slow to grow. Joseph T. Glatthaar's 1985 book about Sherman's campaigns in Georgia and the Carolinas, *The March to the Sea and Beyond*, reports on a few accusations of rape but focuses on the apparent unfairness of the trials towards the soldiers. "These sorts of

²⁴ Michel Foucault, *The History of Sexuality: An Introduction* (New York: Pantheon Books, 1978).

²⁵ William Blackstone, "Of Offenses Against Persons as Individuals," in *Commentaries on the Laws in England*, Book 4 (Oxford, England: Clarendon Press, 1765-1769), 209.

criminal acts, however, were so rare that nearly all the troops... confessed they had never seen such acts," writes Glatthar.²⁶ On the contrary, the testimony of the court martial trials showed that many soldiers witnessed such acts. After recognizing the possible presence of rape in the Civil War at all the acknowledgment of the criminal misbehavior of American soldiers in particular came slower. In 1989, Michael Fellman highlighted what he felt was the "nearly total absence of rape and murder of white women..." in, *Inside War: The Guerrilla Conflict in Missouri During the American Civil War*, and even when reports did surface he largely dismissed them as hearsay. He repeats these beliefs in his chapter "Women and Guerrilla Warfare" in *Divided Houses*. "Strikingly, there are only infrequent reports of rape of white women and all of those are second hand."²⁷ Fellman's work focuses on the restraint of guerrillas, and considers the reports of soldiers perpetrating rape upon African-American women as "allusions" and composed of "few direct reports..." citing only one concrete case of a soldier raping an African-American woman.²⁸ Fellman's "infrequent reports" proved to be incorrect just a few years later when people examined the written records more intently, and this paper directly contests his claims with numerous court martial cases where white women are raped.

The legacy of Brownmiller's low rape war continued into the 1990s and beyond. The focus on quantifying the low level of rape in the war lead many authors to continue to wave away the actions of soldiers committing wartime rape as isolated incidents when it appeared in

²⁶ Joseph T. Glatthar, *The March to the Sea and Beyond: Sherman's Troops in the Savannah and Carolinas Campaigns* (New York: New York University Press, 1985), 72-4.

²⁷ Michael Fellman, "Women and Guerrilla Warfare," in *Divided Houses: Gender and the Civil War*, Ed. Cathrine Clinton and Nina Silber (New York: Oxford University Press, 1992), 149-50.

²⁸ Michael Fellman, *Inside War: The Guerrilla Conflict in Missouri during the American Civil War* (New York: Oxford University Press, 1989), xviii-xx, 201-12.

their research. It is important to restate that writing a book on the American Civil War that does not address sex or rape is justified in many ways - that is not what this paper takes issue with in those works. Referencing rape in the Civil War only to refute it or emphasize the low quantity of rape remains problematic for historians of this time and beyond. In *The Vacant Chair*, Reid Mitchell devotes more pages than most towards the topic of rape in the war and engages in a discussion about why soldiers may have raped enslaved women in particular. However, Mitchell still perpetuates the idea of the low-rape war. "...[F]ew northern soldiers raped" since "True manhood was characterized by sexual restraint, not sexual assertion" and "letting anger towards women break out in unsanctioned violence against women would have been unmanly." Mitchell ends the discussion on rape by stating, "...it is important to reiterate that the Civil War was remarkable in how little rape took place. In general, the code of manly self-restraint that so many northern soldiers accepted performed admirably in keeping them from rape."²⁹ Mitchell, like many authors of the era attributes a lack of records on rape as indicative of a lack of rape overall.

Drew Gilpin Faust echoed Fellman's insistence on overall good conduct and low-rape in the otherwise acclaimed *Mothers of Invention*. "White females, particularly those of the elite, were rarely victims of rape by invading soldiers," writes Faust, while in the footnote explaining that private writings and Southern newspaper's reporting of violations of white women are suspect.³⁰ Stephen V. Ash, in *When the Yankees Came* acknowledges a small amount of rape while largely focusing on symbolic rape or the fear of sexual assault. When rape does occur, Ash eases the readers mind and revives the Lost Cause ideas of Victorian honor by placing most of

²⁹ Reid Mitchell, *The Vacant Chair: The Northern Soldier Leaves Home* (Oxford: Oxford University Press, 1993), 106-9.

³⁰ Drew Gilpin Faust, *Mothers of Invention: Women of the Slaveholding South in the American Civil War* (Chapel Hill: University of North Carolina Press, 1996), 200-12, 296.

the blame on “deserters, stragglers, or other unsupervised enlisted men...” and not that of officers or regular soldiers. Even when those depraved souls do commit rape, we may be consoled because “...when the culprits could be brought to justice, the army was merciless, especially if the guilty soldier was black.”³¹ Ash was right that the army was merciless with black soldiers, but not towards rapists generally. The large number of non-capital punishments, commutations, and pardons attest to that in later chapters. The idea of the Civil War as low-rape persists in some circles to this day. In *Confederate Rage, Yankee Wrath*, published in 2007, George Burkhardt again reminds the reader “...the incidence of rape among all Civil War soldiers was extremely low.”³² As an unfortunate footnote to books of this particular historiography, many of the books already listed here cite one or two isolated cases of wartime rape as a way to dismiss it as nearly non-existent. In a vacuum, it might appear soldiers rarely committed rape during the war. Had the authors combined the individual cases from each book in the historiography they might have revealed a growing record of wartime rape and looked deeper. While this paper does not attempt to quantify the rape in the Civil War, it does dispel the idea of the “low rape war.” Contrary to these authors’ assertions, regarding the amount of rape there is no evidence to indicate that there was any less rape in the American Civil War than any other war. The apparent absence of evidence is not evidence of an absence. By dispelling the myth of the “low rape war,” future historians will be able to properly engage with the topic of wartime rape during the American Civil War along with the actions of the soldiers.

³¹ Stephen V. Ash, *When the Yankees Came: Conflict and Chaos in the Occupied South, 1861-1865* (Chapel Hill: University of North Carolina Press, 1995), 201.

³² George S. Burkhardt, *Confederate Rage, Yankee Wrath: No Quarter in the Civil War* (Carbondale: Southern Illinois Press, 2007), 83; for other books that reference the “low-rape” war, see: Anne J. Bailey, *War and Ruin: William T. Sherman and the Savannah Campaign* (Wilmington: Scholarly Resources, 2003).

Authors who moved past quantification of sexual assault as low or high often managed to produce critical analyses of rape in the American Civil War. George C. Rable's 1989 book *Civil Wars: Women and the Crisis of Southern Nationalism*, is one of the first of such books. Rable focuses on the threat of rape from enslaved men and or the fear of wartime rape from Northerners and acknowledged agency in women by examining their capability to resist rape. While Rable acknowledges that rapes, or at least "rough handling," occurred at the hands of soldiers he considers most accusations and newspapers reports propaganda. "Evidence of these attacks is sketchy because no one investigates the problem and women hesitated to report the crime."³³ Further analysis of the records here fills in those gaps in the history of the American Civil War. Catherine Clinton's *Tara Revisited*, published in 1995, looks deeper into the lives of women in the South during the Civil War through their letters and diaries. Clinton addresses the hypocrisy that existed in the widespread rape of enslaved women at the hands of white Southern slave owners who then professed their courteous conduct on the field of battle and gentle treatment of women. Clinton examines how women coped with the effects of rape and the disparate treatment of white and African-American women by the press and public, but does not delve into wartime rape particularly.³⁴ Writing about non-wartime rape of enslaved women gave way to examinations of the rape of enslaved women during the war.

Wartime rape as committed upon free African-American or enslaved women gained prominence earlier than wider studies of rape in the American Civil War. Newer approaches to historical inquiry contributed to the growth of the study of enslaved women's experiences. As

³³ George C. Rable, *Civil Wars: Women and the Crisis of Southern Nationalism* (Urbana: University of Illinois Press, 1989), 37, 84, 158-62.

³⁴ Catherine Clinton, *Tara Revisited: Women, War & the Plantation Legend* (New York: Abbeville, 1995), 128-30; for other books that touch on, but do not quantify rape, see: Walter Brian Cisco, *War Crimes against Southern Civilians* (Gretna: Pelican Pub. Co., 2007).

Chapter Five illustrates, white authors typically controlled the press and were more likely to have their version of events published as well as redact tales of their relatives or fellow white people participating in or witnessing the rape of other white women. This was likely to have occurred as a part of the post-war Lost Cause movement to reconstruct the narrative post-war towards white supremacy as well as for reasons of privacy. Nina Silber's chapter "Women Teachers of the North" in *The War Was You and Me*, recounts the role of Northern and African-American teachers in the process of emancipation of former slaves. Silber addresses the widespread rape of women living near Union forts and encampments like Port Royal and the Sea Islands. At the aforementioned Union areas, "innumerable instances of Union soldiers sexually abusing African-American women" took place, from both officers and enlisted men.³⁵ Numerous other books chronicle the long history of white masters raping enslaved women but this paper primarily focuses on the rape of women by soldiers or civilians tried in military courts.³⁶ The sexual assault and rape of enslaved men is an underrepresented topic in the historiography of antebellum America and the Civil War that is beyond the scope of this paper since no known court martial cases resulted from soldiers raping enslaved men. Future scholarship on male rape or same sex relationships among soldiers will be path breaking, especially if future historians

³⁵ Nina Silber, "Women Teachers of the North," in *The War was You and Me*, ed. Joan E. Cashin (Princeton: Princeton University Press, 2002).

³⁶ For a selection of books on this topic, see: Eugene D. Genovese, *Roll, Jordan Roll: The World the Slaves Made* (New York: Pantheon Books, 1974); Catherine Clinton, *The Plantation Mistress: Woman's World in the Old South* (New York: Pantheon Books, 1982); Deborah G. White, *Ar'n't I a Woman? Female Slaves in the Plantation South* (New York: Norton, 1985); Elizabeth Fox-Genovese, *Within the Plantation Household: Black and White Women of the Old South* (Chapel Hill: University of North Carolina Press, 1988); and Stephanie M. H. Camp, *Closer to Freedom: Enslaved Women and Everyday Resistance in the Plantation South* (Chapel Hill: University of North Carolina Press, 2004).

find related court martial cases.³⁷ The legal system of the Civil War rarely considered the rape of a male by another male to actually be rape and the cases might be concealed in other general assault based criminal codes. The small handful of cases of same sex rape cases identified typically involved an adult soldier and a pre-adolescent and the courts categorized the crime as assault, not rape. It is also likely that male soldiers then, as today, are far more reluctant to report cases of same sex rape to authorities.

Other authors dedicated considerable time and effort towards documenting sex crimes in the American Civil War and their work is the foundation for modern work on the topic of soldiers committing rape in the Civil War. Thomas P. Lowry has compiled several books about the behavior of Civil War soldiers. Lowry's contributions to the topic of rape in the war include *The Stories the Soldiers Wouldn't Tell*, and *Sexual Misbehavior in the Civil War*, as well as numerous articles and book chapters.³⁸ Lowry's work represents some of the earliest attempts to document the sexual acts of Civil War soldiers and remains the most comprehensive look at the records. Lowry admits that his work does not engage in much analysis and intends for them to serve as a spring point for other authors to begin their work. *Sexual Misbehavior*, in particular, contains short summaries and citations for over 200 court martial cases stemming from rape during the war. This paper owes a huge debt to Lowry's extensive research towards locating the

³⁷ For a small sampling of cases of male rape, see: Martha Elizabeth Hodes, *White Women, Black Men: Illicit Sex in the Nineteenth-Century South* (New Haven: Yale University Press, 1997); Thomas A. Foster, "The Sexual Abuse of Black Men under American Slavery," *Journal of the History of Sexuality* 20, no. 3 (Sept. 2011), 445+.

³⁸ Thomas P. Lowry, *The Stories the Soldiers Wouldn't Tell: Sex in the Civil War* (Mechanicsburg: Stackpole Books, 1994); -- *Sexual Misbehavior in the Civil War: A Compendium* (Philadelphia: Xlibris Corporation, 2006); -- "The Sperryville Outrage," *Civil War Times Illustrated* 38, no. 1 (1999): 24-30; -- "The Trials of Military Occupation," in *Virginia at War, 1862*, Ed. William C. Davis, James I. Robertson (Lexington: University Press of Kentucky, 2007).

court martial cases. Without it, I would have identified far fewer cases to work with. Kim Murphy's more recent *I Had Rather Die* documents many of the same cases of rape in the civil war as Lowry and provides some baseline level of analysis of rape in the war. As in earlier work that focused on the quantification of rape as analysis it misses in-depth examination of the effects the rape and trials had. While this paper bears some similarities to *I had Rather Die*, Murphy only scratches the surface beyond reporting.³⁹ This paper moves beyond numbers and reporting-in-volume to explore the relationships of power that the trials created and upset. An article based on a senior honors thesis by Maureen Stutzman also deals specifically with wartime rape during the American Civil War, but examines only two court martial cases. It too draws upon Thomas P. Lowry's work.⁴⁰

In the last ten years, several scholars have written books on rape in America's history that bear particular importance to this work. Sharon Block's *Rape and Sexual Power in Early America* dealt with the issues of rape in the colonial period to the beginning of the eighteenth century. Block shows the courts and society of the era treated rape as a uniform crime across the time and space of colonial and early America. The one area where Block sees the concept of rape shift is in how white society increasingly racializes rape. Block postulates that people thought black men perpetrated rape against white women as an act of race-warfare; whereas, people viewed the rape of black women by white men as increasingly non-criminal, especially when in a

³⁹ Kim Murphy, *I Had Rather Die: Rape in the Civil War* (Batesville: Coachlight Press, 2014).

⁴⁰ Maureen Stutzman, "Rape in the American Civil War: Race, Class, and Gender in the Case of Harriet McKinley and Perry Pierson." *Transcending Silence* 6, no. 1 (Spring 2009), <http://www.albany.edu/womensstudies/journal/2009/stutzman.html>.

master-slave relationship.⁴¹ The subsequent chapters of this paper show how courts and society had so racialized rape, especially in the south, that a white man was virtually immune from prosecution for raping an African-American woman by the time the war began. By the war's end, the military courts and federal government had worked swiftly and with great effort to undo the racialization of rape. Though their work was not perfect, and later Southern post-Reconstruction society worked to undo the de-racialization of rape, it represents an important temporary shift in the way Americans viewed rape.

Diane Sommerville, in *Rape and Race in the Nineteenth-Century South* argues that while southern society often assumed white males were nearly impossible to prosecute for rape the opposite was not true for black men at the same time. During the early nineteenth century, courts and southern society did not always assume black and enslaved men were guilty. Sommerville shows that economic conditions among white victims typically established the presumed innocence or guilt of the accused. A poor white woman who accused the enslaved worker of a wealthy plantation owner faced a far more scrutinizing judge, jury, and line of witnesses. Courts and society often presumed wealthy white women innocent of any wrongdoing, especially if the accused rapist was a free black man. Sommerville shows that it was the perceived intrinsic honor and purity of the woman that determined the attitude of the courts regarding her innocence. Wealthy slave owners also had an economic incentive to protect their slaves from execution, and mounted a stout defense for their enslaved workers.⁴² The statuses of the victim in court martial trials are important to show the shifting societal expectations for honor and purity. Like *Rape*

⁴¹ Sharon Block, *Rape and Sexual Power in Early America* (Chapel Hill: University of North Carolina Press, 2006). For more on sex in early America, see: Richard Godbeer, *Sexual Revolution in Early America* (Baltimore: John Hopkins University Press, 2004).

⁴² Diane Miller Sommerville, *Rape and Race in the Nineteenth-Century South* (Chapel Hill: University of North Carolina Press, 2004).

and Sexual Power in Early America, Rape and Race in the Nineteenth Century discusses the rapid re-racialization of rape after the war. Even during the war, slave owners were more apt to allow their enslaved workers to suffer execution. In general, most books on nineteenth century rape rarely deal with the actions of soldiers or the effects of court martial trials and military commissions and instead focus on the actions of non-soldiers.

Other articles address only particular instances of rape or expressions of sexual power and violence. Crystal Feimster's article about reinterpreting the success of General Butler's Order No. 28 looks at how women dealt with being unable to express their agency in New Orleans under threat of being classed with and treated as a prostitute. This threat changed their view of southern men who were incapable of protecting their women. The General Order had far-reaching implications for how southern women viewed sex and power in the American Civil War. Though this paper does not overly engage in the topic, the rape of women by Union soldiers changed the way that southern women viewed southern men as failed protectors as they increasingly turned to the Federal government for protection. Robert W. Frizzell's article about an instance of Confederate raiders raping a group of German-American women in Missouri addresses ideas of rape in memory as much of the testimony is based on a child's recollection many years later.⁴³ Memory is important to for this paper to understand the continuing shift in how people viewed sexual violence in the Civil War. The examination of over 100 years of historiography regarding ideas of rape in the war show that it varied and shifted in response to the current events.

⁴³ Crystal N. Feimster "General Benjamin Butler & the Threat of Sexual Violence during the American Civil War" *Daedalus* 138, no. 2 (Spring 2009), 126-134; Robert W. Frizzell, "An Instance of the Rape of German Women in Civil War Missouri" *Yearbook of German-American Studies* 48 (2013), 25-31.

When dealing with the rape in war the legal history of the war and culture is vital and a wealth of scholarship exists on the legal history of the American Civil War. Mark Grimsley's *The Hard Hand of War* remains the most influential and important work on the creation of military policy regarding the treatment of civilians. Military and legal scholars often worked hand in hand to create codes and policies for military action.⁴⁴ One legal scholar was Francis Lieber whose military code became General Order No. 100.⁴⁵ Though other books on family and sex law in the nineteenth century do not deal with military court martial trials, they do bear importance to the early trials of soldiers accused of rape who civil courts tried prior to 1863, and to the general perception of sex and rape in nineteenth century America.⁴⁶

Thus, we come to the place of this paper within the historiography. Most importantly, this paper owes a great intellectual debt to the collected essays in *Occupied Women*, in particular, E. Susan Barber and Charles F. Ritter's "Physical Abuse...and Rough Handling: Race, Gender, and Sexual Justice in the Occupied South."⁴⁷ That essay provided the genesis for much of this work and builds upon the intellectual framework that the authors created. While Barber and Ritter

⁴⁴ Mark Grimsley, *The Hard Hand of War: Union military policy toward Southern civilians, 1861-1865* (Cambridge: Cambridge University Press, 1995).

⁴⁵ Richard Shelly Hartigan, *Military Rules, Regulations and the Code of War: Francis Lieber and the Certification of Conflict* (New Brunswick: Transaction Publishers, 2011); for more general legal histories of the war, see: Stephen C. Neff, *Justice in the Blue and Gray: A Legal History of the Civil War* (Cambridge: Harvard University Press, 2010); and John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012).

⁴⁶ Estelle B. Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* (Cambridge: Harvard University Press, 2013); Peter Winthrop Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South* (Chapel Hill: University of North Carolina Press, 1995).

⁴⁷ E. Susan Barber and Charles F. Ritter, "Physical Abuse...and Rough Handling: Race, Gender, and Sexual Justice in the Occupied South," in *Occupied Women: Gender, Military Occupation, and the American Civil War*, ed. LeeAnn Whites and Alecia P. Long (Baton Rouge: Louisiana State University Press, 2009).

focus on Senate Bill 511 as the source for rape trials during the American Civil War, this paper builds from that Bill to incorporate the Lieber Codes to give a fuller picture of the court martial trials; especially those that took place within the occupied Confederacy. Next, it delves into the evolution of the meaning of rape via trials and explores how the court martial trials for rape came about. Finally, it examines the consequences of the rapists' actions and the larger social meaning that these carried. The scholarship meshes with the most recent works on the topic of rape in the nineteenth century and the Civil War and provides a more comprehensive examination of rape perpetrated by soldiers during the conflict.

CHAPTER THREE

LEGAL AND MEDICAL OPINION REGARDING RAPE

A Doctor who knows nothing of law, and a lawyer who knows nothing of medicine, are deficient to essential requisites of their respective professions.

David Paul Brown, 1845

Port Royal was an island in the Port Royal Bay of South Carolina, and one of the most important ports on the Confederacy's Atlantic coast. In 1861, a Union navy flotilla traded cannon fire with the Confederate forts guarding the island. After four hours, the forts fell silent and Union soldiers approached them with a flag of truce, but no one in the fort responded. To their surprise, the Confederate soldiers had abandoned the forts during the bombardment.⁴⁸ The Confederates, along with many of the white civilians, fled before the Union troops had arrived, leaving over ten thousand enslaved people on the fertile plantations. The Union army occupied the plantations and put the former slaves back to work in the fields as free laborers.⁴⁹ One of the plantations was the Milne Plantation, which employed twenty of the newly freed slaves to grow cotton for the Union army. Government funded educators and privately funded missionaries lived on the plantation, both seeking to improve the lives of the former slaves in their own way. As many as one hundred soldiers and horses might be on the plantation at any one time while

⁴⁸ Robert M. Browning, *Success is All That Was Expected: The South Atlantic Blockading Squadron During the Civil War* (Washington, D.C.: Brassey's, Inc., 2002), 40.

⁴⁹ James McPherson, *Battle Cry of Freedom* (Oxford: Oxford University Press, 1988), 756-60, 370-71.

Union soldiers moved in and out of Port Royal. These soldiers spent their days on the Milne plantation mustering, drilling, and engaging in backbreaking labor alongside former slaves. Compared to the usual marching, camping, and fighting, soldiers described their time on the island in the early spring as paradise. In the evening, they could bathe in the calm waters of the bay and then sleep in the cool sea air. Game of every kind was abundant and easily found, and gentle roads endlessly crisscrossed the island between the plantations, each shaded with tall pines and oaks laden with Spanish moss.⁵⁰

On the Milne plantation on Port Royal, most Union soldiers treated the freed slaves better than the Confederates had. Charles F. Lauer, Assistant Surgeon in the 55th Pennsylvania, however, was little better than their former masters. The former slaves knew Charles was more than just a surgeon. They knew that he was a dangerous person who tried to force the women on the plantation to have sex with him and would assault them when they refused. Charles went to the house of a former slave named Eda on three nights to pressure her to have sex with him and punched her when she refused. Eda slept in the cotton fields to avoid Charles after that. Charles then turned his attention to another former slave named Rebecca. When she too refused Charles' advances, he picked up a chair, hit her in the head with it, and then kicked her in the stomach when she fell to the ground. Rebecca ran to Captain Nesbitt who said he "didn't think the doctor would do such a thing." Nevertheless, guards arrested Charles and brought him before a court martial on the charge of attempted rape. At least two other formerly enslaved women whom Charles had attempted to rape also testified. At the trial, Charles objected to the testimony of all the witnesses because African-American people still could not testify in South Carolina courts. This was not a South Carolina Court. The provost marshal overruled the objection and allowed

⁵⁰ Worthington Chauncey Ford, *A Cycle of Adams Letters, 1861-1865, Volume I* (Boston: Houghton Mifflin Company, 1920), 124-29.

the women to testify. However, before they could testify the women still had to prove they could comprehend what it meant to make an oath in court by answering general knowledge questions posed by the provost marshal. Charles then accused the women of being promiscuous, having low character, and asserted that some of what the women thought were sexual assaults were actually medical examinations. For attempting to rape the four formerly enslaved women, the court suspended Charles without pay for two months.⁵¹

The court martial trial of Charles Lauer presents a striking intersection between antebellum law and medical practices. Charles attempted to exploit every avenue to keep the women he assaulted from testifying against him. Other Union soldier defendants would bring up many of the same legal defenses. Charles unwittingly partook in a wider ongoing attempt to curb women and African-American peoples' new power in court. Charles would not be the last Union doctor to abuse the vulnerable position of his wards nor the last Union soldier to attempt to exploit former slaves for sex. Legal and medical authorities in the antebellum era generally thought women less credible than men and feared the charge of rape due to the difficult nature in unraveling the crime. Successfully prosecuting a man for rape was a staggering uphill battle that threatened to cast the accusing woman to the depths of dishonor with a single misstep. A woman had to prove that she had made it clear to her attacker that she did not wish to have sex, and that she had provided extensive physical resistance, yelled for help, and fought back to the point of death. After the rape had taken place, which many medical and legal authorities were reluctant to acknowledge was possible anyway, the woman had to alert the authorities as soon as possible and was in many cases subjected to invasive examinations by a doctors. Even if she did everything right, if witnesses for the defense identified her as a person of low character or as a

⁵¹ Thomas P. Lowry, *Sexual Misbehavior in the Civil War: A Compendium* (Philadelphia: Xlibris Corporation, 2006), 138-39.

prostitute a jury might still consider her testimony as of lesser value than a male defendant's testimony.⁵² African Americans and African American women in particular often suffered the same or greater prejudices in court as white women.

How American courts and military court martial trials came to this set of standards dates back to at least the seventeenth century. Broadly speaking, the law of the United States, and by extension the Confederate States, grew from English common law. Prior to the seventeenth century, some English courts saw rape and sexual assault as a crime against the property of a father, husband, or other head of household. The court did not consider a woman that a man had raped to be a legal entity with standing in court. Sir William Blackstone, an English jurist, offered one of the most famous examinations of English common law in his *Commentaries on the Laws in England*, published in the 1760s. The *Commentaries* were the first codification of common law in England. Prior to the *Commentaries*, the laws of England existed only in the form of legal precedent or occasional collections and guidebooks. Blackstone's analysis of English law casts a long shadow on the legal history of the world. American courts made constant use of Blackstone in the era of the American Civil War, and his voice echoed through American state laws. Like Blackstone, other legal and medical minds published their own treatises on medical law. The treatises on medical law and in particular the crime of rape appeared in staggering numbers.

Blackstone's conceptualization of sexual crimes bears some extended examination since state courts repeated his words even after the Civil War was over. During the American Civil War, readers would still recognize many of Blackstone's views regarding rape and crimes against women written in his *Commentaries*. Other of his views regarding women seemed

⁵² Alfred S. Taylor, *Medical Jurisprudence*, ed. R. Eggesfield Griffith, M.D. (Philadelphia: Lea & Blanchard, 1845), 485.

antiquated in the antebellum era. For example, harkening back to an earlier time of when crimes against a woman were crimes against property, Blackstone still defined adultery and seduction (which often involved defrauding the female victim) as civil injuries which only the injured father or husband could recover. In the eighteenth century, the state had not granted women many of the same legal protections that men enjoyed and as a result, courts and society sometimes treated them like property. On the subject of rape, Blackstone's legacy proved the most enduring. He defined rape as "the carnal knowledge of a woman forcibly and against her will."⁵³ Blackstone and English common law of the time broke from some earlier tradition which did not consider whether the woman consented to a sexual act. Instead, Blackstone articulated that a woman's agency was key to establishing rape. Blackstone's definition of rape had three important components for establishing rape. The first is carnal knowledge; the man must have placed his sexual organ into the woman's sexual organ. The law restricted rape to only a man vaginally penetrating a woman. The law then weaves the next two components of rape together and their interaction is important to understanding how people in this time understood rape. The man must force the carnal knowledge upon the woman and the carnal knowledge must be against the woman's will. If a man has carnal knowledge against a woman's will, but the man does not force it upon her, or if a man forcibly has carnal knowledge of a woman but it is not against her will courts may not rule the acts as rape. This definition saw only small revisions for the next one hundred years and the various American states adopted it word for word in the early part of the eighteenth century. Later courts struggled to define instances where a man had sex with a woman against her will but did not use force, such as when an attacker drugs their victim

⁵³ William Blackstone, "Of Offenses Against Persons as Individuals," in *Commentaries on the Laws in England*, Book 4 (Oxford, England: Clarendon Press, 1765-1769), 209.

first or when the attacker forces sex but the woman's will cannot be established due to insanity or her death prior to the trial.

One common misconception during the Civil War was whether a prostitute could be raped at all. The passive construction of rape in this instance is important since the men who raped women that they thought were prostitutes did not deny having sex with the women and in many cases did not deny forcing sex either. The rapists believed that if a woman had already cast aside her virtue and honor by engaging in prostitution then they had not violated anything by forcing sex upon the women. The legal meaning of rape referred to the Latin phrase *raptus*, and originally referred to unlawfully seizing or taking property. In the nineteenth century, some people still thought of women as a kind of property whose value society derived from women's chastity and honor. Many thought that a prostitute had no honor and was without anything of value to take; therefore, a person could not rape, or sexually take anything, from her. Despite this belief English common law did protect a "concubine or harlot" from rape; though they could not claim to have their chastity or honor violated and a judge would direct a jury to consider her testimony to be questionable due to her lack of honor and virtue. Blackstone made clear that even if a prostitute gave up her line of work and repented she was still a prostitute. For this reason, Blackstone recommended extending protection of rape to prostitutes. Still, a court was supposed to consider a woman "of good fame" more competent than a woman "of evil fame."⁵⁴ Even though nearly one hundred years had passed since Blackstone published his *Commentaries*, many people considered it common knowledge that a person could not rape a prostitute. Thus, even the accusation of prostitution could lower a woman's legal power in court.

⁵⁴ William Blackstone, "Of Offenses Against Persons as Individuals," in *Commentaries on the Laws in England*, Book 4 (Oxford, England: Clarendon Press, 1765-1769), 209-214.

In 1865, Dennis McGill, a private in the 4th Massachusetts Cavalry attempted to rape Catherine Sharpe, who he believed was a prostitute. According to Dennis's testimony, Catherine summoned him up to her room and asked him for money and provisions in return for sex. Even if she had been a prostitute Dennis had no money or provisions with which to pay her for her alleged trade. Emeline Christian, a "colored servant," was in the room as well and the court called her to testify. Even a Union court martial that was more liberal in who it allowed to testify was reluctant to allow an African-American woman to do so. Prior to giving testimony the court questioned Emeline regarding her ability to understand the meaning of an oath. The court was apparently satisfied with her answer and allowed her to testify. She testified that Dennis raped Catherine, and the courts agreed. Upon conviction, he stated, "If I had any money, none of this would have happened."⁵⁵ Dennis, like many of his contemporaries, believed that he could not truly rape a prostitute due to their lack of virtue. A year earlier, six men of the 20th New York Cavalry raped Grace Barnes. The gang rape was so violent that at the time of the trial Grace was still unable to control her urination. The men did not deny the act in court and like Dennis seemed to think that prostitutes could not be raped. One of the men, Nicholas Kane, offered only his testimony regarding her alleged trade. "We did not pay her anything. She prostituted herself willingly to all the men. I did hear her beg to be let up." He was aware she wanted to get up but continued to gang rape her. The court martial sentenced the men to between three and five years in prison.⁵⁶

In North Carolina, a court martial tried Weedon, a corporal, and Farrier Germain Goodrich, a private, in 1863, for raping Penelope Wood whom they thought was a prostitute.

⁵⁵ MM3937.

⁵⁶ Thomas P. Lowry, *Sexual Misbehavior in the Civil War: A Compendium* (Philadelphia: Xlibris Corporation, 2006), 128.

Both men served in the 3rd New York Cavalry. The two men rode up to the Wood house, which they testified was a house of prostitution. The two men tied Penelope's father to a tree and locked her mother in a separate room. Strange actions for men who believed they were at a brothel. Farrier attempted to rape Penelope but did not succeed. Farrier then offered her three dollars to settle the matter. Penelope refused the money and Farrier fell asleep shortly thereafter, being greatly inebriated. In court, neither Farrier nor Weedon denied the events of the evening but maintained that they thought Penelope was a prostitute. The court found Farrier guilty of attempted rape but only sentenced him to eighteen months in prison and a dishonorable discharge. "The court is thus lenient on account of the impression in the mind of the accused that he was in a house of ill fame."⁵⁷ Farrier and Weedon had no problem forcing sex upon Penelope since they claim they thought she was a prostitute, and the court martial appears to agree with their sentiment on some level since they were lenient in sentencing due to the alleged misunderstanding. The men likely used the cover of prostitution to attempt to shield their actions from legal repercussions, and it apparently worked. Women who brought charges of rape against a man ran the risk that their attacker publically labeled her as a prostitute, whether she was one or not. The defendant could use the charge of prostitution to either attempt to dismiss the charge of rape or to impeach the character of the accuser in court. The fear of their rapist publically naming them as a prostitute may have dissuaded women from bringing charges against their attackers and been used as a weapon of intimidation by rapists, especially ones who could produce witnesses who would back up their claim. Either instance would have dissuaded women from exercising their new legal power against their rapist in court.

⁵⁷ Ibid, 133-34.

To people alive during the Civil War the status of a woman as a prostitute was rather cut and dry. Whereas today we would say that a woman only engaged in prostitution, in that time it was permanent and defining. Many people considered a starving woman who accepted food or money in exchange for sex just once to have as little honor as a woman who regularly engaged in prostitution. Thus, once a woman accepted money for sex she became a prostitute forever - whether she ever engaged in the trade again or not. Despite most state laws stating that a rapist could not gain consent for sex after the fact, several court cases ended in just that way. Some people of the time still believed that the potential rapist could legally defeat the resistance of the victim. That is, if there was initial resistance but it subsided or the woman involved not earnest enough in her cries, or even if the woman gave consent *ex post facto* then the woman had not established the forcible requirement of rape. Though many lower courts agreed with this common interpretation of force in rape it was not universal. In 1843, a Tennessee judge instructed the jury of a case involving rape, "It is no difference if the person abused consented through fear, or that she was a common prostitute, or that she assented after the fact, or that she was taken first with her own consent, if she were afterwards forced against her will."⁵⁸ The judge believed that in all of the preceding scenarios the rapist had violated the woman's will. The Tennessee Supreme Court upheld his ruling and judges still reference the case today.

Louisa Fears accused George McCullough, a private in the 7th Michigan, with raping her. At the court martial, Louisa testified that George had drawn a pistol and pointed it at her and her mother and then forced Louisa inside the house where he raped her. Her mother testified to the same fact. For his defense, George's colonel, George LaPointe, testified that he had paid Louisa \$50, "on account of the accused, as compensation for any damages alleged." He also produced a

⁵⁸ West H. Humphreys, *Reports of Cases Argued and Determined in the Supreme Court of Tennessee, Vol. IV* (Louisville, KY.: Fetter Law Book Company, 1908), 189.

signed contract (see fig. 1) to that affect that Louisa had reportedly signed and noted “In consideration of \$50... would rather that the case of rape between George McCullough and myself be dropped.” The court martial found George not guilty of rape and acquitted him of all charges. Louisa had no say in the matter of ending the rape trial and the court did not question her about the letter.⁵⁹ If Louisa actually received \$50 from the colonel then she received more than most women who testified in a court martial trial, though the long-term consequences may have been more costly. Extrajudicial methods to resolve rape, or criminal trials in general, were common, and often served to undercut women’s power.

Some medical and legal authorities were unsure whether it was actually possible for one man to rape a healthy woman. Many doctors and lawyers believed that the physical force required to perpetrate rape must be so high that it could only happen in the most exceptional circumstances and that “true rape” must be very rare as a result. Thomas Cooper, an American lawyer, district judge, medical doctor, and professor at the University of Pennsylvania published *Tracts of Medical Jurisprudence* in 1819, which collected and annotated various treatises on American medical law along with his own notes and commentaries. Publishers were still publishing new editions of Cooper’s work during the Civil War. He began his chapter on rape by posing a question: “Whether a rape, strictly so called, be possible?” Cooper conceded that rape is possible, but that it required “very extraordinary circumstances” given that rape should be easy to avoid by “drawing back her limbs, and by the force of her hands, to prevent the insertion of the penis into her body, whilst she can keep her resolution entire.”⁶⁰ Fear, drugs, and threats of injury or death do not appear to matter to Cooper.

⁵⁹ NN3993

⁶⁰ Thomas Cooper, Esq., M.D., *Tracts on Medical Jurisprudences* (Philadelphia: Thomas Town, 1819), 25.

(Document 6)

Prince Edwards County
April 23rd 1853

I Louisa A. Fears for a
consideration of Fifty \$50 dollars
received from the estate of
T. Mich. Esq. would rather
be safe between George McCullough
& myself to drop and request
that he be not court martialled

Louisa A. Fears

Witnesses
Lieut A. T. Navarre
Lieut W. I. Stout
W. I. Stout

Fig. 1. Letter specifying \$50 payment to Louisa Fears to drop her rape case against George McCullough. Source: NN3993.

Theodric Romeyn Beck, M.D., wrote *Elements of Medical Jurisprudence* in 1823, and publishers released the eleventh edition in 1860, just before the outbreak of the war.⁶¹ Beck largely agreed with Cooper’s assessment. “However we may doubt whether a rape can be committed on a grown female, in good health and strength...”⁶² He cites other physicians who say it may be possible “where narcotics have been administered – where many are engaged against the female – and where a strong man attacks one who is not arrived to the age of puberty.”⁶³ The 1845 book *Medical Jurisprudence* by Alfred S. Taylor notes that outside a few exceptions involving narcotics, intoxication, groups of men, or threats of death that “... it does not appear probable that intercourse could be accomplished against the consent of a healthy adult female...”⁶⁴ These attitudes regarding force persisted through the Civil War court martial trials. In Virginia in 1865, a military commission charged Michael Shehan, a private in the 8th Maine, with the rape and attempted murder of Maria Wade. Maria was “about fifty” by her own recollection and described as a large and healthy woman by the court. Maria stated that the accused and another man threw her into a canal, raped her, and threatened her life with a knife. She recalled that Michael “...said he’d cut my throat and tear me in half if I hollered...” Despite Michael’s threats on her life should she yell or resist the court still questioned Maria regarding whether she had defended herself sufficiently or made enough noise to attract attention, as well

⁶¹ Theodric Romeyn Beck, M.D., *Elements of Medical Jurisprudence* (Albany: Websters and Shinnars, 1823); Theodric Romeyn Beck, M.D., and John B. Beck, M.D. *Elements of Medical Jurisprudence*, ed. C. R. Gilman, M.D. (Philadelphia: J.B. Lippincott & Co., 1860).

⁶² Theodric Romeyn Beck, M.D., *Elements of Medical Jurisprudence* (Albany: Websters and Shinnars, 1823), 82.

⁶³ *Ibid*, 84.

⁶⁴ Alfred S. Taylor, *Medical Jurisprudence*, ed. R. Eggesfield Griffith, M.D. (Philadelphia: Lea & Blanchard, 1845), 462.

as how she was so “...easily tossed into the canal.” The court, like legal and medical experts Cooper and Beck, appeared to believe that a healthy woman should be able to resist rape except in extraordinary circumstances. The court martial sentenced Michael to serve nine months.⁶⁵ By setting a high bar for rape men and the courts could limit the overall number of cases that women could successfully bring against men for rape and further cast aspersions on their accusations. Court martial cases also generally punished gang rape crimes more severely than a single rape, perhaps reflecting the more likely nature of the crime in their eyes or the greater violation.

In addition to the pain of rape itself and the social and psychological trauma that could result from the defendant accusing the female victim of being a prostitute whether the victim was one or not the trials could also result in physically embarrassing and traumatic examinations. In 1865, after Thomas Mitchell of the 1st New York Engineers raped ten year old America Virginia Pierman, she was forced to undergo an invasive examination of her most private parts. Surgeon Robert Loughran checked for the presence of her hymen, and any damage to the genitals.⁶⁶ These examinations were most common for children, who might not be knowledgeable about the anatomy of men and women or were incapable of understanding what their rapist did to them. During the Civil War, a Union military commission tried Luckey Glass for the rape of eight-year-old Geraldine Ann Jarcke. Doctor Alfred Raoul examined her just after the assault, while she was still “excited and trembling.”⁶⁷ No matter their age if the victim’s performance under examination was not modest enough or if the physician believed the victim to be acting the

⁶⁵ Thomas P. Lowry, *Sexual Misbehavior in the Civil War: A Compendium* (Philadelphia: Xlibris Corporation, 2006), 118.

⁶⁶ *Ibid*, 122.

⁶⁷ Thomas P. Lowry, *Sexual Misbehavior in the Civil War: A Compendium* (Philadelphia: Xlibris Corporation, 2006), 136.

physician might rule the woman to be too experienced in sexual matters to determine whether a person had raped her. For an unmarried woman this very public revelation of their private matters could be social devastating. If a doctor testified in court that the victim was experienced in sex when they were unmarried, their peers might label them as a prostitute or unfit for marriage. After Bunkum P. Osbourne and five other men raped and violently assaulted Elizabeth Webster, a doctor performed an examination on her injuries and genitals. The doctor found severe bruising but could not determine if her wounds were the result of rape due to her “marital experience.” Elizabeth was pregnant at the time Bunkum and his gang raped her. Bunkum admitted to the crime and the court sentenced him to seven years in prison.⁶⁸ The court might read the doctor’s examination into evidence, or instruct them to testify in a public courtroom on the state of a woman’s genitals whether she appeared sexually active or if she was pregnant. A person today would consider these actions very embarrassing but they were socially devastating to women during the Civil War. Elizabeth’s pregnancy, for example, might have been a secret. As in the other barriers women had to overcome, the fear of testimony on the state of the secret parts of their bodies may have further dissuaded women from accusing men of rape.

Even age was no protection from accusations of low character. An 1864 military commission in Little Rock, Arkansas tried Charles Jordan for raping Betsy Smith. There was some disagreement about her age but she was no more than twelve years old at the time of the assault. One night while Betsy’s parents were out working Charles climbed into bed with Betsy and forced himself upon her. Betsy testified that she did not yell out because she did not think anyone was home at first. Betsy’s mother came home during the attack but was unaware of what was happening in the bedroom; however, it was enough for Charles to stop attempting to rape

⁶⁸ Ibid, 147.

Betsy. Despite the brief duration of the attack, it was so damaging that Betsy was incapable of getting out of bed for several days. Charles confessed to having sex with Betsy but his defense was that she tempted him and that she was the one with low virtue. He testified that her mother had invited him to sleep with both of them several times, though she denied it. A defense witness testified, “[Betsy] had coaxed him and tickled him and asked him to get on top of her and do just like Papa does to Mama.” The court acquitted Charles.⁶⁹ The records of the court martial rarely explain why they reached their decision but they generally pass lighter sentences when a woman did not provide enough resistance. It is possible the court took Betsy’s failure to cry out to her mother into consideration when acquitting Charles. Even yelling alone might not be enough to sway courts. After Daniel Tierce, George Nelson, and Lewis Hardin, privates in the 13th US Colored Troops raped Indiana Rose the judge advocate general asked her “Did you use your utmost endeavors to prevent him from executing his desires, or did you simply cry out, thus yielding a tacit consent?”⁷⁰ These kinds of verdicts may have dissuaded more women from suing their attackers. After all, if Charles could legally defend himself from the charge of raping young Betsy by labeling her as a person with loose sexuality, what chance did adult women have? Despite being under the age of consent at the time, the court martial still did not consider this a case of statutory rape.

Like the case of Charles F. Lauer, sometimes the medical staff responsible for the care of the sick and wounded committed the crimes. During the war, Hospital Steward Eugene Hannel, of the 2nd Maryland raped Rebecca Ann Cradle, another employee of the hospital. A surgeon who examined her testified, “She was admitted to the hospital in a state of mild mania,

⁶⁹ LL1746.

⁷⁰ Thomas P. Lowry, *Sexual Misbehavior in the Civil War: A Compendium* (Philadelphia: Xlibris Corporation, 2006), 151.

sometimes insane, sometimes lucid... her private parts were lacerated and swollen, her hymen was intact but lacerated, scratches were on her legs... her insanity was caused by a concussion of the brain from the stoppage of her menstrual flow, which she had at the time of the violence.”⁷¹

Like other outdated beliefs that persisted into the time of the Civil War, some doctors still thought that preventing the flow of menstrual fluid could cause insanity in women. The reprinting of archaic books and treatises on medical knowledge spread these incorrect medical beliefs.

In cases where books on medical law contained direct references or citations of state law, they propagated outdated ideas of law when republished after state legislatures changed a law. In 1819, Cooper accurately stated that some American state laws still required male emission for what he called “true rape;” however, this was not the case in any state by 1860, yet it remained in other books which quoted him including as late as the 1906 edition of *The Medico-Legal Journal*.⁷² Other inaccuracies persisted in republished works like the idea that a woman could not become pregnant from rape. Cooper writes that “...without an excitation of lust, or the enjoyment of pleasure in the venereal act, no conception can probably take place.”⁷³ According to Cooper’s theory, if a woman claims a man raped her and becomes pregnant from the act, no rape could have occurred. Beck disagreed with Cooper’s assessment of the requirement of pleasure for pregnancy, but notes that many state laws still cite enjoyment as a prerequisite for

⁷¹ Thomas P. Lowry, *Sexual Misbehavior in the Civil War: A Compendium* (Philadelphia: Xlibris Corporation, 2006), 130.

⁷² *The Medico-Legal Journal* 24, no. 1 (June 1906).

⁷³ Thomas Cooper, Esq., M.D., *Tracts on Medical Jurisprudences* (Philadelphia: Thomas Town, 1819), 25.

pregnancy.⁷⁴ Like the law regarding emission in rape, this belief was inaccurate by the outbreak of the Civil War, yet publishers printed it in new editions of medical and legal guides. The belief that pregnancy could not result from rape may have deterred women from bringing an accusation of rape, for if they feared they would later become pregnant it could cast doubt on their claim and in turn their honor.

The result of much of this archaic information was misinformation for juries, lawyers, and poorly trained medical staff. Publishers republished many legal texts during the decades leading up to the Civil War. These texts included Blackstone's *Commentaries* in legal reference books without additional notes regarding their outdated status. In some cases, American experts published collections of state laws for local magistrates and sheriffs to use as a guide. Publishers reprinted the references to state law in new editions and collections without correcting the old citations. This could lead readers to believe that repealed or subsequently updated laws were still in force. Because people continuously republished Blackstone's writing with little revision or annotation as if it was still current and authoritative, medical and legal opinions moved slowly and conservatively. By the 1850s, most, but not all, medical and legal authorities seem to have agreed that a person could rape the mentally handicapped or an unconscious person even though they might be incapable of giving proper consent.⁷⁵ *Elements of Medical Jurisprudence* eleventh edition, published in 1860, notes a well-known civil trial from 1850, where a dentist raped a woman under his care after he had administered ether to her prior to extracting a tooth. The

⁷⁴ Theodric Romeyn Beck, M.D., *Elements of Medical Jurisprudence* (Albany: Websters and Shiners, 1823), 101-02.

⁷⁵ "Rape on an Idiot" *The Western Journal of Medicine and Surgery*, Vol. II, Issue 11, 1854; and *Western Law Journal*, Vol X, pp. 501-5; "Rape on an Idiot" *The Medical Examiner* X.XXV (1847): 71; "Alleged Rape Perpetrated on a Female While under the Influence of Ether" *The Medical Examiner* X.XXXIV (1847): 635.

woman was conscious during the rape though she could not move her body to fight or her head to see actual penetration. According to *Elements*, much of the dental community spoke out against the conviction since she was under the effect of mind-altering drugs, she was incapable of resisting, she was not harmed (beyond psychologically, perhaps), and she could only feel the crime taking place and not see it.⁷⁶ Their objection to her inability to see the penetration was unique, as no other defendants seem to have used that defense in cases where the attacker covered their victim's face, for example. The dental community likely seated their objection in the fear of future lawsuits resulting from the relatively new use of ether in medical procedures. Few other medical or legal professionals agreed with the dental community and the common medical definition of rape in the era of the Civil War, as written by a doctor, might read: "Sexual intercourse with a female, forcibly and in opposition to her will; or the same act committed without her knowledge, during intoxication, sleep or [fainting]; or, at so early an age, that she cannot be aware of the gross impropriety of the act." This definition clearly classified rape under the effects of ether as rape; however, it was not widespread outside medical communities.

During the Civil War most people were not familiar with the law regarding what rape was and how it could be committed. Sometimes the defense would cite outdated cases, possibly out of ignorance of updated laws and medical knowledge, and possibly out of feigned ignorance in an attempt to win a case at the expense of the law. At a different civil rape trial in 1851, a man stood accused of raping a woman while both were in the standing position. The woman's defense, headed by the state's attorney, stated that a rape had definitely occurred. Yet the defense also conceded that they did not think it was possible for a person to rape another while both were standing. The defense cited a case from the reign of Queen Elizabeth to prove that rape could not

⁷⁶ Theodric Romeyn Beck, M.D., and John B. Beck, M.D. *Elements of Medical Jurisprudence*, ed. C. R. Gilman, M.D. (Philadelphia: J.B. Lippincott & Co., 1860), 247-48.

be committed while standing. According to the story, the Queen held a scabbard and instructed the prosecuting attorney to insert the sword into the scabbard. The attorney was unable to insert the sword because the Queen only had to move the scabbard slightly for him to miss entirely. Therefore, so would a man's attempts go while attempting to rape a standing woman because his legs would not be free to pin the woman. Back at the 1851 trial, the prosecution wished to bring in a physician to verify whether rape while standing was possible but the judge ruled that it was "common knowledge" that it was not possible. The jury agreed and acquitted the man of rape.⁷⁷ Most other times judges, especially military judges with less legal experience, relied on medical authorities to weigh in when a victim could not testify or if the testimony was split. In 1865, James Bernard raped eleven-year old Sarah Allison, described as suffering from "mental instability." A military commission tried James for rape. The records of the commission indicate that Sarah was too ill to interrogate, but a surgeon's examination of her certified that someone had raped her. The commission sentenced James to a year of hard labor for raping Sarah.⁷⁸

All of these barriers to women's testimony had their roots in the eighteenth century. Blackstone and his successors generally favored a cautious legal system modeled after his famous formulation that it was better to let ten guilty men go free than imprison one innocent man. On rape specifically, Blackstone would often refer back to Matthew Hale, seventeenth century English jurist when justifying the accuser's burden to establish rape. "It is true" writes Hale, "that rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easy to be made, hard to

⁷⁷ "Trial for Alleged Rape.--- Curious Question of Fact," *Nelson's American Lancet* 3.6 (1851): 338.

⁷⁸ Thomas P. Lowry, *Sexual Misbehavior in the Civil War: A Compendium* (Philadelphia: Xlibris Corporation, 2006), 144.

be proved, but harder to be defended by the party accused, though innocent.”⁷⁹ An accusation of rape could require little more than an utterance, but so too could other crimes with only a single witness; yet, Blackstone and Hale seem less concerned in those instances. Rape represented a new kind of crime that, to the eighteenth and nineteenth century mind, only a man could inflict upon a woman and was one of the few crimes that a woman could bring a man to trial for perpetrating. Theft, for example, could be committed by either a man or a woman, yet when a woman was stolen from it was a crime against the woman’s father or husband since she rarely owned anything in the eyes of the law. In the eighteenth and nineteenth century, rape became a crime against the woman’s person, not her husband’s, or father’s property; therefore, she was the injured party and could bring a man to trial for raping her. The shift of rape from a property crime to a personal crime changed the uneven balance in legal power between men and women. People created many barriers to limit women’s new power in the courtroom. Courtrooms were traditional domains of men. Only men could be lawyers, judges, and serve on juries, and usually only white men. These barriers manifested as an unreasonably high burden of proof to establish rape, usually far beyond the burden of proof for other crimes. Not only were women required to establish that they understood an oath and its meaning, which was not required of white men, but also they needed to testify to their true resistance to a man raping them and defend themselves against accusations of prostitution or consent.

Even when women gained the right to testify in court and accuse men of raping them they faced a legal system that believed most rape accusations were false. Some American states laws took Hale’s words regarding the ease of a false rape accusation to heart and reminded justices of the peace to warn women about the consequences for false accusations whenever they reported

⁷⁹ Matthew Hale, *The History of the Pleas of the Crown* (Philadelphia: R. H. Small, 1847).

rape.⁸⁰ It is possible this was a well-meaning, if condescending, attempt to remind women of the serious consequences of fraud or perhaps that it meant to deter complaints or even both. Given that the author did not recommend people who reported other crimes be reminded of the seriousness of their accusation and the consequences it bore, the former seems likely. Women typically contended with medical and legal authorities who still believed that only the most exceptional cases were truly rape. The 1845 edition of *Medical Jurisprudence* noted that "...for one real rape tried on the circuits, there were on the average twelve pretend cases!"⁸¹ Beyond the legal difficulties, there were social problems for a woman who brought an accusation of rape to a trial, even if she won. At trial, her rapist might claim she was a prostitute, and produce witnesses to testify to that fact. If the trial resulted in an acquittal then the testimony of the parties exposed her private life to public scrutiny, including who she may or may not be having sex with, the state of her bodily functions like menstruation or pregnancy, and descriptions of her genitalia in public record. Despite these barriers and risks, many women did make accusations against their rapists during the American Civil War. These women braved a legal system stacked nearly insurmountably against them and sometimes prevailed in bringing their attackers to justice.

Women were also able to exercise power in unexpected ways through court martial trials for rape. In 1864, a court martial in Virginia deliberated over Daniel Geary and Gordon Ransom, privates in the 72nd New York, accused of raping Mary Stiles. Gordon testified that Virginia had had sex with him willingly. Mary testified that Gordon and Daniel raped her. The court agreed

⁸⁰ Joseph Backus, *The Justice of the Peace being a General Directory, and Forms Proper for the Due Execution of the Office According to the Common and Statute Laws now in Force and in Use in The State of Connecticut* (Hartford: B & J. Russell: 1816), 97.

⁸¹ Alfred S. Taylor, *Medical Jurisprudence*, ed. R. Eggesfield Griffith, M.D. (Philadelphia: Lea & Blanchard, 1845), 458.

with her, and executed Gordon and Daniel for raping Mary.⁸² Many years later Mary reportedly recanted her story in a deathbed confession, and “acknowledged that she swore the lives of these men away in order to contribute her mite towards the extermination of the Yankee army.”⁸³ True or not, this was exactly what men of the era feared and how they justified the legal barriers. The tale of Mary’s deathbed recantation fits into the post-war narrative of the Lost Cause which assured white people that there was little to no rape committed by white soldiers, while at the same time furthering the political agenda which favored white men over other groups.

⁸² MM1481

⁸³ Joseph Gould, *The Story of the Forty-Eight: A Record of the Campaigns of the Forty-Eighth Regiment Pennsylvania Veteran Volunteer Infantry during the Four Eventful Years of its Service in the War for the Preservation of the Union* (Philadelphia: Alfred M. Slocum Co, 1908), 273.

CHAPTER FOUR

STATE AND ARMY LAW REGARDING RAPE

What is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country. It is not the civil law of the conquering country.

It is military law – the law of war...

Dow v. Johnson, 1879

Cahaba, Alabama was the first capital of Alabama; and primed to become a powerful town in the 1820s. The city was located on an important trade route leading from Montgomery to Mobile. Unfortunately for the residents of Cahaba, the rivers that surrounded Cahaba flooded the city too often; one even destroyed part of the statehouse in 1825. In 1826, the legislature moved the capital to Tuscaloosa. Just prior to the outbreak of the Civil War Cahaba was again appeared ready to grow. The promise of a new railroad between Cahaba and Montgomery led investors to construct a massive brick warehouse between the rail terminus and the river. The rail line never amounted to more than a few miles of track, and the warehouse stood empty in 1861. In 1863, the Confederacy converted the abandoned warehouse to a prison for Union soldiers. During the war, the Confederate military housed thousands of Union soldiers in the prison. Like all Civil War prisons, conditions were harsh, but Cahaba prison suffered the lowest death rates North or South. As the war drew to a close the military commanders of the Union and Confederacy created a unique arrangement where prisoners of both sides would be kept in a neutral site near Cahaba under both Confederate and Union guard while supplied by Union food and medicine. The opposing guards and prisoners seemed to get along well. In April 1865, the two sides signed

a cease-fire agreement, and exclusive Union control soon extended over Cahaba and the rest of Alabama.⁸⁴

On April 15, 1865, hundreds of miles away from Cahaba, John Wilkes Booth shot and killed President Lincoln in Washington, D.C. On that same day, on a small plantation in the former Alabama capital, John Riley, a white slave owner, reportedly beat one of his slaves named Jane to death. Allen, another of his slaves, testified that John beat Jane with a buggy whip, then a handsaw, and then a piece from a wooden door casing until “her head and face was beat all to pieces.” Jane, not yet dead, managed to crawl away and into the woods. Several days later, other slaves found her dying from her wounds and unable to walk. They brought her back to the house where she died two days later and then buried her under a log. John’s crimes were apparently not limited to murder. On many occasions, John also tried to coerce Martha, another of his slaves, into having sex with him. She always refused. Despite this, John often succeeded in raping Martha, and he grew to resent her refusal to submit to his will. Martha also testified to seeing Jane when the other slaves found her and brought her broken body back to the plantation.

Two weeks later, on April 28, the war was all but over. Soldiers began leaving the prisons and battlefields for their homes, and many former slaves began to experience freedom for the first time. John was either oblivious to this new reality or simply refused to accept that the law did not allow him to own people any more. On that day, John intended to rape Martha as he had done many times before but she again refused his advances. Outraged, John began whipping Martha with a buggy whip. Two other men held her down over a log while he whipped her. John yelled at Martha as he whipped her. “Goddamn you, I’ve bought you for my own use!” Satisfied with the whipping, he sent her back to work in the fields. Just as Martha had her first taste of

⁸⁴ William O. Bryant, *Cahaba Prison and the Sultana Disaster* (Tuscaloosa: The University of Alabama Press, 1990), 16-36.

freedom snatched from her, so too did many of the former prisoners of war leaving Cahaba. The steamship *Sultana*, carrying two thousand of the former Union prisoners, had exploded the morning before while ferrying them from Cahaba back to their homes in the north. Fewer than seven hundred people survived the tragedy.⁸⁵

Union soldiers arrested John shortly after his latest assault and a Union military commission tried him for the rape, murder, and the assault of his slaves. John, like many other white men, would object to the testimony of African-American people in court. Alabama state law did not allow it. “The prisoner objects to the introduction of Martha... as a witness against him on the ground that she is a Negro and he is a white man and that she is therefore incompetent to testify against him. He refers to the code of Alabama and asks that this exception be made a part of the Record in case the motion is overruled.” It was. John did not deny whipping Martha. He considered her his property, and believed he was free to whip her as needed, even after the Union military occupied Alabama. John did deny whipping her as violently or as many times as Martha testified that he did. He also denied raping Martha, insisting she had willingly allowed his embraces. He also testified he knew nothing of Jane’s death until his children told him about it. Several other white male witnesses testified for John’s defense and each accused the African-American witnesses of being liars and thieves. The military commission found John guilty only of assaulting Martha.

The military commission took an aggressive stance in the case of John Riley. They enforced federal law over Alabama state law by allowing African-American people to testify against a white person. Since the commission did not recognize Confederate laws or the status of

⁸⁵ William O. Bryant, *Cahaba Prison and the Sultana Disaster* (Tuscaloosa: The University of Alabama Press, 1990), 111-16; Alan Huffman, *Sultana: Surviving Civil War, Prison, and the Worst Maritime Disaster in American History* (New York: Smithsonian Books, 2009), 107-26.

slaves in Alabama, the military commissioners felt they were within their rights to try John for crimes that took place before they had occupied Alabama. The charges specified not only the rape and assaults in April, but also those “sundry and divers (sic) times previous to and subsequent to that date.”⁸⁶ Military commissions and court martial trials like that of John Riley would provide an opportunity for military commanders and the federal government to re-exert power over the rebellious states and their inhabitants as well as to empower women and African-American people. They could subvert Confederate state laws that disallowed African-American people to testify or bring charges against white people and retroactively charge slave owners for crimes like rape, which the masters had committed against their slaves. When the Union army invaded and imposed martial law upon the Confederate states the military suppressed some state laws and replaced them with their own. Trials for rape during the American Civil War proved to be an opportunity for the Federal government to flex its power over the individual states, and impose greater equality in sentencing within slave states.

To understand how the military was able to overrule state law it is necessary to examine the growth of military law and court martial courts in the United States.⁸⁷ Laws regarding rape in the U.S. were initially a state concern, but the American Civil War created a new need for military and federal powers in prosecuting and sentencing guidelines. As shown in Chapter Three, much of American law owes its beginning to eighteenth century English jurist William Blackstone. Blackstone established that rape was a capital crime deserving of death. In England, only the King or Queen could pardon a capital crime. In court martial trials, this power was

⁸⁶ LL1097.

⁸⁷ For a history of early American law on the topics under discussion, see: Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* (Chapel Hill: University of North Carolina Press, 1996); Sharon Block, *Rape and Sexual Power in Early America* (Chapel Hill: University of North Carolina Press, 2006).

instead reserved to regimental commanders in the early part of the American Civil War, and then exclusively to the President after the issuing of *General Order No. 100*, presenting another opportunity for increased federal power. By the end of the war, regimental commanders could use the accusation of rape as a way to enforce order on their soldiers. The provost martial could bring the charge against the soldiers, and the sentence could be death only pardonable by the President himself.

The federal government of the United States originally did not have laws concerning rape except for instances of military personnel committing rape on federal land or buildings and in cases of crime on the high seas; therefore, it was the state's responsibility to create and carry out punishment for rape when an American soldier committed rape in their state. American states were free to pass legislation imposing a penalty other than death; however, courts generally interpreted a lack of a law to mean the English common law penalty of death was still in effect. After relying on English laws for over twenty years, an Act of Congress in 1825 reaffirmed the penalty for rape on federal land or the seas as death.⁸⁸ Like English common law, state laws evolved through legal precedent. Prior rulings by judges generally bound future judge's decisions. Judges could make new rulings, in effect legislating from the bench as the will of the people changed. This evolution of law through judges' decisions saw the different states' laws concerning rape grow in different directions. The early history of the United States' state law saw two types of laws developing regarding rape. Northern states and states that joined the Union as Free states tended to have a single code of punishment that drifted towards prison time instead of capital punishment, while slave states had separate harsher punishments for free-black men and the enslaved. Slave state legislatures, in an attempt to assuage white fears and control

⁸⁸ Ellis Lewis, *An Abridgement of the Criminal Law of the United States* (Philadelphia: Thomas, Cowperthwait & Co., 1847), 557.

enslaved and African-American populations, passed many increasingly harsh and complex laws surrounding rape. Until the Civil War, American courts did not consider the rape of an enslaved woman a crime against a person, but instead a property crime perpetrated against her master.⁸⁹

By 1810, most southern states passed laws reaffirming rape as a crime deserving death while New England states instead elected for an Enlightenment inspired punishment of incarceration for convicted rapists.⁹⁰ In every state, with some minor variation, state legislatures reaffirmed rape just as Blackstone defined it. “Carnal knowledge of a woman, by force and against her will.” However, in the coming decades the individual states started to exercise their new right to create separate standards for punishment for rape when white men raped and when enslaved men raped. One of the first southern states to do so was Kentucky in 1801, which redefined rape as a felony deserving between ten and twenty-one years in prison, but not death unless the victim was under ten years of age. As part of the same law, the state retained the right to execute free African-Americans along with enslaved people for even attempting to rape a white woman.⁹¹ Other slave states quickly follow suit and by 1860, every slave state, barring Maryland, could execute any “slave, free-negro, Indian, mulatto, or mestizo” who raped or attempted to rape a white woman.⁹²

⁸⁹ William Goodell, *The American Slave Code in Theory and Practice: Its Distinctive Features shown by its Statutes, Judicial Decisions, & Illustrative Facts* (London: Clarke, Beeton, and Co., 1853), 71.

⁹⁰ Sharon Block, *Rape and Sexual Power in Early America* (Chapel Hill: University of North Carolina Press, 2006), 150-52.

⁹¹ George M. Stroud, *A Sketch of the Laws Relating to Slavery in the Several States of the United States of America: With some Alterations and Considerable Additions* (Philadelphia: Henry Longstreth, 1856), 182.

⁹² Wording from *Acts of the General Assembly of the State of Georgia* (Louisville: Ambrose Law, 1806), 53.

Maryland and Virginia, despite being slave states that shared a long border, held diametrically opposed views regarding what Sharon Block calls the racialization of rape. Rape became a crime closely related to the race of the victim and the attacker, with varying punishments depending on the circumstances of race.⁹³ Maryland was the only slave state to have at least the appearance of equality in the laws. The court of Maryland did not hold slaves to a separate standard apart from free persons. Regarding felony crimes like rape and murder, Maryland's law specified, "...slaves [will] be punished, as all other persons now are, for like offences, etc."⁹⁴ Within the state of Maryland, courts punished rape with either death or between one and twenty-one years imprisonment allowing juries great leeway in sentencing, perhaps by race.⁹⁵ Just to the south and west of Maryland, Virginia's laws were far more transparent about the separation of races in the eyes of the law. The 1819 *Code of Virginia* dictated that the punishment for rape was between ten and twenty-one years imprisonment when committed by a white person and that the punishment was death for slaves who the courts convicted of rape.⁹⁶ In 1822, the attempted rape of a white woman by a "slave, free negro or mulatto" was deemed worthy of death, creating a loophole where the punishment of non-white non-enslaved people in cases of rape was unclear, but attempted rape called for their death. The hole closed in 1825,

⁹³ Sharon Block, *Rape and Sexual Power in Early America* (Chapel Hill: University of North Carolina Press, 2006), 142-152.

⁹⁴ *Index to the Laws of Maryland from the Year 1838 to the Year 1845, Inclusive* (Annapolis: Riley & Davis, 1846), 556.

⁹⁵ *At a Session of the General Assembly of Maryland, begun and held at the City of Annapolis, on Monday, the 6th of November, in the Year of our Lord 1809, and ended on the 8th of January, 1810, the following Laws were enacted* (Annapolis: NP, 1810), LXXXIX.

⁹⁶ William Waller Hening, *The New Virginia Justice: Comprising the Office and Authority of a Justice of the Peace in the Commonwealth of Virginia* (Richmond: J & G Cochran Printers, 1820), 551-52.

when the state combined the various laws regarding rape and deemed any rape or attempted rape upon a white woman by “any free negro or mulatto” was punishable by death without the possibility of pardon.⁹⁷ Virginia continued to push the racialization of rape, and in 1837 decreed that any person who even aided and abetted a “slave, free negro, or mulatto” who raped or attempted to rape a white woman risked a sentence of death without the possibility of pardon.⁹⁸

Other slave states modified their laws to become increasingly lenient upon white rapists, while all other people faced execution often without the chance at pardon. Georgia, like Virginia, ruled that even attempted rape by a “slave, free negro, Indian, mulatto, or mestizo” upon the body of a white woman was deserving of death.⁹⁹ By 1811, white men convicted of rape faced only seven to sixteen years of imprisonment, and in 1816 the state lowered the minimum penalty to two years.¹⁰⁰ Missouri similarly lowered the minimum penalty for white male rapists from ten years in 1845, to five years in 1855.¹⁰¹ While the reduction of prison time and capital punishment was widespread in America during the antebellum period, the continuing application of death for all non-white persons, and increasing application of death for new sex crimes when committed by non-white persons demonstrates the increasing racialization of rape within the

⁹⁷ *Acts passed at a General Assembly of the Commonwealth of Virginia, Begun and held at the Capitol, in the City of Richmond* (Richmond: Thomas Ritchie, 1825), 22.

⁹⁸ *Acts of the General Assembly of Virginia, Passed at the Session of 1836-37* (Richmond: Thomas Ritchie, 1837), 49.

⁹⁹ *Acts of the General Assembly of the State of Georgia* (Louisville: Ambrose Law, 1806), 53.

¹⁰⁰ *Acts of the General Assembly of the State of Georgia* (Milledgeville: S. & F. Grantland, 1811), 44; *Acts of the General Assembly of the State of Georgia* (Milledgeville: S. & F. Grantland, 1816), 151.

¹⁰¹ *The Revised Statutes of the State of Missouri* (St. Louis: J. W. Dougherty, 1845), 348; *The Revised Statutes of the State of Missouri* (Jefferson: James Lusk, 1856), 564.

American South. The result of this racialization of rape through the American South produced two distinct punishments for the crime of rape that the American Civil War made it more equal. The racialization of rape revealed a growing obsession with race and rape fears in slave states. The harsher punishment for enslaved and African-American men for rape upon a white woman was an attempt to exert greater control over non-white people and to alleviate white fears at the same time. The laws of the Southern states subjected the few free African-Americans and other groups to harsher punishments as a way to further white domination.

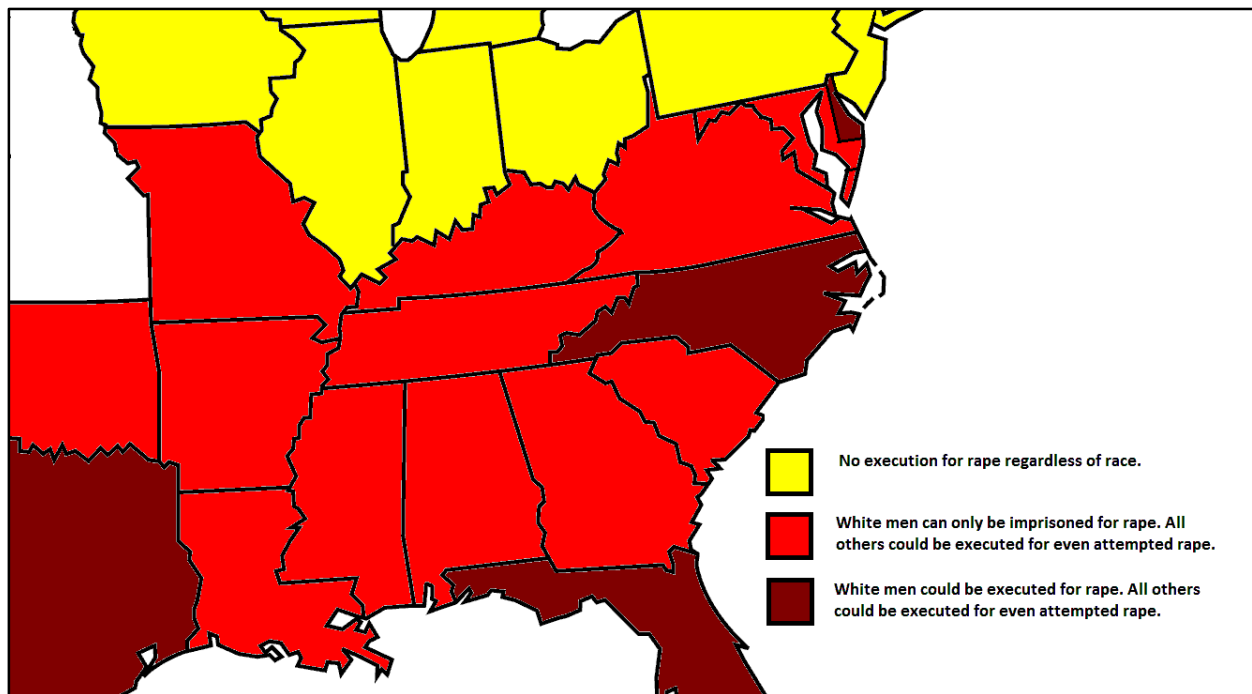


Fig. 2: 1860 map of racialized punishments for rape in the American South.
Source: blank map modified from: <http://www.martinsaphug.com/learn/maps-2/united-states-and-canada/>

Before examining the imposition of federal law on slave states during and after the American Civil War, this paper will explore the formation and creation of military court martial

trials in the Federal military. The so-called Rules of War generally guided the conduct of militaries in the era before American Civil War. The rules were a collection of treaties, agreements, and legal codes, but by no means codified or universal across nations or militaries. The military of one nation might have different rules of war from another nation and different branches of the military within the same nation might conduct themselves differently as well. Similar to the laws of the constituent states, the United States inherited most of its laws from Great Britain, while it invented others at its creation. After the American Revolution, the Continental Congress created their own American Articles of War to regulate their military and then enshrined those powers within the Constitution. Shortly thereafter, Congress created the general Articles of War that went virtually unchanged for over a century. In 1863, the largest change to the Articles of War came in the form of *General Orders, No. 100*, issued by President Abraham Lincoln and written primarily by Francis Lieber. Experts at the time referred to it as the Lieber Code.

Early in the colonies' struggle with Great Britain, Representative John Adams adapted British codes of war into the *American Articles of War*, and the *Rules for the Regulation of the Navy of the United Colonies*.¹⁰² In the *Articles*, there was no rule that allowed a military court martial to try an officer or soldier for a civil crime such as rape. The long history of the rules of war intended that the military only hold court martial trials for military crimes such as striking an officer or falling asleep while on duty. When a soldier committed a crime already covered by

¹⁰² *Journal of the Continental Congress*, "Articles of War; September 20, 1776" (Philadelphia, 1776); *Rules for the Regulation of the Navy of the United Colonies of North-America* (Philadelphia, 1775). For the British Articles of War, see *Articles of War: The Statutes which Governed our Fighting Navies, 1661, 1749, and 1866*, ed. N. A. M. Rodger (Hampshire: K. Mason, 1982).

civil law the rules of war required the soldier's trial take place civil court. Section X, Article 1, of the Articles of War, adopted by the Continental Congress on September 20, 1776, states:

Whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against the persons or property of the good people of any of the United American States, such as punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required, upon application duly made by or in behalf of the party or parties injured, to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate... in order to bring them to a trial.¹⁰³

Civil courts were the intended audience for civil trials no matter who committed the crime: military or civilian. The United States Constitution, signed on September 17, 1787, articulated that the power to regulate the army and navy came from Congress.¹⁰⁴ On April 10, 1806, Congress exercised their Constitutional power to expand the Articles of War from 69 articles to 101, but made no change to the rules regarding civil trials for military personnel. Most of the 1806 additions to the Articles of War outlined the procedure for a general court-martial. According to the articles a court-martial could consist of "any number of commissioned officers, from five to thirteen, inclusively; but they shall not consist of less than thirteen where that number can be convened without manifest injury to the service."¹⁰⁵ If the general court-martial handed down a sentence of death, "the whole proceedings shall [be] transmitted to the Secretary of War, to be laid before the President of the United States for his conformation or disapproval, and orders in the case."¹⁰⁶ The Articles also required the "concurrence of two-thirds of the

¹⁰³ *Journal of the Continental Congress*, "Articles of War; September 20, 1776" (Philadelphia, 1776).

¹⁰⁴ *U. S. Constitution*, art. 1, §8, cl.14.

¹⁰⁵ *Articles of War*, art. 64 (1806).

¹⁰⁶ *Ibid.* art. 65 (1806).

members of a general court-martial” in capital cases.¹⁰⁷ Regimental and garrison commanders could convene their own court-martial, but could not hand down capital punishment.¹⁰⁸ Capital cases also required witnesses to be present to present their testimony, in contrast to most non-capital court-martial cases that allowed a witness to testify at a separate deposition.¹⁰⁹ The only possible outlet for regimental commanders to try their soldiers for civil crimes was through Article 99, which allowed commanders to try soldiers in court martial under the generic accusation of “conduct unbecoming.”¹¹⁰ In the United States, there was little other material change to the Articles of War for the next 50 years.

While no policy change came about during the antebellum period regarding the conduct of soldiers and rape there was a growing shift in the way people viewed the separation of bystander and belligerent in war. Earlier conflicts may have seen civilian death and suffering in war as a sad consequence of the clash of nations, but by the nineteenth century protections for civilians were becoming more important. To create protections for civilians the courts defined them as something distinct from a soldier. Medieval codes of war viewed a civilian and his or her personal property as potential soldiers and fodder for an army since a Prince could force them to fight for him at any moment; thus, law provided them few special protections. Later the soldier became a distinct class of person in the eyes of the law. Common law came to designate this class of soldier as a belligerent, a person who is acting on behalf of a nation, and not on behalf of their own motives in regards to war. Thus, a belligerent became subject to special protections

¹⁰⁷ Ibid, art. 87.

¹⁰⁸ Ibid, art. 66.

¹⁰⁹ Ibid, art. 74.

¹¹⁰ *Articles of War*, art. 99 (1806).

and restrictions. A belligerent who kills another nation's belligerent does not commit murder; they have only killed a soldier in the normal commission of their duty, while civil law still applies to a soldier who commits rape since, assuming the general lack of state sanctioned wartime rape, they are acting of their own volition. Only a military court utilizing the rules of war can judge a belligerent since the belligerent is acting in the service of the nation's military and government. To hold belligerents up to the rules that judge civilians would result in the trials of murder or assault for whole generations of people and the inability for nations to wage war.¹¹¹

The outbreak of the American Civil War in 1861 challenged many of the assumptions of the existing *Articles of War* regarding the behavior of soldiers in war. The *Articles* provided little guidance for the treatment of spies, guerrillas, irregulars, protections for civilians in cities under bombardment, and so forth. The *Articles*, for example, stated, "all persons not citizens of, or owing allegiance to, the United States of America, who shall be found lurking as spies... shall suffer death;" but the legal status of citizens in the seceded states was unclear.¹¹² Civil trials for soldiers committing crimes outside their job as a soldier were difficult for civilian courts to prosecute. Armies moved quickly, rarely staying in one spot for long, making identifying and detaining witnesses and the accused difficult. Regimental commanders also chafed under civilian courts who, sometimes incorrectly, attempted to impose civil rules on military actions or denied them their personnel. It was also unclear who had jurisdiction in Confederate states over civil matters. The military and federal government did not always want to grant Confederate civil courts any agency to exercise laws and tacitly grant them legal existence, since the United States viewed the Confederacy as in some state of rebellion and not a separate country with any

¹¹¹ Stephen C. Neff, *Justice in the Blue and Gray: A Legal History of the Civil War* (Cambridge: Harvard University Press, 2010), 58-101.

¹¹² *Articles of War*, §2 (1806).

authority. At the same time, the *Articles of War* only required regimental commanders to turn their soldiers over to civil courts within the United States, which the seceded states were not strictly a part of anymore. While this requires a certain amount of legal gymnastics, the result was that when Union military personnel perpetrated civil crimes like rape in the seceded portions of America, they were beholden only to their regimental legal authority, which had few ways to prosecute soldiers for civil crimes.

In earlier American conflicts, even the imposition of martial law on an invaded country rarely suspended normal civil courts because the American military recognized the civil laws of the invaded nation. During the Mexican-American War for example, General Scott issued several orders regarding military courts and the conduct of soldiers in foreign nations. The first order was *General Order No. 20*. This order clarified that Article 99; regarding “conduct unbecoming,” in the 1806 *Articles of War* did not cover the crimes of rape or murder. Instead, Scott decreed a military commission would prosecute such crimes in a manner similar to a court martial when committed by any person, military or civilian, in an area under martial law.¹¹³ A military commission acted like a court martial, but Scott designed them to replace civil courts. Eight months later General Scott placed limits on military commissions through the administration of *General Orders No. 287*. The order stated “The administration of justice, both in civil and criminal matters, through the ordinary courts of the country, shall nowhere and in no degree, be interrupted by any officer or soldier of the American forces...” except in a few political circumstances.¹¹⁴ During the American Civil War, where American generals were

¹¹³ Major General Winfield Scott, *General Orders, No. 20* (Tampico, Mexico: Imprenta del la calle de la Carniceria, 1847).

¹¹⁴ Major General Winfield Scott, *General Orders, No. 287*; from, Cadmus Marcellus Wilcox, *History of the Mexican War* (Washington D.C.: The Church News Publishing Company, 1892), 488-89.

invading territory that was both a part of, and separate from the United States, the Articles of War provided regimental commanders little guidance on how to navigate legal gray areas. Commanders and generals were, in many cases like General Scott, left to their better judgment on how to handle soldiers who committed rape or what to do with spies and guerrillas, resulting in varied methods and punishments. General Orders, No. 111, issued by President Lincoln on December 30, 1861, allowed commanders of divisions or brigades to appoint their own court-martial trials for capital crimes, removing executive oversight in the name of expediency and leaving many commanders even more adrift.¹¹⁵ Military commanders convened military commissions in the American Civil War again, most often to prosecute non-soldiers for civil crimes in areas where local courts no longer functioned. Functionally they were largely identical to general court-martial trials.

Many Union generals attempted to clarify the rules of war for their subordinates by issuing General Orders as General Scott did in Mexico. These orders covered many topics, including how regiments should treat capital crimes like rape when committed by soldiers in Confederate states. One of the earliest came in May 1862, when Major General McDowell issued *General Orders No. 12*, which stated that, “The punishment for rape will be death; and any violence offered a female, white or colored, with the evident intent or purpose to commit a rape, will be considered as one, and punished accordingly.”¹¹⁶ The general order was groundbreaking in its explicit protection of all women from the conduct of soldiers and not just white or free women. General Butler, who had been one of the first Union Generals to refuse to return fugitive

¹¹⁵ Abraham Lincoln, *General Orders, No. 111*, Headquarters of the Army, Adjutant General’s Office, Washington, December 30, 1861.

¹¹⁶ Robert N. Scott, *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* (Washington: Government Printing Office, 1885) 52.

slaves to their owners, became the military governor of New Orleans in May 1862, and declared martial law on June 10. Under Butler's interpretation of martial law, outlined in *General Order No. 23*, he reserved the right to try all serious crimes like rape or murder in military courts.¹¹⁷ That June, a court martial under orders from Gen. Butler tried William C. Chinock, a white Corporal in the 26th Massachusetts, for raping Mary Ellen de Riley, a "Negro" washwoman. The court martial found William guilty of rape.¹¹⁸ The trial is one of the first known Union court martial trials that charged a white soldier with the rape of non-white woman in a Confederate state. It also represents some of the first de-racializing of rape laws through federal force. General Butler, by applying the federal or military law regarding rape through martial law, which had no provision for race or enslaved status, suppressed the Confederate state's ability to prosecute crime with racial bias or suppress testimony.

The long series of orders issued by commanders demonstrates how the rules of war left them to their own initiative on many problems not overtly addressed in the *Articles of War*. The commanders also had to issue orders taking back or altering prior orders, or the orders of prior commanders, resulting in uneven treatment of crimes. Despite General Butler's somewhat egalitarian approach to the crime of rape, historians are usually more familiar with him for his infamous *General Order No. 28*, issued in New Orleans on May 15, 1862. The order decreed that Union soldiers were free to treat contemptuous women as non-ladies. Many misinterpreted the General Order as a threat to rape the women of New Orleans or somehow force them into prostitution. The Order proved so controversial that it became the leading cause in his removal

¹¹⁷ Stephen C. Neff, *Justice in the Blue and Gray: A Legal History of the Civil War* (Cambridge: Harvard University Press, 2010), 108.

¹¹⁸ Thomas P. Lowry, *Sexual Misbehavior in the Civil War: A Compendium*. (Xlibris, 2006), 162.

from command at the end of 1862.¹¹⁹ While General Butler stood by his order and felt it was effective later commanders would not agree with all his decisions. General Nathaniel P. Banks *General Order No. 9*, rescinded parts of Butler's General Orders; though, none concerning rape or its punishment.¹²⁰

Higher authorities than regimental commanders also grappled with the law of military commissions and court martial. U. S. Judge Advocate General J. F. Lee noted in early 1862, that military commissions had no authority to try American soldiers on American soil for civil crimes. His replacement, Joseph Holt, took office in September 1862, and felt quite differently. Holt worked with Henry Wilson, chairman of the Senate Committee on Military Affairs, to create Section 30 of Senate Bill 511, which became known as the "Enrollment Act," passed on March 3, 1863.¹²¹ Section 30 of the Enrollment Act gave military court martial and commissions the ability to try military personnel for civil crimes in the United States and dictated that the sentence would never be lower than the state punishment.¹²² Senate Bill 511 was the first step in increasing federal power regarding rape law. Instead of allowing individual states to try soldiers

¹¹⁹ Alecia P. Long "(Mis) Remembering General Order No. 28: Benjamin Butler, the Woman Order, and Historical Memory," in *Occupied Women: Gender, Military Occupation, and the American Civil War* (Baton Rouge: Louisiana State University Press, 2009). For a reassessment of the effectiveness of Butler's General Order, see: Crystal N. Feimster "General Benjamin Butler & the Threat of Sexual Violence during the American Civil War" *Daedalus* 138, no. 2 (Spring 2009), 126-134.

¹²⁰ John Martin Davis, Jr.; George B Tremmel, *Parole Pardon, Pass and Amnesty documents of the Civil War: An Illustrated History* (Jefferson: McFarland & Company, Inc., 2013), 43-44.

¹²¹ E. Susan Barber and Charles F. Ritter, "Physical Abuse...and Rough Handling: Race, Gender, and Sexual Justice in the Occupied South," in *Occupied Women: Gender, Military Occupation, and the American Civil War*, ed. LeeAnn Whites and Alecia P. Long (Baton Rouge: Louisiana State University Press, 2009), 55.

¹²² *Enrollment Act* §30.

in court for crimes the bill now reserved that right for the federal military alone. This did not solve the ultimate problem of court martial trials in the states in rebellion of the Confederacy. While U.S. authorities might have clung to phrases like the “so-called Confederacy” to deny its existence to the international community the domestic legal reality was far murkier. The United States did not want to grant the Confederacy belligerent status for fear of raising the rebelling states’ international profile and drawing in European nations to the conflict; yet, the United States was prosecuting the war as if it were between two nations.¹²³

Even the chief executive and commander in chief considered the problem of soldiers who committed civil crimes like rape. One of the first steps towards deracializing southern courts and state laws came when President Abraham Lincoln issued the Emancipation Proclamation on January 1, 1863. Although it did not free any slaves in Tennessee, the state was under Union military control and subject to martial law. That same month a court martial in Tennessee convicted Henry Murphy of the 35th Indiana of raping an unnamed slave. Previously, Tennessee state law considered the rape of a slave a property crime; however, under military control even the rape of an enslaved person was now a crime against a person. Martial law once again allowed for de-racialization of rape laws in slave states even when not in rebellion. The court martial found Henry guilty of raping the unnamed woman and ordered his regiment to tattoo him with a capital R, for rapist, and drum him out of the regiment.¹²⁴ While politicians were being careful not to alienate the powerful class of border state slaveholders, military commanders were imposing abolitionist morality individually upon their own soldiers.

¹²³ John Fabian Witt, *Lincoln’s Code: The Laws of War in American History* (New York: Free Press, 2012), 141-69.

¹²⁴ Thomas P. Lowry, *Sexual Misbehavior in the Civil War: A Compendium*. (Xlibris, 2006), 155.

These confusing aspects to the Civil War, including who could prosecute an American soldier accused of rape in a Confederate state, prompted Union General-in-Chief Henry W. Halleck to consult with his friend Francis Lieber, a well-respected legal theorist, and Unionist, teaching at Columbia University on how to clarify the Articles of War.¹²⁵ Lieber was a Prussian by birth and his experiences in war had strongly shaped his beliefs on the conduct of soldiers. In 1815 at seventeen years old, he joined the Prussian military to help expel Napoleon from Europe. He participated in two battles, and in the second, a French soldier shot Lieber and gravely wounded him. As the battle raged on around him, Lieber lay wounded on the battlefield and reflected on his previous poor conduct off the battlefield. In one such incident, a starving Lieber threatened to shoot a villager unless they gave him food. As he lay helpless on the battlefield reflecting, some of the same villagers plundered his crippled body. Later, Lieber would move to the United States, and for the next three decades, Lieber published many pamphlets, books, and lectures on the conduct of soldiers in war.¹²⁶

General-in-Chief Halleck had published his own book on international law in 1861, *International Law; or Rules Regulating the Intercourse of States in Peace and War*, while Lieber most recently had compiled his lectures on the rules of law in a series of lectures published as *The Laws and Usages of War* in early 1862.¹²⁷ Secretary of War Edwin Stanton was, during this time, involved in a lengthy public relations battle regarding the outrages Union soldiers were

¹²⁵ Stephen C. Neff, *Justice in the Blue and Gray: A Legal History of the Civil War* (Cambridge: Harvard University Press, 2010), 56-7.

¹²⁶ John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012), 170-96.

¹²⁷ H. W. Halleck, *International Law; or Rules Regulating the Intercourse of States in Peace and War* (San Francisco: H. H. Bancroft, 1861); Francis Lieber, *The Laws and Usages of War* (NP, 1862).

committing in Alabama and other places, further prompting the call for legal reform.¹²⁸ In December 1862, Halleck summoned Lieber to Washington to begin the creation of new rules of war to clarify many of the ambiguities of the existing Articles of War, the result of which authorities of the time often called the Lieber Code.¹²⁹ Other military officers also wrote and published their own treatises on military law that Lieber drew on for his new code, but Lieber was responsible for the majority of the work.¹³⁰ The Lieber Code, written by a Prussian living in the United States came to be the basis for the Hague Conventions of 1899 and 1907 held in the Netherlands. By issuing the Lieber Code as a General Order on April 24, 1863, Lincoln was able to circumvent the process of Congress legislating the rules of the military and did so himself. The legal justification for the General Order was that the code only clarified the *Articles of War* and that it was not an issuance of new articles.¹³¹ Like the military commanders who held court martial trials and military commissions for white slave owners who murdered or raped slaves, Lincoln sought creative ways to impose the law more equally across the various states and these new codes were one such way. Since the Union army controlled the Border States the expanded *Articles of War*, or *Lieber Code*, provided greater protections for enslaved people in the South and in areas where slavery was still legal in the United States even when the Emancipation Proclamation could not.

¹²⁸ Mark Grimsley, *The Hard Hand of War: Union Military Policy towards Southern Civilians, 1861-1865* (Cambridge: Cambridge University Press, 1995), 78-85.

¹²⁹ John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012), 226-34.

¹³⁰ For examples of other works like the Lieber Codes, see: Captain S. V. Benet, *A Treatise on Military Law and the Practices of Court-Martial* (New York: D. Van Norstrand, 1862).

¹³¹ Stephen C. Neff, *Justice in the Blue and Gray: A Legal History of the Civil War* (Cambridge: Harvard University Press, 2010), 57.

While the great bulk of the *Lieber Code* dealt with the treatment of martial law, irregular combatants, and prisoners of war, it codified punishments for rape in an invaded country and designated it as a crime that the military could try by court martial. The *Lieber Code* began by stating that any area under occupation by the United States military was subject to martial law whether the military had declared it or not. This state of martial law also did not automatically end when the war was over. It persisted through any occupation, as was the case in the Civil War allowing for military courts to try crimes through Reconstruction.¹³² The code gave commanders guidance on what martial law was supposed to entail with regard to the civil authorities. Martial law, which by its very definition required the suspension of civil law, was only to extend as far as militarily necessary and allowed commanders to grant civil authorities the right to continue holding civil criminal proceedings. Generally, the *Code* expected commanders to allow civil authorities to resume their work of policing and regulating, and legislative authorities remained suspended until a specific provision allowed them to resume.¹³³ This alone would appear to allow former Confederate authorities to continue the racialization of rape punishment, but other articles suppressed them. First, any trial that resulted in death typically required the approval of either the governor or the state legislature. However, martial law had already suspended the state legislature and replaced the governor with a Union military governor. Article 12 required Presidential approval for military court trials resulting in a penalty of death; thus imposing the will of an abolitionist President upon the Confederate states' racialized rape laws and a check on commanders who might punish African-Americans more harshly.¹³⁴ Article 37 stated that the

¹³² *Lieber Code*, art. 1-2.

¹³³ *Ibid*, art. 3-6.

¹³⁴ *Lieber Code*, art. 12.

United States would “acknowledge and protect, in hostile countries occupied by them, religion and morality... the persons of the inhabitants, especially those of women: and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.”¹³⁵ This provision, especially with Article 21, that stated citizens of a hostile country are enemies would allow military courts in the form of military commissions to prosecute southerners who raped other women in areas under martial law and several were.¹³⁶ In North Carolina, for example, the Union army convened a military commission to try Emanuel Baxter, “colored citizen,” for the attempted rape of Elizabeth Russell, though the commission acquitted him. In 1866, Dilsey Jones, a “colored freedwoman,” and former slave, accused general store operator Charles Cook of raping her. The occupying federal military held a military commission for Charles, and acquitted him of the charge. Elsewhere in South Carolina, Fanny Simpson, “colored girl,” accused Aston Beckwith, “colored citizen” of raping her, whereupon a military commission trial acquitted him as well.¹³⁷ Despite the acquittals, the trials were path breaking because they allowed slaves and African-Americans, acting on their own, to charge white men with rape and testify in court in states where this was against the law. In the case of Fanny and Aston, two African-American people could now even sue each other, creating a court with no white people outside the judge and jury, further expanding their new legal power.

The two most important parts of the *Lieber Code*, in relation to the crime of rape, came from Articles 42, 43, and 44. Articles 42 and 43 decree that slavery “exists according to

¹³⁵ *Ibid*, art. 37.

¹³⁶ *Ibid*, art. 37.

¹³⁷ Thomas P. Lowry, *Sexual Misbehavior in the Civil War: A Compendium* (Xlibris, 2006), 131-33.

municipal or local law only.”¹³⁸ The Emancipation Proclamation had already freed many of the slaves in the Confederacy, but these two articles allowed for self-emancipation once a slave came under the protection of the United States military. The articles also subtly suggest that the laws of the military and federal government can overrule state law. The articles gave more legal teeth to commanders when confronted with state laws that they disagreed with. For example, Union court martial records after the *Lieber Code* show that Union military commanders routinely ignored Confederate state laws that limited testimony from enslaved persons or African-Americans along with racialized rape laws. While these articles clarified the role and abilities of Union military commanders, they made the conflict more legally confusing. The Union military was treating the Confederate states like an invaded nation by suspending local civil law; whereas the Constitution generally reserved civil law to the states.¹³⁹ Article 44 of the Lieber Code directly addresses the crime of rape, and states:

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.¹⁴⁰

This part of Lieber Code thus clarified any ambiguity regarding how commanders were to handle issues regarding rape while operating in the seceded states. The imposition of federal law upon occupied Confederate states contributed to the overall temporary de-racialization of rape in the former slave states and empowerment of federal authority. Many military

¹³⁸ *Lieber Code*, art. 42-3.

¹³⁹ *U. S. Constitution*, art. 10.

¹⁴⁰ *Lieber Code*, art. 44.

commanders and governors saw fit to ignore local racialized laws and to use federal standards in their place. Those commanders also tried civilians in military commissions in some instances, imposing federal law over state law. Finally, the requirement of consent for any execution from the authority of the military commanders and the U.S. President further dampened racialized penalties by creating extra bureaucratic steps for commanders to follow through if they wished to execute someone. Lawsuits that came after the Civil War lent more weight to the conclusion that only the military had jurisdiction over the misconduct of soldiers in invaded areas. The decision of 1879 U.S. Supreme Court case *Dow v. Johnson*, a case regarding whether an invading army can take private property, read:

The question here is, What is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country. It is not the civil law of the conquering country. It is military law – the law of war – and its supremacy for the protection of the officers and soldiers of the Army when in service in the field in the enemy's country is an essential to the efficiency of the Army as the supremacy of the civil law at home and in time of peace is essential to the preservation of liberty. . . . When the armies of the United States are in the enemy's country, the established military tribunals of the United States have under the laws of war and statutory authority exclusive jurisdiction to try and punish offenses of every grade committed by persons in the military service.¹⁴¹

During the war, few Confederate states wished to grant that kind of power to federal or military courts since one of the reasons for their secession had been the supremacy of the state over the federal government in domestic matters, especially regarding laws of race. Some Confederate states tried to stop expansions of federal power through state law. In 1861, Virginia amended their state laws to specify that any soldier of any nation who commits any crime within the state of Virginia must be tried in a civilian court, and that the rape of a white woman in

¹⁴¹ *Dow v. Johnson*, 100 U.S., 158, 170.

particular by any person will be punished with death.¹⁴² Despite the wishes of Confederate legislatures like that of Virginia, their attempts to prevent the United States military from trying their own soldiers proved rather limp in the face of invasion. Union court martial trials tried and convicted hundreds of soldiers for crimes committed while in Confederate states while ignoring any such laws that attempted to rein in federal power.

Just as the federal government used court martial trials as a way to impose federal authority and law on states so too did military officers use the trial as a tool to enforce order upon their regiments. A provost marshal could compel women to testify in court about possible rape. Sometimes the court brought the accusation of rape and not the female victim. In Mississippi in 1865, Peter Small, a private in the 74th US Colored Troops allegedly raped Caroline Andrews. The court martial compelled both Peter and Caroline to testify regarding the alleged rape. Caroline testified that he had never committed any such crime and did not seem to recognize Peter. No other witnesses gave testimony regarding the rape and the court acquitted Peter.¹⁴³ While regimental commanders might use these kinds of military trials to impose order and control over their regiment they could also further spread the belief in widespread false rape accusations and damage the lives of the accused and the alleged victim. The stigma of a false accusation could last long after an acquittal, especially for the woman compelled to testify. If the woman had secretly had consensual sex with the accused, the court might force her to testify to that fact.

¹⁴² *Ordinances Adopted by the Convention of Virginia at the Adjourned Session in November and December 1861* (NP, 1862), 4.

¹⁴³ Thomas P. Lowry, *Sexual Misbehavior in the Civil War: A Compendium*. (Xlibris, 2006), 141.

Military commanders also used the trial and punishment of rape as a crude kind of positive public relations to influence both Union and Confederate soldiers and citizens. William Henry Johnson deserted the 23rd Colored Troops during the siege of Petersburg, in the winter of 1864. While away without leave William attempted to rape a Confederate sympathizing woman. The army soon captured William and tried him before a Union court martial. The court martial found him guilty of attempted rape and desertion then sentenced him to be hanged as soon as possible. The regimental commanders, perhaps in an attempt to reassure the Confederate sympathizing people of Virginia that the United States would maintain order, ordered William's execution to take place within sight of the Confederate held city of Petersburg and the Confederate trenches. Military engineers erected the gallows on an advanced breastwork, and executed William within view of the city and Confederate army. The Confederate commanders allegedly believed that the Union was executing a Confederate spy, and ordered their artillery to open fire upon the gallows, killing one of the Union soldiers standing nearby. Union lines raised a white flag of truce during the ceremony and relayed to the Confederate lines that the hanging man was a convicted rapist and African-American. The Confederate lines held their fire. Later, the Confederate commanders used the execution for their own purposes and marched enslaved people past the body of William. Confederate commanders told the enslaved people that William was an escaped slave and that the same could happen to them if they escaped to Union lines.¹⁴⁴

Civil War court martial trials were important instances where regimental and federal powers expanded along and perhaps inadvertently with the power of women and African-American people. During the course of the war, regimental commanders could suspend Confederate state legislatures via martial law and then try citizens under the federal law of the

¹⁴⁴ "Negro Execution," *Harper's Weekly*, July 9, 1864.

military. Military law made no distinctions on race allowing commanders and military governors to suppress racialized state laws in the south. Even in Border States where the Emancipation Proclamation did not free slaves, slaves under military protection could enjoy increased legal power through military commission and court martial trials. The commanders could also use the court martial trials regarding rape as a way to enforce order on their soldiers. A provost martial could charge a soldier with raping a woman even without the woman making an accusation. Since rape was a capital crime, the execution of a soldier or civilian under a court martial or military commission was capable of sending a powerful message to anyone under the military's gaze.

CHAPTER FIVE

OTHER WRITING ON MILITARY RAPE

*There is published by the authority of the Government a tale of outrage & horror
perpetrated here in N C by two Yankee ... Death to every woman at the South!
Death! welcome Death! before such dishonour!*¹⁴⁵

Diary of Catherine Ann Edmonston, January, 1863

John Basil Turchin was born in 1822 as Ivan Vasilyevich Turchaninov of the Don Cossack Host in the Russian Empire. Like Francis Lieber, he joined his nation's army as a young man. In the Russian Army Turchin fought to suppress the Hungarian Revolution of 1848 and in the Crimean War. There he learned that the best way to defeat an enemy was through force of arms, not winning hearts and minds. Despite this, Turchin was an innovative officer who chafed under the anti-intellectual atmosphere of the Russian army. In 1856, he left the army, and along with his wife Nadine, immigrated to the United States. Five years later at the outbreak of the American Civil War, he joined the army of the Union and set out to bring the Confederacy to heel. The army granted him a commission as a Colonel and command of the 19th Illinois volunteer infantry under Major General Don Carlos Buell in the Army of the Ohio.¹⁴⁶

¹⁴⁵ Edmondston, Catherine Ann Devereux, "Diary of Catherine Ann Edmonston, January, 1863," in *Journal of a Secesh Lady: The Diary of Catherine Ann Devereux Edmondston 1860-1866*, ed. Crabtree, Beth G and Patton, James W. (Raleigh, NC: North Carolina Division of Archives and History, 1979), 330-353.

¹⁴⁶ George C. Bradley and Richard L. Dahlen, *From Conciliation to Conquest: The Sack of Athens and the Court-Martial of Colonel John B. Turchin* (Tuscaloosa: University of Alabama Press, 2006) 18-30.

Major General Buell, Colonel Turchin's commander, was a lifetime officer in the Army of the Union and a celebrated veteran of many wars. He fought alongside future Confederate politicians and generals in the Seminole Wars and the Mexican-American War where the army promoted him for his abilities as a commander and showered him with awards for his bravery. General Buell also had a reputation for moving slowly and methodically and followed a policy of conciliation towards the Confederates. Perhaps it was born from familiarity. General Buell was one of the few slave-owning officers in the Union army. He and Colonel Turchin disagreed on the treatment of secessionists. Colonel Turchin felt that the North should not show the South any quarter and that the harsher the Union was now the less secessionists they would have to deal with later. General Buell felt the opposite - that the kinder the North was the less secessionists they would create. His conciliatory ideology was the dominant one in Washington D.C. at the outbreak of the war. General-in-Chief George B. McClellan had written directly to General Buell in November of 1861 on the topic. "It should be our constant aim to make apparent to all that their property, their comfort, and their personal safety will be best preserved by adhering to the cause of the Union."¹⁴⁷

As the war dragged on into the summer of 1862, Colonel Turchin and the 19th Illinois gained a reputation as marauders and plunderers at a time when the Union's policy was to show restraint. His experience as a European commander along with his lineage of Cossack hosts did not help his reputation. During the Civil War, Colonel Turchin appeared to turn a blind eye towards excessive foraging, believing it to be a fit punishment for secessionists and a way to gain favor with his men. This was despite orders from General Buell forbidding excessive foraging.

¹⁴⁷ George C. Bradley and Richard L. Dahlen, *From Conciliation to Conquest: The Sack of Athens and the Court-Martial of Colonel John B. Turchin* (Tuscaloosa: University of Alabama Press, 2006), 71.

Colonel Turchin felt that the army's conservative policy towards secessionists was similar to the ones he grew to resent in the Russian army. On May 2, 1862, prior to a battle in Athens, Alabama, the soldiers under Colonel Turchin command plundered Athens, and several soldiers raped an enslaved woman.¹⁴⁸

The plundering and rape in Athens was a popular topic of discussion in newspapers, most of whom felt that a policy of conciliation was still important to the successful prosecution of the war. "The sacking of Athens was the most shameful affair of the war. Soldiers of Turchin's brigade were then and there guilty of outrages unfit to be named."¹⁴⁹ While a commander might explain away excessive foraging as military necessity rape was a different matter. Many people in the North, the President included, still felt that a gentle hand would bring secessionist towns in border areas back to the Union without fighting and that the behavior of the 19th Illinois would create more Confederates. In this early stage of the conflict, the war was solely about the restoration of the Union and not the abolition of slaves. Secessionists were not required to alter their society to end the war; they only had to rejoin the United States.¹⁵⁰ Popular versions of the excessive foraging committed by the 19th Illinois in Athens involved Colonel Turchin allowing his soldiers two hours to loot the city like medieval conquerors and ravage the female inhabitants. "Gen Turchin said to his soldiers that he would shut his eyes for two hours, and let them loose upon the town and citizens of Athens ... every outrage committed and every excess

¹⁴⁸ George C. Bradley and Richard L. Dahlen, *From Conciliation to Conquest: The Sack of Athens and the Court-Martial of Colonel John B. Turchin* (Tuscaloosa: University of Alabama Press, 2006) 91-125.

¹⁴⁹ "THE ASTRONOMER IN TROUBLE," *Macon Daily Telegraph* (Macon, GA) July 31, 1862.

¹⁵⁰ George C. Bradley and Richard L. Dahlen, *From Conciliation to Conquest: The Sack of Athens and the Court-Martial of Colonel John B. Turchin* (Tuscaloosa: University of Alabama Press, 2006) 9-17.

indulged in that ever was heard of by a most savage and brutal soldiery towards a defenseless and alarmed population.”¹⁵¹ Colonel Turchin had the rapists sent back to their original regiments instead of convening a court martial to try them. Their individual regiments did not convene court martial trials either, and the men returned to duty under Colonel Turchin a few days later. Government policy, the press, and public opinion were firmly on General Buell’s side, and he finally believed he had the evidence he needed to successfully court martial Colonel Turchin.

On July 5, 1862, General Buell formally charged Colonel Turchin and assembled a court martial. Newspapers across the nation supported the court martial and reprinted the allegations of rape and plunder against John and his regiment.¹⁵² One officer testifying against Colonel Turchin charged him with “... having committed outrages and depredations ... contrary to the printed orders of General Buell ... I charge them with committing rape upon servant girls in the presence of their mistresses, with stripping rings from ladies fingers...”¹⁵³ Unfortunately for General Buell the public’s opinion regarding the war began to shift just as the trial was starting. The Peninsula Campaign in eastern Virginia, which promised a devastating blow to the Confederacy by capturing Richmond, turned into an embarrassing stalemate. By late July, the war began to look as if it would drag on for years, not just months as was predicted only a few weeks before. To win the war people now felt that the military should be swift and aggressive and not risk northern lives in consideration of slave owners’ property. The harsher methods of John and the 19th Illinois were now what people in the North desired. General Buell, who moved

¹⁵¹ “OUTRAGES OF A YANKEE COMMANDER IN ALABAMA – HORRIBLE BARBARITIES,” *Macon Daily Telegraph* (Macon, GA) July 26, 1862.

¹⁵² Mark Grimsley, *The Hard Hand of War: Union Military Policy towards Southern Civilians, 1861-1865* (Cambridge: Cambridge University Press, 1995), 81-2.

¹⁵³ “LETTER FROM ST. LOUIS,” *Daily Evening Bulletin* (San Francisco, California), August 22, 1862. Letter dated July 22, 1862.

cautiously and with respect for secessionist's property fell out of favor with the public and poor opinion with the staff in Washington soon followed. As the winds of popular opinion shifted, the press moved swiftly against General Buell. "Gen. Buell, whose movements combine the celerity of a tortoise and the activity of the elephant, has been engaged for the last four weeks in court-martialing Col. Turchin instead of attacking the enemy."¹⁵⁴

As Colonel Turchin court martial case in Alabama dragged into its fourth week, his wife posted a curious letter in the major newspapers in Washington D.C. dated July 22, 1862, which referred to Turchin not as a Colonel, but as a General. "Brig. Gen. Turchin, how is your health? – How are you coming on with your court-martial?"¹⁵⁵ Turchin's wife, Nadine had disappeared from camp in Alabama the day the court martial trial began only to resurface in Washington with a commission as a brigadier general for Turchin. Nadine, as it turned out, was politically connected and quite clever. She knew that as a general the court martial assembled against her husband had no jurisdiction since only the President could relieve a general of his service. Nadine used the newspapers to deliver a blow to General Buell and his court martial, and the press found it quite amusing. Despite Turchin's new commission the court martial continued and found Colonel Turchin guilty and cashiered from service. General Turchin remained securely in the military and returned home to Chicago before receiving a new command. There he was greeted by cheering throngs lining the streets and was thrown a huge celebration where many speeches were delivered. Turchin gave his own speech as well.

I have simply done my duty; that's all I have done (Enthusiastic applause.) I did my duty as a soldier, and I trust as an American citizen also. (Applause.) ... I don't know whether to call it a happy or an unhappy result that my superior

¹⁵⁴ "GEN. BUELL," *Hartford Daily Courant* (Hartford, CT) August 13, 1862.

¹⁵⁵ "WHAT A PLUCKY WIFE DID," *Jamestown Journal* (Jamestown, NY) August 8, 1862.

officer did not approve of it, and though differently. He thought I must be court-martialed and dismissed from the service. (Groans and hisses for Don Carlos Buell and cries “You shall go back, General.”) My wife informs me that she has a commission, making me a Brigadier General, in her pocket, but I haven’t got it and haven’t seen it. (Applause and three cheers for Madame Turchin.)¹⁵⁶

In the aftermath of the shift of public opinion General Turchin’s policy of harsh treatment was now well accepted and the unprosecuted rapes forgotten. The public justified his actions as necessary to ending the war and the press minimized any real crimes like rape as the sad consequences of war committed by ruffians. The looting of Athens and the rape of an enslaved woman appeared no longer worth pursuing in court. “Now, as to the outrages themselves, I unhesitatingly pronounce that they have been greatly exaggerated... articles of value were taken from at least a dozen houses; mules and niggers were taken out of town and suburbs; two or three scoundrels abused the persons of as many colored women; and this was the extent of the ruin inflicted on Athens.”¹⁵⁷

General Buell, like the policy of conciliation towards the south, was a casualty of public opinion along with any sense of justice for the woman raped in Athens. On September 30, 1862, General Buell was relieved of command by President Lincoln and he never again led an army. No cheering throngs awaited General Buell upon his return home. Once celebrated for his bravery and skill General Buell was now a pariah. “Of what use is Gen. Buell to the country? His avocation seem not to be the vindication of the government by the sword, but to hold court martials to try our loyal and effective officers who were faithfully discharging their duty.”¹⁵⁸

¹⁵⁶ “GEN. TURCHIN AT CHICAGO,” *Hartford Daily Courant* (Hartford, CT) August 28, 1862.

¹⁵⁷ “THE TIMES, IN ITS EDITORIAL TO-DAY, SAYS,” *The Tri-Weekly Telegraph* (Houston, TX) September 1, 1862.

¹⁵⁸ “EDITOR OF THE COURANT,” *Hartford Daily Courant* (Hartford, CT) September 2, 1862.

The press served as a powerful tool, and in the case of the court martial trial of John, showed that the public and military could forget or ignore even widely published rape.

The rape of the unnamed slave woman remains one of the many cases of rape that appeared in contemporary newspapers and letters, but never went to trial. To date, researchers have identified only about 450 cases where a Civil War court martial tried a man for rape. However, the military documents do not tell the whole story of rape in the Civil War, nor did they document every crime. Many of the women that soldiers and other citizens raped never reported the crime to the Union military, or if they did, the military did nothing to arrest the soldier. Some soldiers saw other soldiers commit rape and never reported it, perhaps out of fear, or a sense of camaraderie, or simply because they did not care. In some instances these people recorded what they saw and experienced in their diaries. Reporters who were present in cities as soldiers occupied them also reported on rape and other atrocities, all of which they reprinted across the nation. Not everyone wrote about rape simply to document the incident or to alleviate the burden of witnessing a crime. Some may have exaggerated crimes they saw or fabricated them to slander one side of the conflict or a particular commander. Regardless of the motivation, the public of the time created and consumed a large body of literature that dealt with rape during the Civil War. After the Civil War, the perpetrators and survivors of wartime sexual assault erased many of the crimes from the written record. By altering their records, these people altered the public memory of the war. Because of the self-censorship and long lack of engagement in scholarship, the voices of the victims of sexual assaults during the Civil War are still struggling to be heard.

Like in the case of John Turchin and the 19th Illinois soldiers who raped a woman in Athens, Alabama, hundreds of newspaper articles written during the war followed some of the

more prominent cases and reported on local sexual assault cases involving soldiers. Though the rape of enslaved women in the midst of a national war was small in comparison to the suffering of hundreds of thousands of dead, the case demonstrates the wide discussion of rape, even when it happened to nameless enslaved people. During the Civil War, contemporary authors often produced books for propagandist purposes, or published scandalous newspaper articles with an eye towards selling papers over the truth, yet they still offer valuable insight into the mind of the Civil War sexual violence survivors and witnesses. Newspaper editors reported openly during the American Civil War regarding military personnel committing sexual assaults, both North and South, at home and abroad. A cursory glance through the newspapers of both Union and Confederate states reveals frank discussion regarding sexual assaults, prosecutions for rape, and blunt language of sexuality. In addition to happily reporting on Northern atrocities, the *Richmond Examiner* reported on Confederate soldiers who raped women. “John Sullivan, a soldier, belonging to the 12th Mississippi Regiment, was arraigned before the Mayor on yesterday, on the charge of beating Miss Susan Lavender, and attempting to commit rape on her person.”¹⁵⁹ Not only did they report on those who raped or attempted rape on white women, but on enslaved African-American women as well. “Frederick [unreadable] and Patrick Sullivan were arraigned, charged with attempting to commit a rape upon the person of Eliza, slave...”¹⁶⁰ Northern papers were no more forgiving. The *New York Tribune* reveals many cases of Union troops behaving similarly, and other Union papers were no less vocal. “Last week John M. Phillips, 7th Illinois Vols., committed a rape on the daughter of a clergyman of Springfield, Ill. The Child was only 9

¹⁵⁹ “AN ATTEMPT TO COMMIT A RAPE,” *The Richmond Examiner* (Richmond, VA) August 7, 1861.

¹⁶⁰ “MAYOR’S COURT,” *The Richmond Examiner* (Richmond, VA), July 17, 1862.

years old...”¹⁶¹ None of the articles have a tone of surprise or seem out of the ordinary. Far more cases involving non-military related sexual assaults appear as well and statistical reports of crime show how common newspapers believed rape to be. The *Baltimore Sun*'s Local Matters article, printed daily, included crime statistics indicating several arrests each month for rape, and had tallies for other types of sex crimes like “fornication and bastardry,” “bigamy,” “assault on wives,” “indecent exposure,” and “insulting ladies on the street.”¹⁶²

As early as 1861, newspapers began reporting particularly on the depravities of military men. The *Richmond Examiner* reprinted the *New York Times* account of life in Washington D.C. under the early military occupation. The editor wrote that due to the soldiers' presence, “A day did not pass without murder, or rape, or quarrels, or drunkenness. Even as late as Friday last a lady was shot by an intoxicated soldier.”¹⁶³ By the end of the war, some readers were growing weary of this nearly daily reporting of general violence and sexual assaults by soldiers and civilians. One sarcastic reader of the *Hartford Daily Courant* wrote in 1865, “Unless the newspaper reporters have half a dozen murder, assault, or rape items daily, they are said to grow weary, faint, and tired of life.”¹⁶⁴ Some of the bulk of the articles on rape came from the military court martial trial. Society considered the shaming of soldiers convicted of crimes part of the punishment and the court martial often published their decisions in local papers to that effect, as in the case of Andrew J. Smith. “Lieut. Andrew J. Smith acting Inspector-General of the 2d

¹⁶¹ “OUTRAGE BY A SOLDIER,” *Evening Union* (Washington D.C.) May 20, 1864.

¹⁶² “LOCAL MATTERS,” *The Sun*, (Baltimore, MD) 1861-1865.

¹⁶³ “A MILITARY VIEW OF WASHINGTON,” *The Richmond Examiner* (Richmond, VA) August 12, 1861.

¹⁶⁴ “STATE MATTERS,” *Hartford Daily Courant* (Hartford, CT) August 22, 1865.

Brigade, Kauta's cavalry division, for committing a rape on the person of a colored woman, has been sentenced to be dismissed the service, and confined at hard labor for ten years..."¹⁶⁵

Other articles, particularly editorials and letters from readers address the openly discussed fear of wartime sexual assault by both Union and Confederate soldiers as well as the propaganda regarding Union and Confederate Generals ordering their men to commit widespread rape on the general populace. One letter to the editor of a Confederate paper wrote "... [Union Soldiers] come down on us as the Kossacks (sic) did upon France, and like the Huns, Goths and Vandals came down upon Rome, to kill, to burn, to rob, to pillage, to rape, to destroy..."¹⁶⁶ The *Richmond Examiner* also ran nearly weekly articles attacking various Union generals for ordering or tacitly approving of the rape of Confederate women. General Butler in particular was the target of nearly every Confederate newspaper and some Union papers for his infamous Order No. 28 regarding the treatment of belligerent women in occupied New Orleans. "[Butler] declare[d] the women of a great metropolis to be harlots because they will not flatter Yankee soldiers, and incite the latter to outrage them."¹⁶⁷ Northern and Union aligned papers had their own outrages to report on. The *Farmers Cabinet* wrote about the horrors of the war in East Tennessee, and that Confederate soldiers "...brutally murdered [women], for concealing their sons or husbands, or violated [them] in presence of their bound and helpless male protectors. Rapine pillage, arson, rape, and murder are no longer crimes in East Tennessee..."¹⁶⁸ Whether

¹⁶⁵ "PUNISHMENT OF A MILITARY CRIMINAL," *New York Tribune* (New York, NY) July 29, 1864.

¹⁶⁶ "A LETTER FROM [ILLEGIBLE], THE DIVISIONS IN THE NORTHEAST," *Chattanooga Daily Rebel* (Chattanooga, TN) March 28, 1863.

¹⁶⁷ "TRUMP CARD," *The Richmond Examiner* (Richmond, VA) June 7, 1862.

¹⁶⁸ "REBEL HORRORS IN EAST TENNESSEE," *Farmer's Cabinet* (Amherst, NH) Sep. 17, 1863.

these reporters were using accurate information or even creating reports for propaganda they reveal that people during this time openly discussed wartime rape, and that many more rapes took place than those few hundred recorded in the court martial records.

Some of the records of wartime sexual assault appear between newspaper reporting and private journaling. William G. Simms was a historian, poet, novelist, and a strong supporter of the Confederacy who resided in Columbia, South Carolina. In his personal writings, he recorded Sherman's capture of Columbia in 1865 that he published as a book the same year. In the book, Simms describes whole regiments of Union soldiers gang raping African-American women in "successive relays" during the sack of the city.¹⁶⁹ Some may consider these claims questionable because of their unlikely nature. The imagery of entire regiments carrying out systematic sexual assaults is both horrifying and hard to believe. However, even if similar events may have happened we must still be careful to neither dismiss the claims of Simms without further consideration especially with regard to the actions of General Sherman, whose actions southerners have occasionally exaggerated.¹⁷⁰ Dr. D.H. Trezevant, another witness to the sack of Columbia, wrote "Attila or Alaric shrank into insignificance when compared to [Sherman.]" and that he is "one of the most ruthless invaders that ever cursed the earth by his presence."¹⁷¹ Simms was himself a strong supporter of slavery, secession, and the Confederacy, and suffered

¹⁶⁹ William G. Simms, *A City Laid Waste: The Capture, Sack, and Destruction of the City of Columbia*, ed. David Aiken (Columbia: University of South Carolina Press, 2011), 90; for an account in a different city, see Marion Southwood, "*Beauty and Booty*" *The Watchwords of New Orleans* (New York: M. Doolady, 1867) which addresses alleged sexual crimes carried out by Union soldiers under the guidance of General Butler in New Orleans.

¹⁷⁰ Mark Grimsley, *The Hard Hand of War: Union Military Policy towards Southern Civilians, 1861-1865* (Cambridge: Cambridge University Press, 1995), 199-200, 220-21.

¹⁷¹ D. H. Trezevant, *The Burning of Columbia, S. C.: A Review of Northern Assertions and Southern Facts* (Columbia, SC., South Carolinian Power Press, 1866), 24.

the personal loss of his home and collection of rare historical books when the Union army allegedly razed his house during the destruction of the city. Though these actions may have motivated Simms to slander Union soldiers and General Sherman's leadership his reporting is not completely out of character with other surviving court martial records of the conduct of Union soldiers in South Carolina. In 1863, at Folly Island, a Union officer raped a woman while a tent full of enlisted men assisted by holding the victim down. The officer was dismissed from service. In Beaufort, a court martial accused four men of the 56th New York with breaking into a woman's house with an axe and gang raping her in April 1864, though the court acquitted them and ignored the victim's testimony. Three men of the 79th New York were accused of gang rape in Beaufort as well, but the court martial only convicted one member and only for being AWOL. In McPherson in August 1865, a military court martial convicted five men in the 104th US Colored Troops for gang rape related crimes resulting in two executions, two sentences of hard labor, and one acquittal.¹⁷² It is probable that entire regiments were not forming "successive relays," as Simms describes, but when we compare his testimony against surviving court records, and consider his state at seeing the destruction of his property, city, and nation, we begin to understand why he may have described the events as he did. These mitigating circumstances do not wholly prove or disprove his testimony; instead, they provide an important insight into how the violence affected people living in Confederate territory.

Other personal records of the war existed in the form of journals, diaries, or letters, which their authors later published. Mary Chesnut, wife of a wealthy southern plantation owner, kept a diary during the war and wrote of the ever-present fear that Union soldiers would ravish and violate Southern women. Mary Chesnut wrote that the constant newspaper reporting on rape

¹⁷² Thomas P. Lowry, *Sexual Misbehavior in the Civil War: A Compendium*. (Xlibris, 2006), 135-140.

committed by soldiers frightened her. She wrote, “Women can only stay at home, and every paper reminds us that women are to be violated, ravished, and all manner of humiliation.”¹⁷³ Elite southern women often used ‘ravishments’ as code words to discuss not only rape but more subtle violations of the woman’s body and space. These types of violations often meant searching and touching of the woman’s person, including lifting their dresses to look for smuggled goods and weapons. As she so cleverly put it “Not legs but arms are looked for under hoops. And sad to say, found.”¹⁷⁴ The violations could extend to the searching of Confederate women’s bedrooms as well. Confederate women expected the raiding of horses, cattle, and pillaging of houses, but they also viewed Union soldiers who sorted through negligees looking for contraband to be a serious violators of gender rules.¹⁷⁵ Other less prominent Southern women recorded similar violations of the woman’s sphere and sexual assault. Judith White Brockenbrough McGuire recorded “They took off all the negroes from the Mantua estate; broke up the beautiful furniture at Summerfield, and committed depredations everywhere.”¹⁷⁶ Eleanor H. Cohen wrote, “No words of mine can give any idea of the brutality of the ruffians. They

¹⁷³ Mary Chesnut, *Mary Chesnut’s Civil War*, ed. C. Vann Woodward (New Haven: Yale University Press, 1981), 172.

¹⁷⁴ Mary Chesnut, *Mary Chesnut’s Civil War*, ed. C. Vann Woodward (New Haven: Yale University Press, 1981), 172.

¹⁷⁵ Margaret S. Creighton, “Living on the Fault Line: African American Civilians and the Gettysburg Campaign,” in *The War Was You and Me: Civilians in the American Civil War South*, ed. Joan E. Cashin (Princeton: Princeton University Press, 2002), 215; Lisa Tendrich Frank, “Bedrooms as Battlefields, The Role of Gender Politics in Sherman’s March,” in *Occupied Women: Gender, Military Occupation, and the American Civil War*, ed. Alecia P. Long and LeeAnn Whites (Baton Rouge: Louisiana State University Press, 2009) 33-48.

¹⁷⁶ McGuire, Judith White Brockenbrough, “Diary of Judith White Brockenbrough McGuire, February, 1863,” in *Diary of a Southern Refugee During the War*, 3d ed. (Richmond, VA: J.W. Randolph & English, 1889), 187-95.

swore, they cussed, plundered, and committed every excess. No age or sex was safe from them... Our noble women our [were] insulted by words, and some, I have heard of, in deeds.”¹⁷⁷

Women knew to fear potential sexual assault. In one instance, a Confederate soldier recollected in a letter that while investigating a house during the Gettysburg campaign the young female resident asked if “our men would molest the women.”¹⁷⁸ The soldier was surprised at the accusation. Soldiers and residents recorded rape and sexual assaults in their letters and diaries. Often they would obscure sexual crimes with vague wording. Words like outrages, indignities, ravaged, or violated, were common substitutes for rape and sexual assault. Charles Wright Wills wrote of his cavalry causing great destruction, and taking advantage of local women by marrying them. Either this is an archaic euphemism for rape, or it is possible they were deceiving the women into marriage for sex. “I can now but give you the topics it discussed or elaborated, and leave to your imagination the finishing and stringing together the skeleton. First and foremost, stealing horses; second, defying bravely the tears and entreaties of helpless women, and taking their last measure of meal and rasher of bacon...”¹⁷⁹ A month later he wrote “This little squad of 500 men in the two months they have been mounted have committed more devilment than two divisions of regular cavalry could in five years. Everything you can think of, from shooting negroes, or marrying these simple country women, down to stealing babies' diapers.”¹⁸⁰ Some

¹⁷⁷ Cohen, Eleanor H, “Diary of Eleanor H. Cohen, February, 1865,” in *Memoirs of American Jews, 1775-1865*, vol. 3, ed. Jacob Rader Marcus (Philadelphia, PA: The Jewish Publication Society of America, 1955), 359-363.

¹⁷⁸ Margaret S. Creighton, “Living on the Fault Line: African American Civilians and the Gettysburg Campaign,” in *The War Was You and Me: Civilians in the American Civil War South*, ed. Joan E. Cashin (Princeton: Princeton University Press, 2002), 216.

¹⁷⁹ Charles Wright Wills, Letter to his family, December 8, 1863.

¹⁸⁰ *Ibid*, January 5, 1864.

letters were far more direct in their accusations. Samuel D. Lougheed wrote to his wife about a gang rape he witnessed, and the shame he felt that it cast upon his whole regiment. “My Dear, one more disgraceful act perpetrated by 9 Union soldiers has just come to light. A blooming pretty lady was seized and held by 9 soldiers, while each one in turn gratified his base desire the poor creature humbled, and ruined for all time, and besides half dead.”¹⁸¹ His letter reveals a not-untypical opinion regarding what he thought the priorities of women were their virtue first, and lives second.

Often the writer blamed the crimes on stragglers, camp followers, and other hangers on to a military unit, perhaps as a way to deflect blame from regular soldiers. “The route of the army can be tracked by the cinders, blackened stumps, and remains of dwellings, barns and fences, fired maliciously. The line of march was lighted by conflagrations. Houses were entered and pillaged by lawless stragglers, and indignities heaped on families without regard to age or sex.”¹⁸² Another soldier wrote “The Robberies & depredations from this [torn] may be successful – nothing shows [torn] than the numerous bodies of Robbers [torn] and despoiling every person & thing in this already sorely [torn] where neither life nor property is safe.”¹⁸³ Chauncey H. Cooke, a Union soldier, recorded the apparently widespread belief that the United States government was going to force southern white women to marry newly freed black slaves. This fear of forced sexual relations represented a fear of government-sanctioned rape. “On our left met a lot of poor whites leaving the country. They are a wretched looking lot. They say we are

¹⁸¹ Samuel D. Lougheed, Letter to his family, December 22, 1862.

¹⁸² H. C. Clarke, *Diary of the War for Separation, a Daily Chronicle of the Principal Events and History of the Present Revolution, to Which is Added Notes and Descriptions of All the Great Battles, Including Walker’s Narrative of the Battle of Shiloh* (Augusta, GA: Steam Press of Chronicle & Sentinel, 1862), 107.

¹⁸³ William King, *Diary of William King, Cobb County* (NP: Georiga, 1864), 115.

the first yanks they ever saw... Some of the boys asked them what they were fighting for and they answered, ‘You yanks want us to marry our daughters to the niggers.’”¹⁸⁴ In a letter a month later, “We see them every day, say we Yankees are fighting to free the niggers so they can marry white women.”¹⁸⁵ Again, a month later, “The most they can say when you ask them why their men fighting the north is that Lincoln wants them to marry the nigger when they are set free.”¹⁸⁶ These fears suggest how much they dreaded the loss of their superior status as white men over enslaved people as well as their power to direct the actions of their family household.

Shortly after the war, there was widespread censoring of the horrors of the Civil War in personal writings, especially regarding sexuality outside the constructed ideal of Victorian expectations. William G. Simms labeled the crime of wartime rape he witnessed in Columbia “horrors which the historian dare not pursue - which the painter dare not delineate.”¹⁸⁷ Given the state of the historical record after the war, it seems many shared Simms’s feelings. Soldiers, survivors, and their descendants begin to redact, edit, or destroy letters and evidence of sexual violence to make them suitable for publishing and so-called Victorian sensibilities. Mary Chesnut, for example, edited her journal many times from 1881-84, all with an eye towards publication, toning down the overt sexuality and references to violation.¹⁸⁸ Edward Bacon edited out offensive phrases and words from his journal when he published it as well. “...on or about

¹⁸⁴ Chauncey H. Cooke, Letter to his family, May 10, 1864.

¹⁸⁵ Ibid, June 2, 1864.

¹⁸⁶ Ibid, August 20, 1864.

¹⁸⁷ William G. Simms, *A City Laid Waste: The Capture, Sack, and Destruction of the City of Columbia*, ed. David Aiken (Columbia: University of South Carolina Press, 2011), 90.

¹⁸⁸ Elizabeth Fox-Genovese, *Within the Plantation Household: Black and White Women of the Old South* (Chapel Hill: The University of North Carolina Press, 1988), 354-355.

the 4th day of February, 1863... Thomas S. Clark, was drunk, and being drunk, did then and there make an indecent exposure of his own person and of the person of a certain woman of color called Maria, and did then and there attempt * * * and other things then and there did too enormous to be mentioned.”¹⁸⁹ This censorship usually extended to the actions of white soldiers and white women. Editors and censors rarely granted anonymity to Colored regiments, African-American women, and enslaved people after the war. This may have arisen both as a way to whitewash the actions of white soldiers, and as a way to reinforce preconceived notions about the behavior of African American people. If only the crimes of African Americans remained, it would appear they were the ones committing all the crimes. Fortunately, this personal censorship did not extend to court martial records or newspapers, and we may glean more information from them.

The censorship of writing after the war returns the story of rape in the American Civil War full circle. The paper began with writing after the war, which implicated African-Americans, and ravaging Northern generals in the war crimes. How common was rape in the Civil War? It may seem we are no closer to a quantitative answer; however, we have disrupted any remaining doubt that the war was a “low rape war.” Court martial records, alongside military commissions, letters, newspaper clippings, diaries, and books all attest to the commonality of the discussion of rape during the war. If this paper has done any one thing, it should be to answer the questions regarding how the court martial trials affected Civil War society. At least during the duration of the war, military courts with federal power suppressed racialized laws in southern courts and granted women and African American people greater legal protections and power.

¹⁸⁹ Edward Bacon, *Among the Cotton Thieves* (Detroit: The Free Press Steam Book and Job Printing House, 1867), 114.

Unfortunately, for people living in the Southern United States, the failure of Reconstruction saw much of their new legal power and protections stripped away.

Many questions remain, and many paths still unexplored. Future scholarship on male rape or same sex relationships among soldiers will be path breaking, especially if future historians find related court martial cases. The legal system of the Civil War rarely considered the rape of a male by another male to actually be rape and the cases might be concealed in other general assault based criminal codes. The small handful of cases of same sex rape cases identified typically involved an adult soldier and a pre-adolescent and the courts categorized the crime as assault, not rape. It is also likely that male soldiers then, as today, are far more reluctant to report cases of same sex rape to authorities. The trials also contributed to the nation building of Reconstruction in the post-War period, and scholars have not yet explored their role in recrafting the allegiance to the Federal government. In this same vein, the trials may have created a new kind of dependence on the government that did not exist prior. In the pre-war era, many people, especially Southerners, felt that the federal government should be dependent on the people, not that the people should depend on the government. The Lieber Code trials may have contributed to that new dependence as well.

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