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The Unsuspected Francis Lieber

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THE UNSUSPECTED FRANCIS LIEBER

by

RICHARD SALOMON

A master's thesis submitted to the Graduate Faculty in Liberal Studies in partial fulfillment of
the requirements for the degree of Master of Arts, The City University of New York

2018

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This manuscript has been read and accepted for the Graduate Faculty in Liberal Studies in satisfaction of the thesis requirement for the degree of Master of Arts.

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ABSTRACT

The Unsuspected Francis Lieber

by

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"The Unsuspected Francis Lieber" examines paradoxes in the life and work of Francis Lieber. Lieber is best known as the author of the 1863 "Lieber Code," the War Department's General Order No. 100. It was the first modern statement of the law of armed conflict. This paper questions whether the Lieber Code was truly humanitarian, especially in view of its valorization of military necessity. Also reviewed is the contrast between the Code's extraordinarily favorable treatment of African-Americans and Lieber's personal history of slave-holding.

Lieber's shift from civil libertarian to authoritarian after 1857, as exemplified by his support of Lincoln's suspension of habeas corpus and by Lieber's proposal of a constitutional amendment to impose a duty of "plenary allegiance" on citizens, is critically discussed.

To provide context, this paper examines certain nineteenth-century reform movements, events in Lieber's personal life, and Lieber's political

philosophy of "institutional liberty" -- all to show their effect on Lieber and his work.

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CHAPTER ONE: INTRODUCTION

"Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another, and to God" (Lieber, Instructions 7). The author of this ringing declaration, Francis Lieber (1798-1892), is best known today for the 1863 Lieber Code, the first modern statement of the law of armed conflict and a foundational work of humanitarian law.

The Lieber Code (or "Lincoln's Code," as John Fabian Witt called it in his monumental 2012 book of that title) guided the conduct of the Union Army, and was the inspiration for the international law of war that emerged from the Hague and Geneva conventions. The Lieber Code excited international attention, prompting Russia to call the Brussels Conference of 1874, and, as Elihu Root noted, the Hague Conferences of 1899 and 1907 "gave adherence of the whole civilized world in substance and effect to those international rules which President Lincoln made binding upon the American armies fifty years ago" (qtd. in Department of Defense 1128-1129).

While the law of armed conflict has advanced substantially since the day of Lieber (his thirty-six pages have been replaced with more than one thousand one hundred pages in the most recent Law of War Manual published by the Department of Defense), Lieber's continuing prestige was affirmed when the United States Military Academy at West Point established The Lieber Institute for Law and Land Warfare in 2016.

Apart from the humanitarianism of the Lieber Code regarding the conduct of war, Lieber is widely considered a leading liberal thinker of his age based on his advocacy of prison reform and free trade, his publication of treatises on civil liberty, and the Lieber Code's protections for black soldiers and emancipation of escaped enslaved persons. His biographer Frank Freidel provided a reputation-creating subtitle: "Nineteenth-Century Liberal." The "liberal" label is typically used when critics and historians refer to Lieber (e.g., Blair 93). Lieber's contemporary, M. Russell Thayer, claimed that Lieber's works "have been of incalculable benefit to liberty," and that Lieber was "a zealous defender of . . . civil liberty" (Thayer 13, 43). Accordingly, Lieber is limned in humanitarian and liberal contours.

As these labels are used generally, and as defined more fully below, "humanitarian" refers to an impulse to relieve human suffering (typically in a war), and "liberal" refers to a concern with the advancement of the individual (often in opposition to the state).

Lieber's reputation benefits from a certain halo effect, as Lieber comes to us from the period of the mid-nineteenth century's great liberal accomplishments, especially those of the Civil War in ending slavery and saving the Union. The Lieber Code carries the imprimatur of the great Abraham Lincoln. Accordingly, instead of engaging Lieber critically, commentators tend to rely "on Abraham Lincoln's historical standing as well as our historical mystification of the Civil War to put this legal history...above any criticism or any analysis" (Pierce 2). Would a more critical examination of Lieber disrupt our understanding of him as humanitarian and liberal?

The unexplored or perhaps ignored Lieber is marbled with inconsistencies. While the Lieber Code is essentially a humanitarian

document, and Lieber was certainly liberal in many respects, a close reading of Lieber's work and life reveals that the welfare of the individual was not his particular concern -- especially where the needs of the individual could come into conflict with the goals of society as embodied in the government or the state. Lieber was a fervent nationalist, and hated the idea of the South's seceding from the Union. He believed that a strong state was not only a necessity but a desirable vehicle, both for the protection of its citizens and also as a means of realizing their highest aspirations. While Lieber loved liberty, he did not share the common American admiration for individualism; to the contrary, Lieber despised individualism. His motto was "No right without its duties; no duty without its rights." He thought the best way for the individual to progress and flourish was through the mechanism of the state, and he thought the best way to assure a stable state was through development of myriad institutions. Thus, Lieber advocates "institutional liberty," a seemingly oxymoronic and perhaps Orwellian term that expresses his particular brand of nationalism that purports to advance rather than oppress the individual.

The Lieber Code, too, proposed concepts that seem to be at odds with at once humanitarian or liberal and at odds with our understanding of those terms. The Code, for example, gave license to the doctrine of military necessity. It abandoned the prevailing view of the previous publicist on battlefield conduct, Emer de Vattel. Vattel wrote about war as akin to a tournament between civilized gentlemen proceeding in a mild and compassionate manner. Lieber dismissed de Vattel as "Father Namby-Pamby" (qtd. in Blair 96), urging instead in Article 20¹ of the Lieber Code, "The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief". In

¹ All references in this paper to Articles of the Lieber Code are to those in Lieber, *Instructions for the Government of Armies of the United States, in the Field*.1863. Leopold Classic Library, 2016 .

this, Lieber was a great enabler of robust government action despite adverse consequences to innocent individuals. Article 15 provides that "Military necessity admits of all direct destruction of life and limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable*....[I]t allows all destruction of property...and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army."

Lieber was certainly not a humanitarian in the sense of Jean-Henri Dunant (1828-1910), whose 1862 *A Memory of Solferino* drew attention to the suffering of the wounded on the battlefield and inspired the formation of the International Committee of the Red Cross. Published almost contemporaneously with *Solferino*, the Lieber Code virtually ignores individual suffering in war. The Lieber Code was, nevertheless, humanitarian and civilizing in many respects.

An innovation of the Lieber Code was its position on emancipation of enslaved persons. Contrary to American legal doctrine since the nation's founding (e.g., with respect to American slaves captured by the British in the War of 1812), under the Lieber Code slaves reaching the Union Army lines were to be *ipso facto* free. Indeed, elsewhere the Code is radical in favor of blacks, insisting on the death penalty, for example, for Confederate soldiers who did not treat captured Union soldiers of color as prisoners of war.

Yet, Lieber himself was an owner of slaves. During his entire twenty-one years in Columbia, South Carolina, he owned two domestic servants. What is more, he aspired to the presidency of the college, which itself owned numerous slaves who tended the grounds, performed carpentry, and cooked and served food to the students and faculty. Although he wrote and taught about

civil liberty, and his private letters expressed a hatred of slavery, he did not during these years publish a word against it.

Apart from the Lieber Code, a further Lieberian contrast to be explored is his position on civil liberty versus authoritarian central government. His 1853 treatise, *Civil Liberty and Self Government*, is a paean to Anglo-American traditions of civil liberty, including as an appendix the complete text of the seventeenth-century statute codifying the great common law writ of habeas corpus. Only a few years later, however, Lieber became a great champion of Lincoln's suspension of the writ of habeas corpus.

Beyond habeas corpus, in a political pamphlet of 1865, Lieber proposed seven amendments to the Constitution, the first of which would require that citizens give "plenary allegiance" to the government of the United States. He did not explain what this might mean in practice, but it can only be viewed as a potentially sinister imposition of a duty upon citizens. Certainly, it was alien to the naturalization statutes and the Constitution of the United States as they stood at the time, and was more typical of the authoritarian, monarchical lands of Europe that Lieber, among other emigrants, had sought to escape in America.

Looking at his early years in Europe, we can see the making of the cardinal duality in Lieber: a strong nationalist, who was at the same time a target of political repression by the state. As a teenager, he fought to defend his native Prussia against the forces of Napoleon and was severely wounded in 1815 at the Battle of Namur near Waterloo. He was appalled at the weakness of Prussia and its humiliation by the French, and became convinced that a unified Germany was necessary to assure national independence. But he was dangerously ahead of his time. The royal Prussian government was not ready to give up its sovereignty, and considered Lieber subversive. He was

denied admittance to the University of Berlin and was briefly jailed. (In 1868, Lieber remarked, "Bismarck said in the chamber the very thing for which we were hunted down in 1820 and 1821" (qtd. in Thayer 11-12).) After a brief and disappointing volunteer service in the Greek Revolution of 1821, he resided in Rome, serving as a tutor to the son of the Prussian ambassador, Barthold G. Niebuhr; in turn, Niebuhr tutored Lieber about Edmund Burke and the French Revolution, and Lieber formed his belief that despotism can proceed not only from royal power but also from democratic governments (which he called "democratic absolutism"). Returning to Prussia, he was jailed again for his political views, and then left to find political liberty in England in 1825.

Lieber's career as a professor and publicist began in America in 1827, when he accepted a position in Boston as a school master on the strength of his skill as a swimmer and as a gymnast under Frederick Lewis "Turnvater" Jahn. He developed a plan for education for the new Girard College in Philadelphia. He published various articles and translations, but only his *Encyclopaedia Americana* brought any commercial success. He was finally able to secure a university professorship, but it required him to move to slave-holding South Carolina. At South Carolina College (now, the University of South Carolina), Lieber published the several treatises on government, economics and law that earned him an international reputation. While living in South Carolina, he remained silent on the subject of slavery, but was known to oppose secession. After failing to win the presidency of South Carolina College, he resigned from its faculty.

In 1857, Lieber moved to New York to join what is now Columbia University. While he lived in New York, what he had dreaded occurred: the South seceded and the Civil War started. It was during this time that his more authoritarian views gained the ascendancy over his libertarian side. It

was also where he accepted the Union Army's assignment to write a guide to battlefield conduct, issued as General Order No. 100, and known as the Lieber Code. Valuing the state as he did, Lieber was an ideal author of a manual of battlefield conduct that did not shrink from the mission of a nation at war.

In his life as in his work, Francis Lieber embodied opposites. "Behold in me the symbol of Civil War" (qtd. in Freidel 305), Lieber proclaimed as his three sons became soldiers. The oldest, Oscar Montgomery (1830-1862), was commissioned in the army of the Confederate States of America, and died in its service. The second, Alfred Hamilton (1835-1876), an officer in the Illinois militia, was badly wounded at the Battle of Fort Donelson. The youngest, Guido Norman (1837-1923), served the Union during the Civil War, and became an army lawyer, rising to the rank of brigadier general, and serving as Judge Advocate General for sixteen years.

Lieber's political philosophy purports to accommodate both the free individual and the strong state, a potentially unstable state of affairs. "All relations existing in the state...are relations of right....The individual *demands* of the state that his right --- his jural relation to others, be maintained inviolate; and the state *demands* that the individual do not interfere with the right of others....Finally, the individual, being unable to obtain those ends for which he was placed on earth or made a man, in a state of insulation, but who shall and must, of necessity founded in his very nature, live in society, it is matter of right that he obtain, through and conjointly with society, what he cannot obtain singly, and what nevertheless, is essential to his well-being as man. The state, therefore, has the right and duty to obtain all these ends by the combined energy of society for each individual" (Lieber, *Political Ethics*, vol. 1, 165).

Such a philosophy cannot predict whether Lieber would be on the side of the state or the individual in any given situation, which may account for some of Lieber's inconsistent positions. In this, Lieber was like his adopted country, for America was then struggling with its own paradoxes: those of a land of freedom with slavery, a union composed of sovereign states, and a single nation populated by citizens from everywhere else. It was also an age of reform, in which seemingly every institution was under pressure to improve its usefulness to the citizens.

CHAPTER TWO: Lieber Shares the Spirit of Reform in America.

The America to which Lieber immigrated in 1827 was alive with liberal reform. "Liberal" is used here to refer to a concern with the individual, regardless of his or her class, status, or ethnicity, and to a policy of removing constraints on individuals' realizing their potential, whether the constraints are religious, social, governmental - or the tyranny of the majority. It thus also means a belief in natural, unsubordinated rights, such as freedom of thought, speech, and worship. All of this is opposed to the totalitarian or communitarian outlook, where the goals of the nation or community are paramount, and where individuals are expected or compelled to conform or join in -- subordinating any individualistic aspirations.

Emerson recognized in 1841 that his time possessed a unique spirit: "In the history of the world the doctrine of Reform had never such scope as at the present hour" (Emerson 1). Emerson said that everyone "should call the institutions of society to account" (Emerson 6). The basis for all reform, according to Emerson, "is the conviction that there is an infinite worthiness in man which will appear at the call of worth, and that all particular reforms are the removing of some impediment" (Emerson 8). "Every child that is born must have a just chance for his bread" (Emerson 9). Looking back on the century just ended, W. E. B. Du Bois could remark, "The nineteenth was the first century of human sympathy" (Du Bois 147).

Improvements were sought in the moral, political, material, and intellectual lives of Americans. Among the well-known reform movements were anti-slavery, suffrage for women, and temperance, but almost no aspect of

life escaped the impulse for improvement. The American diet, for example, was critiqued by Sylvester Graham and John Harvey Kellogg.

Lieber was an eager participant in the reforming spirit of the age, having set out for an America that he saw as "a land of progress, where civilization is building her home, while in Europe we can scarcely tell whether there is progression or retrogression" (qtd. in Freidel 52).

At the same time, in his particular reform-advocacy, Lieber was often at odds with the individualist spirit of America. While he relished the personal freedom of the new world, he lamented that it lacked the intellectual rigor and disciplined institutions of Europe. He seems to have accepted the advice of his mentor Barthold G. Niebuhr to "remain a German" (qtd. in Freidel 52), and he sought to bring European ideas to his new country, whether it was ready or not.

This German-American duality showed itself from the outset of his career in America. Lieber's first job in the United States was to establish a school in Boston along the lines of Prussian Frederick Lewis "Turnvater" Jahn's nationalistic gymnasia (motto: "Hardy, Pious, Cheerful, Free"). But it seemed that individualistic New England boys did not see the point of acting in unison in monotonous callisthenic exercises. Lieber revised the curriculum to be more flexible, but attendance dwindled. (Physical education did not become a regular part of public-school curriculum until well into the twentieth century.) This reflects the first and perhaps most emblematic of the Lieberian dualities: He deeply loved America, but longed for it to be more like Germany. Throughout his forty-five years in America, Lieber never ceased proposing European ideas and institutions for the improvement of the young country. While many of these were successful, Lieber was often

frustrated by the failure of the citizens of the New World to see the wisdom of his reforms based on Old World ideas.

Following his failure with the German-style gymnasium, Lieber was more successful with his introduction of an American version of the German *Conversations-Lexikon*. His *Encyclopaedia Americana* collected essays on a wide range of topics, including literature, law, religion, mineralogy, and biography: "what is most important for this country" (qtd. in Freidel 68). While riven with inaccuracies and poorly edited, the encyclopedia sold well.

Another Lieberian attempt to fill a gap in the American intellectual landscape with a German model was a political treatise along the lines of the grand European works. Lieber's *Manual of Political Ethics* of 1838 sought to connect political theory with the reality of the emerging American commercial and agrarian society. Lieber's rambling and disorganized style, in combination with his habit of larding the text with puzzling historical references lacking context, makes the work somewhat inaccessible, and it was a commercial failure in its time. Freidel claims it was influential among scholars for many years, but this may be because it was the only available work of its sort.²

Lieber found more success as a leading contributor to the movement for reform of the American penal system. As explained by David J. Rothman in *The Discovery of the Asylum*, the movement to substitute imprisonment for whipping and the death penalty for almost all crimes began in New York and Pennsylvania and then spread throughout the country. Along with Lieber,

²One gets the feeling it was more assigned than read. An 1872 student edition that I found in the library of The University Club had been inscribed with the student's name and his bookplate, but it bore no underlining, dog-eared pages, or other marks of having actually been read. More, library records suggest no one had checked the book out in the hundred years or so that it has been on the shelf.

Dorothea Dix, Samuel Gridley Howe, William H. Channing, and Louis Dwight formed benevolent societies such as the New York Prison Association and the Boston Prison Discipline Society to promote the humanitarian idea that criminals were the unfortunate products of bad family upbringing and other environmental influences, not inherently evil. The asylum for the insane was invented around the same time and soon "a cult of asylum swept the country" (Rothman 130).

Reform of the Common Law

The theater of reform in which Lieber performed his most enduring work, the Lieber Code, was the rapidly changing American legal system. The Code, as noted, was not only widely used in the Civil War but sparked international reform of the conduct of war. Lieber was drawn into the continuing debates about reforming the law into codes like those found on the European Continent, with Lieber a zealous defender of the common-law system against the movement toward codification. Lieber's contributions to the debate about the interpretation and amendment of the United States Constitution, valorizing the power of the government, were less influential. In later chapters, this papers discusses these legal projects of Lieber's, but first we consider his outlook as a jurist.

Underlying Lieber's legal reform work were the ideas set out in his 1853 treatise, *Civil Liberty and Self Government*. Far more readable than *Political Ethics* of fifteen years earlier, *Civil Liberty* is a paeon to Anglo-American traditions of liberty. Here, the evolution of trial by jury, the right to confront witnesses, habeas corpus, an independent judiciary, and the many other elements of common law and the Constitution are lovingly set out. He also describes how England was able to keep its freedoms while Continental countries could not. The advantage of his first-hand knowledge of Prussian

government enabled Lieber to appreciate the special nature of this sort of liberty. Prussia was not only not graced by these traditions of liberty, but had not been strong enough to resist being overrun by the democratic despotism of neighboring France. Always in tension, these two elements -- of individual liberty and a government capable of assuring liberty -- are essential to Lieber's thinking and the concept he called "institutional liberty," discussed in detail below.

Lieber found in America a legal system grounded in the English common-law traditions (unlike his native Germany, where law was grounded on Roman civil law), but undergoing almost constant reform since the country declared its independence from England. In the years immediately after the American Revolution, reformers seized the opportunity to establish governmental institutions free of monarchical control and its tyranny. It was thought that the mere fact that the new laws were written by the people would provide legitimacy and would be sufficient to assure happy compliance. "Just as colonial codes had encouraged deviant behavior, republican ones would now curtail, or even eliminate it" (Rothman 61). These utopian hopes were not realized. Social control imposed by democratic means can still be unwelcome. Still, in the euphoria of casting off royal power, there lay the impulse to reform the law to make it less an impediment and more the instrument of the people.

Informed by the liberal spirit of the age in which success of the individual was to be added, not retarded, by institutions, law was constantly the subject of reform. The law real of property was reformed to fit the needs of a mobile and developing United States rather than a static and settled England. For example, in 1792, New York abolished fee tail - the state of land-ownership in which title passed only to a pre-determined heir (typically, in England, the first-born male). With a fee-tail estate, the

current "owner" could not freely dispose of any portion of his property for a market price or even bequeath it to a person of his choosing. This legal device could be used to assure the integrity and continuity of an estate, despite the wishes and changing needs of subsequent owners. Whatever its merits for aristocratic landed families in England, entailment was unsuited to the developing and democratic new world.³ The newly elected legislature of New York abolished fee tail, and thus lifted from the land the possibility of posthumous control by dead hands, the creation of undividable estates, and the eventual rise of a landed aristocracy.

Similarly, the common-law presumption of "joint tenancy" was reversed in favor of the more readily marketable "tenancy in common." Under the old law, when two persons purchased property together, the presumption was that they intended to own it with a "survivorship" feature: On the death of one, the survivor automatically succeeded to the dead partner's share. This had the practical effect of restricting transfers of 50% shares, as few purchasers would want to take a title that evaporated on the death of the former 50% owner. Thus, the law contained a bias against free trading of interests in land. In New York, the presumption of survivorship was eliminated, a reform that favored marketability over stability of ownership.

Among the ancient common-law doctrines that had been continued in the United States was that of coverture, under which a married woman did not have a legal existence independent of her husband. Single women could own property; but, upon marriage, a woman's legal identity was merged with her husband's and only his emerged. In nineteenth-century America, reacting to a

³ It is doubtful that fee tail had actually been in widespread use in New York, but perhaps its abolition was inspired by the example of unhappy tenant-farmers on the great manorial estates along the Hudson River, some formerly Dutch patroonships, who could not purchase the plots on which they lived and farmed.

doctrine that disabled a large portion of the population from conducting business, there were various reforms to set women free from coverture. The most successful was New York's 1848 Married Women's Property Act, which provided, in part: "It shall be lawful for any married female to receive...and hold to her sole and separate use, as if she were a single female, real and personal property, and the rents, issues and profits thereof, and the same shall not be subject to the disposal of her husband, nor be liable for his debts." A number of states (Pennsylvania, Massachusetts, Oregon, Kansas, Illinois, and Nevada) soon thereafter adopted the New York statute or something like it. The federal Homestead Act of 1862 also enabled married women to take title to the western lands available for homesteading, in that it contained no disqualification on account of marital status; a claimant only needed to be a citizen, twenty-one years old, "the head of a family," and have not taken up arms against the country.

Codification

For a few reformers, the practice of tackling legal reform one issue at a time was inadequate, and they saw that the law could be streamlined by codification -- a process in which an entire legal subject is comprehensively stated in one place. A wholesale codifying project would not only more easily fit reforms into the larger scheme, but codification would eliminate the reliance on judges to explicate, case-by-case, the centuries' accumulation of statutes, judicial opinions, and treatises. But many, even reform-minded jurists like Lieber, saw danger in codification.⁴

⁴ Although informally called the Lieber Code, Lieber's text on battlefield conduct is a short summary of customary law (and some Lieber innovations). It is not a formal codification of law.

Codification has its roots in the earlier and persistent utopian notion in America of doing without lawyers, a "dream about simple, clear natural justice, striped clean of obfuscation and jargon, a book of law that everyone might read for himself" (Friedman 14).

While codification may seem an appealing reform, there was a great deal of skepticism by English and American lawyers steeped in the traditions of the common law. Many championed the common law as the best assurance of a free society. Lieber stated the argument, this way: "[T]he civil law... is a matter of learned study, of antiquity; while common law is a living, vigorous law of a living people...The civil law excels the common law in some points. Where the relations of property are concerned, it reasons clearly and its language is admirable, but as to personal rights, the freedom of the citizen, the trial, the independence of the law, the principles of self-government, and the supremacy of the law, the common law is incomparably superior" (Lieber, *Civil Liberty* vol. II, 230-231).

Advocates for the common law were wary, too, of the inflexibility of a code, and were more comfortable with the discretion lodged in a judge in the common-law system. This was Lieber's position. He believed that rules simply could not be created that could govern every situation that might arise in place of a system in which judges apply precedents to the case in front of them: "Nor is it possible for high authorities to establish general rules, which will apply so precisely to the endless variety of combinations in law, as the authority of precedents is able to do," and he declared that turning to the government rather than an independent judiciary to resolve doubtful matters "throws an impediment in the way of a free and wholesome development of the law, according to the spirit of the nation" (Lieber, *Hermeneutics* 205).

The common law had long been associated with the idea of English liberty, and as a general matter, the common law, as it developed in the hands of courts, served as a bulwark against tyranny - something to which citizens were "entitled" (Friedman 67). With the recent example before them of the repression carried out in the name of reform in the French Revolution, nineteenth-century reformers were wary of codes. No less a radical liberal than Thomas Paine warned that in the "circumstance that has now taken place in France" there is a danger that "we lose sight of morality, of humanity, and of the theology that is true" (Paine 696). In the codification debates, the cause of code writers could not have been helped by the fact that its most familiar example was the civil code of Napoleon - thus connecting codification with the great (un-English) tyrant.

While it was conceded that codification might be successfully employed for some areas of the law, there was no general agreement as to which areas of law were suitable. In the case of the American colonial experience with common-law crime, for example, the common law did not seem to be a protection against arbitrary government action. Instead, judges appointed by the king sometimes used their common-law discretion, untethered to a specific penal statute, to punish political opponents. What is more, it would seem to be a matter of fundamental fairness that a person should be on notice of what is a crime, and not be subject to a judge's finding, after the fact, that his or her conduct was criminal under unwritten or unpublished common law. "Notice" may have been of little concern when criminal law addressed matters such as murder, theft, and rape; such acts are patently wrong (*malum in se*). But as criminal law was extended to conduct that might once have been accepted or even logical to self-interested actors, such as child labor laws (*malum prohibitum*), notice of the prohibiting statute assumed importance. So, in the area of criminal law, America moved away from the tradition of unwritten

common-law crimes in favor of explicit codes that set forth all the crimes, including their elements, of which a person could be convicted. In 1812, the U.S. Supreme Court rejected the idea of federal common-law crime, holding that "The legislative authority of the Union must first make an act a crime" (qtd. in Friedman 216). In 1881, the New York legislature enacted a new penal code that expressly provided that it was a complete statement of the criminal law, thus precluding a judge from finding some additional common-law crime: "[N]o act...shall be deemed criminal or punishable, except as prescribed or authorized by this Code." (qtd. in Friedman 435).

An area of the common law generally agreed to be in sore need of reform was that of court procedure and forms of pleading. The elaborate and arcane system of pleading, with its "weird complexities" (Friedman 95), was widely acknowledged to be an impediment to the efficient administration of law. In 1848, New York adopted a radical reform of its legal proceedings and pleadings, which came to be known as the Field Code after its proponent, David Dudley Field (1805-1894). The Field Code simplified the chaotic, hyper-technical, and incomprehensible (to all but highly experienced lawyers), system of writs that had accreted over the centuries in common law. The Field Code abolished the distinction between "law" and "equity" in pleading, adopting in their place the streamlined "civil action." The Field Code asked only that lawyers base their claims on a clear statement of facts, independent of form.

The Field Code enjoyed great favor with business interests, which were eager for efficiency and predictability in the law. In the western United States, where there were few lawyers skilled in the ancient pleading forms and little tradition to overcome, as well as a need to speedily resolve land-claims, the Field Code was widely adopted. Missouri adopted the Field Code

almost immediately after New York in 1849, and California followed in 1851. By the start of the Civil War, a dozen states had adopted it.

But when it came to substantive law, Field's codification projects failed. In 1865, he submitted to the New York legislature a civil code that would codify the private, substantive law of New York. He was met with vigorous opposition. In New York and other Eastern states, there were competing interests and ideas about how law should work, and lawyers, legislators, and judges were not entirely ready to abandon the common law which, they found, had many virtues not found in the proposed code. James Coolidge Carter, of the Association of the Bar of the City of New York, led the impassioned debate in favor of retaining the common law, with its gradualist changes that freely and naturally evolved. He thought the substantive code proposed by Field was pernicious as it did not take into account the practical, on-the-ground conditions in which the subjects of the proposed code operated. It was, in this sense, a "top down" imposition of a doctrine conceived by theoreticians and imposed on individuals, rather than the common law, an empirically derived, accretion of decisions made in response to individual cases. The proposed code was thought to give more attention to the integrity of its internal system than respect for the toil and dignity of the individuals it would affect. It left little room for the messy variations in human behavior.

Similarly, Field failed to win support for his idea for an international code. Lieber, although eager to see international law developed, opposed Field's idea. He was too wary of the imposition of civil codes by a French-style tyranny. Lieber thought international law should be established over time through the circulation of proposals of esteemed jurists. As Freidel reported Lieber's letter to Thayer, " 'I am unqualifiedly averse to [David Dudley] Field's idea of having a code of the

Law of Nations drawn up and then try[ing] to make governments adopt it,' he insisted. 'The strength, authority and grandeur of the Law of Nations rests on, and consists in the very fact that Reason, Justice, Equity speak through men, greater than he who takes the city'" (Freidel 403).

Reasons for Reform

Why was the American nineteenth-century the scene of so much reform? First, the citizens of the new United States of America entered the century without the burden of a government with authority in matters of their conscience and happiness. Alexander Hamilton had explained that, under the then proposed Constitution, the President would have "no particle of spiritual jurisdiction" (Hamilton 468). In omitting a role for the central government in such matters, the Constitution left to citizens the scope to develop a variety of ideas for their own improvement, and to form non-governmental societies for the implementation of those ideas. Similarly, in the absence of a tradition of a paternalistic aristocracy, Americans were left to pull up their own bootstraps.

Another powerful underlying condition for the flowering of reform in the nineteenth century was the shift in religious attitude about human nature. The grim determinism of the old Puritan or Calvinist church gave way to an Enlightenment-inspired view of possibility for boundless improvement. No longer seen as inherently corrupt, men and women were now seen as perfectible. To a people who no longer accepted that natural depravity was the implacable condition of humanity, it seemed viable to undertake the enterprise of improvement, moral uplift, and rehabilitation. The religious revivals known collectively as the Great Awakening spread the idea that all souls, regardless of their birth condition or other earthly status, were

worth saving, and thus various liberal reform movements can be seen as the furtherance of this religious belief.

Francis Lieber's participation in the great reforming movements taking place in nineteenth-century America had its successes and its failures, the failures occurring especially when he sought to import continental European ideas unsuited to individualistic America. Despite his efforts to create a body of influential and enduring scholarship on European lines, his most influential work was his little pamphlet of rules for the Union Army, the Lieber Code. Lieber's intimate friend M. Russell Thayer, a prominent judge and political figure, thought it would be otherwise. In summing up the life and works of the recently deceased Lieber, Thayer claimed that the works "upon which his fame will chiefly rest" (Thayer 21) were *Political Ethics*, *Hermeneutics*, and *Civil Liberty* -- works available today only from the publishing company called "Forgotten Books." On the other hand, Thayer dismissed the Lieber Code with faint praise as "one of the greatest works of his later years" (Thayer 35).

CHAPTER THREE: The Humanitarianism of the Lieber Code.

Like so many other reforms of the nineteenth century, the Lieber Code was a response to a problem of human behavior and suffering that, in the spirit of the age, could be improved upon by liberal minds. It was in this spirit of reform that the Union Army tackled the problems of the conduct of its soldiers.

While, in past ages, the military elites may have shared an understanding of what was fair and foul on the battlefield, the mass armies of the Civil War were composed of civilians. The most conscientious soldiers tried to take seriously the exhortations in Sunday sermons to be good Christians while serving as soldiers, but there was little practical guidance available to them. What is more, the Union Army faced novel problems such as occupying and controlling large and hostile civilian populations, and confronting armed partisans not in regular formation or uniform.

General Henry W. Halleck asked Lieber to prepare guidance for the Union Army, with the resulting work being issued in 1863 as an order of the War Department, General Order No. 100, entitled "Instructions for the Government of Armies of the United States, in the Field," with the preface that it had been "prepared by Francis Lieber, LL.D., and revised by a Board of Officers, of which Major-General E.A. Hitchcock is president having been approved by the President of the United States" (Lieber, *Instructions* 2). Not intended or presented as a weighty philosophical tome, it was a useful pamphlet of a mere thirty-six pages, setting out practical rules and their rationales, that could be read by everyone.

In writing the Lieber Code, Lieber drew upon his years of study and writing. Many of the ideas expressed in the Code can be seen in the final chapter of his 1838 *Political Ethics*. In his *Hermeneutics* of 1839, Lieber declares that lawyers retain their humanity ("The lawyer does not cease to be a citizen, not cease to be a man, and all the fundamental obligations are the same for him as for all others" (Lieber *Hermeneutics* 92)), a phrase that Lieber re-purposed to apply to soldiers for Article 15 of the Lieber Code ("...do not cease on this account to be moral beings, responsible to one another, and to God"). The Lieber Code's guidance on irregular troops was based on his 1862 *Guerrilla Parties Considered with Reference to the Law and Usages of War*.

Despite its being a mere military order, created without the authority of Congress and with no color of an international treaty, the Lieber Code is very ambitious in its scope. Article 152 declares, for example, that foreign nations have no right to recognize the Confederacy as a state in reliance on the Union's treating rebel soldiers as lawful combatants under the rules of law; a nice argument under international law, but expressed in a self-serving, unilateral order to its own Army, it would hardly seem to carry any weight with England as it considered whether to recognize the Confederacy as a state. Even as a regulation of its own national soldiers, the Lieber Code arguably exceeds the authority of President Lincoln. As William A. Blair has pointed out, the Constitution gives Congress the power to regulate military forces,⁵ and Congress played no role in the promulgation of the Code.

Despite its sketchy origins, the Lieber Code has nevertheless had a large and lasting impact within the United States and around the world. The

⁵ Article I, Section 8 provides, "The Congress shall have the Power...To define and punish...Offenses against the Law of Nations...To make Rules for the Government and Regulation of the land and naval Forces...."

Code was widely disseminated in the Union Army and, after initial complaints, largely adopted by the Confederacy as well. It soon formed the basis for the first international conventions on the law of war.

Humanitarianism

The Lieber Code may be famous as the foundation of modern international conventions on humane conditions in armed conflicts, but can we say that the Code is a humanitarian document or that Francis Lieber was a humanitarian? "Humanitarian" is a term that has been used loosely since it first appeared in the early nineteenth century (disregarding its earlier coinage to describe the religious view that Christ was not divine but entirely human). Generally, and for this discussion, the term is used to refer to the impulse to alleviate human suffering, especially in the crisis of a war or natural disaster. Humanitarians typically address an unprotected population, without regard to nationality or political affiliation. Thus, humanitarianism is often contrasted with nationalism. Apart from alleviating suffering, some humanitarians seek to promote human rights and the dignity of the individual. Others promote the humane treatment of animals and/or animal rights.

For some, humanitarian work is their dedicated purpose. We might call such people "humanitarian idealists." Medecins Sans Frontieres/Doctors Without Borders, for example, is a dedicated humanitarian organization, which provides medical aid to populations suffering from war or natural disasters, while carefully maintaining its independence from any national government and neutrality in any dispute. Others, such as the Anglican Pacifist Fellowship, have as their work the elimination of warfare. Such organizations may be guided by the statement attributed to Albert Schweitzer: "Humanitarianism consists in never sacrificing a human being to a purpose."

Other humanitarians seek to temper by moral considerations the actions of non-humanitarian institutions, and/or constrain them to adopt humane means and methods in the pursuit of their secular goals. We might call these people "humanitarian moderators." Law of war theorists, for example, address a nation's army, a non-humanitarian organization; to the extent the army abides by the law of war, the army will have constrained itself for humanitarian considerations. The rule of law is itself generally mentioned as a humanitarian device (e.g., in the Universal Declaration of Human Rights promulgated by the United Nations), serving to protect human rights as a government or other institution goes about its non-humanitarian pursuits.

A third category comprises those who, in pursuit of a larger humanitarian purpose, do not let individual suffering stand in their way. We might call these "dark humanitarians." In contrast to Schweitzer, the dark humanitarian might say that a great purpose cannot be sacrificed merely to avoid individual suffering. Examples can be found in the work of imperial powers to improve their colonies. The "dark roots" (Huneke 1) of humanitarianism may be seen in the period from the middle of the nineteenth century through the early twentieth century, when Western colonizing nations undertook development projects such as the construction of the Congo-Ocean Railway in French Equatorial Africa, in the belief that they would improve lives in the colonies, making them wealthier and more stable -- even if in the short term such beneficent projects led to misery and death for some individuals. "Defenders of empire in the 19th and 20th centuries regularly saw imperialism as a fundamentally humanitarian enterprise" (Huneke 1).

Dark humanitarianism did not start in the nineteenth century. Though the term was not known then, the two hundred or so years from 27 B.C.E. to 180 c.e., is known as *Pax Romana*, "the period in the history of the world, during which the condition of the human race was most happy and prosperous,"

according to Edward Gibbon (qtd. in Pedicone 63). But these benefits were achieved by "rapacious, violent conquest" of the Romans who brought order and stability "but often taking no prisoners in the process" (Pedicone 63).

These categories are useful in thinking about humanitarianism, but they are not separated by bright lines; many humanitarians exhibit traits of more than one type. The International Committee of the Red Cross, for example, a dedicated humanitarian organization, works not to abolish warfare but to moderate it through the use of law. Florence Nightingale did her best known work on behalf of the British in the Crimean War in 1854, but eventually her work transcended national boundaries.

How do these categories apply to Francis Lieber? He certainly cannot be considered a humanitarian idealist, and indeed many humanitarians of the idealist variety would find cold comfort in the Lieber Code. First, in asserting rules and limits on behavior in war, the Code could be said to normalize war; i.e., the Code implicitly accepts that war is a reality and explicitly that it is a legitimate enterprise among sovereign states. The Code thus has no truck with the notion that war should be abolished, and does not hold with those humanitarians in peace movements who are pacifists. Nor is the Code in sympathy with those who work toward an idealism of borderless internationalism; on the contrary, it recognizes nations as essential elements of a world order to be preserved. Thus, the supreme law of the Lieber Code is Article 4: "To save the country is paramount to all other considerations."

Further, as Rotem Giladi has pointed out, the Code does not address the dignity of the individual. The Lieber Code has a collective humanity in mind, privileging the state over the individual. The Code does not trouble itself overly with civilian suffering, providing only that civilians should

not generally be the object of harm and protected if feasible (Articles 24, 25 and 37). If, for example, a town under siege were to send out its civilians to make food last longer, the Code authorizes the hostile army to drive them back in to keep the pressure up (Article 18). An occupying army is not tasked by the Code with taking care of the civilian population. Nor does the Code have much to say about the suffering of the wounded left on the battlefield, a horrific problem recognized at the time by Dunant in *A Memory of Solferino* of 1862. Dunant's work, not Lieber's, inspired the formation of the International Committee of the Red Cross and in 1864 the first international Geneva Convention for the Amelioration of the Wounded in Time of War. The Lieber Code, by contrast, is largely silent about the suffering of the wounded, noting only that prisoners are to receive medical treatment if feasible (Article 79), and that hospitals are usually marked with yellow flags so that they may be spared (Articles 115, 116). Mainly, the Code values military necessity and extends its instrumentality to any civilian infrastructure useful to the enemy's war effort. Sherman's March to the Sea could be said to represent the prime example of Lieberian license in this regard; certainly, the civilian populations of Georgia and South Carolina would think it insane to link that war philosophy with the word "humanitarian."

Humanitarianism in the Lieber Code

Still, General Order No. 100, properly understood, must be seen as humanitarian, and profoundly so - although it does not fit neatly into any of the definitions discussed above. In bringing law to the battlefield, the humanitarianism of the Lieber Code belongs largely to the moderating category, and possibly, in its valorizing of the state, partakes of the dark variety, too. As always with Lieber, his brand of humanitarianism defies

ready categorization. I have identified below a number of features of the Lieber Code that speak to its particular brand of humanitarianism.

Constraint. As a first principle, the notion that war is not mere savagery but is subject to law, and moreover that soldiers could be expected to act with restraint and follow rules, is itself fundamentally humanitarian. Article 15 of the Lieber Code provides, "Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another, and to God." The traditional rules of law embrace a panoply of humanitarian aspects, including the avoidance of cruelty and infliction of unnecessary suffering. A soldier who has been wounded such that he is incapable of fighting is not to be further injured, but given medical aid. Perhaps the principal feature is the combatant's privilege: deeming a soldier a lawful combatant, not a murderer, who, if captured, is to be given the status and protection of a prisoner of war.

Rebels are Lawful Soldiers. The Code creates an innovative legal solution that allowed the Union to grant the rebel soldiers the traditional protections of the laws of war even though the Confederacy did not have the status of a sovereign state. This presented a conundrum as the outbreak of the Civil War, as the rules of war were understood to function between states. The United States could not be seen to recognize the Confederacy as a state, as that would effectively accept the South's position that it had the lawful right to secede. (This was similar to the problem faced by Great Britain in the American Revolution, where the desire to avoid recognizing the revolting colonies as a foreign sovereign led to treating the captured Americans as criminals and not qualified for traditional prisoner exchange; the problem was eventually worked around, with generals on both sides making personal agreements for exchange of prisoners (Tyler 74).) The humanitarian impulse was to treat the soldiers of the South not as murderers but lawful

combatants, entitled to prisoner of war status if captured. Article 152 provides, "When humanity induces the adoption of the rules of regular war towards rebels...it does in no way imply a partial or complete acknowledgment of their government, if they have set one up, or of them, as independent or sovereign power." Thus, Lieber found a way to extend the protections of the traditional rules of war to the rebels.

Public, not Private Purpose. Another aspect of Lieber's brand of humanitarianism is found in his articulating that war possesses, properly, a public character and is not to be pursued for the "private" purposes of rulers and their religions. Here, Lieber is expressing not an original idea but an essentially modern one that the exploitation of public office for private gain constitutes corruption. Pursuit by the ruler animated by his private concerns, including creed, may have constituted a legitimate exercise of personal sovereignty in a former era; in modern times, however, it is in effect an abuse of power. "Public war is a state of armed hostility between sovereign nations or governments.... Ever since the formation and co-existence of modern nations" war has become "the means to obtain the great ends of the state" (Articles 20, 30). It may seem odd to modern ears that this is humanitarian, but "[Lieber] wields restraint not as a shield of the individual but as a sword against past wars by private sovereigns, nobility, and men of the cloth" (Giladi101).

Just War. At the same time, Lieber did not think that the state could do whatever the state decided to do for no more reason that it had the power to do so. His philosophy was not the cynical realism of raw force as a determination of action. Lieber thought that only just wars should be undertaken. Moreover, even just wars should not be undertaken unless circumstances rendered it necessary. This "just war" viewpoint does not offer much practical guidance in sorting good wars from bad ones, but it was

perhaps a logical necessary underpinning to the Code: If we are to claim it is moral and legal to pursue the war aims of the state, we must assume not only that the aims themselves are the state's but that they are themselves just. (This does not negate the important advance that battlefield conduct is to be judged as if both sides have a claim of right, as mentioned in Article 67. This advance replaced the old idea that, if one side is waging a just war, its people were justified in killing. This proved useless as a legal standard, since both sides almost always believe in the justice of their cause. It worked only as one-sided, victor's justice.)

Stability. "The ultimate object of all modern war is a renewed state of peace" (Article 29). In giving priority to the larger, collective humanity as embodied in the state, Lieber sides with the peace to which the state has returned the land, even if it is a peace imposed by a conquering army. In Lieber's Code, we find no room for the freedom fighter -- an individual of principle who carries on the fight even though the enemy has conquered and occupies his homeland. The Code provides that, once a people has been conquered, it should submit to the new order and the reality of the new state established (even temporarily), and not engage in sabotage, counterinsurgency, or other acts against the peace now established. Article 26 provides that the conquerors may require the local magistrates to swear a temporary allegiance to them, and that the people and the civil officers "owe strict obedience to them as long as they hold sway over the district...." Similarly, in Article 85, Lieber invents a special category of bad actor, "war-rebels," defined as "persons within an occupied territory who rise in arms against the occupying or conquering army or against the authorities established by the same." War-rebels are not entitled to the protection of prisoner-of-war status. This insistence that the conquered people accept their loss and keep the peace reflects the humanitarian principle of

stability and order that Lieber believed came from "close intercourse" (Article 29) between states. "This was a fundamental feature of a stable, regenerative order, which was necessary to preclude the emergence of short-lived hegemonies and total war" (Giladi 95).

Military Necessity. A critical element of Lieber's unique brand of humanitarianism is the doctrine of military necessity. This may seem surprising, as it is the license granted in the Code to military necessity that perhaps draws the greatest criticism from its detractors. Jefferson Davis cited the military-necessity provisions of the Lieber Code "to contrast its 'unhuman' terms with the 'moral character' of the South's 'Christian warriors,'" and Confederate Secretary of War James Seddon said it authorized "committing 'acts of atrocity and violence' that would 'shock the moral sense of civilized nations'" (Witt 245). Yet military necessity, when properly understood as being that which furthers the war aims of the state, serves to limit the lawful actions of the army to those necessary or expedient to achieve the state's purpose. War for Lieber (as for Clausewitz and others) was an instrument of the state, to be used in pursuit of state purposes. This idea of the instrumentality of war thus contains a duality, in that it both authorizes stern measures (say, depriving a population of the means to support the army, as in Article 15) and limits measures to those tethered to its purpose. The doctrine of military necessity limits the soldier to doing no more than is militarily necessary -- i.e., that which is directed toward the mission. This would obviously rule out gratuitous infliction of suffering and other depredations (Article 68, for example).

Established Practices. Actions in furtherance of military necessity are further limited by Article 14's qualification "and which are lawful according to the modern law and usages of war" - a proviso that admits into the Lieber Code generally agreed restrictions like that on poison, even if

the logic of military necessity alone would not preclude or limit such practices. This rather small qualification has proven powerful over time, as where specific prohibitions have been agreed (by treaty or by sufficient common observance among nations to otherwise become part of customary international law), they stand outside military necessity as unlawful acts.

Short Wars. Perhaps the most famous of Lieber's humanitarian principles is that shorter wars are better, and the way to make them short is to make them intense. "The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief" (Article 29). The first part of this idea, shorter is better, is unremarkable. It is the second part, that intense violence is a good thing, that eluded (and eludes) compassionate thinkers. Pacifists, of course, would avoid violence altogether, and even people who are not pacifists may wish in the name of humanity, or Christianity, to see war pursued with the mildest measures possible. Lieber knew that the hesitant and the gentle leaders only drew the matter out and prolonged the suffering and dislocations of war. Better to get it over with.

Lieber thus implicitly accepted the duality of the nature of soldiers: Like all humans, they are capable of great kindness as well as slaughter. *The Killer Angels*, the title of Michael Shaara's famous novel, is especially apt. Prior to General Order No. 100, there was little practical guidance available to soldiers. Sermons urged them to conduct themselves as Christians, but this pastoral advice was of little use in the field. How could a soldier be a good Christian? How could he reconcile his duty as a soldier with the Commandment, "Thou shalt not kill"? Lieber provided guidance for the conscientious soldier grappling with this paradox. It was effective in its time and meaningful for our own because it did not shrink from the killer-angel duality of its readers and their work.

A similar idea had been articulated by Clausewitz in his 1832 *On War*: “Kind-hearted people might of course think there was some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine this is the true goal of the art of war. Pleasant as it sounds, it is a fallacy that must be exposed: war is such a dangerous business that the mistakes which come from kindness are the very worst” (Clausewitz 75). (Lieber would have seen this passage in Clausewitz before he wrote the Lieber Code; while the English translation of *On War* did not appear until 1874, Lieber was able to read it shortly after its German publication and cites *On War* in his *Political Ethics* of 1838.)

Perhaps Lieber understood the paradoxical humanitarian value of intense and conclusive fighting because, unlike many other war theorists, he was a combat veteran. One can imagine the disdain Lieber held for the arm-chair philosophers, making matters worse in their well-intended but deeply ignorant humanitarianism that urged warriors to adopt mild methods.

No Place for Chivalry. Another element of humanitarianism in Lieber can be found by considering what is not expressed in the Code. Any general consideration of the history of the law of war will not fail to mention the chivalric tradition of courtesy between knights in the middle ages, which has had brief re-appearances in modern times (arguably, among World War I pilots). Chivalry certainly represents a restraint on the conduct of warriors, and in this sense may be considered among the origins of the law of war. The Lieber Code and the modern law of armed conflict that it spawned, however, do not in any sense represent continuity with this particular line of combat restraint. There is nothing in Lieber’s Code about the noble fellowship of warriors; nor is bravery or honor proposed as a standard of conduct. For example, Lieber struggles, as an old soldier, with outlawing the unseemly practice of lacing abandoned redoubts with explosive devices,

writing, "The soldier within me revolts at the thing. It seems so cowardly. The jurist within me cannot find argument to declare it unlawful" (qtd. in Mancini 11).⁶

This failure of the Code to take up the blessings of chivalry is not to be lamented, for chivalry was only for the aristocrats. As modern armies grew to include masses of men, what could chivalry do for them, especially if the leadership class thought themselves distinguished qualitatively from the thralls on the field. Whatever the merits of chivalry as a form of restraint on combat, the Lieber Code is addressed to every soldier without regard to his origin (including serving blacks and enslaved persons reaching Union lines). In this regard, we may consider the Code to convey a particularly American and democratic humanitarianism, as illustrated by an incident in 1942, recorded by Dwight Eisenhower in his diary. Americans fighting in North Africa had captured German General Hans-Jurgen von Arnim, and members of Eisenhower's staff suggested he "should observe the custom of by-gone days" and meet Arnim (a courtesy the British that same year had extended when capturing General Johann von Reavenstein, who was shaken by the hand by the British commander and given a compliment on his and his division's fighting with chivalry). Eisenhower, however, declined to meet his German, writing: "The tradition that all professional soldiers are comrades in arms has...persisted to this day. For me, World War II was far too personal a thing to entertain such feelings....[T]he forces that stood for human good and men's rights...were confronted by a completely evil conspiracy with which no compromise could be tolerated" (qtd. in Walser 37).

⁶ A singular exception may be seen in his retention of Vattel's romantic objections to poison, perfidy, and assassination; on the other hand, Lieber may have considered these prohibitions not chivalric, but sufficiently established among nations to constitute customary international law of war.

Emancipation. Another humanitarian aspect of the Code is its radical grant of freedom to enslaved persons and its equal treatment of black soldiers, as discussed in the next chapter of this paper. These aspects of the Code may be in the "dark humanitarian" category. As Witt has pointed out, these features of the Code represent an assertion of principles of justice at the cost of increased suffering. "Embracing Emancipation and demanding equal treatment for black soldiers were the right things to do. But they did not reduce the suffering in the conflict. To the contrary, Lincoln's code helped produce some of the war's most enduring humanitarian crises" (Witt 249).

War-Crime Prosecutions. Lieber did not use the term "war crime," but his work laid the foundation for personal responsibility without the excuse that a soldier was "just following orders." Article 71 of the Code contains the remarkable statement that not only an enemy soldier but one in uniform of his own army is subject to the death penalty if he intentionally harms or kills a disabled enemy, or orders it done, whether or not "he belongs to the army of the United States." Lieber also explained the principle of common law that "every officer remain[s] individually answerable for his acts...no positive order by the supreme executive, even though this be a king, as in England, be allowed as a plea for impunity" (Lieber, *Civil Liberty* vol. I, 175). Together, these principles form the basis for the modern jurisprudence under which a soldier may be held personally liable for criminal behavior, and cannot assert as a defense that he was merely following (unlawful) orders (Solis 49). Lieber has been credited with being the first to point out this unique principle in Anglo-American jurisprudence (Thayer 26). The opposite ethos was being developed at the same time in Prussia, discussed below, where the "professionalism" of the modern soldier would lead him to be untroubled by matters of conscience.

Moral Uplift. Lieber states in his *Political Ethics* that war, if it is a just war, brings an elevating moral spirit to its participants and their nation, citing as examples the American Revolution and the German struggle for independence against the French of 1812-1814. "The tone of morality of those who engage in a patriotic war is eminently raised..." He mentions the "patriotism, public spirit, devotion to common good, purity of motive and action," and the "lasting friendships" formed between soldiers, as well as the war's source of inspiration for poets to create poems that "delight or animate a nation." "To no period whatever do men look back in their old age with such animating delight as to that in which they fought for a good cause" (Lieber, *Political Ethics* 440).

Cultural Objects. Among the new and humanitarian elements of the Code is its treatment of cultural objects. Article 34 provides a special exemption for the property of church, hospital, university, and museum properties from the license found in Article 31 for the conquering army to freely use the money and other public property it may capture. Classical works of art and valuable instruments like telescopes are to be protected, under Article 35, from injury and maintained in a fortified place during bombing. This goes beyond the general rule of avoiding wanton destruction or cruelty that does not advance the war aims; this is a positive injunction to take care -- a striking exception to the doctrine of military necessity that is otherwise so amply followed in Lieber's Code. Lieber's biography provides a likely explanation for this cultural exceptionalism, for Lieber surely remembered the Napoleonic acts of plunder in the French wars of his youth.

Napoleon's humiliating defeat of Prussia had a profound effect on both Prussia and its young soldier Lieber, and may well have informed the drafting of the Lieber Code. First, the ideals of the Enlightenment no longer seemed

to hold the great promise of the prior century. "For educated Prussians the internationalist spirit and sympathies of the Enlightenment and its revolutionary stepchild became a thing of the past.... [N]ationalism took hold..." (Bonadonna, 172). This disapproving spirit certainly can be seen in Lieber's view of the foremost publicist of that age as "Father Namby-Pamby" (qtd. in Blair 93). Second, a profound martial culture was developed in Prussia. "Prussia's defeats at Jena and Auerstadt in 1806 were a rude awakening from a sleep of presumptive military superiority.... [T]he Prussian army and state instituted major reforms...to create a Prussian war machine.... Ultimately this most 'professional' of institutions would become a danger to humankind, prorogued to rise again as the servant of a mad tyrant. The German model would transform itself into a cautionary tale of excessive nationalism and deficient conscience, of narrow know-how rather than broad understanding or humanity" (Bonadonna 169-170).

Did these tumultuous events inform Lieber in drafting the Code? Is this any part of the explanation of the Code's elevation of the status of military necessity ("those measures which are indispensable for securing the ends of the war" (Article 14)), intense fighting ("The more vigorously wars are pursued, the better..."(Article 29)), nationalism ("To save the country is paramount to all other considerations" (Article 5)), and the "hard hand of war" felt by Southern civilians during Sherman's March to the Sea ("The citizen or native of a hostile country is thus an enemy...and as such is subjected to the hardships of the war" (Article 21))? Perhaps not; perhaps the opposite is true. Arguably, the Lieber Code is an explicit repudiation of the "deficient conscience" of the ideal of the Prussian general staff, grounded, as the Code is, in the opposite proposition -- namely, that soldiers are "moral beings, responsible to one another, and to God" (Article 15).

It seems that dualities abound in the Lieber Code. To its credit, it does not shrink from the confounding issues of war, but wrestles with and tries to accommodate them. The special Lieberian humanitarian character of the Code includes a realism about battle that Vattel lacked, and it appreciates the goals of the state as idealist humanitarians do not.

CHAPTER FOUR: SLAVERY AND LIEBER

The Lieber Code's provisions that radically favor the dignity and humanity of African Americans are well known. What is less familiar is that Lieber himself was a slaveholder. This tension between the Lieber Code and its author on the subject of slavery is impossible to reconcile.

In the Code, Lieber settled the vexing question of how the Northern army should deal with escaped slaves. Soldiers had been troubled by the necessity to comply with law that recognized slaves as property and required the return of such property to its rightful owners. Article 43 of General Order No. 100 is explicit: "[S]uch a person is immediately entitled to the rights and privileges of a freeman." Note that the emancipating terms of this Article apply to any and all escaped or captured slaves, without regard to their state of origin. In this, it went further than the Emancipation Proclamation, issued a few months earlier, which purported to free slaves only in those states that were still in rebellion. The Emancipation Proclamation did not purport to free enslaved people in Delaware, Kentucky, Maryland, and Missouri, which had not seceded; Tennessee and Louisiana, which were then occupied and therefore arguably no longer in a state of rebellion; as well as those parts of Virginia being carved out to form West Virginia. Article 43 of the Lieber Code, on the other hand, recognized no such exceptions to its grant of liberty.

What is more, the Code broke with the long-established American view that the law of war did not allow an invading army to free slaves owned by its enemy. The Declaration of Independence listed, among King George's history of "injuries & usurpations" that justified the Revolution, that he

"excited domestic insurrection among us." Jefferson's first draft and his notes make it clear that the Declaration was speaking of slaves. Similarly, following the War of 1812, the United States sought compensation from the British for the loss of slaves who achieved freedom by fleeing, with British encouragement, to British lines. Article 43 of the Lieber Code was thus a radical shift in the American position on the subject of whether the freeing of slaves was a lawful tactic in war.

Beyond favoring freedom for enslaved persons, Lieber took up the case for protection of free blacks who served in the Union Army but who the South had said it would not treat as lawful prisoners of war: Article 57 declared that the color of a soldier could not be used to disqualify lawful combatant status, and Article 58 provided the death penalty for anyone who enslaved and sold a captured Union soldier.

Yet, before Lieber drafted the handsome and generous provisions for race in General Order No. 100, he had been a slaveholder. For the entire twenty years of his tenure at South Carolina College (now, the University of South Carolina) he kept slaves as domestic servants. Their names are found in his journals: "Tom, Elsa, Betsy, Isaac, Henry" (O'Brien 34). As Michael O'Brien has pointed out, the College itself -- to whose presidency Lieber aspired -- owned slaves, and they would have been seen everywhere on campus, attending to landscaping, food service, cleaning, and construction. Lieber did not publish a word against slavery while at South Carolina College.

Is it possible to reconcile this behavior with the Code's position on slaves and Lieber's private statements about slavery -- "this nasty, dirty, selfish institution" (qtd. in Freidel 236), or this in an unsent letter to John Calhoun in 1850: "It is not the North that is against you, it is mankind, it is the world, it is civilization, it is history, it is reason, it

is God, that is against slavery" (qtd. in Witt 226)? Lieber's own explanation is weak: "[I]n a place where slavery existed, it was better to own slaves and treat them well than to leave them to other, less benign owners" (Witt 227). It would seem that Lieber's principles and his behavior are irreconcilable. That he could maintain them both was a feat of cognitive dissonance.

A certain amount of opportunism was surely at work here. The owning of domestics was likely to have been the expected mode of living for Southern gentlemen-professors, and Lieber's going along with the practice would have gone some distance to quell the career-damaging suspicions that the non-native Southerner was an abolitionist.

Yet, when he was under no such pressure to conform, it seems Lieber used a slave as a household servant in Boston. The "servant" George had been "lent him by a Puerto Rican brother-in-law..." (Freidel 118).

We see this dual outlook toward bondage foreshadowed in an earlier chapter of his life. In July of 1824, while still a young man in Prussia, Lieber obtained a position as a tutor in the household of an important government official, Count Albrecht von Bernstorff. The young idealist was shocked by conditions on the estate, but not so much that he felt compelled to give up the advantageous position. "Though the absolute power the count exercised over the peasants disturbed Lieber, he enjoyed merry excursions to seaside and lakes with the gay young ladies" (Freidel 45). Lieber finds he is able to put aside his sense of injustice about the plight of the peasants, or at least cabin it, while he pursues "a happy, pastoral summer" (Freidel 45).

Lieber's unsavory racial attitudes did not disappear with his maturing into a wiser old age - even after the conscience-raising of Civil War. As late as 1870, in a letter to Secretary of State Hamilton Fish, Lieber recommended a constitutional amendment to ban nonwhite immigrants to the United States (Freidel 393).

Lieber himself gives us an extended passage on the "intellectual and psychological dualism" of human nature. Lieber notes the inconsistency of the French who, in spite of their professed love of equality, celebrate the ancient orders of nobility (revived by Napoleon himself). This, according to Lieber, is similar to the "antagonistic elements" that we "frequently observe in individuals in regard to liberty and despotism.... Nothing is more common than men with a decided intellectual bent toward freedom and an equally decided psychological inclination toward absolutism.... There is a dualism within them whose two elements are at war, very similar to that which, without hypocrisy, makes many persons sincerely preach peace and charity abroad, but act at home as domestic tyrants" (Lieber, *Civil Liberty* vol. 1, 306-307).

As evinced in many of his letters and other writings unnecessary to catalog here, Lieber believed black people were racially inferior to white people. Such a belief does not necessarily indicate a slaveholding mentality; one did not have to believe in racial equality to be sympathetic to enslaved persons or to take the position that they should be free. Lieber wrote that there was "no logical link between the inferiority of the negro race and the consequent necessity of enslaving it" (Lieber, *Amendments* 30). It was common among those opposing slavery to believe that blacks were members of an inferior race (but deserving of freedom). The reverse is, of course, not true; it is impossible to imagine a slave holder who believed blacks were his equals. Lieber's racial views did not preclude his anti-

slavery position; but, while such views did not necessarily lead to slave-owning, they no doubt made it easier.

All that being said, Samara Trilling has suggested that his personal experience with slavery helped to humanize Lieber, and this in turn led to a more humanitarian Lieber Code. She notes that Lieber, probably unique among academics, made a study of the language employed by the black persons and otherwise took an interest in them. Lieber developed "a personal connection to, if not always a sympathy for, the lived experiences of subjugated peoples. This connection, and his understanding of life on both sides of the Mason-Dixon line, indubitably influenced his guidelines for the ethical treatment of human beings in the Civil War" (Trilling 21).

CHAPTER FIVE: PLENARY ALLEGIANCE

In the realm of the political, we find another great Lieberian duality, that of his belief in both a powerful state and freedom for its citizens. In his early life in Prussia, Lieber was persecuted by the government as a dangerous radical, and he eventually fled to England and then to the United States for political freedom. In his *Civil Liberty*, Lieber celebrates the traditions of liberty on which Anglo-U.S. tradition and governments are based. At the same time, Lieber was a nationalist, and had always valued the strong state as the source of assurance of national independence, of individual liberty, and as the vehicle for pursuit of society's goals.

Once the Civil War began, the authoritarian side of Lieber became ascendant, and his public writings championed state action -- even when it seemed to violate the Constitution. The war-time Lieber pronounced himself frustrated by "sticklers for constitutionality" (qtd. in Brown 76). In a speech in which he denounced any consideration of ending the Civil War on any basis other than total victory, Lieber declared that even talk of compromise was treason: "We hold every one to be a traitor to his country, that works or speaks in favor of our criminal enemies, directly or indirectly, whether his offence be such that the law can overtake him or not" (Lieber, *Address* 144)

In a letter published in the *New York Times* on March 13, 1862, Lieber wrote, "Nations in utmost need are never saved by legal formulas, and if the fundamental law of a nation omits to provide for these exceptional cases, the power will be arrogated, as people arrogate power in cases of shipwreck."

This is a shocking statement. To aver that constitutional protections should be suspended during times of crisis is to virtually read them out of the Constitution -- for when else do we need them?

To similar effect was his 1864 German-language screed urging German-Americans to vote for Lincoln's re-election: "We too honor the Constitution, but the Constitution is not a deity. We love our country, the nation, freedom; and these things are superior even to the Constitution; and it should never be forgotten that by this Southern Rebellion a state of things is brought upon us for which the Constitution never was and never could be calculated..." (Lieber, *Lincoln or McClellan* 455).

Another example of Lieber's war-time authoritarianism is found in his support of military commissions. Lieber was instrumental in justifying the North's use of military commissions to try civilians -- even in the Northern states where the civil courts were functioning. By contrast, the Confederacy, arguably facing more of a civil emergency than the North, rejected martial law for civilian society as unconstitutional: "In the very months of 1863 in which Holt, Lieber and Halleck were crafting the Union's expansive conception of the law of war as a source of authority, the Confederate assistant adjutant general responsible for military justice denounced the idea of martial law as anathema to the Confederate Constitution" (Witt 273).

What is more, while critics generally describe Lieber as undertaking the seemingly benign and scholarly task of organizing the archives of the Richmond government ("At the close of the war he was placed in charge of the Rebel Archives for the purpose of classifying and arranging them" (Thayer 36)), Witt has pointed out that Lieber was searching for evidence to be used in the military commission prosecuting Southern civilians for the (imagined)

conspiracy in the assassination of Lincoln. Far from engaging in disinterested scholarship, Lieber was acting as part of the government's prosecution team.

Habeas Corpus

Perhaps the best example of Lieber's libertarian/authoritarian duality was his support of President Abraham Lincoln's unilateral suspension of habeas corpus in 1861. The power of a court to compel a jailor to present legal cause for holding a prisoner is no small thing. Known in full as the writ of habeas corpus *ad subjiciendum et recipiendum*, it has its origin in England's Magna Carta of 1215. It was codified in that country's Habeas Corpus Act of 1679 as a principle protection against arbitrary arrest by the Crown; it was not until ten years later, during the Jacobite crisis, that Parliament added the power of suspension during national emergencies.

England's failure to recognize habeas corpus for American colonists was "a major complaint" and "contributed to the movement for independence" (Tyler 12). Although not listed among the grievances in the Declaration of Independence, deprivation of habeas corpus -- "that great bulwark and palladium of English liberty" (qtd. in Tyler 65) -- was the subject of complaint of the Continental Congress in a 1774 letter to the people of Great Britain. Habeas corpus became among the rights retained but not enumerated in the United States Constitution: Its existence is acknowledged implicitly in Article I, by including among the Section 9 limitations on the powers of Congress the following: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Lieber himself asserted the cardinal position of habeas corpus in his 1853 *Civil Liberty*: "Civil liberty requires firm guarantees of individual liberty, and among these there is none more important than the guarantee of personal liberty, or the great habeas corpus principle" (vol. I, 76). Lieber even included the complete text of the English Habeas Corpus Act of 1679 as an appendix to the treatise. His treatise goes on to note the universal tendency of repressive regimes to abandon habeas corpus: "All absolute governments, whether monarchical or democratic, have ever found the regular course of justice inconvenient, and made war upon the organic action of the law, which proves its necessity as a guarantee of liberty" (vol. I, 131).

Yet, only a few years later, Lieber was a vigorous defender of Lincoln's suspension of the writ of habeas corpus, acting alone as chief executive without Congress. When Lieber was reminded that in his earlier treatise he took the opposite view, that the power to suspend the writ resided in Congress, not the President ("that this cannot be done by the president alone, but by congress only, need hardly be mentioned" (Lieber, *Civil Liberty* vol.I, 131)), Lieber offered this: "People forget that a treatise on Navigation is not written for cases of ship wreck" (qtd. in Freidel 313). This "defense" was unprincipled, suggesting that, in a crisis, his views of the Constitution were sufficiently plastic to accommodate any sort of tyrannical action.

The debate over Lincoln's suspension of habeas corpus possessed both legal and political dimensions. Legally, there was no question that the writ could be suspended, as Article I, Section 9 of the Constitution expressly provides for it. But, though Article I deals with the legislative branch, the Constitution does not explicitly state whether the suspension power resides in the President or Congress or both. Consequently, a legal question seemingly existed about Lincoln's authority to act as he did. Inasmuch as

the suspension clause is contained in the Article that deals with the powers of Congress, one could certainly argue that the Constitution places the power in legislative hands. Indeed, the history of habeas corpus in England, with which the Founders were familiar through the widely-read work of Blackstone, makes it plain that Parliament alone held the suspension power as a check on the power of the king to make arbitrary arrests, and that lodging the suspension power in the king when it was the king's actions it was intended to restrain would undermine the very purpose of the great writ.

These were the views of Supreme Court Chief Justice Roger B. Taney in Ex Parte Merryman in 1861, upon hearing the petition of John Merryman, arrested during a suspension -- ordered not by Lincoln, but by General Winfield Scott, to whom Lincoln had purported to delegate the power. Taney ordered that, if no specific charges were to be brought against Merryman, he was entitled to be released. Taney also referred to the debates at the time of the Burr Conspiracy, when no one thought that President Thomas Jefferson could suspend the writ without Congress. As Tyler has pointed out, this was the same position taken by Chief Justice Marshall years earlier, as well as by Justice Story in his treatise, and was likewise President Madison's view, which led him to rebuke Andrew Jackson for his purported suspension by military order in 1812. Blackstone was clear in his *Commentaries* that the suspension power resided in the legislature, and Hamilton relied upon this statement in the *Federalist Papers* (Tyler 53). The Confederate president, Jefferson Davis, did not believe that as executive he had the power to suspend habeas corpus under the Confederacy's parallel constitution drawn from the same English law traditions, and he always waited for the legislature to authorize his action before suspending the privilege.

Lincoln, however, did not accept the Merryman ruling and all the precedents and arguments marshalled against the presidential power to

suspend. He continued to proclaim suspensions over the next two years without the benefit of legislative authority. Perhaps in going along with this apparent usurpation of its power, Congress could be said to have virtually ratified the President's actions or to have implicitly delegated the suspension power to him. At any rate, in 1863, Congress did in fact pass a statute authorizing the president to suspend habeas corpus during the rebellion, thus putting the issue of presidential suspension authority to rest. Interestingly, the legislation dodged the question of the previous two years' unlawful suspensions by providing that the president "is authorized" rather than "is hereby authorized" to suspend, leaving open "whether the bill was an investiture of the power in the president or a validation of the president's prior acts" (Tyler 170).

Regardless of the legal authority to do so, as a political matter, suspending the great writ of habeas corpus would always be a controversial, if not explosive, matter. The legal and political issues run together, so that the charge that Lincoln's suspension of habeas corpus was tyrannical can be seen as arising from his extraordinary political choice to suspend the writ, with the nice legal question of the location of the suspension power simply providing a grounding for that charge.⁷

⁷In assessing the "tyrannical" nature of Lincoln's behavior, it is noteworthy that Lincoln at least purported to act within the law to suspend the writ, and did not cause the government to make unaccountable arrests in the absence of the suspension. Contrast this behavior with that of President Franklin D. Roosevelt, who -- without first suspending, or asking Congress to suspend, the writ -- proclaimed in 1941 that Japanese, German, and Italian citizens were "alien enemies" subject to summary apprehension, and, in issuing Executive Order 9066 of February 19, 1942, authorized the exclusion of persons from military zones that led to the internment of about 120,000 Japanese including over 70,000 U.S. citizens.

Habeas corpus remains a keelson of Anglo-American jurisprudence, and Lieber's dismissive view of the great writ has not been generally validated by later generations. The contrary view (that is, contrary to Lieber of 1861, but consistent with Lieber of 1853), that habeas corpus must be available even during war-time absent a formal legislative suspension, was expressed by Winston Churchill, who, when England was facing great peril in 1942, released the British fascist leader Oswald Mosley, who had been held for two years. Churchill wrote, "The power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him judgment by his peers for an indefinite period, is in the highest degree odious, and it is the foundation of all totalitarian Governments, whether Nazi or Communist....Nothing can be more abhorrent to democracy than to imprison a person or keep him in prison because he is unpopular. This is really the test of a civilization" (qtd. in Ricks 230).

Similarly, in our own time, Justice Scalia of the United States Supreme Court expressed the view (*contra* Lieber of 1861, but cognate Lieber of 1853), that habeas corpus cannot bow to the exigencies of war. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a writ of habeas corpus was sought by Yaser Hamdi, a U. S. citizen captured on the battlefield in Afghanistan and held at Guantanamo Bay. Hamdi lost. Justice Scalia wrote in his dissenting opinion, "Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis that, at the extremes of military exigency, *inter arma silent leges* ["In times of war, the law falls silent"]. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it."

Plenary Allegiance

Lieber's shift from libertarian to authoritarian can be further seen in his proposal for amending the Constitution to strengthen the authority and power of the national government. In 1865, Lieber published a pamphlet proposing seven amendments to the Constitution. The idea of amending the Constitution itself was a big step, one that had not been taken in fifty years. The previous Amendment was the Twelfth, first proposed in 1797, when the framers were still alive.

What would prompt Lieber to take such a radical stand? "This was a natural step to take for the foreign-born Lieber, who had witnessed firsthand the frequent constitutional changes in Europe during the early nineteenth century" (Vorenberg 25). Lieber held the framers of the Constitution in less esteem than did Americans generally. Far from being divinely inspired, the framers were, in Lieber's view, flawed compromisers. "The framers of our Constitution were finite and imperfect beings; men like ourselves, to whom the future state of our country was not revealed" (Lieber, *Amendments* 8). That the Constitution was not sacrosanct made it easier for Lieber to propose amending it. What is more, with his grounding in natural law, Lieber saw that justice trumped positive law and the latter should be molded as necessary to comply with the rights of men and women that followed naturally from the fact of their being men and women. "Though Lieber strongly approved of American constitutional forms, he considered the fundamental spirit or essence of the government more significant. The ideal state rested not only upon positive law but upon a powerful organic basis.... His consistency ran deep—far deeper than mere constitutional principles" (Freidel 161,313).

These amendments were not simply the proposal of a scholar, but a war measure to be imposed on the conquered. In 1863, Lieber noted that amending

the Constitution should be done "as the prize of victory" (qtd. in Vorenberg 24), a theme he continued when he published his proposed amendments: "The irons have been heated in the forge of civil war; let us have them on the anvil while it is time yet to fashion them with earnest and with skillful blow in the smithy of the Constitution" (Lieber, *Amendments* 35).

The first of his proposed amendments bears an authoritarian if not sinister tone, requiring that every citizen render "plenary allegiance" to the government. This is the full text: "Article XIII - Every native of this Country, except the sons of aliens whom the law may exempt, and Indians not taxed, and every naturalized citizen, owes plenary Allegiance to the Government of the United States, and is entitled to and shall receive its full protection at home and abroad" (Lieber, *Amendments* 36). The meaning of "plenary allegiance" is not clear, and the political implications of such an amendment, if adopted, are unstated. There is nothing else like it in the Constitution.

One approach to Lieber's puzzling first amendment is to take it not as a literal proposal to be adopted, but as a rhetorical device, an exhortation to Americans for the way forward after the war. We are invited to take this view by the publisher's introduction to the Lieber work proposing the amendments: "[T]heir chief value consists not so much in the particular amendments suggested, however important these may be, as in the clear, philosophical exposition of the nature of our fundamental law, and the enlightened and statesmanlike view of the Constitution as the *frame* of the National Government.... Jas.McKaye, Ch.Pub.Com" (Lieber, *Amendments* 2). Lieber's own preface exhorts everyone to participate in the "great work of repairing the mansion of Freedom" (4). Later in the pamphlet, he offers this: "that we form and ought to form a Nation; and that we will on no account allow the integrity of our country and the nationality of our united

people to be broken in upon, cost what it may" (15-16). Perhaps, then, "plenary allegiance" is merely symbolic, or a statement of exhortation to patriotism.

Explaining the proposed amendments, Lieber gives us this definition of allegiance: "Allegiance is that feeling of pride and adhesion, and that faithful devotion to a person's nation which every generous man is conscious of owing to his country - cast into the highest obligation of obedience to the highest agent, politically representing the country or the nation" (26).

Lieber does not, interestingly enough, provide a definition of "plenary." The common dictionary definition of "plenary" suggests, however, that Lieber was proposing to intensify "allegiance" to make it unconditional, unlimited, unqualified, and absolute. This would be an extraordinary duty to impose on a free citizen.

Lieber explains that "it is proposed to provide constitutionally for a national expression on the necessity of the integrity of our country, o[r] allegiance" and that our pre-Civil War "easy life...engendered a general spirit of levity with reference to matters of government and laws" which led to "calamitous consequences." "A trifling spirit is one of the greatest evils which can beset a nation" (28). Perhaps Lieber's purpose was to shake lackadaisical Americans out of the stupor of their "easy life" and to replace their "spirit of levity" with serious attention to governmental matters. If so, it appears misplaced, more suited to South Sea islanders, perhaps, than to the Americans of 1865, whose years of exhaustion, death, privation, and crises could not be described as an "easy life" oblivious to governmental matters.

Whether or not Americans needed their nationalistic spirit strengthened in 1865, none of this sheds any light on how his first amendment would function in practice. What, exactly, would be required of the plenary allegiant citizen? One obvious possibility is that such a citizen would refrain from promoting secession, but this is covered expressly by Lieber's second and third amendments, as described below, so the first amendment's independent and free standing duty of "plenary allegiance" must mean something else.

Lieber devotes substantial portions of *Political Ethics* to the right, indeed, the obligation, of a citizen to disobey the laws and orders of his government. This is impossible to reconcile with his proposal for a duty of plenary allegiance. "[N]o man can be lawfully bound or lawfully promise to do what is unlawful....So that neither allegiance nor oath can bind to obey that which is unlawful" (Lieber, *Political Ethics*, vol. II, 171). Other portions of *Political Ethics* are devoted to the problems of allegiance to dual sovereigns, leading to disunion. None of this explains what Lieber had in mind for his proposed amendment. Patriotism is discussed as a possible analogue to allegiance: "[H]ow mistaken those are, who believe that the state is nothing but an association founded upon material interest, and not a society of closely united men. If they were right, the state might dispense with public spirit; but it cannot. Where public spirit has departed, the commonwealth is corrupt...a refreshing dew upon the arid fields of practical life" (Lieber, *Political Ethics*, vol. I, 148). Lieber notes that political allegiance, unlike natural allegiance of family, is not indelible but can be and often is dissolved and reattached to new governments; nor can political allegiance be based on a citizen's gratitude, as Blackstone claims (211-212).

Prior to the proposed Lieber amendment, "allegiance" had a well-understood significance for determining legal jurisdiction relating to

treason. Under English law in the eighteenth century, a subject of the crown engaging in hostile action toward his government was liable for criminal prosecution as a traitor for violating his duty of allegiance. But an alien, owing no such allegiance, could not be guilty of treason; the foreign soldier was to be treated as a prisoner of war subject to the rules of war (which typically meant he could expect to be exchanged for English prisoners at some point). In the case of the citizen or subject, his detention was subject to his right to petition for a writ of habeas corpus and the other protections afforded a citizen under domestic law. The foreigner bearing arms, on the other hand, was held under a different legal paradigm, and could not seek habeas corpus. Allegiance, then, served a sorting function, and was often a determination made at the earliest stages of the combatant's detention. In this sense, allegiance was more or less a passive status, typically a matter of birth, rather than any affirmative undertaking. More, at least in England, one's obligation of allegiance (and thus potential as a traitor) was not easily disposed of; French prisoners were found to be eligible for treason prosecution if they had once been English subjects or found obligated to the crown if they had been born to parents who were English subjects. There was a third possibility in this legal sorting: Aliens living in England and enjoying the protection of its laws might be treated as traitors if they violated their temporary or "local" allegiance; likewise, they were not categorically denied habeas corpus on account of lacking permanent status.

But jurisdictional differentiation was unlikely to have been Lieber's purpose in proposing his "plenary allegiance" amendment. For one thing, it was unnecessary as it already existed as a common-law concept and does not seem to have been a problem that needed clarification. Americans seemed to have followed without difficulty the British practice in making distinctions

between combatants who were traitors in the sense they turned on the country in which they resided and enjoyed the protection of its laws, and those who were soldiers acting on behalf of foreign sovereigns. True, Lieber was sorely disappointed that the rebels, or at least their leaders, were not prosecuted as traitors, but the failure to mount such prosecutions was not because the Union was unable to sort the rebels into American and foreign categories; they certainly knew they were Americans. Forbearance from prosecution had more to do with the policy to re-bind the nation along the lines of Lincoln's policy of "malice toward none."

Questions of its uncertain yet troubling provenance and meaning aside, a constitutional duty of "plenary allegiance" would have imposed a novel obligation on citizens, potentially to be construed as a totalitarian duty to serve the government. What if one did not do his or her duty? This amendment would potentially have formed the basis for criminal prosecutions of citizens who breached or neglected their duty, likely leading to political prosecutions and prisoners of conscience. True, in explaining his reason for proposing the amendment, Lieber does not mention any penalty, instead giving his readers the "feeling of pride" rationale quoted above. But this anodyne rationale provides cold comfort and is at odds with the total and unquestioning "duty" the amendment would impose.

The infamous Civil War arrest of Lamdin Milligan, an Indiana Copperhead, illustrates that authorities are ever ready to fashion fresh crimes out of such duties: Milligan was charged, among other things, with disloyal practices - "charges that could not be grounded in existing federal criminal statutes enacted by Congress but were announced in the first instance by the [military] commission" (Tyler 171-172).

The Fourteenth Amendment as adopted in 1868 contains one feature that is perhaps close to Lieber's purpose in his "plenary allegiance" concept. The Amendment disqualifies from office any person who, "having previously taken an oath...to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof." Here we see in the penalty for oath-breaking how the Lieber proposal might have worked: All citizens would face disqualification (or other penalty), even without having explicitly taken an oath, by virtue of their constitutional obligation under the Lieber doctrine of citizen allegiance.

A further and insidious aspect to be inferred from a duty of "plenary allegiance" to the government is its capacity to tread on individual freedom of conscience. It is one thing for a citizen to be obligated to comply with laws or policy of a government that he or she may not approve of, but quite another to be compelled to be their enthusiast or to be exposed to criminal jeopardy for actively seeking to change government policy. Lieber himself, while living in the South Carolina, was an active opponent of secession, for example; how would he have fared under a duty of allegiance to that government?

If and to the extent that Lieber's proposed duty of "plenary allegiance" speaks to private conscience, his proposal of a constitutional duty cuts against the deepest grain of American principle: Conscience cannot be compelled. In his great "Memorial and Remonstrance Against Religious Assessments" of 1785, James Madison, for example, articulated a number of reasons why the state should not establish religion. Principal among these is that conscience cannot be compelled; a person comes to his beliefs on the evidence of his mind, not by following the dictates of others. What is more, conscience takes precedence over citizenship; that is, moral duties supersede

political obedience, not vice versa. A younger Lieber recognized this, resoundingly declaring in his 1853 treatise that "[t]he end...towards which all liberty and political civilization tends, is perfect liberty of conscience" (Lieber, *Civil Liberty* vol. I, 122).

The continuing vitality of this particularly American trait of rejecting automatic allegiance to the government was recently described by Ricks in his account of Martin Luther King in a Birmingham jail in 1963. King had been admonished to be patient, on the basis that his civil rights march was "unwise and untimely" (Ricks 266). King responded, in his famous "letter from Birmingham City Jail," that people should look at the facts "to determine whether injustices are alive" (King qtd. in Ricks 267). "King was arguing that in a world based on facts, in which the individual has the right to perceive and decide those facts on his or her own, the state must earn the allegiance of its citizens. When it fails to live up to its rhetoric, it begins to forfeit that loyalty. This is a thought at once profoundly revolutionary and very American" (emphasis added) (Ricks 267).

To be sure, nowhere does Lieber say that his proposed amendment would be available to prosecute the citizen of less-than-plenary allegiance or to compel his or her conscience. But it is impossible to add language to the Constitution merely as decoration; meaning and consequence would inevitably have been given to any such amendment.

The Language of Allegiance

This incongruity of compelling American citizens to give allegiance (let alone plenary allegiance - an intensifier of Lieber's own coining, as far as I can find) to the government is illustrated by the language employed in the Declaration of Independence, in the Constitution, and in the earliest

statutes for military and civilian officers and for naturalized citizens. First, the term "allegiance" was either avoided altogether or generally used asymmetrically -- that is, to refer to a duty owed to a foreign potentate that was to be renounced when becoming an American, without substituting a new allegiance to the United States. Second, "allegiance" was something to be asked of a commissioned military or constitutional officer but never an ordinary citizen. Third, when an oath of fidelity was required, the obligation was to be sworn to the Constitution - never to the government.

The Declaration of Independence provides the first example of the asymmetry of the use of "allegiance." It provides that "The good people of these Colonies...are absolved from all Allegiance to the British Crown." Having got rid of allegiance to the Old World, the Declaration does not go on to burden its newly-independent citizens with a replacement allegiance to their new government.

The Constitution does not use the word "allegiance" at all. The Constitution requires an oath to be taken by the President, other officers of the government, and judges, but not ordinary citizens. The oath required of those officers is itself one of fidelity to the Constitution -- never the government: "preserve, protect and defend the Constitution of the United States" (Article II, Section 1); and, "an oath or affirmation to support this Constitution" (Art. VI).⁸

⁸The omission of "allegiance" from the Constitution does not seem to bother Lieber; it is merely evidence of the imperfection of the framers, a mistake he would now correct with a fresh amendment. By contrast, when discussing state sovereignty, which he disapproves of, he declares that the framers' decision to leave it out of the Constitution proves that the concept has no place in our system. This is an example of the remarkable flexibility of Lieber's style of argumentation during this period. Another typical device is his declaration that "everyone agrees," putting those who don't outside the pale. For example, when discussing slavery and states' rights, he writes, "As to those points on which our nation is now fully agreed, and which must

Similarly, the first act of Congress dealing with naturalization, in 1790, required only that aspirant citizens take an oath to support the Constitution (not the government). Nothing was said about "allegiance" until the 1795 Act, and there allegiance was treated as a negative, a foreign thing to be shed by the new citizen. To become naturalized, a citizen was required to "renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whatever." But the new citizen was not required to make any statement of positive allegiance to the United States. It was not until 1906 that allegiance was first expressed as something positively owing by a new citizen (and then only to the Constitution, not the government).

Even as to military officers, allegiance was not immediately considered an appropriate word for loyalty in the new, non-monarchical nation. The first oath for commissioned officers passed in 1776 by the Continental Congress did not require allegiance to the new government, only renounced allegiance to King George and agreement to defend the United States.⁹ It was not until more than twenty years later, in 1789, that Congress revised the military

be taken as past discussion, plainly settled and firmly established...boisterous reclaimants to the contrary notwithstanding..." (Lieber, *Amendments* 15).

⁹ "I _____, do acknowledge the Thirteen United States of America, namely, New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, independent, and sovereign states, and declare, that the people thereof owe no allegiance or obedience to George the third, king of Great Britain; and I renounce, refuse and abjure any allegiance or obedience to him; and I do swear that I will, to the utmost of my power, support, maintain, and defend the said United States against the said king, George the third, and his heirs and successors, and his and their abettors, assistants and adherents; and will serve the said United States in the office of _____, which I now hold, and in any other office which I may hereafter hold by their appointment, or under their authority, with fidelity and honour, and according to the best of my skill and understanding. So help me God" (*Oaths*).

officers' oath to require that they not only "support the Constitution" but also "bear true allegiance to the United States of America" (*Oaths*).

Similarly, cadets entering West Point were not initially burdened with any oath of allegiance. For example, Robert E. Lee, in his cadet oath of September 25, 1825, merely promised to obey orders.¹⁰ By 1857, the West Point cadets were asked to swear "allegiance to the United States of America." In 1861, apparently appalled by the number of its graduates who joined the South in the Civil War, West Point changed the oath to require entering cadets to subordinate (not renounce) their allegiance to their respective states to that of the national government.¹¹

When it was used, the term "allegiance" seems to have been generally applied to describe the duty of soldiers rather than civilians. A clear military-civilian distinction was made by the first Congress of the United States. It added "allegiance" to the military officer's oath in 1789, but, when revising the oath of naturalization the next year, it did not require "allegiance" of new citizens. It would seem Congress found a difference

¹⁰ "I, Robert E. Lee, a cadet born in the State of Virginia, aged 18 years and 9 months, do hereby acknowledge to have this day voluntarily engaged with the consent of my mother to serve in the Army of the United States for a period of five years, unless sooner discharged by proper authority. And I do promise upon honor that I will observe and obey the orders of the officers appointed over me, the rules and articles of war, and the regulations which have been or may hereafter be established for the government of the Military Academy." (Douglas S. Freeman, *R. E. Lee: A Biography*, Vol. 1, page 51 qtd. in <https://civilwartalk.com/threads/the-oath-of-allegiance.1035>, accessed January 10, 2018).

¹¹ " I, (your name), do solemnly swear that I will support the Constitution of the United States, and bear true allegiance to the National Government; that I will maintain and defend the sovereignty of the United States, paramount to any and all allegiance, sovereignty, or fealty I may owe to any State or Country whatsoever; and that I will at all times obey the legal orders of my superior officers, and the Uniform Code of Military Justice." (<http://www.west-point.org/academy/malo-wa/inspirations/buglenotes.html>, accessed January 10, 2018)

between what is asked of soldiers, who must follow orders, and what citizens should be asked to swear -- merely to comply with law.

This military orders-civilian laws distinction was recognized by Lieber himself, and indeed something that Lieber emphatically approved in his antebellum treatise, *Civil Liberty*. There, Lieber makes a distinction between following laws and following orders, saying that the citizens of a democratic society should not uncritically follow orders as if they resided in a military camp, only laws that had been enacted after public debate by elected representatives. Lieber listed among the dangers of standing armies that they infuse the population with an "evil effect...a spirit directly opposite to that which ought to be the general spirit of a free people devoted to self-government. A nation of freemen stands in need of a pervading spirit of obedience to the laws; an army teaches and must teach a spirit of prompt obedience to orders." This would induce a view of government "which is contrary to liberty, self-reliance, self-government" (vol. 1, 139). This may well have been the distinction that underlay Congress's decision in 1789-1790 to require "allegiance" in the oath of military officers but not in that of naturalized citizens.

Lieber's proposed amendment, by the use of the heightened language of "plenary allegiance" and identifying the subject of such allegiance as the government, seems to make the very mistake Lieber warned against: that citizens might be led to the "evil" habit of following orders. If the amendment were meant merely to require allegiance to laws, it would seem to be unnecessary, as laws contain civil or criminal penalties of varying kinds and are thus self-enforcing without the need for a separate statement of

allegiance.¹² Therefore, something else must have been meant by the proposed "plenary allegiance," something closer in spirit perhaps to the obedience to orders that (at least in 1853) Lieber thought was repugnant.

Lieber's proposal to introduce an obligation of allegiance into the Constitution can be seen as a gesture to a pre-independence notion of birth condition, one with which the American Revolution essentially broke. Allegiance was something more familiar in Europe than America. In ancient English common law, allegiance was a debt of moral obligation, owed by a subject due to his birth in the king's domains, as a part of the natural hierarchical order. It was intrinsic, perpetual, and unrenounceable. Later political theory introduced the element of contract or consent to citizenship obligations -- not mere condition of birth. At the time of Lieber's proposal, as Lieber points out, Parliament had made it clear that allegiance was owed to the king personally (not the crown) -- an idea that would seem to be out of harmony with American democratic values. For Americans in particular, a nation of immigrants from different kingdoms, the idea of intrinsic and perpetual allegiance by virtue of one's birthplace was not

¹²The exception to this general rule of avoiding use of the term "allegiance" is to be found where the law defined treason. This follows the traditional sorting rule (described above) that an alien is incapable of treason as he owes no duty to the state in the first place. The Continental Congress, for example, declared that, "all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws" (qtd. in Tyler 108), and accordingly they would be guilty of treason if they aided Great Britain in the Revolutionary War. Similarly, a traitor was defined by the first United States Congress as one who "owing allegiance to the United States shall levy war against them or shall adhere to their enemies" (qtd. in Tyler 142). And, the 1806 American Articles of War defined a foreign spy, eligible for summary execution, as follows: "[I]n time of war, all person not citizens of or owing allegiance to the United States of America, who shall be found lurking as spies...shall suffer death..." (qtd. in Tyler 144). Here, no duty is imposed on citizens; "allegiance" merely provides a sorting function, determining which category of prosecution may apply.

suitable; they became American citizens by choice. Seen in context, it does not surprise that the Constitution omits mention of its citizens' "allegiance," for it was a word that carried the flavor of monarchical European birth-condition. Thus, in his (possibly rhetorical) first amendment, Lieber is taking a giant step backwards in time and distant in place.

The second of Lieber's 1865 proposed amendments would make it an act of treason to forcibly attempt to separate a state or territory from the United States. This was consonant with Lieber's ambition to prosecute the leadership of the South for treason after the end of the Civil War. The third proposed amendment would make it a high crime to join a group whose object was to offer armed resistance to the authority of the United States. Perhaps animated by his views regarding the Southern rebellion, this proposal flirts with infringing on the existing First Amendment right of free association. In contrast to these proposed amendments emphasizing and privileging government authority, however, were two that provided for emancipation and citizenship rights. They were similar in import to the Thirteenth and Fourteenth Amendments as ultimately adopted years later.

Lieber's seven proposed amendments embodied a persistent Liberian duality. Some would strengthen the hand of the government over its citizens, including the first one -- the proposal to add "plenary allegiance" as a duty of the citizen -- that was out of character for America. His two proposed amendments on the subject of slavery, on the other hand, were progressive and liberating.

CHAPTER SIX: INSTITUTIONAL LIBERTY

The ideal of the free citizen living in, or under, a powerful state is a paradox that Lieber never purported to resolve. Instead, he offered a view of society as being in a state of constant tension, always ready to slip out of harmony. According to Lieber, our best hope, which he returned to repeatedly in his treatises, resides in "institutional liberty."

Lieber's concept of institutional liberty is not easily grasped, especially for those accustomed to thinking of these ideas in opposition to each other -- that institutions tend to threaten liberty. For Lieber, it is the contrary: only through institutions, and in particular, a strong government, can liberty be achieved and preserved.

This Lieberian combination of seeming opposites has been described by Steven Alan Samson this way: "Lieber skillfully synthesized the English emphasis on civil liberty and the importance of local political institutions with the German emphasis on nationalism....It was, Lieber believed, the happy combination of local institutions and national purpose that protected and fostered liberty in a modern nation-state" (Samson, *Transatlantic* 129). Samson has also noted that, despite its originality and importance, the concept of institutional liberty has been "unaccountably neglected for over a century" (Samson, *Sources* 1).

Lieber's account of the modern era was one in which nation states generally endeavor to extend human rights and civil liberty, and in which an international system of many nations flowers under international law and a commonwealth of civilized nations. These nations have evolved over centuries from Asiatic and European despotism; to the classical age, in which citizenship was the highest state; through the feudal age of individualist

license of class privilege; then, with the advent of Christianity, in which God spoke to all men, regardless of birth, fortune, condition, or color, to the modern nation-state, where individuals are valued as part of a system of a social or public character.

I would summarize institutional liberty as being composed of several components.

Not Individualism. Lieber did not think that humans should be free to pursue whatever they desire or, as he quotes Cicero, "living as thou willest" (*Civil Liberty* vol. 1, 39), but must be balanced by respect for the competing and equally valid claims of others. His fierce motto against unbridled individualism was, "No right without its duties; no duty without its rights." This is an essential Lieberian concept, and appears frequently in his political works. "Rights and duties are inseparable correlations.... [W]e cannot imagine rights without corresponding duties" (Lieber, *Amendments* 9).

Man in Nature: Society. Lieber rejected as simply fallacious the starting point of Rousseau and others that man in nature was solitary and later contracted his way into the state. "There is a strange confusion of ideas - rights in a state of *nature!*... So much for these fictions. Man never lived in this state of nature, because he never lived or could live without law, in however incipient a state of civil development this might be" (Lieber, *Political Ethics*, vol.I,214-215). He believed instead that man was, from the first, a social creature. Accordingly, individuals must be protected against interference from other individuals and from the government. As they always reside within society, individuals must experience liberty in a societal context. Samson points out that, for Lieber, civil liberty is thus "relative": "the highest degree of independent

action that is compatible with obtaining those essentials that are the proper objects of public power" (Samson, *Sources* 10).

Protection of Government. At the same time, the government itself must be protected. "[L]iberty includes a proper protection of government" (Lieber, *Civil Liberty*, vol. I, 53). Government can be and often is tyrannical, but a benign government is necessary to liberty, not only to protect individuals; more than that, it is only through government that individuals can best achieve their grandest ambitions; it is the vehicle to projecting the public will, and must itself be autonomous and free from interference from other governments. Liberty requires that the government be protected from other nations and powerful enough to effect its national purposes.

Stability. Lieber fretted that history demonstrated that good governments did not last, and identified two opposite and destructive tendencies in governments: First, they tend to aggregate power (the "centripetal") and become tyrannical; second, if they are not powerful enough, the state descends to disunion ("centrifugal") and loses its capacity to protect its citizens and otherwise perform the functions of the state. "One of the dangers of a strongly institutional self-government is that the tendency of localizing may prevail over the equally necessary principle of union, and that a disintegrating sejunction may take place..." (Lieber, *Civil Liberty*, vol. II, 30-31).

Lieber noted that the creation and continued existence of liberty as understood and experienced in America depended on popular understanding of its value and popular support. "Lieber was fully conscious of both the uniqueness and the fragility of the American union" (Samson, *Sources* 8), and despaired of the Continental nations particularly his native Germany which lacked the experience found in America of self-governing institutions. Thus,

it was the deep-seated public opinion and belief, rather than any particular formula for governance, that assured liberty for a nation.

Institutional Experience. According to Lieber, the variety of institutions that grow up outside of government are incubators of the habits of self-government and assure the continuity of government in its representative, non-tyrannical form. "Institutional self-government trains the mind and nourishes the character for a dependence upon law and habit of liberty, as well as of a law-abiding acknowledgment of authority. It educates for freedom. It cultivates civil dignity in all the partakers, and teaches to respect the right of others" (Lieber, *Civil Liberty* vol. II, 13). To assure both that government does not become tyrannical and that it will have continuity over time, Lieber believed, we depend on self-governing institutions. Such institutions are formed not merely by positive law but by customs, practices, and habits of mind. Institutions both cabin liberty and protect it.

Lieber distinguished between centralized "Gallican" liberty and "Anglican" liberty. Gallician is the sort granted by absolute governments (whether monarchical, or democratic absolutist like the French revolutionaries), while Anglican is rooted in long-standing common-law traditions and rights. Lieber lovingly catalogues these Anglican protections like jury trial and habeas corpus, which compose these institutional freedoms. Perhaps the principal one of these is the separation of the legislative and executive functions - something notably absent in France.

Consonant with Lieber's notion of the value of such self-governing institutions, his friend and kindred spirit, Alexis De Tocqueville, famously noted the tendency of Americans to form improving societies of all kinds. "Americans of all ages, all conditions, and all dispositions constantly form

associations.... [I]n this manner they found hospitals, prisons, and schools. If it is proposed to inculcate some truth or to foster some feeling by the encouragement of a great example, they form a society. Wherever at the head of some new undertaking you see the government in France, or a man of rank in England, in the United States you will be sure to find an association" (De Tocqueville 106).

De Tocqueville attributed this phenomenon to American political freedom. "The free institutions which the inhabitants of the United States possess and the political rights of which they make so much use, remind every citizen, and in a thousand ways, that he lives in society. They every instant impress upon his mind the notion that it is the duty as well as the interest of men to make themselves useful to their fellow creatures; and as he sees no particular ground of animosity to them, since he is never either their master or their slave, his heart readily leans to the side of kindness" (De Tocqueville 105).

Another facet of the American scene noted by De Tocqueville that validates Lieber is that, speaking generally, associations came from the "bottom up" - originating with the private action of motivated individuals rather than "top down" political power. Liberal ideas that emerge from the citizens have a better chance of flourishing than those imposed from the government: "A government can no more be competent to keep alive and to renew the circulation of opinions and feelings among a great people than to manage all the speculations of productive industry. No sooner does a government attempt to go beyond its political sphere and to enter upon this new track than it exercise, even unintentionally, an insupportable tyranny..." (De Tocqueville 109).

Nationalism. Individuals acting alone are necessarily limited in what they can achieve, Lieber believed, and must look to the state for the realization of their highest ambitions. "The institution is the opposite of subjective conception, individual disposition and mere personal bias... [T]he institution give[s] a vigor to that which is unhallowed and unattainable by the individual....Members of an institution will do that which, as individuals, they would never have possessed the immoral courage of perpetrating" (Lieber, *Civil Liberty*, vol. I, 339-341).

Bernard Edward Brown has explained the heavy component of nationalism in Lieber's political philosophy, alongside his love of liberty, and concluded that Lieber is best described as a "liberal nationalist." Lieber certainly cherished individual liberty, and he hated oppression by the state - whether the state be aristocratic or popularly elected. But unlike other liberals, he did not extol individual rights alone but saw that duties, too, are part of the equation. Each individual has a claim to certain rights, but as the individual lives in a social relationship with other individuals who have claims too, individual rights must be accompanied by obligations. Rights by themselves would lead to despotism; duties alone, to slavery; but yoked together, Lieber thought, they pull us to a just society. Government is the means for mediating and adjudicating these contrasting states of rights and duties. Property, for example, is a sacrosanct right of the individual; nevertheless, property is subject to regulation by the state.

As Brown describes the view of Lieber the German nationalist, the state, beyond functioning as an umpire between competing individuals, should play an even greater role as an agency for the advancement of the human condition. There are some necessary matters that are beyond the reach of individual in an isolated condition: "The individual, being unable to obtain the ends of man in an insulated condition, has a right to obtain with the

cooperation of society what he cannot secure singly" (Brown 68). Whatever may have been the state of play in ancient times among families, tribes, or city states, modern man needs a nation for the "fullest development of literature, law, industry, and liberty" (Brown 49).

Lieber admired the Hamiltonian tradition of a government that would provide aid to industry and commerce, including a robust program of internal improvements. Seen in this light, it is unsurprising that the great liberal Lieber was in favor of the renewal of the charter of the Bank of the United States so fervently opposed by the Jacksonians. He favored America's expansion to encompass California, which he thought was insufficiently exploited by the Spanish and would benefit in the hands of industrious Americans, and advocated the annexation of Nova Scotia. (He did not, however, want to see slavery expanded and on that ground opposed taking over Mexico and Cuba.) Even war had its appeal, as a great expression of national energy. "Blood is occasionally the rich dew of history" (qtd. in Brown 53). The Civil War, while "now ruining our fair land - ruining it in point of wealth," would, "with God's help, elevat[e] it in character, strength, and dignity" (Lieber, *Address* 139).

Lieber drew the important distinction that nationalism did not necessarily mean totalitarianism. Rather, national unity was the first order of business, and liberty would follow afterwards. Hence, Lieber welcomed Bismarck in 1870, as the "bold man" who could finally unite Germany; "with time, he hoped, freedom would develop" (Brown 45).

Brown argues that German liberals were in the "peculiar" (Brown 174) position of having suffered under Napoleon's occupation and whole-heartedly accepted Burke's criticism of the French Revolution's theory of equality and liberty. More, theirs was a middle-class ideology that wanted the freedom to

pursue bourgeois economic and cultural ambitions. They both despised reactionary Prussian authoritarianism and feared the proletariat.

There is, of course, a central dilemma in this tradition of German liberalism: How to protect the individual while pursuing a strong national agenda? Lieber sometimes favored the individual and sometimes the state. After the commencement of the Civil War, his sympathies were heavily in favor of the state.

CHAPTER SEVEN: CONCLUSION

It is hard to get a handle on the complex and changeable Francis Lieber. He was, like Homer's Odysseus, marked by polytropos; he was a "man of twists and turns."¹³

The range of Lieber's interests and activities is astonishing. Our focus here on the Lieber Code and Lieber's public positions on constitutional matters barely touches upon the variety of Lieber's work. Lieber liked to say that "his life consisted of many geological layers" (Thayer 4). At a 2001 symposium on Lieber in connection with the two-hundredth anniversary of the founding of the University of South Carolina, scholars from a range of disciplines were invited to address the contributions made by Lieber to their several fields. Lieber's "multidimensional interest and pursuits" (Mack and Lesesne, Intro. xiii) were represented by American cultural studies, art history, history, law, linguistics, philosophy, political science, religion, and sport science. They could as well have included representatives from the disciplines of international trade, penology, civil-service reform, library science, and pedagogy -- in all of which Lieber had been both a theoretician and activist. Nor should we overlook his poetry, a volume of which written in his youth was published in Lieber's old age by a friend, and received the courteous congratulations of Longfellow ("I rejoice greatly" (qtd. in Freidel 415).) He was prolific as well in the genre of correspondence, exchanging letters with great contemporaries (e.g., Charles Sumner, Alexis De

¹³ This reference to Homer is made in the spirit of Lieber's practice of surprising his readers with classical references without the benefit of context. It also refers to Lieber's days as a turner or gymnast under "Turnvater" Jahn.

Tocqueville, Henry Wadsworth Longfellow), as well as many "bright and refined women" (Thayer 48).

In view of that correspondence with women and his work with Dorothea Dix and other prominent women, Lieber reflected another Lieberian duality in that Lieber was anti-feminist. (Freidel cites his comment on the 1872 candidacy for President of Victoria Woodhull, that "A 'manifest vein of lechery in the advanced women's rights women' would lead inevitably to 'promiscuous intercourse of the sexes' and communism of goods" (Freidel 416).

Lieber shared many other of the worst prejudices of his age. He was anti-Catholic ("It is the worst of Absolutisms, incompatible with Liberty..." (qtd. in Freidel 407). He opposed the importation of cheap labor into the West from China, fearing "that the Pacific Coast would become 'mongolified' by the prolific Chinese 'who invade our country similar to the Norway rat'" (Freidel 393). And, he actually recommended to Secretary of State Fish "the adoption of a constitutional amendment to bar entrance of all nonwhite peoples" (Freidel 393).

Lieber rejected the single most important idea of the nineteenth-century, evolution. "He thoroughly despised the Darwinian Theory of natural selection and development, and always spoke of it as Darwin's beast humanity" (Thayer 44). Darwin and his followers, Lieber suggested, would "not only prove to you that your grand-mother was a hideous gorilla, but they do it with enthusiasm and treat you almost like a heretic if you will not agree" (qtd. in Freidel 415).

Lieber was working in, and responding to, the great turmoil of mid-nineteenth-century America. The United States was in a state of tension over its inherent contradictions: The freest nation in the world also held the

most enslaved persons; a central government that had been established under an enviable Constitution was composed of sovereign states; a population of emigrants from many lands and cultures was in theory bound into a single nation - all this without benefit of a unifying state religion. At the same time, it was a period of reform, especially of legal institutions. Conflict, change, and heterogeneity were in the air Lieber breathed.

Some apparent Lieberian dualities may be reconciled when properly understood. In the Lieber Code, for example, humanitarianism is reconsidered in light of experience, leading to the realization that the prosecution of war by mild measures will prolong the war and its suffering. At the same time, the Code embraces the reality that war is waged in pursuit of national aims, not merely to suppress violence or re-establish peace.

Harder to reconcile is Lieber's professed hatred of slavery and his Code's radicalism, on the one hand, with his personal slaveholding, on the other. Perhaps the explanation for Lieber's inconsistency in this regard is a simple one: He was an imperfect, flawed human being, capable of behaving at odds with his principles. This is rather typical of the species, as is well known, and we should not be surprised or disappointed when we come upon such behavior in people we otherwise admire.

Lieber's political philosophy defies categorization. We see Lieber's love of civil liberty in contrast to his support of strong state action - a duality of a peculiarly German nature. Lieber had imbibed a German nationalist tradition (that he did not abandon in liberal America) that values the state as a source for the realization of national purpose beyond the ability of individuals acting alone, and that abhors unchecked democracy.

Lack of a coherence and resolution in Lieber's political philosophy may be due in part to his early exposure to Edmund Burke (by way of Barthold G. Niebuhr). Burke had been appalled by the French revolutionists' willingness to throw over all that had come before (and thereby squander their inheritance of the "wealth" of the rights of man) in pursuit of theories formed *a priori* without regard to facts. Burke argued for starting with practical facts first, rather than adopting an idea and afterward bending the nature of man and society to fit the system as so designed. Lieber seems to have internalized this lesson. He was wary of grand systems, and did not feel obligated to tidy his thinking to fit within the contours of some careful design. Instead, Lieber noted with approval the English customary practices of liberty, which, in their accumulation (rather than by design) had been effective not only to establish a free society but, perhaps the greater feat, to keep it over many years.

Lieber shifted away from individual liberty in favor of state power after 1857. The Lieber in South Carolina who wrote *Civil Liberty* in 1853 was quite a different author from the Lieber in New York who wrote in defense of the suspension of habeas corpus in 1862 and who proposed several authoritarian constitutional amendments in 1865. It seems that the Constitution's guaranties of liberty, so prized by Lieber as a young professor in the South, did not hold as much appeal for him when he was at Columbia University in New York. In examining this change, four events should be considered. First, Lieber had moved to New York in 1857, leaving behind Columbia, South Carolina and the necessity to maintain a discrete silence on certain topics -- in particular, slavery and states' rights. Second, the Civil War that Lieber had long dreaded at last broke out. This appalling threat to the existence of the nation no doubt put him in mind of his radical patriotism of his youth in Prussia, where his disgust at the

weakness of a disunited Germany led him to a near-treasonous position against Prussian independence. Third, the Lieber in New York was older than the Lieber in South Carolina. The distance between age fifty-five, when *Civil Liberty* was published, and age sixty-seven, when he proposed his amendments to the Constitution does not seem very great; yet, age almost always makes a person less resilient, less able to cope with life's setbacks and assaults. The fourth event, discussed below, taken together with his advanced age, may have made a material difference to Lieber's outlook.

At age sixty-four, Lieber was dealt two personal blows by the Civil War. When his son, Hamilton, was seriously wounded and lost an arm at the battle for Fort Donelson in February 1862, Lieber hurried to the hospitals in St. Louis to find him. The emotional searing he felt searching among the wounded (as Mancini has noted, comparable to Walt Whitman's search in hospitals for his brother George Washington Whitman, where Whitman found "the face of Christ himself,/Dead and divine and brother of all") Lieber later described to Charles Sumner: "I knew war as [a] soldier, as a wounded man in the hospital, as an observing citizen, but I had yet to learn it in the phase of a father searching for his wounded son, walking through the hospitals, peering in the ambulances" (qtd. in Mancini 335). Later that same year Lieber learned that his eldest son, Oscar, who had broken his heart by joining the South Carolina Volunteers, had been killed serving the Confederate cause that Lieber so despised. These blows could not have failed to deeply affect the aging Lieber.

Finally, in attempting to understand the puzzling Lieber, consideration should be given to the hint that Lieber left about himself. In a footnote in *Civil Liberty*, Lieber reviewed the etymology of the word "liberty." The resemblance of his own surname "Lieber" to the word "liberty" may explain the personal importance of this topic. "The Latin liber is believed to be

derived from the same root with the Gothic *Lib* (in German *Leib*, body, connected with the Gothic *Liban*, our *live*, the German *leben*), so that *liber* would have meant originally, he who has his own body, whose body does not belong to some one else" [sic]. He explains that the Greek word for free, *eleutheros*, "properly means, he who can walk where he likes" (Lieber, *Civil Liberty* vol. II, 49). Here, I believe Lieber has told us that, as his name implies, he was owned by no one, and felt free to walk where he liked.

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