

# The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber

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Those who taught law in American colleges before 1870 were seldom striving to prepare their students to perform legal services for private clients. Generally, such preparation was left to the apprenticeships often required by state law,<sup>1</sup> insubstantial as these often were, or to proprietary law schools such as that at Litchfield, Connecticut<sup>2</sup> (or others less well remembered) that offered brief programs of training as surrogates for the apprenticeships otherwise required. In some states, particularly on the frontier, professional preparation was often left to self-instruction by those most endowed with wit, aggression, and cunning,<sup>3</sup> a system known to produce some astonishingly good lawyers, Abraham Lincoln being the premier example.<sup>4</sup>

If early American law teachers were largely uninterested in "Hessian training,"<sup>5</sup> neither were they persons of academic bent, at least in any modern sense. It is true, as Brainerd Currie<sup>6</sup> and Charles McManis<sup>7</sup> have observed, that early American law teachers were more attentive to the classics and to contemporary works on politics and political economy than to technocratic professional literature. But it is not correct to infer from their preoccupation with political and economic theory that they favored academic discourse of the sort

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1. For an account of the alternatives in the early years of the republic, see Alfred Zantinger Reed, *Training for the Public Profession of the Law* 67-103 (New York, 1921).
2. For an account, see Marian C. McKenna, *Tapping Reeve and the Litchfield Law School* (New York, 1986).
3. See, e.g., Joseph G. Baldwin, *The Flush Times of Alabama and Mississippi* (New York, 1866).
4. See generally John Paul Frank, *Lincoln as a Lawyer* 11 (Urbana, Ill., 1961) ("The title [of lawyer] may fairly be said to have been obtained by seizure and to have been retained by exercise.").
5. The term, I believe, is Thomas Bergin's. See *The Law Teacher: A Man Divided Against Himself*, 54 Va. L. Rev. 637, 638 (1968).
6. *The Materials of Law Study*, 3 J. Legal Educ. 331 (1951).
7. *The History of First Century American Legal Education: A Revisionist Perspective*, 59 Wash. U. L.Q. 597 (1981).

many, and possibly most, readers of this *Journal* now practice. Indeed, they were not part of an academic profession, for in their time such a profession was barely incipient.

If they had no interest either in technical training of lawyers or in academic discourse, what then was their animating purpose? George Wythe and his followers were consciously engaged in moral education: they sought to prepare young men (and, at Oberlin, perhaps a woman or two) for public life in a democracy. They taught law as an act of patriotism. What they sought was to inculcate standards of public conduct appropriate to popular self-government subject to constitutional constraints. Those standards of conduct, if they could be made to exist, were admittedly but dimly understood, and there were perhaps quite disparate views as to what they might be; for almost half a century there was no attempt at a full and coherent statement of them.

It was Francis Lieber who first set forth those standards of conduct, in three volumes published in 1838 and 1839.<sup>8</sup> For reasons to be specified, I take this part of Lieber's work as an expression of the pedagogical aims of most of those who taught law in American colleges from the time of George Wythe's appointment at William and Mary in 1779 at least until the Civil War.

### I. The Tradition of Early American Law Teaching

This part of the article is a quick summary; I have elsewhere more fully explained the early history of law teaching in American colleges as a pursuit of a political aim closely associated with the ideology emerging from the American Revolution.<sup>9</sup> At almost every American college of the post-Revolutionary era, a serious attempt was made to develop responsible political leadership that, it was hoped, might sustain the fragile institutions of the republic.

Thomas Jefferson, as Governor of Virginia, was responsible for the appointment of his own mentor, Wythe, at William and Mary.<sup>10</sup> He articulated his aims<sup>11</sup> more fully in later years when he planned the University of Virginia as

8. *Manual of Political Ethics* (2 vols., Boston, 1838-39); and *Legal and Political Hermeneutics*, enl. ed. (Boston, 1839) (Buffalo reprint, 1970), which first appeared serially in *American Jurist* in 1837 and 1838.

9. *The Revolutionary Idea of University Legal Education*, 31 *Wm. & Mary L. Rev.* 527 (1990); *Teaching Law and Virtue at Transylvania University: The George Wythe Tradition in the Antebellum Years*, 41 *Mercer L. Rev.* 673 (1990) [hereinafter Carrington, *Transylvania*]; *Teaching Law in the Antebellum Northwest*, 23 *U. Tol. L. Rev.* 3 (1992).

10. See William Clarkin, *Serene Patriot: A Life of George Wythe* 142 (Albany, 1970).

11. As Governor, Jefferson most clearly expressed his aims in a letter to James Madison in 1780 assessing the new professorship. He reported it to be

a success which has gained it universal applause. Wythe's school is numerous. [He had 40 students.] They hold weekly courts and assemblies in the capitol. The professors join in it; and the young men dispute with elegance, method and learning. This single school by throwing from time to time new hands well principled and well informed into the legislature will be of infinite value.

(July 26, 1780), in 3 *Papers of Thomas Jefferson*, ed. Julian P. Boyd, 506, 507 (Princeton, 1951) [hereinafter *Jefferson Papers*].

"a nursery" for whiggish<sup>12</sup> democratic leaders.<sup>13</sup> He planned for law to be at the center of the curriculum of "his" university, a study bonding the aspiring young men of the Commonwealth to democratic institutions and to the leaders among them who would bear responsibility for those institutions.

But Jefferson was far from alone in his aims. Alexander Hamilton appears to have had a similar vision for Columbia when it reopened in 1790,<sup>14</sup> a vision expressed in the appointment of James Kent, an ardent Hamiltonian, as Columbia's first law professor and in Kent's own words.<sup>15</sup> Kent's politics were far removed from those of Jefferson, but his mission, like that of Wythe, was to train young men for a secular clergy, or as Tocqueville would later style it, an "aristocracy,"<sup>16</sup> who would be morally and intellectually prepared for the political roles to which (their mentors hoped) they would be called by the people. In pursuit of that general aim, the law curriculum of American colleges before 1870 often emphasized public law, frequently as a companion study to political economy and political ethics, and generally included the law of nations as well as American constitutional law.<sup>17</sup>

The idea shared by Jefferson and Hamilton animated those responsible for most other colleges existing at the time of the Revolution or in the decade following. All these colleges were extremely small by our standards and were often without funds. They included not only William and Mary and Columbia,

12. Jefferson's use of this term had reference to English, not American, politics. Lieber, an adherent of Henry Clay, was an American Whig, but not more faithful to the thinking of Hamilton than of Jefferson.

13. Jefferson's plans were embodied in instruments cosponsored by others, notably James Madison and Joseph Cabell. Their 1818 Rockfish Gap Report is summarized in Herbert B. Adams, *Thomas Jefferson and the University of Virginia* 88-95 (Washington, 1888). See also David P. Peeler, *Thomas Jefferson's Nursery of Republican Patriots: The University of Virginia*, 28 *J. Church & State* 79, 79 (1986) ("[Jefferson's] University was to be a nursery for leaders").

14. Columbia College was reopened in 1784 under its present name and under the aegis of the State of New York. See Fon W. Boardman, Jr., *Columbia: An American University in Peace and War* 6 (New York, 1944). An ambitious committee of which Alexander Hamilton was a member planned a reconstituted program, with three members of the faculty of law. John Howard van Amringe, *Kings College and Columbia College*, in *A History of Columbia University, 1754-1904*, at 1, 63-64 (New York, 1904).

15. In his inaugural lecture, Kent urged:

A lawyer in a free country . . . should be a person of irreproachable virtue and goodness.

. . . .

[The design of this institution] is intended to explain the principles of our constitutions, the reason and history of our laws, to illustrate them by comparison with those of other nations, and to point out the relation they bear to the spirit of representative republics.

James Kent, *An Introductory Lecture to a Course of Law Lectures*, delivered November 17, 1794 (New York, 1794), reprinted in Kent's *Introductory Lecture*, 3 *Colum. L. Rev.* 330, 338, 341 (1903); see also *A History of the School of Law, Columbia University*, ed. Julius Goebel, 13 (New York, 1955) [hereinafter Goebel].

16. *1 Democracy in America*, trans. Henry Reeve & ed. Phillips Bradley, 284-88 (New York, 1945); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 *Yale L.J.* 1239 (1991).

17. These were the subjects of the first volume of Kent's *Commentaries on American Law* (New York, 1826-1830).

but also Brown (then the College of Rhode Island),<sup>18</sup> Charleston,<sup>19</sup> Dartmouth (a mission to Indians),<sup>20</sup> Georgia (the state college in the least populous state),<sup>21</sup> Middlebury (a municipal effort in the wilds of Vermont),<sup>22</sup> North Carolina (a public school without public fiscal support),<sup>23</sup> Pennsylvania (then the College of Philadelphia, with as few as a dozen students),<sup>24</sup> Princeton

18. In 1790 David Howell was appointed Professor of Law, Mathematics, and Natural Philosophy. 1 Charles Warren, *History of the Harvard Law School and of Early Legal Conditions in America* 174 (New York, 1908) (New York reprint, 1970). He had been a member of the Continental Congress, where he was the chief proponent of the antislavery provision of the Northwest Ordinance of 1787. He was also a leading advocate in Rhode Island of ratification, and a trustee of the college. Walter Cochrane Bronson, *The History of Brown University, 1764-1914*, at 34-39 (Providence, 1914). His appointment proved to be largely titular. His fellow trustees had expected that he would provide lectures on law, presumably reflecting the public aspirations to which he had already committed much of his career. But it does not appear that Howell ever taught law at Brown on any regular basis, except in 1791-92 when he served as President ad interim. He remained on the faculty after his appointment to the federal judiciary in 1812.
19. In 1790 the College of Charleston opened to students under the leadership of an Anglican priest, Robert Smith. Although a man of considerable personal wealth, he had not only supported the Revolution but performed military service as a private. J. H. Easterby, *A History of the College of Charleston, Founded 1770*, at 28 (Charleston, 1935). From 1806 to 1808, the College of Charleston was revived under George Buist, a Presbyterian minister who had studied at Edinburgh. *Id.* at 49-55. With the help of others, Buist established a curriculum similar to that presented at Princeton and Yale; it included lectures to the seniors on politics, political economy, and jurisprudence. *Id.* at 54.
20. James Fairbanks Colby, *Legal and Political Studies in Dartmouth College: 1796-1896*, at 3, 4 (Hanover, N.H., 1896).
21. The first President of the University of Georgia was Josiah Meigs, a lawyer and a Yale professor. See Robert Preston Brooks, *The University of Georgia Under Sixteen Administrations, 1785-1955*, at 13 (Hopeville, Ga., 1956). Meigs, a native of Connecticut, had studied at Yale with Ezra Stiles. For a decade, he edited the *New Haven Gazette*, a Jeffersonian newspaper. He was appointed a professor of mathematics and natural philosophy (biology) at Yale, where he taught for six years before accepting the invitation to be the founding president at Georgia. From 1801 to 1810 Meigs was the sole teacher in the University of Georgia, except for a language tutor. To the extent that the limited resources of his time and energy allowed, Meigs sought to prepare his students for republican leadership. E. Meron Coulter, *College Life in the Old South*, 2d ed., 14-32 (Decatur, Ga., 1951).
22. In 1806 Daniel Chipman was appointed Professor of Law; he was a Dartmouth alumnus who practiced law in the village of Middlebury. Chipman lectured in the college until 1816, when he resigned and was replaced by his older brother, Nathaniel, who had been a founding trustee of the institution. Nathaniel Chipman held the position until 1843, although he appears to have ceased teaching earlier on account of deafness. Daniel Chipman, *The Life of Hon. Nathaniel Chipman, LL.D.* 208 (Boston, 1846). Nathaniel was a war veteran, and yet another educator who had studied at Yale with President Stiles. Both Chipmans were public men; Daniel served as a judge and a Congressman after his teaching experience, Nathaniel as Chief Justice of Vermont and as a United States Senator before his time at Middlebury. In 1833 Nathaniel Chipman published *Principles of Government: A Treatise on Free Institutions, Including the Constitution of the United States* (Burlington, Vt.).
23. The University was founded in 1795 in order that the State "may draw forth men of abilities to direct her Councils and support her Government." 19 State Records of North Carolina 498 (1794). Professor Samuel E. McCorkle, a former student of John Witherspoon at Princeton, was designated the Professor of Moral and Political Philosophy and History and assigned responsibility for instructing the young gentry of the state on Hume, Montesquieu, and Paley; state and federal constitutional law; and international law. 1 Kemp P. Battle, *History of the University of North Carolina* 94-95, 99-100 (Raleigh, 1907).
24. The government of the United States was conducted in Philadelphia from 1790 to 1800. One of the first acts of the post-war trustees was to appoint James Wilson, a Justice of the Supreme Court, as Professor of Law. Wilson was a Scotsman who had prepared for the Presbyterian

(then the College of New Jersey),<sup>25</sup> Transylvania,<sup>26</sup> and Yale.<sup>27</sup> While not all these programs survived, they would in later decades be joined in the enterprise of training public leaders by others, including Vermont in the outskirts

ministry and was thus well-trained in the classics at St. Andrews before his emigration to Philadelphia in 1765, at age 20. See Robert Green McCloskey, Introduction, in 1 *The Works of James Wilson*, ed. Robert Green McCloskey, 8-9 (Chicago, 1967). Wilson had represented Pennsylvania in the Constitutional Convention of 1787, where he performed services "[s]econd to Madison and almost on a par with him." Max Farrand, *The Framing of the Constitution of the United States 1787* (New Haven, 1926). In appointing Wilson, the University explained that it hoped "to furnish a rational and useful entertainment to gentlemen of all professions, and . . . to assist in forming the legislator, the magistrate and the lawyer." *Quoted in* Reed, *supra* note 1, at 122. Wilson's lectures were published in 1804 and remain an important source for persons interested in the origins of American constitutional law. They confirm that as a teacher Wilson had the same aim as George Wythe, St. George Tucker, James Kent, Ezra Stiles, and Samuel Stanhope Smith. His opening lecture asserted the interconnection of popular republican governance and "love of the law." 1 *The Works of James Wilson*, *supra*, at 70. He hoped especially to train republican leadership:

In every government, which is not altogether despotical, the institution of youth is of some publick consequence. In republican government, it is of the greatest. Of no class of citizens can the education be of more publick consequence, that of those, who are destined to take an active part in publick affairs. Those, who have had the advantage of a law education, are very frequently destined to take this active part. This deduction clearly shows, that, in a free government, the principles of a law education are matters of the greatest publick consequence.

*Id.* at 81.

25. During the Revolution Princeton was a battlefield of consequence; the college was closed, occupied, shelled by American guns, and surrendered by Redcoats as a ruin. Thomas Jefferson Wertenbaker, *Princeton 1746-1896*, at 57-65 (Princeton, 1946). After the war, the college was awash in revolutionary sentiment, with President Witherspoon in the vanguard of enthusiasts. He had "found the college, if not a theological seminary, at least a place where religion struck the dominant note and where a very large percentage of the graduates went into the ministry; he left it a place devoted chiefly to training men for public life." *Id.* at 76. Witherspoon's successor, Samuel Stanhope Smith, commenced a series of lectures in 1795 on "the subjects of jurisprudence, politics, and public law or the law of nature and nations, with which every man . . . in a free country ought to be acquainted." 1 *The Lectures, Collected and Improved; Which Have Been Delivered for a Series of Years in the College of New Jersey, on the Subject of Moral and Political Philosophy* 10 (Trenton, 1812). See generally Mark A. Noll, *Princeton and the Republic, 1768-1822: The Search for a Christian Enlightenment in the Era of Samuel Stanhope Smith* (Princeton, 1989).

26. See Carrington, *Transylvania*, *supra* note 9.

27. As soon as Yale was reopened after the conclusion of hostilities in New Haven, President Ezra Stiles proposed the establishment of a professorship in law to be funded by the newly independent state of Connecticut. 1 Warren, *supra* note 18, at 165-66. His stated purpose was to "enable such a multitude of Gentlemen among the body of people at large to judge on political matters, as shall awe those into Fidelity whom the States may entrust with public and important negotiations." *Quoted in id.* at 168. This purpose was to be effected by lectures on Roman civil law, English common law, the codes of all thirteen states, and comparative law. *Id.* at 167-68.

The proposal was a radical one for Yale, for at the time its curriculum was limited to the sacred and classical languages, mathematics, and divinity. The plan failed on the issue of governance, the Yale governing board being unwilling to surrender any authority to the state of Connecticut in exchange for funding. *Id.* at 165.

After Stiles was admitted to the Connecticut bar in 1783, he commenced "to guide the studies, and facilitate the progress, of such particular students as were destined for the bar." Abiel Holmes, *The Life of Ezra Stiles* 25 (Boston, 1798). In 1789 Yale established a requirement that students read Montesquieu's *The Spirit of Laws*, and Stiles began lectures and recitations on that work. 1 Warren, *supra* note 18, at 169.

of New England,<sup>28</sup> Hamilton (another mission to Indians in remote central New York),<sup>29</sup> New York University,<sup>30</sup> Dickinson (Benjamin Rush's institution in Pennsylvania),<sup>31</sup> and Lafayette<sup>32</sup> in the Northeast; by Cincinnati,<sup>33</sup>

28. Royall Tyler was appointed Professor of Law in 1811. His biography is G. Thomas Tanselle, *Royall Tyler* (Cambridge, Mass., 1967). He was a man of repute as a lawyer, but of even greater notice as a man of letters. See Robert A. Ferguson, *Law and Letters in American Culture* 111-19 (Cambridge, Mass., 1984). A native of Boston, he graduated from Harvard in 1776, in time to serve as a major in the Revolutionary Army. He was admitted to the bar in 1780, and practiced in Braintree. He played a major role in suppressing Shays' Rebellion. For an account, see Robert Joseph Taylor, *Western Massachusetts in the Revolution* 128-67 (Providence, 1954). After a successful career as a playwright in New York, Tyler moved to Vermont, becoming a trustee of the University and a State's Attorney, and then served on the Supreme Court of Vermont from 1801 to 1813. His teaching career, said "to promote virtue," came to an end when the college was made into a barracks in 1814. Julian Ira Lindsay, *Tradition Looks Forward, The University of Vermont: A History 1791-1904*, at 15, 102 n.\* (Burlington, Vt., 1954).
29. John Hiram Lathrop was appointed the first Maynard Professor of Law, Civil Polity, and Political Economy in 1835. Jesse H. Coursault, *John Hiram Lathrop*, 11 *Dictionary of American Biography*, ed. Dumas Malone, 16, 16 (New York, 1933). He was instructed to teach constitutional law and international law, and also subjects deemed more practical. Lathrop was succeeded by Theodore Dwight, later to become the founding spirit of the 1858 rebirth of the Columbia Law School. Dwight's Hamilton students reported that "he impressed us with the belief that the law is the most honorable of all callings in life." Goebel, *supra* note 15, at 39.
30. In 1835, Benjamin F. Butler, then Attorney General of the United States, was invited to propose a plan for the establishment of a Faculty of Law at recently established New York University. *The Law School Papers of Benjamin F. Butler: New York University School of Law in the 1830s*, ed. Ronald L. Brown, 7 (New York, 1987) [hereinafter Brown]. Butler's plan was approved and he accepted an appointment to commence in 1837. *Id.* at 7-8; see *Plan for the Organization of a Law Faculty and for a System of Instruction in Legal Science*, in the *University of the City of New York (1835)*, reprinted in *id.* at 111. The University was modeled on the new institution in London, and was accordingly much influenced by Bentham. With his friend and political colleague David Dudley Field, Butler was an adherent of Bentham's proposals for codification of the common law. He also advocated the popular election of Supreme Court Justices, an idea generally accepted by state constitutional conventions dominated by Jacksonians. Despite his populism, Butler's ambition as an educator was to advance the development of a legal profession that would serve as a political elite, practicing the public morality necessary to sustain the trust of the people in popular institutions. See *Inaugural Address*, reprinted in *id.* at 167.
31. The college was established by Rush, a signer of the Declaration, a Jeffersonian, and a leading intellect among the Revolutionary generation. Although his own profession was medicine, he aimed to create a college that would be a "temple of justice" to train democratic leaders. James Henry Morgan, *Dickinson College: The History of One Hundred and Fifty Years, 1783-1933*, at 10 (Harrisburg, 1933). Like Siles in Connecticut and Hamilton in New York, Rush hoped to secure additional financial support from the state legislature to support law teaching. In 1810, he selected as one of his professors a radical lawyer, Thomas Cooper, who probably taught law as well as chemistry before the college was closed in 1815.  
 John Reed was appointed Professor of Law when the college was reopened in 1821. Reed had been a student at Dickinson in 1806, had represented Carlisle in the state senate, had served nine years as the presiding judge of the state district court in Carlisle, and was a leader of the public school movement in the Commonwealth. On Reed's professorship, see Burton R. Laub, *The Dickinson School of Law—Proud and Independent*, pt. I (Carlisle, Pa., 1976). It is, however, unclear whether his aims were those of Wythe and Lieber, or whether his teaching more nearly fit the mold of Litchfield.
32. James Madison Porter was a founder of Lafayette and later its Professor of Jurisprudence and Political Economy from 1837 to 1852. He was also briefly a member of the Tyler cabinet. See 1 David Bishop Skillman, *The Biography of a College: Being the History of the First Century of the Life of Lafayette College* 3, 15-16, 116, 206 (Easton, Pa., 1932).
33. The guiding spirit of the law school was Timothy Walker, a native of Massachusetts who had graduated from Harvard in 1826. After three years of schoolteaching, he had studied law with

Indiana,<sup>34</sup> and Miami<sup>35</sup> in the Ohio Valley; and Cumberland,<sup>36</sup> Louisiana (later Tulane),<sup>37</sup> Maryland,<sup>38</sup> Mississippi,<sup>39</sup> and South Carolina<sup>40</sup> in the South.

Joseph Story at Harvard for a year and then served his year of apprenticeship in Cincinnati in 1830-31. Reginald Charles McGrane, *The University of Cincinnati: A Success Story in Urban Higher Education* 26 (New York, 1963). His aims and values were revealed in his 1837 book, *Introduction to American Law* (Philadelphia) (New York reprint, 1972) [hereinafter Walker, Introduction], which saw eleven editions in the nineteenth century. His 1850 Phi Beta Kappa lecture at Harvard, entitled *The Reform Spirit of the Day*, expressed his ideas on procedural law reform, criminal law reform, and the rights of married women, and was widely read and applauded. Timothy Walker, 5 *National Cyclopaedia of American Biography* 422, 422-23 (New York, 1907). Walker's career was cut short in 1855 by a carriage accident.

34. The law department at Indiana was founded in 1842. Its public aims are recorded in James Albert Woodburn, *History of Indiana University 1820-1902*, at 179 (Bloomington, 1940). The first professors were Daniel Read and David McDonald. During two decades at Indiana, Read took an active role in public affairs in the state, and taught public law and political economy as well as classics. *Id.* at 185-203. At the time of his appointment, McDonald had served in the legislature and as a prosecutor. He was an experienced public man, and was well known as an active Clay Whig. His book was addressed to the justices of the peace, mayors, marshals, and constables of Indiana and sought to provide them with all the law they might need to know to adequately perform their official duties. McDonald's *Treatise* (Indianapolis, 1850).
35. In 1824 Robert Hamilton Bishop was elected President and opened the college. He was a native of Scotland, a Presbyterian minister, and a former colleague of Henry Clay on the Transylvania faculty. The trustees sought to establish a law professorship in 1827 but found no funds with which to do so. Walter Havighurst, *The Miami Years* 37, 45 (New York, 1958). Bishop took it upon himself to supply the need: "The core of his teaching interest [was] the progress of civil liberty." James H. Rodabaugh, Robert Hamilton Bishop, in 21 *Dictionary of American Biography*, Supp. 1, ed. Harris E. Starr, at 83 (New York, 1944).
36. See generally Winfred Paine Bone, *A History of Cumberland University, 1842-1935* (Lebanon, Tenn., 1935).
37. For a brief account, see Ferdinand Stone, *Tulane Law School: The Early Years*, Tulane Law., Spring 1985, at 2.
38. When the University opened in 1812, David Hoffman, a native of Baltimore, was appointed Professor of Law. He had studied at St. John's College, a new institution in Annapolis, and at Göttingen and Oxford. Delayed by the war, Hoffman nevertheless published an elaborate syllabus in 1817. This *Course of Study* was a critical success. Hoffman's curriculum included an examination of both legislation and case law, but every subdivision also entailed an examination of all the moral, political, or religious literature that might be thought to illuminate the underlying aims of the law. It was weighted toward public law and articulated the aim of guiding students in the development of law that would better serve the public. For Justice Joseph Story's acclaim, see Book Review, *N. Am. Rev.*, Nov. 1817, at 76, cited in William Wetmore Story, *Life and Letters of Joseph Story* 1219 (Boston, 1851). Hoffman was at last able to begin his full program of lectures in the fall of 1822, Thomas L. Shaffer, *David Hoffman's Law School Lectures, 1822-1833*, 32 *J. Legal Educ.* 127, 128 (1982), but was soon subjected to an unfortunate interruption when the building in which he was teaching was seized and closed by the State of Maryland for nonpayment of a debt owed to the state by the University trustees. 2 Anton-Hermann Chroust, *The Rise of the Legal Profession in America* 205 n.142 (Norman, Okla., 1965). Nevertheless, Hoffman managed to attract and maintain for a decade a student body numbering between 20 and 40. These students resided together in the Law Department dormitory on Market (now Baltimore) Street, apparently in reasonable comfort. George H. Callcott, *A History of the University of Maryland* 37 (Baltimore, 1966). And they were provided with a library that was quite good by the standards of the time. Shaffer, *supra*, at 131. Hoffman's lectures were described by Lon Fuller as sharing "a sense of embarking on an adventure in democratic government, an intense desire to seek out the underlying principles that make a satisfying life in common possible, a faith that the basic problems of law and government can be solved by reason." Preliminary Statement of the Committee on Legal Education of the Harvard Law School, ed. Lon L. Fuller, 94 (Cambridge, Mass., 1947).
39. For a brief account, see Daniel J. Meador, *Lamar and the Law at the University of Mississippi*, 34 *Miss. L.J.* 227, 232-33 (1963).
40. In 1805 South Carolina became the first state to spend significant public money on higher education by establishing a well-financed college. The state was deeply riven between the old-

Harvard was relatively late in joining the group with the appointment of Joseph Story in 1827, and was perhaps less clear about the mission.<sup>41</sup> It had established a law "school" in 1815 to emulate the Litchfield Law School. Litchfield was a product of lax Connecticut law that allowed a single mentor to train an unlimited number of apprentices and thus allowed Tapping Reeve to establish a program of formal study offered as an efficient alternative to a private apprenticeship. Reeve's program emphasized the study of private law<sup>42</sup> and had little in common with the initiative of Jefferson, whom Reeve reviled. Like Harvard, Yale at times replicated Litchfield.<sup>43</sup> Virginia, although planned by Jefferson, was likewise ambivalent about its role, but was at least at times numbered among the group consciously seeking to nurture democratic political leadership.<sup>44</sup> The same ambivalence may well have been found in several other institutions.

Although now largely forgotten, the flagship institution of antebellum American law teaching in this tradition was the Law Department of Transylvania University in Lexington, Kentucky, founded at the beginning of the nineteenth century by five former students of Wythe.<sup>45</sup> That institution enrolled one of the largest cohorts of law students in America in 1840 (seventy-one), and enjoyed the services of the largest law faculty, three.<sup>46</sup> Transylvania Law

money aristocrats of the low country and the new-money planters of the upcountry. A purpose of investing in higher education was to bridge this divide; the idea was apparently sold in the drawing rooms of Charleston as a means of civilizing their cruder co-citizens from the western part of the state. 1 Daniel Walker Hollis, *South Carolina College* 14-16 (Columbia, S.C., 1951). Jonathan Maxcy, a Rhode Island Baptist who was then the President of Brown, was hired as the first President. *Id.* at 33. Despite its uncertain beginning, the institution was toasted by its Jeffersonian trustees as "a nursery for virtue and science, the two brightest pillars of republican government." *Id.* at 35. In 1821, Thomas Cooper, formerly of Dickinson, was appointed President; Cooper became an apostate radical, and even a spokesman for slavery. He retired in 1835 and was replaced on the faculty by the appointment of Lieber. On the tumultuous career of Cooper, see generally Dumas Malone, *The Public Life of Thomas Cooper, 1783-1839* (New Haven, 1926).

41. As noted above, the earliest beginnings of the Harvard Law School did not correspond to the model established by Wythe, but more nearly resembled the successful proprietary school at Litchfield. See Arthur E. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967*, at 43-91 (Cambridge, Mass., 1967).
42. See generally McKenna, *supra* note 2, at 20.
43. Although law study at Yale had been initiated by Ezra Stiles in the Jeffersonian mold, that model was not maintained. The Yale Law School was established in 1824 by the adoption of a proprietary school conducted by Seth Staples and his younger assistant, Samuel Hitchcock. Reed, *supra* note 1, at 140-42; Leonard M. Daggett, *The Yale Law School*, 1 *Green Bag* 239 (1889).
44. The University had difficulty in finding an appropriate law professor. In due course, the committee fastened on John Tayloe Lomax, a man quite unsuited for the role of George Wythe, by reason of both his intellectual attainments and his interests. He had a classical education at St. John's College and had also read law in Annapolis as an apprentice. His experience, however, was in conveyancing, the settlement of estates, and the intricacies of equity proceedings. E. Lee Shepard, John Tayloe Lomax, in *Legal Education in Virginia*, ed. W. Hamilton Bryson, 359-61 (Charlottesville, 1982). Lomax may have manifested approval of the Jefferson plan, John Ritchie, *The First Hundred Years* 11 (Charlottesville, 1978), but he never adhered to it. Some of his successors tried much harder.
45. See generally Carrington, *Transylvania*, *supra* note 9.
46. Charles Kerr, *Transylvania University's Law Department*, 31 *Americana Illus.* 34 (1937).



was the academic shadow of Henry Clay,<sup>47</sup> himself once the law professor in that department, and the most formidable political leader in America for the four decades preceding his death in 1852.<sup>48</sup> A substantial portion of Transylvania's alumni were elected to public office in states west of the Alleghenies, including about thirty United States Senators; it is possible that the old school tie held diverse Senators to Clay and in fact held the nation together, particularly at the Compromise of 1850.<sup>49</sup>

As the union of Jefferson and Hamilton suggests, the political aim of law teachers from the Revolution to the Civil War was no more precisely defined than it is today. Almost all antebellum law teachers strove to save the Union and almost all opposed slavery, but as teachers they were preoccupied with the practical morality of democratic institutions. This preoccupation may in many cases have derived from their own public careers, for the generation of Americans who established university law teaching in the United States were active and pragmatic men, not political or educational theorists, or exponents of the life of contemplation. Indeed, most were engaged in public affairs, usually as judges, at the same time that they taught law.

The literature on which they drew for guidance was scant in its application to their teaching, and only a few of the small number of law teachers made any effort to enhance it: Judge-Professor St. George Tucker of William and Mary did an excellent American edition of Blackstone;<sup>50</sup> Chancellor-Professor James Kent wrote an admirable treatise to replace Blackstone;<sup>51</sup> Justice-Professor Joseph Story wrote encyclopedically;<sup>52</sup> Judge-Professor George Sharswood of

47. Clay served on the governing board for four decades, secured the school's endowment, recruited faculty, and wrote letters of recommendation for graduates. For details, see Carrington, *Transylvania*, *supra* note 9.

48. Merrill Peterson, *The Great Triumvirate: Webster, Clay, and Calhoun* (New York, 1987), is an excellent recent account of Clay's role in relation to those of Calhoun and Webster.

49. Among the fifty Senators in 1850, at least seven were Transylvanians: David Atchison of Missouri, Jeremiah Clemens of Alabama, Jefferson Davis of Mississippi, Solomon W. Downs of Louisiana, George Jones of Iowa, Joseph R. Underwood of Kentucky, and James Whitcomb of Indiana. Because of Clay's political genius in designing the Compromise, it remains impossible to tell from the voting on the seven separate resolutions precisely who made what concessions and why. And not to be underestimated was the personal magnetism of Clay, which might have carried the day without the old school tie. As the result of the Compromise, the seven were joined by an eighth Transylvanian, William M. Gwin of California.

50. Blackstone's *Commentaries*, With Notes of Reference to the U.S. Constitution and Laws of the Federal Government and of the Commonwealth of Virginia (Philadelphia, 1803).

51. *Commentaries on American Law*, *supra* note 17.

52. *Commentaries on the Law of Bailments with Illustrations from the Civil and the Foreign Law* (Cambridge, Mass., 1832); *Commentaries on the Constitution of the United States with a Preliminary Review of the Constitutional History of the Colonies and States before the Adoption of the Constitution* (Boston, 1833); *Commentaries on the Conflict of Laws, Foreign and Domestic in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (Boston, 1834); *Commentaries on Equity Jurisprudence as Administered in England and America* (Boston, 1836); *Commentaries on Equity Pleadings, and the Incidents Thereto According to the Practice of the Courts of Equity of England and America* (Boston, 1838); *Commentaries on the Law of Agency, as a Branch of Commercial and Maritime Jurisprudence* (Boston, 1839); *Commentaries on the Law of Partnership as a Branch of Commercial Maritime Jurisprudence* (Boston, 1841); *Commentaries on the Law of Bills of Exchange, Foreign and Inland, as Administered in England and America* (Boston, 1843).

the University of Pennsylvania wrote a useful book on professional ethics for private lawyers;<sup>53</sup> and Professor Timothy Walker of the University of Cincinnati, a sometime judge, wrote an excellent law book for lay readers.<sup>54</sup>

But these works seldom and then only casually addressed the educational purpose to which the Jefferson-Wythe tradition summoned them. Lieber's exegesis of that purpose came only three years after he began teaching at the University of South Carolina; it was set forth in his two-volume *Manual of Political Ethics*<sup>55</sup> and the separate *Legal and Political Hermeneutics*,<sup>56</sup> a volume spun off from the larger work.

Many authors have since penetrated more deeply into the intellectual problems that Lieber confronted. Lieber's works do not merit reading as a source of insights unavailable in more accessible contemporary work. Many of his thoughts do, however, resonate with contemporary thinking reflected in the so-called "Revival of Republicanism," particularly in the work of Frank I. Michelman<sup>57</sup> and Cass Sunstein,<sup>58</sup> and also embody some related thoughts about democratic education and political ethics that can be found in the work of such contemporary authors as Amy Gutmann<sup>59</sup> and Dennis Thompson.<sup>60</sup> His body of work also prefigures contemporary thinking on the use of techniques of literary criticism in the study of legal texts. These volumes interest me, and I hope readers, as evidence that the concerns of such contemporary authors occupied the minds of early American law teachers. In other respects as well, Lieber's work prefigured intellectual pursuits of American law teachers in the late twentieth century. There is less that is new about our contemporary pursuits than we are sometimes tempted to suppose.

## II. Classical Civic Virtue: The Revolutionary View

Readers familiar with the literature read by American Revolutionaries need little explanation of how or why that generation was animated by concern for moral education to nurture the traits of republican virtue. Nevertheless, it may be useful to describe the antecedent conception of civic virtue that was familiar both to Americans of the Revolutionary generation who established the tradition that Lieber served as herald, and to their offspring who were

53. A Compend of Lectures on the Aims and Duties of the Profession of Law (Philadelphia, 1854).

54. Introduction to American Law (Philadelphia, 1837).

55. The first edition was published in Boston by Little, Brown & Co. References here are to the second edition edited by Theodore D. Woolsey and published in Philadelphia in 1881 and 1911 by J. B. Lippincott Co. [hereinafter *Manual*].

56. An enlarged edition was published in Boston by Little, Brown & Co. in 1839, and a third edition edited by William G. Hammond was published in St. Louis in 1880 by F. H. Thomas & Co. Unless otherwise noted, references here are to the 1839 edition, which was reprinted in 1970.

57. E.g., The Supreme Court, 1985 Term—Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4 (1987).

58. E.g., Interest Groups in American Public Law, 38 Stan. L. Rev. 29 (1985).

59. See *infra* text accompanying notes 247, 383-92.

60. See *infra* text accompanying notes 283-89, 365.

Lieber's generation. What was the origin of the public morality that they had in mind and why did they deem it so important to the nation's future?

Classicists to the man, American Revolutionaries, perhaps universally, employed the word *disinterested* as a synonym for *virtuous* in the context of public affairs. No one attempted to state or codify what proper disinterest entailed,<sup>61</sup> and it seems likely that many of those who shared in the endeavor of teaching law to promote public virtue or disinterest would have acknowledged that their aim was ill-defined and perhaps problematic. If some doubted even the possibility of public virtue, others were unclear about its meaning and all must have been uncertain as to how that quality might be transmitted to unruly youth.

There was no indigenous literature to give definition to the aim, or to guide the nurturing, although it was apparent that public virtue had special meaning in a constitutional democracy. For the first half century of our national history, the literature on politics and government read by Americans was most often classical, sometimes mixed with more contemporary French or Scottish works of the Enlightenment. Most of this literature had scant application to the American circumstance in the early nineteenth century; it offered few thoughts directly pertinent to the conduct of persons participating in the governance of the United States and even less to those who sought to elevate such conduct by appropriate training.

Disinterest was an idea of classical patrimony. It seems to have been taken as the antithesis of self-interest; it was an impulse seldom recognized among tribal cultures but emergent with the notion of individual rights.<sup>62</sup> Thus, disinterest was the civic virtue extolled by Pericles as the key to Athenian republican governance. Pericles explained Athenian civic virtue as the discipline assuring that citizens in the exercise of their democracy would "attend both to public and private duties, and . . . not allow absorption in their own various affairs to interfere with their knowledge of the city's."<sup>63</sup>

61. Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, in *Beyond Confederation*, eds. Richard Beeman et al., 69, 84 (Chapel Hill, 1987). Dr. Johnson defined *disinterested* as being "superior to regard of private advantage; not influenced by private profit." *A Dictionary of the English Language*, 9th ed. (London, 1805).

62. See Clifford Geertz, *From the Native's Point of View: On the Nature of Anthropological Understanding*, in *Interpretative Social Science: A Reader*, eds. Paul Rabinow & William M. Sullivan, 225, 229 (Berkeley, 1979).

63. The Funeral Oration, *quoted in* 2 Thucydides, *The History of the Peloponnesian War*, trans. Henry Dale, § 35, at 111 (New York, 1860). For contemporary readers, Judith Shklar restates Periclean virtue thus: "A true system of legislation . . . would redirect pride to public ends . . . maintained by scientific morality that would identify private and public interests. . . . [T]rue virtue is the identity of personal passion and public good." *Men and Citizens: A Study of Rousseau's Social Theory* 81 (London, 1969). Jean-Jacques Rousseau derived his standard of virtue from the social contract, concluding that the sovereign is obligated by contract to practice virtue and to compel individuals to do the same. *The Social Contract*, trans. Henry F. Tozer, bk. I, ch. 7 (London, 1902).

Civic virtue was the trait for which Pericles was himself, justly or not,<sup>64</sup> most widely admired by his fellow Athenians. He was valued for his apparent disinterest in discussing public affairs: although wealthy, he seemed open to suggestions of civic action that were contrary to his private interest and to that of wealthy Athenians. Because of his reputation for civic virtue, Pericles was for a time able to induce others to make sacrifices for the good of the city.<sup>65</sup> The ideally virtuous Athenian was expected to view civic affairs from a perspective resembling in an important respect that defined by John Rawls as "the original position":<sup>66</sup> from behind a "veil" of self-imposed ignorance of self-interest that enabled him to appraise all else of consequence to his co-citizens.<sup>67</sup>

The mutual willingness to sacrifice private advantage for a larger common benefit was thought to be an essential inducement to the assent of republican citizens to the shared exercise of power. A majority that was perceived to serve only itself would soon lose the assent of dissenting and competing factions; chaos and despotism would soon follow.<sup>68</sup>

64. Thucydides described Pericles' rule (which was maintained for 32 years) as "an aristocratic government that went by the name of democracy." 2 Thucydides, *The History of the Peloponnesian War*, trans. Richard Crawley, 125 (London, 1876). Plutarch described Pericles as far from democratic:

[H]e was able generally to lead people along, with their own wills and consents, by persuading and showing them what was to be done; and sometimes, too, urging and pressing them forward extremely against their will, he made them, whether they would or no, yield submission to what was for their advantage.

Plutarch's *Lives*, trans. Arthur Hugh Clough & ed. Edwin Ginn, 61 (Boston, 1918).

65. As told in 2 Thucydides, *supra* note 64, at 143-44:

Pericles by his rank, ability, and known integrity was enabled to exercise an independent control over the multitude—in short, to lead them instead of being led by them; for as he never sought power by improper means, he was never compelled to flatter them, but on the contrary, enjoyed so high an estimation that he could afford to anger them by contradiction. Whenever he saw them unseasonably and insolently elated, he would with a word reduce them to alarm; on the other hand, if they fell victims to panic, he could at once restore them to confidence. In short, what was nominally a democracy became in his hands government by the first citizen. With his successors it was different.

66. *A Theory of Justice* 17-22 (Cambridge, Mass., 1971). Rawls's thinker, unlike Lieber's patriot, has no conception of the good and is not required to appraise the interests of others. *Id.* at 127-30. And he or she ignores considerations of political morality. *Id.* at 40-45.
67. Cass R. Sunstein, *Beyond the Republican Revival*, 97 *Yale L.J.* 1539, 1567 n.160 (1988). I have elsewhere employed the Rawls metaphor to describe the posture sought by procedural rulemakers. *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Transubstantive Rules of Civil Procedure*, 137 *U. Pa. L. Rev.* 2067, 2079 (1989). For skeptical comment, see Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 *N.C. L. Rev.* 795 (1991).
- Appropriately, it was said of George Wythe: "[H]e lived in the world without being of the world; . . . he was a mere incarnation of justice—that his judgments were all as between A and B; for he knew nobody; but went into court, as Astaea was supposed to come down from heaven, exempt from all human bias." 1 Warren, *supra* note 18, at 170 n.3 (attributing statement to John Randolph).

68. Accord, Hannah Arendt, *The Origins of Totalitarianism*, new ed. (New York, 1966).

In addition to their classical learning, among American Revolutionaries the most widely read single book on politics was Montesquieu's *The Spirit of Laws*.<sup>69</sup> While acknowledging the inevitability of culture's influence on legal institutions, Montesquieu sought to express general principles of politics. One of these is that republican government is inherently unstable. Collapse into factionalism and then despotism was in fact the fate of all those republics known to eighteenth-century readers, Athens itself being an outstanding example.<sup>70</sup> Montesquieu thought this almost inevitable, except in very special cultural circumstances that enabled citizens to maintain mutual trust. A republic could endure, he asserted, only in a society perpetuating republican virtue.<sup>71</sup> Such a society, Montesquieu thought, required a strong tradition of family that would educate children to the sense of shared public duty.

American Revolutionaries were prone to accept Montesquieu's dictum that the primary aim of republican education is to develop the moral condition of public virtue, whatever that might be. The Baron had unhelpfully described such virtue as "a sensation, and not a consequence of acquired knowledge."<sup>72</sup> Even when challenged by Jesuit critics, Montesquieu did not clarify. He emphasized only that his work concerned political virtue, which is also moral virtue as it is directed to the public good; it had little to do with private moral virtue, and it was not at all concerned with that virtue which relates to revealed truths.<sup>73</sup>

A possible reason for Montesquieu's failure to specify more fully the virtue required to maintain a republic was his assumption that the content might well vary among republics, and perhaps even from one generation to the next. The virtue of which Montesquieu wrote appears in its essentials to be the same trait or quality acclaimed by Niccolo Machiavelli,<sup>74</sup> who in *The Prince* celebrated the capacity, which he hoped personally to provide to his own prince, for dispassionate and disinterested judgment in the resolution of public

69. Published in Geneva in 1748 and translated by Thomas Nourse for English readers in 1750.

70. See Thucydides, *supra* note 64, at 144 ("[E]ach grasping at supremacy, they ended by committing even the conduct of state affairs to the whims of the multitude. This, as might have been expected in a great and sovereign state, produced a host of blunders . . .").

71. Montesquieu, *supra* note 69, bk. V, chs. 2-8.

72. *Id.* bk. V, ch. 2. Rousseau was marginally more helpful:

[P]eople always desire the good, but do not always discern it. The general will is always right, but the judgment which guides it is not always enlightened. It must be made to see objects as they are, sometimes as they ought to appear; it must be shown the good path that it is seeking, and guarded from the seduction of private interests; it must be made to observe closely times and places, and to balance the attraction of immediate and palpable advantages against the danger of remote and concealed evils. Individuals see the good which they reject; the public desire the good which they do not see. All alike have need of guides. . . . Hence arises the need of a legislator.

The Social Contract, *supra* note 63, bk. II, ch. 6.

73. Montesquieu, *supra* note 69, bk. III, ch. 5, § 6, n.\*.

74. J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, 1975).

matters.<sup>75</sup> Machiavelli, in turn, drew many of his thoughts from classical sources. Thus, not only as classicists, but as readers of Montesquieu and Machiavelli, the generation of American Revolutionaries derived a framework for their vision of proper political conduct from classical sources. But it was no more than a framework or mode of discourse.

An important weakness of republican government widely perceived by American Revolutionaries was the difficulty of inculcating and maintaining the transfer of loyalty to community or nation implied by classical notions of public virtue. Montesquieu had made no effort to describe how this "sensation" of virtue might be created, except to confer primary responsibility for its transmission on the republican family,<sup>76</sup> a premise he shared with Rousseau.<sup>77</sup> To sustain the republican family and its values, Montesquieu held, a republic would have to be small,<sup>78</sup> egalitarian,<sup>79</sup> and thrifty.<sup>80</sup> A large, extravagant, or hierarchical society was, he foretold, doomed quickly to disintegrate into greedy factionalism.<sup>81</sup>

Although on the eve of the Revolution he had acknowledged that virtue was essential to republican governance,<sup>82</sup> John Adams's more mature thought was to dismiss republican virtue as "celestial."<sup>83</sup> Adams, himself a man of exceptional probity,<sup>84</sup> probably expressed the view of many New England Calvinists when he denied the perfectibility of human society.<sup>85</sup> Predestination, the

75. See Machiavelli's introduction to *The Prince*, which is addressed to Lorenzo the Magnificent. There are, we are told, persons still in search of just this role: "[Michal Kalecki, the English economist, searched for] *Il Principe Nuovo*, who would be prepared to listen carefully to the advice of counsellors, and to value their independence of mind and devotion to society above devotion to his own person. [He] looked for such a prince from Havana to Delhi." Edward Lipiński, Michal Kalecki, 39 *Oxford Bull. Econ. & Stat.* 69, 76 (1977).

76. Montesquieu, *supra* note 69, bk. IV, chs. 1, 5. Rousseau elaborated his ideas on the education of citizens in J. J. Rousseau, *Emilius; or, a Treatise of Education* (3 vols., Edinburgh, 1773). A recent edition is *Emile or On Education*, trans. Allan Bloom (New York, 1979). He was, however, preoccupied with the development of traits enabling the citizen to exercise personal liberty, to resist conventionality, and he had no concern for developing traits to enable them to share in the exercise of political power. Rousseau left no doubt that he favored family or private education and held in disesteem "those laughable institutions that go by the name of colleges." Bk. I, ¶¶ 90-91.

77. Montesquieu, *supra* note 69, bk. IV, ch. 1.

78. *Id.* bk. VIII, ch. 16.

79. *Id.* bk. VII, ch. 2.

80. *Id.* bk. V, ch. 6.

81. See *id.* bk. II, ch. 2; bk. V., ch. 14.

82. "There must be a positive passion for the public good, the public interest, honor, power, and glory, established in the minds of the people, or there can be no republican government, nor any real liberty; and this public passion must be superior to all private passions." Letter from John Adams to Mercy Warren (Apr. 16, 1776), in *The Selected Writings of John and John Quincy Adams*, eds. Adrienne Koch & William Peden, 57-58 (New York, 1946).

83. 2 *A Defence of the Constitutions of the Government of the United States* 504-05 (London, 1788) (New York reprint, 1971).

84. Perhaps most illustrative of Adams's character was his acceptance of the brief in support of Captain Preston, who was charged with murder in the Boston Massacre of 1770. The story has often been told. See, e.g., James Truslow Adams, *The Adams Family* 33-34 (New York, 1930).

85. John P. Diggins, *The Lost Soul of American Politics: Virtue, Self-Interest, and the Foundations of Liberalism* 69-99 (New York, 1984).

quintessential Calvinist tenet, was not agreeable to the possibility of silencing greedy natures by an action of will. "If the absence of avarice is necessary to republican virtue," Adams asked, "can you find any age or country in which republican virtue existed?"<sup>86</sup>

George Washington, no Calvinist, was almost as skeptical. Citizens who act disinterestedly are, he thought, "no more than a drop in the Ocean."<sup>87</sup> Patriotic love of country can animate conduct for only a limited time, and human institutions ought not be designed on the assumption that it can be expected in routine matters. Even Madison, the chief architect of the Constitution, had expressed pessimism: "[i]ndividuals of extended views . . . and of national pride" might practice public virtue, but not "the multitude."<sup>88</sup>

Reflecting such views, the gentry who had led the Revolution were apprehensive about the results of pure democracy.<sup>89</sup> As the winners in a notable war, they were an elite who shared elements of a common political faith,<sup>90</sup> but who were seriously divided on many lines. In the warmth of victory, they recoiled in diverse degrees from the rhetoric of Jefferson's Declaration of Independence that had thrilled them and the world a decade or so earlier. The recoil was stimulated by such alarming events as Shays' Rebellion in Massachusetts,<sup>91</sup> the increasingly shocking aftermath of the French Revolution,<sup>92</sup> and the secondary but equally bloody revolution of slaves in Caribbean sugar fields<sup>93</sup>—all of which suggested that the history of their American republic would be as short and anticlimactic at that of the Athenians.

86. 3 Adams, *supra* note 83, at 488-89.

87. Edmund S. Morgan, *The Genius of George Washington* 45 (New York, 1980).

88. Vices of the Political System of the United States, in 9 *The Papers of James Madison*, eds. Robert A. Rutland et al., 345, 355 (Chicago, 1975).

89. For a lively account, see Garry Wills, *Inventing America* (Garden City, 1978). *The Federalist* contains many dour statements about the need to contain the corrupt instincts of politicians. For a collection, see Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va. L. Rev. 543, 555-62 (1986). For an expression of Jefferson's skepticism, see 14 *Writings of Thomas Jefferson*, ed. Albert Ellery Bergh, 487 (Washington, 1905).

90. Robert H. Wiebe, *The Opening of American Society* 7 (New York, 1984).

91. The rebellion was a rising of debtors to close the courts against collection proceedings; it started in June 1786 and influenced the constitutional ratification debates. See Richard D. Brown, *Shays' Rebellion and the Ratification of the Federal Constitution in Massachusetts*, in *Beyond Confederation*, *supra* note 61, at 113.

92. French developments were followed closely in America. At first, the French Revolution seemed a welcome echo of the American event, or of the British Revolution of 1688, both comparatively tame. The strong similarity lay in the common origins, all three revolutions being led by those who had the greatest stakes in their respective societies and who were motivated by desires of reform. French developments showed how easily the sponsors of such events can lose control and find themselves on the guillotine, with power in the hands of genocidists. The story is elegantly told in Simon Schama, *Citizens* (New York, 1989). On the relationship of French events to American politics, see Bernard Fay, *Revolutionary Spirit in France and America*, trans. Ramon Guthrie (New York, 1927).

93. In 1793, reacting to events in France, the slaves in the French Indies began slaughtering their masters, some of whom fled to America. After a series of military encounters, the former slaves established the Republic of Haiti in 1804. See C. L. R. James, *The Black Jacobins: Toussaint l'Ouverture and the San Domingo Revolution* (New York, 1963).

It was at least partly in response to their rising anxiety,<sup>94</sup> and as a precaution against the potential excesses of factional, unvirtuous *democracy*,<sup>95</sup> that the Revolutionary generation ratified the Constitution of the United States.<sup>96</sup> In important respects the Constitution was anti-democratic and, in a manner of speaking, elitist. The familiar design of Madison and his fellow draftsmen was so to divide power that no faction would be able to marshal sufficient control to effect its private advantage. Their idea was another adaptation from Montesquieu, who misdescribed separation of powers as a feature of the unwritten British Constitution of 1688, and therefore as a source of strength characteristic of monarchical, as opposed to republican, government.<sup>97</sup> Applying this "monarchical" idea to a government without a crowned head was the draftsmen's creative stroke, aimed to allow political leadership that would be weak, but uncontrolled by faction, and strong enough to perform essential functions. The Founders hoped to make do with something less than the widely shared public virtue that Montesquieu and others had proclaimed essential to a republic.

Antifederalists were prone to accept Montesquieu's proposition that republican government required a level of community trust that could be attained only in a small republic.<sup>98</sup> Echoing long-held doubts, many emphatically denied the possibility that republican virtue could be shared among co-citizens, and remained skeptical that a republic cast in the model of Athens or Florence could ever be made to work in America. This skepticism reflected the premise that the transfer of loyalty from family to tribe to state could be made only in small steps. Antifederalists argued that it would be a cynical hoax to propose a republic that would extend across half a continent: one "might as well attempt to rule Hell by Prayer"<sup>99</sup> as rule such a space by a government deriving authority from its people. Their estimate of the people led them to see the Constitution as an ineffectively disguised grasp for oligarchic power by the Revolutionary aristocracy, as in some sense it was. The antifederalists dreaded, even more than the alleged hazards of excessive democracy, that the

94. For an expression of concern by Washington in 1786, see *Amicus Publicae*, in 1 *American Political Writing During the Founding Era, 1760-1805*, eds. Charles S. Hyneman & Donald S. Lutz, 638, 644 (Indianapolis, 1983).

95. In the eighteenth century, the word *democracy* was often disfavored as implying disorder; by the early nineteenth century, it had displaced *republic* as a description of American aims.

96. See *The Federalist* Nos. 9, 12, 71 (Hamilton), No. 10 (Madison).

97. Montesquieu, *supra* note 69, bk. XI, ch. 6. That Montesquieu misunderstood the eighteenth-century English Constitution was demonstrated in Walter Bagehot, *The English Constitution* (London, 1867).

98. Jefferson regarded this as one of Montesquieu's "heresies." Letter to Nathaniel Niles (Mar. 22, 1801), in 10 *The Writings of Thomas Jefferson*, ed. Andrew A. Lipscomb, 232 (Washington, 1905).

99. Quoted in Ferguson, *supra* note 28, at 24. Governor Winthrop of Massachusetts gave his opinion that "[t]he idea of an uncompoundd republick, on an average one thousand miles in length, and eight hundred in breadth, and containing six millions of [free] inhabitants all reduced to the same standard of morals, of habits, and of laws, is itself an absurdity, and contrary to the whole experience of mankind." *The Agrippa Letters, in Essays on the Constitution of the United States Published During Its Discussion by the People, 1787-1788*, ed. Paul Leicester Ford, 91-92 (Brooklyn, 1892).



national government would be a forum for the exercise of aristocratic hubris that would enlarge the power of the strong over the weak and the few over the many.

Thomas Jefferson<sup>100</sup> and the Federalist James Wilson (later the first law teacher at the University of Pennsylvania)<sup>101</sup> stood between the contending groups, almost alone among the Revolutionary generation in their optimism that, with education to develop virtuous leadership and with power divided, the nation could stand as a republic of continental dimension. At the time of the founding of the law professorship at William and Mary, Jefferson had expressed the optimistic belief that those few "whom nature has endowed with genius and virtue" could be "rendered by liberal education worthy to receive and able to guard the sacred rights and liberties of their fellow citizens."<sup>102</sup> Although forming the core of a slender middle at the time of ratification, Jefferson and Wilson were in time joined by many on both sides (including Hamilton and Benjamin Rush)<sup>103</sup> in recognizing that the government created by the Constitution was the only one available to America if it would be a nation, and that even constitutional government would require a modicum of public virtue or disinterestedness among its leaders to enlist the public trust needed to sustain its institutions.

Educating leadership was for many early Americans not merely the best hope for making the Constitution work, but the only one. Accordingly, it came to be that "[a]ll the founding fathers saw themselves as moral teachers,"<sup>104</sup> and the moral content of teaching law in colleges was an expression of the fears that gave rise to the political institutions they had created. This connection was symbolized by James Wilson's inaugural lecture at the University of Pennsylvania, attended by President Washington, Vice President Adams, and members of Congress.<sup>105</sup> Wythe and Tucker, Kent and Wilson, later Story and Walker, and the Transylvanians were thus implementers of the Constitution, inculcating the moral standards or restraints in its officers that would enable the republic to stand.

100. About Washington, Jefferson wrote: "The only point on which he and I ever differed in opinion, was, that I had more confidence than he had in the natural integrity and discretion of the people and in the safety and extent to which they might trust themselves with a control over their government." Letter from Thomas Jefferson to John Melish (Jan. 13, 1813), in 13 *The Writings of Thomas Jefferson*, *supra* note 98, at 206, 212.

101. Wilson's political views were distinctive and prescient. Despite its popular democratic provisions, Wilson had opposed ratification of the Pennsylvania Constitution of 1776 because it made no provision for separation of powers, and he persuaded his fellow citizens to ratify a new Constitution in 1790 that did. A Federalist, he agreed with Hamilton that a strong national government was needed, provided there be appropriate separation of powers, but he did not share Hamilton's mistrust of popular governance. See McCloskey, *supra* note 24, at 3-6.

102. A Bill for the More General Diffusion of Education (1779), in 2 *Jefferson Papers*, *supra* note 11, at 527.

103. Rush, a medical doctor, was an eminent Pennsylvanian, a Jeffersonian, the founder of Dickinson College, and an ardent advocate of nationalism.

104. Wood, *supra* note 61, at 83.

105. McCloskey, *supra* note 24, at 37.

### III. Francis Lieber

It is unjust that few contemporary American law teachers are familiar with the work of Francis Lieber. When he died in 1872, shortly after his retirement from Columbia University, he was the most renowned American law teacher. He was honored in many other nations. He was to become the subject of more biographies<sup>106</sup> than any American law teacher save Wythe.<sup>107</sup> He was in fact a significant link between the teachings of Wythe and later generations of American law teachers. Because of his paramount interest in republican virtue and its role in democratic politics, Lieber would probably have been recognized as the right person to be the founding professor of law at Thomas Jefferson's "nursery of republicans," the University of Virginia, had he been known to Jefferson in the spring of 1826.<sup>108</sup>

106. Frank Freidel, *Francis Lieber: Nineteenth Century Liberal* (Baton Rouge, 1947); Lewis R. Harley, *Francis Lieber: His Life and Political Philosophy* (New York, 1899); *The Life and Letters of Francis Lieber*, ed. Thomas Sergeant Perry (Boston, 1882) [hereinafter *Life and Letters*]; M. Russell Thayer, *The Life, Character and Writings of Francis Lieber*, in 1 *The Miscellaneous Writings of Francis Lieber*, ed. Daniel Coit Gilman, 13 (Philadelphia, 1880) [hereinafter *Miscellaneous Writings*]; see also Bernard Edward Brown, *American Conservatives: The Political Thought of Francis Lieber and John W. Burgess* (New York, 1951); Elihu Root, *Francis Lieber: Presidential Address at the Seventh Annual Meeting of the American Society of International Law* (1913), in *Addresses on International Subjects* 89 (Cambridge, Mass., 1916); Ernest Bruncken, *Francis Lieber: A Study of a Man and an Ideal*, 15 *Deutsch-Amerikanische Geschichtsblätter* 54 (1915); C. B. Robson, *Francis Lieber's Theories of Society, Government and Liberty*, 4 *J. Pol.* 227 (1942).
107. Wythe was Jefferson's law teacher, a signer of the Declaration of Independence, the first American law professor, and Chancellor of Virginia. He left the Constitutional Convention of 1787 to attend his sick wife. His biographies include Joyce Blackburn, *George Wythe of Williamsburg* (New York, 1975); Imogene E. Brown, *American Aristides: A Biography of George Wythe* (Rutherford, N.J., 1981); William Clarkin, *Serene Patriot: A Life of George Wythe* (Albany, N.Y., 1970); Alonzo Thomas Dill, *George Wythe: Teacher of Liberty* (Williamsburg, 1979); William Edwin Hemphill, *George Wythe the Colonial Briton: A Biographical Study of the Pre-Revolutionary Era in Virginia* (1937) (unpublished Ph.D. dissertation, University of Virginia); L. S. Herrick, *George Wythe*, in *Randolph-Macon Historical Papers* (Richmond, 1912); Robert B. Kirtland, *George Wythe: Lawyer, Revolutionary, Judge* (New York, 1986); Oscar L. Shewmake, *The Honorable George Wythe: Teacher, Lawyer, Jurist, Statesman* (Williamsburg, 1954); see also Lyon Gardiner Tyler, *George Wythe: 1726-1806*, in 1 *Great American Lawyers*, ed. William Draper Lewis, 51 (Philadelphia, 1907).
108. The search for a law teacher for the new university was long and troublesome. In 1820 Thomas Cooper was prematurely appointed. Cooper was driven out before his arrival by a Presbyterian clergy warned of his virulent anticlericalism. For a brief account of Jefferson and Cooper, see 6 Dumas Malone, *Jefferson and His Time: The Sage of Monticello* 366-85 (Boston, 1981). The appointment was thereafter offered to several other persons, including William Wirt, the Attorney General of the United States, and James Kent, the aged former Chancellor of New York. It was at last settled shortly before Jefferson's death on John Tayloe Lomax. Lomax was a conveyancer fascinated by the intricacies of equity practice. Shepard, *supra* note 44, at 360-61. In 1827, the year after Jefferson's death, the law program was rescheduled so that a student could attend all the law lectures in a single year of residency without exposure to any of the other disciplines highly valued by Jefferson: science, history, political economy, or the classics. In 1830, Lomax reported of his few students that "[t]heir demand for the law is as for a trade—the means, the most expeditious and convenient, for their future livelihood. I found myself irresistibly compelled to labor for the satisfaction of this demand, or that the University would have no students of law." *Quoted in Currie, supra* note 6, at 361.

Lieber, to his own dissatisfaction, spent the bulk of his career at the University of South Carolina.<sup>109</sup> But his book, *Political Ethics*, was assigned reading for students at Joseph Story's Harvard Law School,<sup>110</sup> and was familiar as well to students at Transylvania University in Kentucky, the place where Jefferson's vision of legal education best flourished in the antebellum decades.<sup>111</sup> Many of Lieber's works would be the subject of posthumous editions, including several by President Woolsey of Yale<sup>112</sup> and two volumes of miscellaneous writings edited by Daniel Coit Gilman, the founding President of Johns Hopkins University, and published in 1881.<sup>113</sup>

Lieber was the first American to apply the techniques of literary criticism to law,<sup>114</sup> and the first American law teacher to write a work on law and economics.<sup>115</sup> He was the first American law teacher to do survey research.<sup>116</sup> He was the first American encyclopedist.<sup>117</sup> He was arguably the first American legal comparativist.<sup>118</sup> More than four decades after his death, he was nominated by the Secretary of State as the "patron saint" of the American Society of International Law.<sup>119</sup>

Yet he is today known only to those well informed in the history of public international law and to political scientists of a similar historical bent. He has been ignored, or given merely glancing attention, by most historians of American legal education.<sup>120</sup> He did not fit the paradigm of the more techno-

109. See *infra* text accompanying notes 189-204. He was appointed in 1835 and resigned in 1856.

110. Elizabeth Kelley Bauer, *Commentaries on the Constitution: 1790-1860*, at 338 (New York, 1965).

111. Carrington, Transylvania, *supra* note 9.

112. *Manual*, *supra* note 55, republished in 1881 by J. B. Lippincott & Co. of Philadelphia; and *On Civil Liberty and Self-Government* (Philadelphia, 1853), republished in 1859, 1877, and 1901 [hereinafter *On Civil Liberty*]. Citations to *On Civil Liberty* are to the third edition, edited by Theodore J. Woolsey.

113. *Miscellaneous Writings*, *supra* note 106.

114. *Hermeneutics*, *supra* note 56.

115. *Essays on Property and Labour* (New York, 1841) [hereinafter *Property and Labour*].

116. *A Popular Essay on Subjects of Penal Law, and on Uninterrupted Solitary Confinement at Labor* (Philadelphia, 1838).

117. He edited the first edition of the *Encyclopedia Americana*, appearing from 1828 to 1833.

118. See *On Civil Liberty*, *supra* note 112.

119. *Root*, *supra* note 106, at 103.

120. See generally Warren, *supra* note 18; James Barr Ames, *The Vocation of the Law Professor*, in *Lectures on Legal History and Miscellaneous Legal Essays* 354 (Cambridge, Mass., 1913); James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston, 1950); Alfred S. Konefsky & John Henry Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 Harv. L. Rev. 833 (1982). For very brief discussions of Lieber, see Reed, *supra* note 1, at 121 n.3, 155 n.2, 158-59, 176 n.1, 303 n.1, 334; Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s*, at 39, 49 n.44 (Chapel Hill, 1983). I have no satisfactory explanation for the general oversight. Dennis R. Nolan has observed about a quite different point: "Warren and his followers seem to have violated a number of basic rules of historical writing through their limited research, regionalism, and lack of historical perspective." *The Effect of the Revolution on the Bar: The Maryland Experience*, 62 Va. L. Rev. 969, 994 (1976). This does not account for Hurst, the dean of American legal historians, whose interests simply ran in other directions. Brainerd Currie, writing history that is chiefly directed at the Columbia Law School of the 1920s, makes mention of Lieber,

cratic law teacher established in the minds of many by the seminal work of Charles Warren, the first historian of American law teaching.<sup>121</sup> Warren, who formed his impressions of law teaching on the banks of the Charles River in the late nineteenth century, attached little importance to law teaching that antedated the emergence of Christopher Columbus Langdell at Harvard in 1870, save perhaps that of Joseph Story.

True, Lieber was never trained as a lawyer and made no pretense of technocratic skill in the performance of legal services for private clients, but for his generation that was acceptable.<sup>122</sup> He lived and worked in a time when academic or even professional credentials had little value. Perhaps because later historians tended to perceive the legal profession chiefly in terms of such credentials,<sup>123</sup> they took too little notice that professional status as a lawyer was then loosely worn, more as a tool than as an ornament. Almost every person to stride the public stage from the time of President Adams to President Garfield was at least nominally a lawyer, and nineteenth-century American literature was often the work of lawyers.<sup>124</sup> For related reasons, public law stood near the center of many college curricula, and some of the important law teaching in antebellum times was done by persons trained chiefly in the classics,<sup>125</sup> who were not privy to the apprenticeship system that trained candidates for private legal service and who did not presume to offer instruction designed to displace that training. Charles Warren and those whose vision was bound by his seem not to have noticed that among those teaching American law in the century following its beginnings in 1779, Lieber was perhaps the premier intellect.<sup>126</sup>

Lieber was born in Berlin in 1800, one of twelve children of a Prussian ironmonger. In 1811, enraged at the sight of the French army marching in his

but discounts his influence. Currie, *supra* note 6, at 378-79. Currie took little note of Lieber's prolific writing, being chiefly interested in Lieber's slight personal influence on his colleague Theodore Dwight at the end of his career. See also Maxwell Bloomfield, *Lawyers and Public Criticism: Challenge and Response in Nineteenth-Century America*, 15 *Am. J. Leg. Hist.* 269 (1971); McManis, *supra* note 7.

121. Like this author, none of the persons who have written about the history of legal education were professional historians. Charles Warren was a Boston lawyer during much of his career, including the time when he wrote his history of the Harvard Law School, first published in 1908. *Dictionary of American Scholars*, 2d ed., 987 (New York, 1951).
122. At one point, Lieber thought of taking an apprenticeship in law, but was dissuaded by Joseph Story. Freidel, *supra* note 106, at 110.
123. This focus of Warren's is most evident in his *History of the American Bar to the Year 1860* (Boston, 1911) (Buffalo reprint, 1990). Describing the post-Revolution development of law teaching, he observed that "[i]t will readily be seen that none of these professorships attempted to afford a complete or practical education for law students." *Id.* at 357.
124. See generally Ferguson, *supra* note 28, at 72-78.
125. For a spirited defense of the classics as preparation for a career in law (or anything else), see the Yale Report of 1828, in 1 Richard Hofstadter & Wilson Smith, *American Higher Education: A Documentary History* 289 (Chicago, 1961).
126. By the standards of the present, only St. George Tucker and James Kent can be compared to Lieber as legal scholars. See Hurst, *supra* note 120, at 256-58 (discussing Tucker and Kent); Currie, *supra* note 6, at 357. Kent did very little teaching. See John Theodore Horton, *James Kent: A Study in Conservatism, 1763-1847*, at 95 (New York, 1939).

street, he pledged to assassinate Napoleon.<sup>127</sup> In the same year, he became a disciple of Friedrich Jahn, a physical culturist and Prussian patriot. As a participant in Jahn's *Turnverein* movement,<sup>128</sup> he developed impressive physical strength. In 1815 he joined his seven brothers in volunteering to fight Napoleon in the Waterloo campaign. (He later said of his mother that if she had had twenty sons, she would have sent them all!<sup>129</sup>) He fought with distinction at Ligny, and was seriously wounded at Namur in a skirmish preliminary to Waterloo.<sup>130</sup>

On returning from the war, Lieber renewed his studies and also his activities with Jahn. After Napoleon was banished and the Prussian monarchy turned its attention to domestic security, Jahn and his followers were arrested in 1819 and imprisoned; Lieber was held for four months "as [a] dangerous enem[y] of the [Prussian] state."<sup>131</sup> Released, he was forbidden ever to study in a Prussian university or to hold office in the Prussian state. He completed his studies in 1821 at the University of Jena in Thuringia. Then, with permission, he went to Greece as a "Philhellene" to fight in the revolution against Turkey.<sup>132</sup> Revealing himself to his diary as a predictably arrogant young Prussian, he reported that his service to Greece was useless because "the cowardice and incapacity of the Greeks made them unfit to defend or free their country."<sup>133</sup> But he thought that they might nevertheless prevail because of the still greater cowardice and incompetence of the Turks. This militant youth averred that a battalion of good Prussians could conquer both competing armies in a few weeks.<sup>134</sup>

Arriving in Rome, Lieber was befriended by Berthold Niebuhr, a learned classicist then serving as German Ambassador to the Vatican.<sup>135</sup> Lieber tutored the Niebuhr children for a year while he explored Italy and studied Roman culture with his friend and employer. On his return to Germany, now with the patronage of Niebuhr, he was cautiously permitted to commence advanced study at Halle. He was, however, again imprisoned, on the occasion of a political assassination, as a suspected member of a student group known to have leftist leanings and a relation to the assassin, a suspicion seemingly based entirely on Lieber's unwillingness to give evidence against fellow students.<sup>136</sup> While imprisoned, he wrote some publishable poetry and read the works of Shakespeare in English.<sup>137</sup> He was released as a result of Niebuhr's interven-

127. Thayer, *supra* note 106, at 16.

128. The *Turnverein* was a gymnastic association. Jahn called himself the *Turnwater* or Father of Gymnastics. Most of his gymnasts volunteered to fight Napoleon. He was imprisoned by the Prussian government from 1819 to 1825 and thereafter exiled from Berlin until 1848.

129. Life and Letters, *supra* note 106, at 8.

130. *Id.* at 9-17. Senator Rufus Choate, the Massachusetts Whig and ally of Daniel Webster, was heard to say that Lieber's life was spared so that he might write the books that are the chief subject of this article. Harley, *supra* note 106, at 20 n.1.

131. Life and Letters, *supra* note 106, at 29.

132. *Id.* at 121-41.

133. *Id.* at 41.

134. *Id.*

135. *Id.* at 42-50.

136. *Id.* at 56.

137. *Id.* at 59.

tion,<sup>138</sup> and was under virtual house arrest. During that time, he was not permitted to work in Prussia, except as an occasional tutor in Italian.

Frustrated, Lieber in 1826 evaded the Prussian police to stow away on a ship sailing from Hamburg to London. There, he earned his keep giving private lessons in German and Italian, and was endorsed by Niebuhr for appointment at the new University of London.<sup>139</sup> He became acquainted with Jeremy Bentham and with John Austin, the English legal theorist, and his wife.<sup>140</sup> Among Lieber's private students in London was his future wife, Matilda. But he decided to move on to Boston, "the most scientific city in the United States,"<sup>141</sup> even though he had no assured prospects in America except a job at a gymnasium giving swimming lessons. He proposed marriage, but left Matilda in England until 1829, when he was sufficiently settled in Boston to support a wife.<sup>142</sup>

The Americanization of Lieber occurred with astonishing rapidity.<sup>143</sup> More enthusiastic about his adopted country at the time he set foot on American soil in 1827 than were most of its natives, he instantly acquired an enviable acquaintanceship. Before the end of his third month at the gymnasium, the President of the United States came to his gym and swam with him.<sup>144</sup> Within a short time, he was known not only to John Quincy Adams and to the Harvard faculty, including Justice Story, but also to Senators Calhoun, Clay, and Webster and other notables including John James Audubon, Nicholas Biddle, and Julia Ward Howe.

In 1838 Lieber published a book on criminal law and penology, a subject of which he had first-hand knowledge reinforced by the results of his primitive attempts at empirical methods.<sup>145</sup> Echoing Immanuel Kant,<sup>146</sup> for a lifetime he

138. *Id.* at 58.

139. *Id.* at 68.

140. Brown, *supra* note 106, at 36; Freidel, *supra* note 106, at 49.

141. Life and Letters, *supra* note 106, at 73.

142. *Id.* at 83.

143. As with many immigrants, the process may have occurred in anticipation. At sea, he wrote his parents in Berlin:

I know that [America] will not be a paradise. I believe that the customs and influences of the Middle Ages were required for the development of the race then, but now new and greater ideas are dawning which Europe is too petrified and ossified to accept or adopt. . . . These new ideas will find their soil in America, and many have already taken root. There never has existed, to my knowledge, a government that has been formed so entirely for the good of the people. Never in the history of the world has so much wisdom and humanity been shown as in their civilization.

*Id.* at 70. Two weeks after his arrival, on July 8, 1827, he wrote his future wife: "The law reigns here. Every citizen honors it as his birthright. He knows that it is necessary and abides by its mandates." *Id.* at 75.

144. *Id.* at 77-78.

145. A Popular Essay on Subjects of Penal Law, *supra* note 116. Lieber advocated imprisonment in lieu of quicker but more painful punishments, believing in the rehabilitative effects of isolated confinement. In this, he may have reflected the ideas of Jeremy Bentham.

146. Kant's Principles of Politics, trans. & ed. William Hastie, 61, 119 (Edinburgh, 1891).

insisted on the necessity of empirical testing of falsifiable observations.<sup>147</sup> He was later recognized as a pioneer of American sociology.<sup>148</sup>

Meanwhile, he set to work on his idea of an *Encyclopedia Americana*. Within two years he had published the first two volumes, having gained the help of many of his new friends in Boston. He persuaded Justice Story to write 120 double-columned, small-print pages of material as "labors dedicated purely to friendship."<sup>149</sup>

After Lieber completed his *Encyclopedia* in 1833, he devoted a year to planning Girard College for orphans in Philadelphia. Meanwhile, he searched for an academic appointment. He was interviewed for a position on the founding faculty at New York University, but was not offered an appointment, perhaps because of his still heavy Teutonic accent,<sup>150</sup> or perhaps on account of his reputation for bold thinking or even radicalism. He was also, on the advice of Henry Clay, considered by Transylvania for its presidency, but he was not offered that position either.<sup>151</sup> In 1835 he was at last appointed as Professor at the College (later University) of South Carolina,<sup>152</sup> a position he was to hold until 1856, lecturing regularly on constitutional law and on political economy.

He also wrote profusely,<sup>153</sup> and shortly published the three volumes on public virtue. His writing was discursive and prolix. Like George Wythe, he was a pedant,<sup>154</sup> full of obscure references not only to classical events but also to contemporary European history, of which he was an exceptionally close observer. To the modern reader, Lieber betrays bigotry with respect to race<sup>155</sup>

147. See 2 Miscellaneous Writings, *supra* note 106, at 408; and his argument for better data gathering by the government, printed upon the motion of Senator John C. Calhoun in S. Doc. No. 314, 24th Cong., 1st Sess., serial set 282, at 1 (1836).

148. See Albion W. Small, *Fifty Years of Sociology in the United States (1865-1915)*, 21 *Am. J. Soc.* 721, 727-28 & n.1 (1916).

149. On Civil Liberty, *supra* note 112, at 213 n.3.

150. See Life and Letters, *supra* note 106, at 94.

151. See Letter from Henry Clay to Francis Lieber (Sept. 15, 1834), in 8 *The Papers of Henry Clay*, eds. Robert Seager II & Melba Porter Hay, 747 (Lexington, Ky., 1984) [hereinafter *Clay Papers*]; Letter from Francis Lieber to Henry Clay (Nov. 8, 1834), in *id.* at 750; Letter from Henry Clay to Francis Lieber (Dec. 3, 1834), in *id.* at 752.

152. In that position, he succeeded another notable radical émigré, Thomas Cooper, the "English Jacobin." See generally Malone, *supra* note 40.

153. With editorial assistance from Charles Sumner, Joseph Story, and Simon Greenleaf, all of Harvard. Life and Letters, *supra* note 106, at 106.

154. William Wirt, *Sketches of the Life and Character of Patrick Henry*, 15th ed., 66 (Hartford, 1854) ("[Wythe] carried his love of antiquity rather too far for he frequently subjected himself to the charge of pedantry; and his admiration of the gigantic writers of Queen Elizabeth's reign, had unfortunately betrayed him into an imitation of their quaintness . . .").

155. For example, he was confident of the moral superiority of Europeans, especially those of Germanic or English origins; he regarded Asians as "cunning." 1 *Manual*, *supra* note 55, at 389; see also *id.* at 151 (explaining that there will be no black mayor of Boston).

and gender,<sup>156</sup> although perhaps less than the norm for persons of his time. Quaint was his opposition to trade unions, which he feared as expressions of anti-communitarian greed.<sup>157</sup>

Despite these substantial blemishes, his work was a large achievement, synthesizing the author's many thoughts about right standards of conduct in a wide array of public roles calling for the performance of public duty by citizens. The work detailed the appropriate functions and limits of ambition, friendship, popularity, ideology, religion, patriotic loyalty, education, suffrage, the media, and the habit of obedience to law, in the nurture of representative government.

The related work, *Legal and Political Hermeneutics*, was subtitled *Principles of Interpretation and Construction in Law and Politics*. It explored the ethical responsibilities of judges and lawyers when dealing with legal texts, breaking new ground as the first substantial American work on legislation and on the doctrine of precedent. It can fairly be said to be the first American book applying techniques of literary criticism to legal institutions.<sup>158</sup>

Though addressed to college students, Lieber's books were quickly embraced by his learned American friends, winning the admiration of both educators and public men. Henry Clay wrote Lieber in 1838 extolling the *Hermeneutics* volume in some detail.<sup>159</sup> Chancellor Kent commended Lieber's work "in the strongest terms," observing that a reader of Lieber's works "always felt that he had a sure pilot on board, however dangerous the navigation."<sup>160</sup> Justice Story commended the creativity of the work, calling it "one of the best theoretical treatises on the true nature and objects of government,"<sup>161</sup> and he accordingly recommended an appointment for Lieber at Harvard. It was declared by an English reviewer to be a definitive work, superior to Montesquieu.<sup>162</sup>

Lieber's books remained in use for a half century. After his death the *Manual of Political Ethics* was edited in 1875 by Theodore Woolsey, the President of Yale,<sup>163</sup> and *Hermeneutics* was edited in 1880 by Professor William

156. 2 *id.* at 122:

[Woman] is framed and constituted more delicately, and in consequence of this marked difference of organization has advantages and disadvantages compared to the male sex, differences which are fundamental and of the last importance for the obtaining of those ends for which man and mankind are placed on this globe, and from which likewise different positions, callings, duties, and spheres of activity result.

157. *Id.* at 196-204.

158. See James Farr, Francis Lieber and the Interpretation of American Political Science, 52 J. Pol. 1027, 1030 (1990), reprinted in *Legal Hermeneutics: History, Theory and Practice*, ed. Gregory Leyh 83 (Berkeley, 1991). Compare, however, John Taylor, *Construction Construed, and Constitutions Vindicated* (Richmond, 1820).

159. *Life and Letters*, *supra* note 106, at 126-28.

160. Quoted in Theodore P. Woolsey, Preface to the Second Edition, 1 *Manual*, *supra* note 55, at 3, 3.

161. *Id.*

162. Thayer, *supra* note 106, at 26.

163. See *supra* note 112 and accompanying text.



Hammond of the University of Iowa. His works were also published in London, and won recognition in France and Germany. They were presumably the basis for his pardon by the King of Prussia in 1842.<sup>164</sup>

Although the long-envisioned Harvard appointment was never made, Lieber continued his prolific work. In 1841, he published *Property and Labour*, a work that can be fairly described as the first effort of an American law teacher to apply economic analysis to legal institutions. In that work Lieber revealed his adherence to the political tenets of Alexander Hamilton.<sup>165</sup> He argued that labor benefits from the accumulation of capital, and that political stability is essential to the economic investment that creates jobs. This book may also be taken as a primitive expression of what has become the familiar concept of human capitalism.<sup>166</sup>

Although Lieber was still Teutonic in his oral delivery, his English prose had improved, sometimes achieving an admirable simplicity and directness—for example, in his introduction to the idea of property:

The thing was before the word; the word before reflection upon its meaning, extent and usefulness. Upon inquiry, we shall find that private property exists many centuries, probably thousands of years, before men began to reflect upon its origin, its fairness and utility; and that those among whom it grew up, had no conscious intention of bringing it about, nor any clear conception of the many effects which might result from it. Neither did they reason upon the right by which they held it, any more than the daring fisherman does now, who sails in his craft to the Banks of Newfoundland to catch the unappropriated fish of the sea, but feels his right very strongly so soon as anyone attempts to dispossess him of the well-earned produce of his labor and danger.<sup>167</sup>

In 1844 the King of Prussia invited Lieber to return there permanently. He received a paid leave from the College of South Carolina and resided in Berlin for a year.<sup>168</sup> His visit with the King led to an invitation to join the royal court as an intimate advisor,<sup>169</sup> the very role so ardently sought in Florentine times by Machiavelli.<sup>170</sup> He was also offered an appointment at the University of Berlin, from which he had been expelled a quarter century earlier.<sup>171</sup> Lieber gave the King some advice on penology but gratefully declined the Prussian offers, electing to return to South Carolina.

A volume based on Lieber's lectures at South Carolina, *On Civil Liberty and Self-Government*, was published in 1853. In a little over 400 tightly packed pages, *Civil Liberty* covers most of American constitutional law, with comparative and historical dimensions. It shortly came to be used as a text in colleges throughout the United States. It survived into a fourth edition published in 1903. The

164. See Harley, *supra* note 106, at 78.

165. For whom Lieber appears to have named his second son.

166. See *Property and Labour*, *supra* note 115, at 218 n.1.

167. *Id.* at 27-28.

168. *Life and Letters*, *supra* note 106, at 185-87.

169. *Id.* at 187-88. The role apparently would have resembled that of membership on the American Council of Economic Advisors.

170. See *supra* notes 74-75 and accompanying text.

171. Freidel, *supra* note 106, at 26.

later editions were prepared by Lieber's self-acknowledged disciple, Theodore Woolsey, sometime President of Yale and for four decades the teacher of constitutional law<sup>172</sup> and international law in the Yale Law School.<sup>173</sup> After 1873 Woolsey taught in the law school of Dean Francis Wayland,<sup>174</sup> in a program not radically dissimilar from that designed by Jefferson.

Lieber's *Civil Liberty* commenced from the Montesquieuan premise that law is a cultural artifact, a piece of the social order to be understood in its cultural context. Like Montesquieu, Lieber was preoccupied with hierarchy and the status of the elite in different polities, and with the causes and effects of those differences. Lieber was far better informed than Montesquieu about the European cultures and governments which he undertook to compare. More faithful to the limits of his knowledge than the French Baron, he abstained from comparisons with Persia, Turkey, and China. Despite his personal friendship with Tocqueville,<sup>175</sup> he remained an unabashed Francophobe. Most despotic institutions were associated in Lieber's mind with one or the other Napoleon, and were hence labeled "Gallican,"<sup>176</sup> to distinguish them from most institutions serving to protect individual liberty, which were "Anglican."<sup>177</sup>

Despite this self-indulgence, the work is still cited as an early but sophisticated use of historiography.<sup>178</sup> In the decades following Lieber's death, it became the cornerstone not only of constitutional law at the Yale Law School, but of the emerging discipline of political science. Among Lieber's adherents, besides Woolsey and Gilman, were Andrew Dickson White at Cornell, Charles Kendall Adams at Michigan, Julius Seelye at Amherst, John Burgess at Colum-

172. Woolsey was described as a "disciple" of Lieber's. 1 John W. Burgess, *Political Science and Comparative Constitutional Law* 70 (Boston, 1890). He was President of Yale from 1846 to 1871. He had trained as a lawyer for a year in Philadelphia before his appointment at Yale in 1831. He was a devoted classicist, achieving distinction as a professor of Greek that led to his elevation to the presidency of Yale. Theodore Dwight Woolsey, in 20 *Dictionary of American Biography*, ed. Dumas Malone, 519-20 (New York, 1936). As President, he assumed responsibility for teaching political ethics and constitutional law; he remained in the law school after his retirement as President. Daggett, *supra* note 43. On Lieber's relation to Woolsey, see Freidel, *supra* note 106, at 168, 275-76.

173. In the late nineteenth century, Yale Law School was led by Dean Francis Wayland and bore a closer resemblance to the Jefferson-Wythe model of legal education than to Langdell's Harvard Law School as it emerged during that era.

174. Wayland's father had been President of Brown, a teacher of political economy, and an advocate of Jefferson's views on higher education. See Francis Wayland, *Thoughts on the Present Collegiate System in the United States* (Boston, 1842). For a biography of the senior Wayland, see James O. Murray, *Francis Wayland* (Boston, 1891). The younger Wayland served as Lieutenant Governor of Connecticut and then as Dean of the Yale Law School from 1873 to 1903. He also served a term as President of the American Social Science Association. It is easy to see in the law school conducted by Wayland and Woolsey the seedbed of the legal realism that came to the institution a few decades later. On the advent of legal realism at Yale, see Laura Kalman, *Legal Realism at Yale: 1927-1960* (Chapel Hill, 1986).

175. *Life and Letters*, *supra* note 106, at 140.

176. On *Civil Liberty*, *supra* note 112, at 279-96; see also *id.* at 256 n.1.

177. *Id.* at 51-55.

178. See Dorothy Ross, *The Origins of American Social Science* 40-42 (New York, 1991).

bia, and Johannes Bluntschi at Heidelberg.<sup>179</sup> This following kept Lieber's name and influence in political science very much alive well into the twentieth century.<sup>180</sup>

Given the comparative nature of the work, Lieber did not confine his study to constitutionally protected civil liberties. He treated the freedom of river navigation as an important civil liberty, as indeed it may be.<sup>181</sup> He even classified the right of adversaries to arbitrate their disputes without judicial oversight or intervention as something approaching a civil liberty.<sup>182</sup> Despite the impressive breadth of his work, as a South Carolinian he gave slight attention to the status of slaves—a rather astonishing oversight for an antebellum treatise on American constitutional law.<sup>183</sup>

Lieber's thinking was clearly influenced by Bentham. He treated with some care Bentham's idea that judges should be seated in the legislative bodies to elevate their disinterest and rationality.<sup>184</sup> Generally hostile to the populism of Andrew Jackson, he was nonetheless open-minded about the election of judges in his first edition. But his revisions declared the practice to be a failure that grievously diminishes judicial independence and thereby threatens civil liberties.<sup>185</sup> His brief statement of the case for the right to trial by jury in civil cases is fairly succinct and as effective as any available today.<sup>186</sup>

As a teacher, Lieber was exuberant and rigorous. His method bordered on the Socratic, with mandatory recitation and argument, criticism of error, and a written final examination at the end of the term, an exceptional requirement for the time.<sup>187</sup> His teaching was highly valued by many of his students, even though he was not always skilled in dealing with unruly antics that may sometimes have been reactions to his soaring instruction:

If he failed in any respect, it was in the lack of that regular system so dear to the American student's heart, his mind was so deep in thought, so rich in suggestion, so affluent in illustration, that to an ordinary student there might seem to be a break in the continuity of treatment of his subject, when there were in fact only elegant accessories or delightful excursions, from which he would in due time return to the main track of his discourse.<sup>188</sup>

Others may have been discomfited by his persistence in criticizing any ideas smugly cherished by the young elite of the state. "I belong to no party when

179. *Id.* at 66-69.

180. *Id.* at 279-80.

181. On Civil Liberty, *supra* note 112, at 266-69.

182. *Id.* at 229-31.

183. *Id.* at 260.

184. *Id.* at 224-26.

185. *Id.* at 221-28.

186. *Id.* at 234-37.

187. Freidel, *supra* note 106, at 138-39.

188. Theodore W. Dwight, *Columbia College Law*, New York, 1 Green Bag 141, 155 (1889).

teaching,"<sup>189</sup> he explained. The duty of the public law teacher to criticize public institutions and policies carried the burden of disengagement from disabling interests, but carried the right (not then generally acknowledged) to academic freedom: "No government, no censor, no suspicious partisan watches my words; no party tradition fetters me; no connections force special pleading on me. . . . On no occasion have I bent to adjust my words to gain the approbation of prince or people."<sup>190</sup>

Yet it was apparent to his students at South Carolina that Lieber was an ardent nationalist, and in 1851 he attracted public criticism for his anti-secessionist views.<sup>191</sup> The people of the state nevertheless took considerable pride in his intellectual attainments and global reputation. They were desirous of his approval in turn; it was never received, although he was fully aware that he could achieve adoration by his neighbors with "a pamphlet written for the South, especially in favor of Slavery."<sup>192</sup> One South Carolina position that he did favor was free trade, and he assigned to his students the free trade advocacy of Jean Baptiste Say<sup>193</sup> and of his predecessor at South Carolina, Thomas Cooper.<sup>194</sup>

Among his dissatisfactions with South Carolina, Lieber longed for the more bracing intellectual life of Boston. He devoted considerable energy to his correspondence, much of it directed to seeking employment elsewhere. "Boston," he wrote Matilda, "I say, God, grant me Boston."<sup>195</sup> He fled north every summer, expressing his desire to avoid the Carolina weather.

Ever an Anglophile, Lieber was an Episcopalian intolerant of the religious fundamentalism of some of his associates and many of his neighbors.<sup>196</sup> Perhaps partly on account of his own shortcomings as a disciplinarian, he deplored the leniency of South Carolina patricians in the social training of their children. He reported to many friends in the North the escapade of one student who was expelled from college, convicted of felonious assault and imprisoned, married and had a child, admitted to the bar, and elected to the legislature, all before he was twenty-two.<sup>197</sup>

189. *The Ancient and Modern Teacher of Politics: An Introductory Discourse to a Course of Lectures on the State* 12 (New York, 1860) [hereinafter *Teacher of Politics*]; see also Letter to Oscar Lieber (Nov. 1860), *Life and Letters*, *supra* note 106, at 313.

190. *Teacher of Politics*, *supra* note 189, at 12.

191. 1 Hollis, *supra* note 40, at 183-84. Among Lieber's activities was the cofounding of the Loyal Publication Society, a group that published 43 pamphlets under his leadership, including some by Lieber, all of them expounding nationalism. Brainerd Dyer, Francis Lieber and the American Civil War, 2 *Huntington Libr. Q.* 449, 458 (1939).

192. *Life and Letters*, *supra* note 106, at 171.

193. 1 Hollis, *supra* note 40, at 188.

194. Cooper's *Manual of Political Economy* was first published in 1827 and saw an 11th edition in 1970.

195. *Life and Letters*, *supra* note 106, at 189.

196. Freidel, *supra* note 106, at 217. On Lieber's assessment of religious fundamentalism, see *infra* text accompanying note 355.

197. *Life and Letters*, *supra* note 106, at 126.

Above all, Lieber could scarcely abide slavery. From his first days in South Carolina to his last, he reviled it, but never in public print. In 1835 he publicly denied being an abolitionist,<sup>198</sup> and he continued until the war to support Henry Clay's plan for compensated emancipation rather than abolition. He leased a few slaves to keep his home,<sup>199</sup> but he was never comfortable with slaves around, or effective in managing his relationships with them.<sup>200</sup> He was a sometime correspondent of Senator Calhoun, to whom he addressed four letters urging support for emancipation. In the last of these, he penned strong words indeed for a teacher writing a half century before the advent of academic tenure: "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."<sup>201</sup>

Lieber undertook advocacy of prison reform in South Carolina. This was his one substantial involvement in the public affairs of the state, and it was a failure.<sup>202</sup> Whether he could have achieved his objective if he had not in so many ways resisted the culture in which he was immersed cannot be known. Doubtless his chances would have been better.

In 1855 Lieber sought the vacant presidency of his college. Perhaps he saw this as an opportunity to influence the state, or perhaps it was pursuit of vanity. One wonders what could have happened to him, to the state, and even perhaps to the nation, if he had gained that position. It was not to be, on account of his strongly held antislavery sentiments.<sup>203</sup> Stung by the rejection, though he might have foreseen it, Lieber resigned and moved to New York, leaving behind his oldest son, Oscar, who had adapted to South Carolina.<sup>204</sup> Grateful for his twenty-one years amongst them, his colleagues and neighbors mounted a handsome bust of Lieber in the college hall. Within a few months of his arrival early in 1857, he was appointed at Columbia University.

Lieber's appointment straddled the new department of political science and the law school then emerging under the leadership of Theodore Dwight.<sup>205</sup> His relations with the undergraduates and with the President of the University proved difficult,<sup>206</sup> and in due course he settled into the law school as Dwight's colleague, where he remained until his death.

198. Freidel, *supra* note 106, at 125.

199. On the day of his arrival in South Carolina, he complained to his diary about "this nasty, dirty, selfish institution." *Life and Letters*, *supra* note 106, at 108. The next day, he met the boy, Tom, whom he had leased to do chores around the house. That night, he wrote: "O God! What is man with all his religion, learning, and philosophy? . . . The fact that Americans are a kind race, well disposed, makes it but the more humbling; for it is so with all mankind. It is man's poor, wretched, flimsy nature." *Id.* at 109-10.

200. Freidel, *supra* note 106, at 236.

201. *Life and Letters*, *supra* note 106, at 235.

202. 1 Hollis, *supra* note 40, at 189-90.

203. *Id.* at 190-92.

204. Oscar fought for the Confederate Army and was killed in combat. See Freidel, *supra* note 106, at 306.

205. Goebel, *supra* note 15, at 44-67.

206. *Id.* at 55-56 (describing college president's attempt to have Lieber removed from faculty because of failure to preserve order in classroom).

Soon after his arrival in New York, he became an outspoken critic of slavery, even addressing large audiences on the subject, to the distress of his former neighbors in South Carolina and especially of his son, Oscar. He favored retention of the union, by force if necessary.<sup>207</sup>

Too old for combat, Lieber nevertheless offered his services to the War Department, which assigned him to the staff of General Halleck, President Lincoln's Chief of Staff. In that role, with the help of four volunteer officers, he drafted General Orders 100, issued by General Halleck in 1863 as instructions to the Union army; the Orders consisted of 157 articles governing the army's conduct in occupied territories. It was the premise of General Orders 100 that there remained a community of shared interest even between adversaries at war, a mutual interest that could be served by self-restraint in the face of provocation.

General Orders 100 was adopted by the Prussian army to govern the conduct of its soldiers in the occupation of France in 1870. At the Brussels Conference of 1874, the Russian delegate proposed its adoption as an international convention, and this was achieved with the Hague Conferences of 1899 and 1907, which established the international law of war, based in large measure on the work of Francis Lieber. It is for this achievement that Lieber is best remembered by students of public international law.<sup>208</sup>

#### IV. "The Science of Duties and Virtues"

I turn now to the promised examination of Lieber's 1838-39 work as an expression of the aspirations of early American law teachers for their students. The three volumes about which I write may be summarized as Lieber's effort to coordinate individual rights with the duties of citizens and public officers in a constitutional democracy. He sought rationally to harmonize liberalism with republicanism, while recognizing the tension between them.

##### A. *Disinterest as Patriotism*

Lieber described his work on ethics as the "science of duties and virtues."<sup>209</sup> But he otherwise disavowed the term "virtue," because, he explained, "Marat and Robespierre . . . had the name of virtue always on their lips" as they sent innocent men and women to the guillotine.<sup>210</sup> For Lieber, as perhaps for other Americans of his generation, public virtue was better termed "patriotism":

207. See *What is Our Constitution—League, Pact or Government?* (New York, 1861), *republished* in 2 *Miscellaneous Writings*, *supra* note 106, at 87.

208. See Root, *supra* note 106, at 103. Lieber returned to Columbia after the war. His teaching appears to have attracted few students, for he was competing with a great simplifier and popularizer, his colleague Theodore Dwight. He remained active in public affairs until his sudden death in 1872.

209. 1 *Manual*, *supra* note 55, at 19.

210. *Id.* at 82.

The patriotic citizen acts for the benefit of others; not for his interest, but because that sympathy and impulse, patriotism, impels him to share dangers, to work out liberty for those who are not yet born, to preserve liberty. Patriotism is the religion of liberty and the state, and at all times have tyrants and sordid politicians been at pains to deride it unless they expected to turn it to their own advantage.

Without patriotism . . . all must dissolve into dreary, heartless egoism. But even to regret such an occurrence and strive to prevent it requires patriotism . . .<sup>211</sup>

Lieber's reliance on classical sources is apparent at every turn,<sup>212</sup> especially when he calls on citizens and officers to sacrifice personal interest,<sup>213</sup> but it also appears that his thinking was broadly influenced by that of Kant. Citing Kant, he affirmed as a *categorical imperative* that citizens and officers act on motives that "may become a universal rule in an obligatory legislation for all intelligent beings,"<sup>214</sup> and that right and duty are interdependent: individual rights, he emphasized repeatedly, imply corresponding individual duties.<sup>215</sup> He seldom failed to note that it is the performance of duties that begets entitlements.<sup>216</sup>

With Montesquieu and Tocqueville, Lieber emphasized the importance of the family, particularly the mother, in the shaping and transmission of standards of public conduct appropriate to a particular culture.<sup>217</sup> It may be important to recall that Lieber thought and wrote before the advent of public education or what we call "the media," or of the transiency begotten by internal combustion; in the world in which he lived, the family was indeed the powerful force shaping the values of citizens. He was right for his time in reckoning women to be the primary source of patriotism.<sup>218</sup> There was little if any patronization of women implied in his views on gender roles; he truly believed, and not without reason, that motherhood is the highest calling. In addition to the family, he stressed the influence of language, which gives "continuity" to family, tribe, and nation.<sup>219</sup> And he imposed on every citizen "an absolute duty" to know the history of his country:

211. 2 *id.* at 88-89.

212. E.g., *id.* at 120 ("the classical department will always be of the highest importance").

213. 1 *id.* at 56 ("[M]an rises highest when he is willing to make sacrifices to others which he does not desire others to make for him, when he frees himself from all egotism.").

214. *Id.*

215. *Id.* at 211 ("No man . . . has a right to declare himself out of the state, and no circumstance can sever him from the state, so long as he is [alive, for he has] rights, the infringement of which the state must repel.").

216. Lieber was vastly annoyed that Karl Marx appropriated his slogan: "No right without its duty, no duty without its right." *Life and Letters*, *supra* note 106, at 416.

217. 1 *Manual*, *supra* note 55, at 103; 2 *id.* at 109-11. He advocated rights for married women appropriate to the importance that he attached to motherhood. 1 *id.* at 137-38.

218. 2 *id.* at 109-27. Yet he opposed suffrage for women. *Id.* at 136-38; see also 1 *id.* at 139. "How would we like to have a female president and what would it lead to?" 2 *Miscellaneous Writings*, *supra* note 106, at 207-10. For his criticism of Mary Wollstonecraft, see 2 *Manual*, *supra* note 55, at 135.

219. 1 *Manual*, *supra* note 55, at 106.

[F]or whatever it is, it did not spring forth yesterday, but it became such gradually, and the institutions which surround the citizen, which form the essence of his government, are not known from their casual appearance as it may strike him at first glance, but from their operation, which is but their history . . . .<sup>220</sup>

His point was not merely the commonplace that those ignorant of the past are destined to relive its mistakes, but that what is a feasible and therefore desirable goal of any polity is defined and limited by its cultural context, by what the society has been as well as by what it is becoming in consequence of the forces bearing upon it. It was in the context of this reality that he joined Montesquieu and Jefferson in acknowledging the cultural relativism of virtue: he would not judge Moses by the standards of Sparta.<sup>221</sup> He all but denied the possibility that a revolution could alter the mores of a people.<sup>222</sup>

In particular, Lieber acknowledged the special clash between the claims made by the public's insisting on the disinterestedness of its co-citizens and officers and the interests of the individual so highly elevated by American political culture and economy: ancient states "nearly absorbed the rights and interests of the individual, and public attention was directed far more towards the preservation of the whole than the protection of the individual."<sup>223</sup>

A sometime adherent of Locke<sup>224</sup> as well as of Montesquieu, he sought to reconcile the obligations of patriotism with the public aspiration to shelter individual liberty. In emphasizing this relation, he asserted that any morality implies individual responsibility; standards of public conduct are applicable to individual citizens or officers, not to whole communities, because, he asserted, virtue or merit, fault or crime, cannot be shared.<sup>225</sup> And, he added, "the freer a country, the more it stands in need of public spirit and the more baneful becomes isolating selfishness."<sup>226</sup>

For Lieber, the duties of public citizenship have limited substantive content.<sup>227</sup> He was preoccupied chiefly with process, with the manner in which political and legal power is exercised and with the spirit in which public decisions are made. What he sought to provide was an intellectual process or a discipline for the consideration of public issues; in this he anticipated much of

220. 2 *id.* at 58.

221. 1 *id.* at 310-33.

222. *Id.* at 234, 235 ("How many times have we now witnessed a revolutionary government take on, with respect to its relation to individual citizens, the characteristics of the very government that the revolution had overthrown?").

223. *Id.* at 81.

224. *Id.* at 110. The influence of Locke is most evident in other Lieber works. See especially *Property and Labour*, *supra* note 115.

225. 1 *Manual*, *supra* note 55, at 102.

226. 2 *id.* at 95-96.

227. Richard Epstein protests the separation of republican virtue from what he deems its necessary social implications, which he described as militarist, religious, elitist, and sexist. *Modern Republicanism—Or the Flight from Substance*, 97 *Yale L.J.* 1633, 1635 (1988). Although Lieber might fairly be described by any of Epstein's adjectives, the moral discipline he sets forth is not, in his view, or in the view of this author, connected with these traits, save perhaps in a special sense the elitism.



the thinking done a century later by legal scholars who emphasized the importance of process values.<sup>228</sup>

To be sure, there were ideas he expressed that can be reasonably viewed as substantive, such as his opposition to slavery, labor unions, and universal suffrage. Lieber proceeded from a premise articulated by Montesquieu and proclaimed in Jefferson's Declaration of Independence, that a republic can be maintained only among a people of equals,<sup>229</sup> and one may imply other substantive aims from that premise. Thus, while he was anything but a socialist, his notion of patriotism implied an obligation to redistribute wealth in a democracy in which concentrations of wealth were so great as to increase class mistrust to the point of disabling effective governance. In the America known to Wythe and Lieber, slavery was *the* issue; they opposed it in part because it threatened the republic. There is no reason to doubt that their conceptions of virtue or patriotism would also have led them to share contemporary concerns for the well-being of the poor, especially the urban poor,<sup>230</sup> not only for reasons of compassion, but also for the sovereign purpose of saving the whole, of protecting the nation's institutions and processes from threatening social and economic consequences.

The discipline of Lieber's patriotism was intended for use by citizen voters as well as legislators and judges. The duty to participate as a voter was explicit.<sup>231</sup> By bringing all citizens to a sense of shared duty to democratic process, Lieber aimed to reconcile the substantively irreconcilable, to negotiate the non-negotiable, again to save the whole.

Lieber was mindful of many of the difficulties to be encountered in reconciling individual duty to the public with individual rights. These difficulties of

228. E.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass., 1980); see generally Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063 (1980).

229. Montesquieu, *supra* note 69, bk. VII, ch. 3. This idea was also central to the thought of James Harrington, the author most favored by the Antifederalists. See *The Art of Lawgiving*, bk. I, ch. 1 (London, 1659).

230. Henry Clay, the political leader most admired by Lieber, expressed his concern in 1829 that America would develop an urban poor threatening to the security of democratic government. See Address to Gentlemen of the Colonization Society of Kentucky, in 8 Clay Papers, *supra* note 151, at 138. Timothy Walker, another Whig law teacher, who was Lieber's contemporary, did address the problem of the poor and the homeless in 1837:

We have seen that practically no property is necessary here as a qualification for office or for the right of suffrage. We have also seen that poll taxes are prohibited, for the benefit of the poor; and that they have the same access to our free schools as the rich. . . . There is no [constitutional provision] which directly asserts, that those who cannot support themselves, shall be maintained at the public expense. Yet their right of maintenance would seem to result, not only from the dictates of humanity, but from all the great principles of social organization. In a state of nature, the poor might appropriate to themselves the first property within their reach. By entering into the social contract, they have been obliged to renounce this right; and among the chances of life, it has fallen to their lot to be destitute. May they not then claim a bare support as of right? Life is the first and highest of all rights; but what is life without the means of living?

Walker, Introduction, *supra* note 33, at 197.

231. 2 Manual, *supra* note 55, at 230.

course abide, and are the subject of current comment and concern in light of what is described as the contemporary "Republican Revival."<sup>232</sup>

### *B. Identifying the Public*

An essential element of Lieber's concept of public virtue or patriotism was the identity of the public: who is the public whose good is to be valued and served? Athenians were said by Pericles to judge what is good for Athens; he did not say for Sparta. Indeed, Pericles was himself an imperialist as well as a republican.<sup>233</sup>

Identifying the public to be served was a task central to the virtue or patriotism of American citizens and officers in the era between the Revolution and the Civil War. Should the citizen-patriot sacrifice for his state or for the nation? The dilemma was confronted most publicly and painfully by Robert E. Lee, when he was offered commands in both Confederate and Union armies.<sup>234</sup> Although Lieber did not address this particular dilemma directly in 1838, his students could have had no doubt that he would have resolved the issue in favor of a primary obligation to America.<sup>235</sup>

Other troublesome aspects of the American public's identity were also evident: those arising from class distinctions. Even in republican Athens there seemed to be limits of class on the scope of the obligation imposed on Athenian citizens. Athenians did not call upon themselves to sacrifice their private interests for the welfare of their numerous slaves, who were generally regarded as prisoners of war, and not as members of the community to be served. On the other hand, Periclean Athenians would have included within the group to be served the families of all citizens, including women equally with men. The women were excluded from public decision making, it is true, but few Athenians seem to have thought of men and women as having competing interests, and it was presumed that men were obligated to speak for both. That seems to have been Lieber's perception.

Although the classical theory of republican citizenship clearly implies a boundary to the city or nation beyond which the public duty does not extend, nothing in classical theory or in Lieber suggests where that boundary should be drawn. There is no principle of exclusion: to the contrary, the essential aim of citizenship is to conserve the whole, however that may be defined. If conserving the whole calls for pluralism or redistribution of wealth, then cautious pluralism or redistribution is the course of virtue.<sup>236</sup> Although Lieber shared in some measure his contemporaries' racism, nothing in his work argues for the exclusion of any racial minority. Nor, although he also shared

232. See Sunstein, *supra* note 67, at 1540-41.

233. "He sent . . . a thousand . . . into the Chersonese as planters, to share the land among them by lot, and five hundred more into the isle of Naxos, and half that number to Andros, a thousand into Thrace, and others into Italy." Plutarch's *Lives*, *supra* note 64, at 56.

234. 1 Douglas Southall Freeman, *R. E. Lee: A Biography* 437-42 (New York, 1934).

235. Lieber, although a South Carolinian at the time, rejected the conception of America as a voluntary association of states having rights to secede. E.g., 1 *Manual*, *supra* note 55, at 239.

236. Cautious because it is not the course of virtue to accept a pluralism that enshrines group identity based on mutual mistrust or that denies the existence of common needs, rights, values, and interests. Frank Michelman, *Law's Republic*, 97 *Yale L.J.* 1493, 1507 (1988).

nineteenth-century perceptions of gender roles, is there any argument to be made from his conception of patriotism for gender discrimination. Indeed, Lieber and Wythe before him would almost surely have agreed with Frank Michelman's recent observation that "republican constitutional thought is not indissolubly tied to any . . . static, parochial, or coercive communitarianism [but] can remind us of how the renovation of political communities, by inclusion of those who have been excluded, enhances everyone's political freedom."<sup>237</sup>

Lieber would have been quick to emphasize that any group's inclusion within the whole entails obligations.<sup>238</sup> A group of citizens, whether their citizenship is voluntary or involuntary, who insist on primary consideration of their interests in the making of public decisions deny their obligations of citizenship, and perhaps at some point relinquish their claim to that status. For example, a citizen who forever "asks the woman question"<sup>239</sup> first is engaged in fundamentally divisive conduct that is unvirtuous in the classical view, or unpatriotic in Lieber's Americanized view.

Lieber saw, as Kathleen Sullivan has recently noted,<sup>240</sup> that voluntary associations and public virtue are mutually threatening:

Nor must it be forgotten that no moral phenomenon is more common than that the more compact an association becomes, the more its members are apt, be it by the common esprit de corps or by an erroneous feeling of honor, to value the interests of the association higher than any other, and sometimes, as has but too frequently happened, to end in adopting a moral code or standard of their own, to be judged of only by the promotion of the interests of that association.<sup>241</sup>

Lieber could have had in mind the National Rifle Association or the American Association of Retired Persons when he remonstrated against single-issue voting.<sup>242</sup>

237. *Id.* at 1495. Confidence in Lieber's agreement with "inclusionary republicanism" is reinforced by the knowledge that he was an adult immigrant to America who was enormously grateful for his own inclusion. Lieber might have resisted Michelman's argument for the unqualified inclusion of homosexuals, for Lieber asserted that the monogamous family is the source of virtue or patriotism, 1 *Manual*, *supra* note 55, at 139-40, and this could arguably provide a basis for the regulation of sexual conduct threatening the continuity of the monogamous family. For further explication of the "sexual Tory" policy seemingly favored by Lieber, see Paul D. Carrington, *A Senate of Five: An Essay on Sexuality and Law*, 23 *Ga. L. Rev.* 859, 874-94 (1989). Cf. *Bowers v. Hardwick*, 478 U. S. 186 (1986), but note that there is nothing whatever in Lieber's work to suggest that he would have condoned the conduct of the police complained of in that case. And for a contrary view, see Claudia A. Lewis, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 *Yale L.J.* 1783 (1988).

238. Compare Shklar, *supra* note 63.

239. The expression appears to derive from Simone Beauvoir, *The Second Sex* xv (New York, 1957). See Katherine T. Bartlett, *Feminist Legal Methods*, 103 *Harv. L. Rev.* 829 (1990). It is awareness of this conflict that justifies the rejection of public virtue by some feminists. E.g., Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 *Ethics* 250 (1989); Kathleen M. Sullivan, *Rainbow Republicanism*, 97 *Yale L.J.* 1713 (1988).

240. Sullivan, *supra* note 239, at 1719-21.

241. 2 *Manual*, *supra* note 55, at 197.

242. *Id.* at 233.

On the other hand, nothing in Lieber's public morality contravenes a public policy favoring associations of almost any kind that individual participants might choose, so long as the purpose of association is not the promotion of the interests of its members over those of fellow citizens. Indeed, Lieber acknowledged that the most effective guarantee of civil liberty is not the forms of government but the diffusion of social power.<sup>243</sup>

That limits of constituency are implied by the concept of civic virtue or by Lieber's patriotism does not indicate that the interests of persons outside the community, however defined, are a matter of no concern to the virtuous citizen. Good relations with Sparta may be valuable to Athens. To advance mutually beneficial relations between cities, a virtuous Athenian citizen might on occasion be expected to yield a personal interest to an interest outside Athens.

Moreover, the public interest may be measured in diverse coin. The moral as well as the physical or economic welfare of the public should be considered by the virtuous citizen. A policy of selfish brutality to distant peoples is not virtuous if it diminishes the moral capacity of the public to make disinterested decisions affecting its own members. Because of our interconnectedness in a world that is a "global village," the public good may more nearly resemble the good of humanity than it did in Lieber's time, or in the time of the Athenian authors. Lieber would have had no reluctance to join in that observation.

But there is an inhibition against broadly humanist policy implicit in the obligations of co-citizenship that Lieber states. The duties of Lieber's patriotic citizen run to fellow citizens, not the world; however the body of co-citizenry is delimited, its boundaries cannot be ignored, because it is the trust of co-citizens on which democratic government depends. There are times when it is us against them, and democratic leaders and citizens must sacrifice to protect our interests, not those of all creation. For those global villagers who favor unconstrained humanism in the making of public decisions, an unacknowledged problem with Lieber's duty of citizenship is that it operates much as do the associations that he decried as a source of division and mistrust.

### *C. Sources of Public Values*

Lieber was aware that public virtue or patriotism assumes the existence of a calculus by which a selfish individual interest can be measured to be of less value than the larger community interest for which it is sacrificed.<sup>244</sup> But he was not in his time required to confront ideas that today question the existence of a common good independent of the multitude of individual goods,<sup>245</sup>

243. See *On Civil Liberty*, *supra* note 112, at 248-49, 326-27.

244. See Shklar, *supra* note 63, at 63 ("What is central to [the tradition of civic virtue] is the [troublesome] notion of a public good . . .").

245. E.g., Kenneth Arrow, *Social Choice and Individual Values* (1951); James M. Buchanan, *Social Choice, Democracy and Free Markets*, 62 *J. Pol. Econ.* 114 (1954); cf. Robert Dahl, *A Preface to Democratic Theory* (Chicago, 1956). Such thinking can be traced as far back as an essay of the Marquis de Condorcet published in 1785. David J. Mayston, *The Idea of Social Choice* 14 (New York, 1974). On the existence of a common good, see generally Thomas L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (Chicago, 1988).

or propose to derive public decisions from a "calculus of consent"<sup>246</sup> favoring individual insistence on individual interests even in public affairs.

Nor did Lieber confront the sort of value neutrality which asserts that, just as people have equal rights, their ideas have equal merit and are entitled to equal respect.<sup>247</sup> Such theories of value neutrality deny a major premise of the concept of Lieber's patriotism. His works assume, but do not demonstrate, that an accepted hierarchy of *shared public values* is indispensable to the practice of disinterested, virtuous, or patriotic governance and can in some appropriate way be discerned by citizens.<sup>248</sup>

Lieber did not deny that the public good is difficult to measure, and he knew that rarely if ever does one get a clear view of competing values. One may infer his acceptance of the earlier dictum of Benjamin Franklin, offered with Franklin's accustomed cheek:

There is no Science, the Study of which is more useful and commendable than the Knowledge of the true Interest of one's Country; and perhaps there is no Kind of Learning more abstruse and intricate, more difficult to acquire in any Degree of Perfection than This, and therefore none more generally neglected. Hence it is, that we every Day find Men in Conversation contending warmly on some Point in Politicks, which, altho' it may nearly concern them both, neither of them understand any more than they do each other.<sup>249</sup>

In response to skeptics doubting the existence of a measurable public good, Lieber insisted that there are at least some overarching values claiming sufficient public acceptance to justify their use by the public's decision makers<sup>250</sup>—including especially those values of process that can be relied upon to save the whole. In identifying those overarching common values, Lieber resorted first to the history of the culture giving rise to them. But he resisted with equal vigor an approach that denied "the validity of any tradition except that already frozen in the founding events" or another "so unconcerned with history as to have no concept of tradition at all."<sup>251</sup> Lieber also urged as a source of shared values the literary tradition central to the culture.<sup>252</sup> He specified Shakespeare as an excellent source of instruction on the range of human impulses to be encountered in public life: "A public man cannot read him too much."<sup>253</sup> We can be sure that in so endorsing Shakespeare Lieber did

246. James M. Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor, 1962).

247. For a more extended argument against value neutrality, see Amy Gutmann, *Democratic Education* 54-56 (Princeton, 1987).

248. He would thus have agreed with Joseph L. Sax, *The Legitimacy of Collective Values: The Case of the Public Lands*, 56 U. Colo. L. Rev. 537 (1985).

249. *A Modest Enquiry into the Nature and Necessity of a Paper-Currency* 2 (Philadelphia, 1729), reprinted in *Benjamin Franklin: Writings*, ed. J. Leo Lemay, 119, 119 (New York, 1987).

250. These are more fully enumerated in *On Civil Liberty and Self-Government*.

251. H. Jefferson Powell, *Reviving Republicanism*, 97 Yale L.J. 1703, 1704 (1988).

252. Lieber's view appears on the surface to bring him afoul of some contemporary thought opposing a hierarchy of values. See, e.g., Barbara Herrnstein Smith, *Contingencies of Value: Alternative Perspectives for Critical Theory* 53 (Cambridge, Mass., 1988).

253. 2 Manual, *supra* note 55, at 292.

not approve English royalism or countless other ideas expressed by one or another of the playwright's characters. He simply believed, as has most of the world for almost four centuries, that there is more to be learned from Shakespeare about human frailty and human nobility than from any other source, and that such learning provides a suitable framework for the making of public decisions.<sup>254</sup>

Public values, Lieber urged, are often revealed in public instruments, and the first obligation of the public officer is to faithfully interpret those instruments and to apply them in a manner reflecting their implicit values,<sup>255</sup> forbearing interpretation or construction that is idiosyncratic or self-indulgent. Lieber's work was not explicitly directed to issues requiring the interpretation and construction of the Constitution, the drafting of which was obviously much closer to his time. Instead, he proposed patriotism as a comprehensive approach to all public issues, whether legal or not. In this respect, his aim in writing about public virtue was broader than is that of today's "revivalists" who would employ similar conceptions of public virtue merely as a framework for constitutional adjudication.<sup>256</sup>

Lieber's patriotism explicitly opposed as a source of public mistrust the imposition by co-citizens of idiosyncratic, subcultural values on one another. Indeed, he would likely have joined in Voltaire's condemnation of the dogmatic legislator as "a traitor, because he subject[s] his country to his own opinions."<sup>257</sup> Virtue, in Lieber's terms, requires "sensitivity to national feeling."<sup>258</sup> This expression could be taken to endorse blind deference to entrenched moral conventions,<sup>259</sup> but it is more consistent with the general tenor

254. *Id.* at 292-93:

There is so vast a stage of action in his works, such a quintessence of all human life, such a vigorous delineation of character and such depth of observation, such an exuberance of thought, of subtle penetration, and endless variety of sentiment, all the differently combined motives of the infinite multitude of human individualities are so impartially viewed and given from a point so high above them, vulgarity is drawn so truly, and human greatness, joy, and misery are presented with such loftiness, that his works are like a concentration of all that is essential in the active life of men, of what ephemerally passes or historically lasts, so that no one can penetrate into his works without having his mind invigorated and enlarged and his vision made keener as well as loftier.

Abraham Lincoln agreed, claiming to have read *Macbeth* "as frequently as any unprofessional reader." John J. Duff, *A. Lincoln: Prairie Lawyer* 11 (New York, 1960). See generally Annabel Patterson, *Shakespeare and the Popular Voice* (Oxford, England, 1989).

255. This is the theme of *Legal and Political Hermeneutics*.

256. See generally Sunstein, *supra* note 67; Michelman, *supra* note 236; see also Michelman, *supra* note 57; Sherry, *supra* note 89; Sunstein, *supra* note 58; Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *Yale L.J.* 1013 (1984); Diggins, *supra* note 85; Morris Janowitz, *The Reconstruction of Patriotism: Education for Civic Consciousness* (Chicago, 1983).

257. *The Philosophy of History* 314 (London, 1766).

258. 2 *Manual*, *supra* note 55, at 43.

259. For example, Lord Devlin seemed to have embraced such a view in urging that the law governing sexual conduct reflect the tastes "of the man in the Clapham bus." Patrick Devlin, *The Enforcement of Morals* 15 (London, 1965). But see *id.* at 25 ("the law must base itself on Christian morals"). For discussion, see Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 *Yale L.J.* 986 (1966).

of Lieber's work that he countenanced reference to *aspirational* "national feeling" and a body of law that might be "in quest of itself."<sup>260</sup> The problem—and a source of tension—is the imperfect ability of citizens or officers to detect the evolving "national feeling" except by resort to internal feelings. A partial resolution of this tension could lie in Lieber's repetition to the citizen of the ancient injunction: "Know thyself."<sup>261</sup> It is possible for at least some mature adults to know their idiosyncratic prejudices well enough to discount them when making a public decision. Lieber urged a universal effort to acquire and to employ such knowledge. Without it, public virtue is indeed an illusion, and patriotism indeed a refuge for scoundrels.<sup>262</sup>

#### D. Independence of Judgment

Independence in the exercise of political judgment is manifestly essential to disinterest. Lieber cherished the values of friendship and doubted the qualifications for public office of any person without friends.<sup>263</sup> Yet he opposed all favoritism: "I must not pay my private debts out of public stock."<sup>264</sup> Officers, he urged, must be independent of debt, either by having sufficient means or by controlling their wants.<sup>265</sup>

A duty to take public action reflective of public values does not require a surrender by virtue or patriotism to a poll of callow opinion or to momentary popular convention. To the contrary, Lieber noted that the dread of unpopularity had ruined many statesmen,<sup>266</sup> and he reserved some stringent prose for the denunciation of demagogues who "flatter and pamper the evil dispositions of men."<sup>267</sup> He opposed "log-rolling,"<sup>268</sup> public instructions to its representatives,<sup>269</sup> and even election pledges, other than an oath to support the national interest.<sup>270</sup>

Lieber would have agreed with the recent dictum of Frank Michelman that public virtue is not satisfied by benign motive and fortitude alone, but requires sound judgment in the application of public values to advance the public

260. The term is, of course, taken from the title of Lon L. Fuller's 1940 book.

261. There is uncertainty as to the origin of this expression, but it was the first of three maxims inscribed on the Temple of Apollo at Delphi. Some attributed it to Thales, others to Phemonoe; among later classical authors, it was invoked by Chilon, Ausonius, Epictetus, Cicero, Juvenal, and Plutarch. *The Home Book of Quotations: Classical and Modern 1789-90*, ed. Burton Stevenson, 10th ed. (New York, 1967).

262. See 1 James Boswell, *The Life of Samuel Johnson* 583 (London, 1904) (3d ed., 1799).

263. 2 *Manual*, *supra* note 55, at 24-27.

264. *Id.* at 30.

265. 1 *id.* at 460.

266. 2 *id.* at 41.

267. *Id.* at 46.

268. *Id.* at 305. "Pork barrel" politics is close in meaning to this nineteenth-century term descriptive of mutual gratification of factional legislative objectives.

269. *Id.* at 365.

270. *Id.* at 323.

good.<sup>271</sup> He affirmed that patriotism in public office requires wisdom in the exercise of independence, and imposes on officers a duty of dissent from ignorance.<sup>272</sup>

Because of the importance of independence of judgment, Lieber regarded the judiciary as the keystone of American government: "The judiciary has neither honor nor place to bestow; it is accompanied by no pageant; its power rests more essentially upon moral power than that of any other branch."<sup>273</sup> The ancients, he noted, "could not have elevated [themselves] to the great idea of an independent judiciary," while "we cannot sufficiently value it."<sup>274</sup>

Lieber's interest was not, however, focused on the conduct of judicial officers. He assuredly would have subscribed to much of the program recently outlined by Cass Sunstein<sup>275</sup> to restore or enlarge the independence of American legislators.<sup>276</sup>

Lieber wrote in full awareness of the melancholy dynamics of representational politics; he knew, as Richard Epstein affirms, that "self-interested behavior . . . is too large a component of politics for anyone, republican or not, to ignore."<sup>277</sup> Yet he deplored the dispiriting domination of political action groups.<sup>278</sup> It was on this account that he specified as qualification for public office a readiness to retire and to accept ingratitude from constituents well-served.<sup>279</sup>

271. Michelman defines republican virtue as "a certain combination of motivation and ability: the motivation to deal with public questions by sincere engagement in deliberative colloquy aimed at discernment of the general good, and the ability to do it well." Michelman, *supra* note 57, at 58. This concern for sound judgment may subject Lieber to the mockery of Richard Parker. See In Memoriam: J. Skelly Wright, 102 Harv. L. Rev. 367 (1988).

272. 2 Manual, *supra* note 55, at 274. Edmund Burke put it more strongly:

[I]t is not enough that in his single person [the virtuous citizen] never did an evil act, but always voted according to his conscience . . . This innoxious and ineffectual character . . . falls miserably short of the mark of public duty. That duty demands and requires, that what is right should not only be made known, but made prevalent; that what is evil should not only be detected, but defeated.

Thoughts on the Cause of the Present Discontents (1770), in Edmund Burke on Government, Politics and Society, ed. B. W. Hill, 110 (New York, 1976).

273. 2 Manual, *supra* note 55, at 148.

274. 1 *id.* at 363. Lieber's views seem to have been modified in reaction to *Dred Scott*. "Who watches the watchman?" he asked. "They are not angels either, suppose they do wrong?" Brown, *supra* note 106, at 76.

275. Sunstein, *supra* note 67, at 1576-89. Paul Brest, in Further Beyond the Republican Revival: Toward Radical Republicanism, 97 Yale L.J. 1623, 1627 (1988), finds it worthy of comment that Sunstein's program is congruent with proposals made by "mainstream" legal theorists such as Gerald Gunther and John Hart Ely. It is my thesis that Sunstein's republicanism is the main stream flowing in 1779, in 1838, and at many times since.

276. See also E. Donald Elliott, Constitutional Conventions and the Deficit, 1985 Duke L.J. 1077.

277. Epstein, *supra* note 227, at 1639. Epstein's observation is a premise of 1 Manual, *supra* note 55. As Epstein notes, "No matter how lofty their ambitions when they enter public service, [legislators] quickly learn that political survival depends on their dogged defense of parochial interests against all comers in the political arena." Epstein, *supra* note 227, at 1638. It was for precisely this reason that Lieber urged that persons unwilling to face defeat should not seek election.

278. 2 Manual, *supra* note 55, at 196-98.

279. *Id.* at 286.



Lieber's awareness of the debilitating consequences of self-aggrandizement in office seeking is manifest in his treatment of political parties, to which he gave qualified approval.<sup>280</sup> He acknowledged that

where great tasks are to be performed and where weighty interests are at stake, those who agree on the most important principles, will unite and must do so in order to be sufficiently strong to do their work. Without party administration, and party action, it is impossible that the majority should rule, or that a vigorous opposition can rise to a majority and rule in turn.<sup>281</sup>

On the other hand,

[i]f by party be understood a despicable union of men, to turn out a certain set of office-holders merely to obtain the lucrative places, and, when they are obtained, a union to keep them, it becomes an odious faction of placemen or office-hunters, the last of those citizens to whom government ought to be entrusted.<sup>282</sup>

While Lieber did not resolve this dilemma, his manifested concerns and his preoccupation with process make it likely that he would have approved an approach to the problem of the legislator's self-interest emphasizing process; such an approach is set forth in the recent work of Dennis Thompson.<sup>283</sup> Thompson concludes:

The ethical legislator is constantly tempted—and often obligated—to satisfy particular claims, to defer to reasons irrelevant to the merits of legislation, and to conceal personal and political activity that citizens may wish to know. How these conflicts should be resolved at any political moment is best decided in a legislative process that itself observes the requirements of legislative ethics. In a process in which legislators act publicly and autonomously on general principles, both legislators and citizens stand a better chance of finding a resolution that, however temporary, respects the fundamental values that they share.<sup>284</sup>

### *E. Pragmatism: Responsibility for Results*

In Lieber's science of duties, results matter.

Virtue or patriotism in classical or in modern dress requires public action that works. Trust is not evoked by public decisions that in the event disserve the public good, however pure the motive in theory or in ideology. Public trust is sustained only by visible results that can be reckoned positive, and the public cannot be long beguiled by achievements that are merely symbolic. Realism is thus an essential aspect of virtue, and hard-eyed realism a trait to be highly valued in Lieber's democratic leader.

Disregard of unwelcome realities such as the legendary emperor's nakedness is a temptation as old as government<sup>285</sup> and a practice as common as demagoguery. But ignoring reality bears a special cost in a republic that must

280. Cf. Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. Pa. L. Rev. 1567 (1988).

281. On Civil Liberty, *supra* note 112, at 148.

282. *Id.* at 148-49.

283. See generally *Political Ethics and Public Office* (Cambridge, Mass., 1987).

284. *Id.* at 122.

285. Yet, Lieber noted, even papal infallibility does not extend to the facts. 1 *Manual*, *supra* note 55, at 259.

maintain the trust of people who see with their own eyes. It is in this connection that Lieber emphasized the deplorable and contagious consequences of lying in public discourse.<sup>286</sup> An advocate, he contended, whether in politics or law, has no right to abandon truth.<sup>287</sup> A lying politician is a free rider indulging himself in the consumption of the resource that enables the public to govern itself.<sup>288</sup> The fear of a politician to be the messenger of bad tidings inspired no compassion whatever in Lieber.

Because practical consequences matter, the virtuous officer should accept broadened responsibility for events. Lieber subscribed to Dennis Thompson's recent dictum that adverse consequences of a public decision cannot be excused by reference to an intervening cause if that intervention was foreseeable.<sup>289</sup> For example, Kant's famous defense of the moral obligation to tell the truth even to the murderer asking the whereabouts of his intended victim does not apply to making a public decision. That an utterance is true does not excuse the public speaker of responsibility for the consequence of the policy favored when that consequence is the destruction of a nation and a culture.

Herein lies yet another tension apparent in Lieber's conception of public duty. The public person, openly facing harsh realities, is obliged to speak the truth as much as it is known, yet accept responsibility for the consequences when the information disclosed is employed by others for malevolent purposes. Lieber was not unaware of this difficulty, but he offered no solution to the dilemma. Perhaps there is none.

In his heavy emphasis on the duty to confront unwelcome reality, Lieber proceeded from a premise resistant to the contention now sometimes heard that there is no objective truth, only differing perspectives associated with different positions in a social or political hierarchy.<sup>290</sup> Lieber would have affirmed that water is made of two atoms of hydrogen and one atom of oxygen no matter who drinks it. While acknowledging that perceptions often differ, he would insist that there is generally but one physical and political reality upon which a virtuous public decision can rest.

By his own text, Lieber illustrates an ability to face unwelcome realities. While extolling virtue and patriotism, he often acknowledged that people generally abuse power when they get a chance. Republicans like him complained of abuse by monarchs, "and yet each complainant carries within

286. *Id.* at 444:

Yet we find great laxity as to the obligation of veracity in politics: willful calumnies are propagated, fictitious facts boldly proclaimed, the reputation of men attacked in its very vitals, under the deceptive excuse of party warfare, as if the victory of a party was the ultimate object and the prevalence of truth and the spirit of veracity not more important.

See generally *id.* at 447-57.

287. 2 *id.* at 415. A motto recorded by Lieber on the wall of his classroom was *patria cara, carior libertas, veritas carissima*. Thayer, *supra* note 106, at 12.

288. Compare Sissela Bok, *Lying: Moral Choice in Public and Private Life* 165-81 (New York, 1978).

289. See Thompson, *supra* note 283, at 58-59.

290. Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 Harv. L. Rev. 10 (1987).

himself the germ of a despot."<sup>291</sup> In this regard, Lieber knew himself. An apparent purpose of his work was to cause young readers to look within themselves to find the potential usurper lurking there.

Both the obligations to face reality however distasteful and to secure practical results favorable to the polity require of the virtuous citizen an additional trait commended by Lieber, intellectual courage. Public action must be taken as occasions require and often cannot await full information, but must rest on imperfect knowledge. Sound public judgment therefore requires a willingness to risk error when the odds are right.

Similarly, public action can seldom be accommodated to theoretical or ideological purities. Even an ideology that is wholly in accord with the "national feeling" is rarely a complete guide to action. So often there are competing interests to be considered, interests that have not been adequately reflected in an abstract theory. Lieber's friend, Alexis de Tocqueville, observed: "The world is not led by long or learned demonstrations; a rapid glance at particular incidents, the daily study of the fleeting passions of the multitude, the accidents of the moment, and the art of turning them to account decide all its affairs."<sup>292</sup> It is not practical, and it is therefore neither virtuous nor patriotic in Lieber's sense, to effect a decision that does not take appropriate account of the uncertainty of those unforeseen, perhaps remote, consequences of a handsome idea, especially if the idea is an abstraction of broad sweep.

Lieber cautioned his young readers that there are always "two parties in questions of justice,"<sup>293</sup> each often favored by an applicable idea reflecting recognizable public values. Although admitting the difficulty, he urged the necessity that citizens see matters "not only from our own point of view, but also from that of others, perhaps of our adversaries and enemies."<sup>294</sup>

Lieber also reminded his readers of the ubiquitous practical need for compromise in the making of public decisions. Where the ideologue may regard compromise as a subversion of principle,<sup>295</sup> or as a sacrifice of coherence, Lieber's patriot can regard compromise as fulfillment if it enables the commonwealth to survive and to maintain healthy relations among co-citizens. He urged hamarchy in preference to autarchy:

Autarchy acts by power and force; hamarchy acts and produces as organized life does: in the autarchy laws are made by the power; in the hamarchy they are rather generated: in the autarchy the law is absolute, after it has been made; in the hamarchy the law modifies itself in application and operation. . . . In the autarchy the law is the positive will of power; in the hamarchy it is much more the expression of the whole after a thousand modifications. Hamacratism rests materially on mutuality; autarchy, on direct power. The principle of autarchy is sacrifice; the principle of hamarchy is compromise.<sup>296</sup>

291. 1 Manual, *supra* note 55, at 269.

292. 2 Tocqueville, *supra* note 16, at 44.

293. Hermeneutics, *supra* note 56, at 51.

294. 1 Manual, *supra* note 55, at 406.

295. Compare Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984).

296. 1 Manual, *supra* note 55, at 353.

He extolled moderation as a habit that "cannot be acquired unless it be an honest, daily-repeated endeavor to temper our appetites and impulses."<sup>297</sup> Passion "obscures the judgment of parties and causes them to mistake their own advantage for that of the public welfare."<sup>298</sup> He accordingly counseled his students to remain ever calm, and resistant to rumor.<sup>299</sup> The implication is clear that Lieber's patriotism may require a sacrifice of ideological preference, and even of a deeply cherished conviction, as well as of tangible interest.<sup>300</sup>

One of the demerits of making decisions on the basis of broad principles is that broad principles are less amenable to compromise. "Deep moral discussion" can in some political contexts defeat the effort to achieve consensus needed to save the whole.<sup>301</sup> It can therefore be in Lieber's view an unvirtuous act to engage co-citizens in a public debate that touches their deepest feelings and thereby impedes their ability to assent to arrangements that would be tolerable but for a moral or ideological affront.<sup>302</sup> The proper role of public discourse among virtuous citizens is often to accommodate, and not to exacerbate, differences.

In the same vein, Lieber's discipline leaves little room for the citizen's concern with issues that are mere symbols. He deplored that "[m]illions have died for similes,"<sup>303</sup> and decreed that virtuous politics have "nothing to do with suppositions." He dismissed William Blackstone as an observer preoccupied with symbols.<sup>304</sup> It is not difficult to imagine his contempt for those who in 1990 were investing significant political energy and capital in the issue of flag burning.<sup>305</sup> Indeed, it is not clear that Lieber would have regarded the abortion issue when framed by those who favor either "life" or "choice" as more than a "simile."

297. *Id.* at 438.

298. *Id.* at 442. He also observed that passionate persons "are highly dangerous in free countries, because they act not only blindly, and 'if correctly but by chance' and by mere impulses, which rapidly vanish; but they communicate their excitement to others, and prevent truth and justice in a larger circle." *Id.* at 407.

299. *Id.* at 423. Impartial and passionless objectivity has been labeled by Catharine A. MacKinnon as distinctively male. *Feminism Unmodified: Discourses on Life and Law* 50 (Cambridge, Mass., 1987). Lieber's conventional nineteenth-century sexism would have caused him to agree with the label "male." See 1 *Manual*, *supra* note 55, at 139.

300. Lieber's anti-dogmatism seems derived from Kant. Brown, *supra* note 106, at 31-32. But it was shared by a non-Kantian friend, Albert Gallatin, who cautioned that officials not be "blinded by enthusiasm or prejudice in favor of any modern system." Letter to Louis F. Delesdernier (May 25, 1798), in 1 *Writings of Albert Gallatin*, ed. Henry Adams, 13 (Philadelphia, 1879).

301. Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 *Yale L.J.* 1651 (1988).

302. An example of Lieber's practice of this dictum occurred on his visit to the home of Henry Clay. They shared a long and wide-ranging conversation but stayed away from the topic of tariffs, on which they were in fundamental disagreement. See Letter to Matilda Lieber (Sept. 3, 1846), in *Life and Letters*, *supra* note 106, at 205.

303. 1 *Manual*, *supra* note 55, at 168-69.

304. *Id.* at 169.

305. See *United States v. Eichman*, 496 U.S. 310 (1990) (invalidating the Flag Protection Act of 1989, 18 U.S.C. § 700 (Supp. II 1990)). For background, see Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 *Stan. L. Rev.* 1337 (1990).

It is in connection with the practical requirements of calm and compromise that Lieber attached substantial importance to parliamentary procedure, even blaming the excesses of the French Revolution on the French lack of parliamentary courtesy.<sup>306</sup> He took special pride that

[f]oreigners frequently express their surprise at the ease with which, in our country, meetings, societies, bodies, communities, and even territories, self-constitute and organize themselves; and transact business without violence, and without any force in the hands of the majority to coerce the minority, or in the hands of the minority to protect itself against the majority.<sup>307</sup>

#### F. Interpretive Morality: Legal Texts

Lieber's patriot not only makes public decisions in the public interest as measured by public values and the public good, but also presumes to make only those public decisions properly entrusted to him or her. Lieber emphasized that this principle is perhaps of cardinal importance in a government of deliberately divided powers: the constitutional principles of federalism and separation of powers are in the first instance moral commands by the governed to their public officers to stay within their designated stations. Officers who fail to restrain themselves forfeit public trust, and are thus free riders on the system in much the same way that liars are.

It is this requirement that led Lieber to his preoccupation with the interpretation and construction of legal texts. He acknowledged, as seemingly he had to, that "[t]here is no direct communion between the minds of men,"<sup>308</sup> that all communion must be by signs. The art of democratic government therefore requires the mastery of interpretation, the art of finding "that meaning which those who used [signs conveying ideas] were desirous of expressing,"<sup>309</sup> an art that demands the self-discipline of resisting possible meanings that the interpreter might prefer.<sup>310</sup> Necessarily, democratic government depends in turn on a measure of the cultural homogeneity that supplies meaning to signs; an excess of heterogeneity precludes interpretation and so defeats democratic government: "Party spirit may run so high that the greatest link and tie of humanity, language, loses its very essence and people cease to understand one another, when even the best-intended words are unintentionally, yet passionately or willfully wronged, misconstrued, wrung from their very sense . . . ."<sup>311</sup>

Democratic government also requires the mastery of construction, which is the art of creating a meaning that was not expressed but is necessary to effect the manifest purpose of the text or the legal institutions and arrangements of which the text is a part.<sup>312</sup> Even in construction, it is faithless, he held, to

306. 2 Manual, *supra* note 55, at 227 n.3.

307. On Civil Liberty, *supra* note 112, at 191.

308. Hermeneutics, *supra* note 56, at 13.

309. *Id.* at 17. Note that Lieber was not required to deal with the contemporary use of manipulated "legislative history" as a purported expression of the collective aim of those who made a legal text.

310. *Id.* at 93.

311. 2 Manual, *supra* note 55, at 262.

312. Hermeneutics, *supra* note 56, at 56-58.

substitute one's own purposes or motives for those embodied in the text and the context.<sup>313</sup> Manifestly, Lieber was here again calling for self-knowledge as well as self-restraint. In fashioning a discipline of construction, Lieber urged the importance of custom, and thereby resisted the teaching of his friend, John Austin, whose major work had been published in London in 1832<sup>314</sup> and was surely well known to Lieber. In his resistance to Austin's mode of thought, Lieber prefigured in some measure the sociological jurisprudence of Roscoe Pound<sup>315</sup> and the legal realism of Karl Llewellyn.<sup>316</sup>

Lieber provided his students with a systematic analysis of the causes and uses of ambiguity.<sup>317</sup> He also offered some principles of construction to be employed at points of uncertainty.<sup>318</sup>

The benefit of the community is the supreme law . . . Whether we rejoice in it or not, the world moves on, and no man can run against the movement of his time. Laws must be understood to mean something for the advantage of society . . .<sup>319</sup>

We ought to be careful, however, not to misjudge our own times; for every one, who is desirous of justifying an extravagant construction, does it on the ground, that the case is of a peculiar character and the present time is a crisis.<sup>320</sup>

[W]e must guard ourselves against mistaking our private views and interests, our passions and appetites, for public wishes or demands; in short, against confounding our individuality with public welfare.<sup>321</sup>

Exhibiting the difficulty of adhering perfectly to this prescription, Lieber also offered as a principle of construction that texts should be construed in favor of the independence of the judiciary, which he deemed a paramount value,<sup>322</sup> an assessment he attributes to the Constitution. He might well have approved other principles of construction rooted in the purpose of enhancing disinterested public decisions.<sup>323</sup> It was in urging that construction should generally favor the weak against the powerful<sup>324</sup> that Lieber most nearly departed from his concern with process to express a substantive preference, but, as we have observed, the protection of the genuinely powerless is, in

313. *Id.* at 132.

314. *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (London, 1832).

315. E.g., *Common Law and Legislation*, 21 *Harv. L. Rev.* 383 (1908); *An Introduction to the Philosophy of Law* (New Haven, 1922).

316. E.g., *Some Realism about Realism—Responding to Dean Pound*, 44 *Harv. L. Rev.* 1222 (1931); *Jurisprudence: Realism in Theory and Practice* (Chicago, 1962).

317. *Hermeneutics*, *supra* note 56, at 25-40.

318. For a synthesis of these principles of interpretation and construction, see Farr, *supra* note 158, at 1038-43.

319. *Hermeneutics*, *supra* note 56, at 135.

320. *Id.* at 137.

321. *Id.* at 182.

322. *Id.* at 188-89.

323. E.g., Sunstein, *supra* note 67, at 1581-89; see also Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 *Tex. L. Rev.* 873 (1987); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 *Colum. L. Rev.* 223 (1986).

324. *Hermeneutics*, *supra* note 56, at 144.

Lieber's view, necessary to the security of democratic processes and institutions—and hence reasonably inferable from the Constitution.

Perhaps in some respects Lieber's prescriptions of canons of construction can be read as a lapse in his own self-discipline, reflecting as they do some predilections of his own. Such canons may be more a source of costly and unwelcome uncertainty than a tool of effective decision making.<sup>325</sup> Surely Lieber could not have been greatly surprised to learn that such canons have a way of "often march[ing] in matched pairs that point in opposing directions."<sup>326</sup> Nor could he have disagreed with Stanley Fish's observation that the principles of hermeneutics notwithstanding, "interpretation . . . has to be done every time."<sup>327</sup>

### G. Time Perspective

Lieber was mindful of the "authoritarian" implication of making law for future generations.<sup>328</sup> While he did not embrace Jefferson's proposal for liberal amendment of the Constitution,<sup>329</sup> his relativism assured his concern for the freedom of the next generation to make public decisions according to its own lights: a "man can no more step out of his time than he can help being the offspring of his progenitor."<sup>330</sup>

This intergenerational relativism animates Lieber's treatment of judicial precedent, which is constrained by his overriding concern for adaptation to contemporary circumstance.<sup>331</sup> Moreover, he advised virtuous draftsmen of opinions or legislation to abstain from the effort to draw language so tight that it might constrict the opportunity for "faithful" interpretation on the occasion of application. Lieber thus commended to lawmakers "a sartorial wisdom" found on the wall of a tailor shop: "Tight will tear, wide will wear."<sup>332</sup>

One aspect of the relation of the virtuous citizen to the future was apparently overlooked by Lieber: the responsibility for the availability of resources needed by a future generation to exercise its will in public matters. Public virtue would seem to require a balanced capacity for postponed gratification. The citizen who opts for today's public circus at tomorrow's cost,<sup>333</sup> who

325. Epstein, *supra* note 227, at 1648.

326. Jerry Mashaw, As If Republican Interpretation, 97 Yale L.J. 1685, 1687 (1988) (citing Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand. L. Rev. 395 (1950)).

327. Play of Surfaces: Theory and the Law, in *Legal Hermeneutics*, *supra* note 158, at 297, 316.

328. See John Leubsdorf, Deconstructing the Constitution, 40 Stan. L. Rev. 181, 188 (1987).

329. Notes on the State of Virginia, ed. William Harwood Peden, 110-29 (Chapel Hill, 1955).

330. 1 Manual, *supra* note 55, at 285.

331. Hermeneutics, *supra* note 56, at 192-222. "[T]he more the advocates of a political measure feel themselves obliged to rely on precedents, the less they ought to be trusted . . ." *Id.* at 215.

332. Legal and Political Hermeneutics, 4th ed. William G. Hammond, 195 (St. Louis, 1880).

333. E.g., Plutarch's Lives, *supra* note 64, at 55 ("And so Pericles let loose the reins to the people, and made his policy subservient to their pleasure, contriving continually to have some great public show or solemnity, some banquet, or some procession or other in the town to please them, coaxing his countrymen like children, with such delights and pleasures as were not, however, unedifying."). Socrates is reported as criticizing Pericles for this tendency. Gorgias, in *The Collected Dialogues of Plato*, eds. Edith Hamilton & Huntington Cairns, 229, 297 (Princeton, 1961) [hereinafter *Collected Dialogues*].

spends his grandchildren's money to pay interest on today's public debt, evades public duty and forfeits the trust of those members of the public having a stake in the nation's future.<sup>334</sup> James Madison put it firmly: "Government ought to secure the permanent interests of the country . . . ."<sup>335</sup>

Lieber did not address this problem of intergenerational justice perhaps for the reason that there was in his time an almost universal concern for the future of America: there were few Americans indeed who did not live with and among many young children for whom they shared responsibility. It may also have been a factor that there was in his time and place no sense of the exhaustibility of natural resources.

There is a practical limit to the foresight of the virtuous citizen or officer seemingly unobserved by Lieber. Since virtue and patriotism require that the citizen maintain the trust of contemporaries, not that of future generations, present interest cannot be sacrificed to the future welfare beyond the willingness of the present to concur. A republic can look generations ahead only if its citizens widely share a sense of involvement with their collective progeny and successors.

#### H. The Elitism of Virtue

There has been an enduring temptation to resist calls to public duty such as Lieber's as distastefully elitist,<sup>336</sup> as "undetachable from a sort of snobbish-exclusive-patrician-WASP sensibility of *noblesse oblige*."<sup>337</sup> Without question, George Wythe emerged from a culture in which *noblesse oblige* was a piece of the moral furniture.<sup>338</sup> Because elitist, it is then implied, virtue must be reactionary, a mere service to propertied interests.

It is also true that almost all antebellum American law teachers were Whigs, supporting Henry Clay in opposition to the populist politics of Andrew Jackson.<sup>339</sup> Lieber fit that pattern. In this respect, they shared an undeniable political link to the upper-class America of their time. On the other hand,

334. See Elliott, *supra* note 276.

335. 1 The Records of the Federal Convention, ed. Max Farrand, 431 (New Haven, 1937). As he spoke, Madison was identifying landed interests as "permanent interests."

336. E.g. Linda K. Kerber, Making Republicanism Useful, 97 Yale L.J. 1663 (1988).

337. Robert W. Gordon, The Independence of Lawyers, 68 B.U. L. Rev. 1, 71 (1988).

338. A statement of the case for *noblesse oblige* was provided Virginia readers in 2 Francis Hutcheson, A System of Moral Philosophy 113 (London, 1755) (New York reprint, 1968). The debates in the House of Burgesses are fully recorded; one reader observed that they afford little evidence of flowery language or learned rhetoric which might have been directed at a more general audience, but for almost two centuries they do show close reasoning and thoughtful consideration of theories of law and government, as well as a sharply conscious sense of history and even of American destiny.

Richard Beale Davis, Intellectual Life in Jefferson's Virginia 7 (Durham, N.C., 1964). "[The Virginia planter] was always aware of what he called the rights of Englishmen, and of Justinian's natural right . . . ." *Id.* at 7-8. See also 1 Henry Adams, History of the United States During the First Administration of Thomas Jefferson 133 (New York, 1890).

339. In his 1838 work, Lieber cautioned his students to resist "democratic absolutism," noting that republics "are not freer from base courtiers than monarchs." 1 Manual, *supra* note 55, at 331.



Benjamin Butler, no Whig but a "barnburner" Democrat and a former member of the Jackson cabinet, articulated a public purpose in his plan for the New York University Law School that was similar to the aim manifested by Lieber's work.<sup>340</sup> Just as men as different in their politics as Jefferson and Hamilton had shared an educational mission in the previous generation, so there was a bond between Jacksonian and anti-Jacksonian teachers.

Lieber and his contemporaries would not have denied the existence of an elitist touch to their teaching of law. That link was reinforced by the role of professor, for virtually all American college students were drawn from families who could support leisure for lessons, whether on the violin or in the classics, there being no sense that a college education was particularly useful in the pursuit of most worthy careers. Early American law teachers were calling their students to an elevated sense of place. Without apology, the quality these teachers sought to nurture was what Tocqueville described as the "aristocratic" aspect of American law. It is unlikely, however, that Lieber would have approved the use of the term "aristocratic" to describe the traits he sought to teach, not merely because it would have been politically ruinous,<sup>341</sup> but also because it implies an exclusivity and an intergenerational continuity that neither Lieber nor his colleagues manifested any desire to create or reinforce.

Some may suppose that the motive to practice Lieber's patriotism is more likely to be found in someone who is conscious of having a stake in the nation, and who might therefore expect in some general way to share in any benefit that results from the advancement of the public good. Communitarian impulses may, in this view, be less common among the members of an underclass who participate less fully in whatever public good is to be advanced. That is, indeed, a reason for regarding a persisting underclass as incompatible with democratic government.

It is also possible, albeit surely undemonstrable, that a member of such a social elite may be more likely to be attuned to the public values appropriately employed to measure the public good. Perhaps those who are more estranged are less attuned to those public values. In this view, the offspring of an underclass may be less able to practice public virtue should they aspire to do so. Perhaps for these reasons, in the eighteenth century the call for disinterested politics was heard most frequently on the lips of the gentry. Yet, as Robert Gordon grants, at least Lieber and "the Federalists put their money where their mouths were and lived up to their ethic."<sup>342</sup>

The credo of public duty is hardly a monopoly of class. Nothing could be clearer than that Lieber's patriotism was not based on birth, inherited wealth, or academic attainment. To the contrary, it was an act of self-regard and an

340. Brown, *supra* note 30, at 111.

341. Apparently, the use of the term was not politically ruinous in Revolutionary times, at least in Virginia. An elected member of the new Commonwealth's legislature was heard to say publicly: "I am an aristocrat; I love liberty, I hate equality." 2 William Cabell Bruce, John Randolph of Roanoke 203 (New York, 1922). Of course, the expression of such sentiments was protected by property requirements for suffrage in Virginia and elsewhere.

342. Gordon, *supra* note 337, at 71 n.249 (citing Leonard D. White, *The Federalists: A Study in Administrative History* (New York, 1948)).

expression of an ambition to achieve moral worth, qualities that seem to have little if any necessary correlation to social or economic status. As Gordon observes, "It is just as illogical . . . to give public service the taint of snobbery as it would be . . . to blame the decline of the service ethic on the increasingly diverse composition of the bar."<sup>343</sup>

It is undeniably true that Lieber's patriotism is a mandate to conserve the republic itself, and therefore to conserve those institutions and relations on which the republic seems to depend; it is in this sense an invariably conservative impulse. Yet, if the public good commands change, it was not Lieber's path of patriotism to resist: law that is judged by its culture to be unjust must yield in the interest of all. Lieber, as noted, would have favored wealth redistribution needed to maintain sufficient equality among the people in order to dispel mistrust that would disable democratic government.<sup>344</sup>

Although Lieber in other work revealed himself to be an unrepentant advocate of the rights of property,<sup>345</sup> aligning himself with those men of property who drafted and secured ratification of the Constitution,<sup>346</sup> he was a willing and vigorous exponent of adaptive change in the reform of law and legal institutions to fit the moral aspirations of the culture.<sup>347</sup> With slavery, he seems not to have doubted that ardent advocacy of emancipation was patriotic,<sup>348</sup> although he did until the last sustain his hope that the nation could be saved without civil war.

### *I. Religion and Virtue*

The claim has recently been advanced that republican virtue (or Lieber's patriotism) is a priestly dictate of the Calvinist clergy that should be disregarded by sophisticated humanists who deny the doctrine of predestination.<sup>349</sup> Was Lieber, the classicist-Episcopalian, the unwitting tool of John Calvin?

It is true that Presbyterians and Congregationalists influenced by the Scottish Enlightenment tolerated the idea of public duty. James Madison, John Adams, and Benjamin Rush among the leading Revolutionaries and Founding Fathers were of Calvinist persuasion. It is also true that many early law teachers were trained for the Calvinist ministry: these included George Buist at Charleston, Samuel McCorkle at North Carolina, George Robertson at Transylvania, Rosewell Shurtleff and John Wheelock at Dartmouth, Ezra Stiles

343. *Id.* at 71.

344. Equality was an important theme of classical republican theory. Montesquieu, *supra* note 69, bk. V, chs. 3-5; Alisdair C. McIntyre, *After Virtue: A Study in Moral Theory*, 2d ed., 237-38 (Notre Dame, 1984).

345. See generally Property and Labour, *supra* note 115; On Civil Liberty, *supra* note 112.

346. See generally Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York, 1935); see also John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* 103-13 (Madison, 1986).

347. He employed the undefined term "justice" to describe the aims of laws made by virtuous citizens, but this, like virtue, was for him a relativist idea. 1 *Manual*, *supra* note 55, at 153-56.

348. See *supra* text accompanying note 207.

349. E.g., James Oakes, *From Republicanism to Liberalism: Ideological Change and the Crisis of the Old South*, 37 *Am. Q.* 551 (1985).

at Yale, Samuel Stanhope Smith and John Witherspoon at Princeton, and James Wilson at Pennsylvania.

This Calvinist connection is less surprising in light of the fact that most higher education in antebellum America was an enterprise conducted by Presbyterian clergymen. They were by far the best educated group on the continent.<sup>350</sup> It was equally true that Calvinist Congregationalists, especially in Massachusetts, were the religious group in America least attracted to the Jeffersonian vision of higher education.<sup>351</sup> Their resistance may account for Harvard's slowness in joining in the national enterprise of "nurturing patriotism."

Among American faiths, the idea of public virtue was perhaps most congenial to the Quakerism of George Wythe's family or to the loose deism practiced by Jefferson, Kent, Tucker, Lieber, and others within the Anglican or Episcopal Church or the Unitarian Church. Montesquieu, an important source of republican theory in Revolutionary times, had explicitly attacked the doctrine of predestination as hostile to law.<sup>352</sup> As it happens, Jefferson<sup>353</sup> and Lieber<sup>354</sup> were both in their time hounded by Calvinists for their ideas. We can surmise Lieber's response to the suggestion that he was a purveyor of Calvinism from his protest against the "bitter, biting, acrid, scratching, tearing, grating, grinding, harrowing, infaming Hyper-Calvinism, that seems to forget that Saviour means healer."<sup>355</sup>

On the other hand, Lieber would have affirmed a connection with Christian teaching for his conception of civil liberty.<sup>356</sup> He was not less hostile to predestination than he was to Social Darwinism, another adversary of free will that was circulating in his time. Either notion was incompatible with his notion that all rights must be earned by the performance of duty, and all impositions of duties compensated by the recognition of rights.

#### *J. Private Interests and Private Virtues: The Divided Self*

Montesquieu was especially careful to distinguish public virtue from private charity or morality.<sup>357</sup> Pericles also made a sharp distinction between public affairs and those private ones with respect to which his fellow Athenians might be as selfish as any without harming their city. This distinction between the

350. Frederick Rudolph, *The American College and University: A History* 55-56 (New York, 1962).

351. See Sutherland, *supra* note 41, at 32-42 (describing the slowness of Harvard in responding to the Jeffersonian leadership). Samuel Eliot Morison described the entrenched Calvinism prevalent at Harvard before the commencement of its "Augustan age" in 1815. *Three Centuries at Harvard, 1636-1936*, at 76-88 (Cambridge, Mass., 1936).

352. Montesquieu, *supra* note 69, bk. XXIV, ch. 14.

353. Jefferson's encounter was related to his efforts to secure the services of the anti-cleric, Thomas Cooper, as professor of law at the University of Virginia. See Malone, *supra* note 152, at 239-45.

354. Freidel, *supra* note 106, at 124. Ironically, the attack on Lieber was led by a former student of Cooper, his predecessor at South Carolina. *Id.* at 133.

355. Quoted in *id.* at 285; see also 1 Manual, *supra* note 55, at 304.

356. E.g., Teacher of Politics, *supra* note 189, at 27.

357. See *supra* text accompanying note 73.

public self and the private self is an important implication of the concept of public virtue, or of Lieber's patriotism. If, like monarchs of yore, each citizen were to say "I am the state," the transfer or elevation of loyalty from one's self to the commonwealth, so essential to republican theory, would be defeated. While some contemporary theorists appear to accept the inevitability of that conflation of self with public interest,<sup>358</sup> Lieber's conception clearly assumed that the distinction can in some degree be preserved at least in the minds of trained citizens.

Richard Sennett has, however, gained some acceptance for his argument that this distinction between the public and private self has, probably for good reason, subsided from American ethical standards and culture.<sup>359</sup> For us, and to some extent for Lieber, the line so clear to Montesquieu and Pericles is blurred. Both modern media and accepted public policy treat almost all human conduct as vested with a public interest and therefore amenable to legal control. If indeed the personal is political, then perhaps what is political is merely personal. We now also recognize the powerful human trait we identify as cognitive dissonance, the impulse that attracts us to rationalizations affording public justifications for our most self-seeking conduct.<sup>360</sup>

We still perceive, as did Lieber, that there are people of great personal generosity and private rectitude who have no acquaintance with public virtue, and others of public rectitude who lead tawdry private lives. On the other hand, Lieber himself came close to conflating public duty with private in arguing that monogamy is essential to the family structure needed to perpetuate patriotism.<sup>361</sup>

Yet in this respect as in the others, Lieber was mindful of the difficulty inhering in the standards of public conduct he proposed. He pressed forward because he assigned great value to constitutional self-government and because he perceived self-government to depend for its continued existence on the development and observance of the sorts of standards that he set forth.

### V. An Impossible Dream?

Given so many obstacles to its exercise, well might Lieber's students have asked: Is not this patriotism utopian or "celestial"? Was Lieber in fact a Don Quixote, engaged in a pursuit as foolish as it was honorable? As John Adams's reaction manifests, republican virtue is likely to be scorned as utopian by those who deny the possibility of altruism, as most old-fashioned Calvinists did,<sup>362</sup>

358. E.g., Richard Sennett, *The Fall of Public Man* (New York, 1972); cf. Erving Goffman, *The Presentation of Self in Everyday Life* (Garden City, N.Y., 1959); see also Gordon, *supra* note 337, at 71; Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. Rev. 63 (1980); Deborah Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589, 643-47 (1985); Richard Wasserstrom, *Lawyers and Professionals: Some Moral Issues*, 5 Human Rights 1 (1975).

359. See Sennett, *supra* note 358.

360. See generally Leon Festinger, *A Theory of Cognitive Dissonance* (Evanston, 1957).

361. 1 *Manual*, *supra* note 55, at 139-40.

362. See generally Thomas Nagel, *The Possibility of Altruism* (Oxford, 1970). Nagel's definition of altruism is particular and should not be conflated with Lieber's patriotism.

and as many of our contemporaries are prone to do, even without the associated religious dispositions. And even if altruism is possible, one may doubt whether this form of it can be induced or enhanced in young adults by means of higher education.

I will not venture a definitive response, but here offer those reassurances that can be gleaned from Lieber's own thoughts about the feasibility of his enterprise.

*A. The Necessity of Realism in Framing Standards of Public Virtue or Patriotism*

By definition, the requirements of public virtue or Lieber's patriotism cannot exceed the possible. We must be governed; government will be conducted either by trust or by fear, there being no other choice; the public cannot withhold the trust necessary to governance until men and women are angels, but must accept the reality that its leaders and citizens are made of the common clay. Few democratic political leaders or lawyers have a taste for martyrdom. Only the very few will contest for the political counterpart of the Medal of Honor. Government cannot await the election of persons possessing that kind of moral courage.

Lieber was mindful that the demands of patriotism cannot be superhuman, framed in dimensions so great as to deter the effort of citizens to meet them.<sup>363</sup> He did not ask his students to achieve absolute selflessness in their conduct of public affairs. A republic that is well served in the management of its own affairs, he observed, is improvident if it is too quick to fault its leaders for personal failings having slight public consequence.<sup>364</sup> Lieber would thus have accepted the recent instruction of Dennis Thompson that the privacy of officials should be respected in order not to make unacceptable demands on them.<sup>365</sup> Standards of public conduct as set forth by Lieber should be understood as aspirational.<sup>366</sup> Those failing to meet his standards in all respects are not by the slightest failures doomed to his rebuke and rejection. Just as tolerance between co-citizens is essential, so is a modicum of tolerance by citizens of the uncontrollable human failings of their officers.

In this respect, Lieber's pragmatic Patriotic Citizen is to be distinguished from such truly utopian constructs as the Socialist Man in the minds of some early Marxists. Socialist Man was the selfless citizen who would emerge in the true Marxist society to disavow self-interest in all relations, private and public. The concept of Socialist Man retains sufficient vitality that even so sensible an observer as Christopher Lasch urged not long ago that socialism might be the remedy for the narcissism infecting our culture and causing, among other misfortunes, a widely distributed sexual malfunction.<sup>367</sup> Lieber's patriotism

363. Lieber gave favorable mention to Erasmus, who evaded martyrdom and devoted his career to reform from within. 1 Manual, *supra* note 55, at 239.

364. But cf. 2 *id.* at 289 ("A public man must not shrink from having his most private affairs scanned and misrepresented.").

365. Thompson, *supra* note 283, at 123-47.

366. See also Lon L. Fuller, *The Morality of Law*, rev. ed., 3-32 (New Haven, 1970).

367. *The Culture of Narcissism* 31-50 (New York, 1978).

makes no such claim to transform the full range of human relations; his patriots are not promised more or better orgasms.

Even those who disbelieve in altruism may acknowledge that men and women may take their pay in many different coinages. Montesquieu attributed the success of monarchies to their ability to motivate persons by fulfilling the ambition for honor.<sup>368</sup> As Lieber repeatedly urged, there is no reason that a republic cannot honor public virtue or patriotism, or that its citizens will not seek such honor in lieu of other coin.<sup>369</sup> In addition, there are the rewards of self-esteem that are generally associated with craft, and may be had by any citizen acting in public matters with public virtue. The practice of Lieber's patriotism can thus be an art that gives its own reward to those who devote themselves to it.

Human capacity to strive for the degree of altruism required by Lieber's patriotism is in fact demonstrable. John Adams and especially Washington<sup>370</sup> were themselves much esteemed for their public virtue, to such an extent that their own careers were powerful counterexamples to their contention that public virtue is "celestial." James Madison was perhaps a paradigm.<sup>371</sup> That humans have innate tendencies to form social orders is an empirical datum; this implies some innate willingness to subordinate individual interest to shared interest. And there are forms of altruistic behavior that are common and can be readily observed to confirm this inference. To tell the truth against interest, to invest uncompensated effort in the moral development of children, and to be brave in military combat are three examples. Lieber's patriotism is a generalized form of such common altruism embracing all three of the examples just stated. It was therefore, in his view, no quixotic pursuit in which he was engaged. One need not be Washington, or any other model of perfection, to contribute to the pursuit of common goals distinct from, and even at odds with, one's direct personal stakes.<sup>372</sup>

368. Montesquieu, *supra* note 69, bk. III, ch. 6.

369. Compare Aristotle, *Politics*, trans. Benjamin Jowett, bk. III, ch. 9, in *Aristotle on Man in the Universe*, ed. Louise Ropes Loomis (New York, 1943):

[P]olitical society exists for the sake of noble actions . . . . And they who contribute most to such a society have a greater share in it than those who have the same or greater freedom or nobility of birth but are inferior in political virtue, or than those who exceed them in wealth, but are surpassed by them in virtue.

370. Garry Wills, *Explaining America: The Federalist 216* (Garden City, N.Y., 1981).

371. See Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy 11-25* (New York, 1989).

372. The pursuit of honor may carry problems of its own:

[S]ought after by all men in all cultures . . . is the gratification of vanity, the petty dependence on the approval and admiration of one's fellows and neighbors. Once given legitimacy in a rationalist and egalitarian mass democracy, this dependence grows like a cancer, issuing in the ever-more-absolute sway of conformist "public opinion" and "public relations" over the spiritually dwarfed and morally cowed and atomized individual.

Thomas Pangle, *The Ennobling of Democracy: The Challenge of the Postmodern Age 39* (Baltimore, 1992).

*B. The Possibility of Cultivating Public Virtue or Patriotism in Young Adults*

All forms of altruism are taught, at least partly, as Montesquieu supposed, at mother's knee. At the time of the baron's writing, it would have been difficult to proceed from any other supposition since almost all learning was then conducted at mothers' knees. Jefferson's idea of using colleges to effect such training was a hopeful speculation in 1779. Perhaps it was little more than that in 1838 when Lieber published his *Political Ethics*, and it may yet remain a question.

It was also understood even in the eighteenth century that morality, public or private, is importantly reinforced by community standards and expectations, by mores of time and place. With Montesquieu,<sup>373</sup> Lieber asserted that civic virtue is effect as well as cause of republican community, or that republican community and civic virtue are reciprocally conditional.<sup>374</sup> Lieber and his contemporaries surely accepted the conception of a public morality influencing individual morality on public matters.<sup>375</sup> Mothers were known to have a collective as well as an individual effect on the morals of children.

Jefferson hoped, and Lieber was seeking to confirm, that the appropriate spirit or morality could be deliberately induced in young adults by their experience in college. Subsequent events have tended sometimes if not always to confirm the assumption. It is indeed even possible that a morality of public conduct such as Lieber sought to nurture is more likely to be transmitted to and acquired by young adults in a university than in a family, for the reason that most of us achieve adulthood and independence from our parents before we achieve awareness of our roles as citizens. This is especially true insofar as the public role we learn is also a professional one, for then our standards of professional conduct are substantially influenced by the models of those from whom we acquire professional competence and with whom we first share

373. Cf. Montesquieu, *supra* note 69, bk. IV, ch. 5.

374. To illustrate his point, Lieber expressed the view that nineteenth-century Italy lacked sufficient support from its people to become an effective state. 2 *Manual*, *supra* note 55, at 91. He attributed the frailty of South American republics to the same lack. *Id.* at 97 n.1. A modern Lieber or Montesquieu might well demonstrate this relationship empirically, with data drawn from the many societies that have striven in this century to create republics, often to be defeated by the absence of the community or national "spirit" that was the subject of Montesquieu's great work, or as Lieber would have expressed it, by the absence of sufficient patriotism in the citizens to save their state, but no such demonstration was necessary. For a particularly bleak report on the state of civic virtue among our neighbors immediately to the south, see Alan Riding, *Distant Neighbors: A Portrait of the Mexicans* (New York, 1984). Mexico is, we need not doubt, in far better condition in this respect than dozens of other countries, and we may hopefully surmise that it is improving. Yet the problem of public self-dealing in that culture, as in so many others, seems to be very deeply entrenched, despite such notable historic examples of virtue as Benito Juarez and Fernando Morelos. A contributing cause is the rich diversity of Mexican culture, which is a serious obstacle to communication and mutual trust.

375. This was an important founding aim of public education. It is not accidental that many antebellum law teachers were in the forefront of the public education movement. Examples are John Barbee Minor of Virginia, Thomas Read of Indiana, John Reed of Dickinson, David Lowry Swain of North Carolina, and Timothy Walker of Cincinnati.

professional responsibility.<sup>376</sup> What it means to be a professional is that we have acquired and embraced certain moral standards applicable to particular work,<sup>377</sup> and those standards are not necessarily connected to the private morality we acquire from family. In this sense, Lieber was grasping for a profession of politics.

There is a feature of mutuality or reciprocity in the learning that Lieber sought to effect. Our expectations of the conduct of others powerfully influence our own. Those expectations can be influenced by *shared* training that enables us to acquire our expectations from the best source, our fellow students who will be our co-citizens. This is perhaps part of what Aristotle had in mind in asserting that "[t]raining for an end which is common should also itself be common."<sup>378</sup> Even at the time of Pericles, there was long experience to confirm that military discipline can be substantially improved by training methods designed to enhance soldiers' mutual expectations of one another. Soldiers who come to believe that their comrades will not flee in the face of danger are themselves less likely to flee and more likely to serve the common interest. One must be careful not to conflate military courage with other forms of altruism, particularly political virtue. Yet Pericles in his Funeral Oration may nevertheless have drawn on his military experience, as Lieber may have drawn on his, in forming the hope that citizens can be socialized to higher expectations for one another's political conduct.

Today there is even some empirical evidence that communitarian altruism can be systematically increased. Seemingly, young adults can be trained to a higher willingness to sacrifice their individual interests to community needs: those who are required to make one sacrifice often find that to be a source of self-esteem and thus of self-satisfaction and so are generally more willing and sometimes eager to make another sacrifice for the public good.<sup>379</sup> Those returning in 1991 from the Gulf War were heard to have expressed precisely those sentiments.<sup>380</sup>

We can therefore have some confidence that moral education for young adults is at least possible, and that the values identified by Lieber can, with imperfect and varying success, be transmitted and acquired in a university environment that provides suitable reinforcement for the self-discipline that

376. See Émile Durkheim, *Professional Ethics and Civil Morals*, trans. Cornelia Brookfield (Glencoe, Ill., 1957); *Moral Education*, trans. Everett K. Wilson & Herman Schnurer (Glencoe, Ill., 1961).

377. Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* 225-32 (Los Angeles, 1977); Alexander Morris Carr-Saunders & Paul Alexander Wilson, *The Professions* (Oxford, 1933).

378. *The Politics of Aristotle*, trans. Ernest Barker, bk. VIII, pt. 1337, § 3, at 333 (New York, 1962) [hereinafter *Politics*].

379. There is some evidence that persons selected for compulsory military service, and who are required to serve up to three years, leave the service with marginally elevated willingness to make additional sacrifices for community or nation, as compared to those who do not serve at all, or who serve for longer periods of time or on a volunteer basis. The studies are reviewed in Janowitz, *supra* note 256, at 43-72.

380. See Charlayne Hunter-Gault's interviews, *Coming Home*, McNeil-Lehrer News Hour (May 14-17, 1991) (available in LEXIS, NEXIS Library, Macleh File).



the art of patriotism entails. This is not to say that universities are the only means available to a community to effect virtue or patriotism among young adults. But Jefferson's aim cannot be dismissed as an unworldly academic impulse, any more than Lieber can be dismissed as a mere Quixote blind to the harsh realities of the world.

#### VI. The Right and the Duty of the University to Transmit Democratic Values

Finally, there remains to consider the possible application of Lieber's notions of rights and duty to the very institutions in which he functioned. The matter seems to have attracted very little notice from Lieber, but it is one quickly noted by the contemporary observer. And it may be possible to construct (using Lieber's *Hermeneutics*) a position on the right and duty of a university to seek to impose its vision of appropriate public value on its students.

We may suppose that at least some of Lieber's students, even as our own, not only resisted but resented Lieber's moral pretensions. While by Lieber's time, it was no longer fashionable to argue with John Locke that a free society must leave all educational functions to the family,<sup>381</sup> there were and still are adherents of John Stuart Mill's dictum that "[a]ll attempts by the State to bias the conclusions of its citizens on disputed subjects, are evil."<sup>382</sup> It may indeed have been an intuitive response of Lieber to Mill's point that induced his self-restraint in elevating process over substance, in emphasizing a political ethic that would control manners more than outcomes.

Surely even those who most strenuously insist on their individual autonomy must grant the state and the university the right, and perhaps even the duty in a democratic society, to transmit those values and manners that enable a republic to stand. The argument for such a right, and for such a duty, has recently been stated by Amy Gutmann.<sup>383</sup> She proceeds from the classical and relativist premise, implicit throughout the volumes that are the subject of this article, that "citizens of a state should always be educated to suit the constitution of their state."<sup>384</sup> In a democracy, citizens must be taught mutual respect, whether they like it or not,<sup>385</sup> because mutual respect is necessary to their own preservation and to the liberty of all. Moreover, Gutmann argues, the democratic community has a right like any other to take reasonable steps to perpetuate itself; this is an aim and a reward of social organization, and a human impulse entitled to its share of respect. Individual citizens are in fact likely to have "a greater range of choice (and to live more satisfying lives) if

381. See *Second Treatise of Government*, ed. Peter Laslett, ch. 6, § 67, at 355 (New York, 1965) ("God hath woven into the Principles of Human Nature such a tenderness for their Offspring, that there is little fear that Parents should use their power with too much rigour . . .").

382. On Liberty, ch. 5 in *On Liberty and Other Essays*, ed. John Gray, at 1, 119 (Oxford, 1991); see also Bruce A. Ackerman, *Social Justice in the Liberal State* 139 (New Haven, 1980).

383. Gutmann, *supra* note 247; see also *General Education in a Free Society: Report of the Harvard Committee* (Cambridge, Mass., 1945).

384. *Politics*, *supra* note 378, bk. VIII, pt. 1337, § 2, at 332.

385. Gutmann, *supra* note 247, at 32-33.

their education is biased in favor of those values" most central to "their society."<sup>386</sup> To have a reasonable individual aspiration, "we need to know who we are; otherwise our choices will be endless and meaningless."<sup>387</sup> Thomas Pangle has recently presented a similar analysis.<sup>388</sup> His and Gutmann's aims are the same as Lieber's.

Indeed, in describing the values that a democracy is entitled to transmit, Gutmann comes very close to those values of process that Lieber espoused. She contends that training in argument is part of democratic education, because it enables citizens to understand, to communicate, and in some cases to resolve disagreements.<sup>389</sup> She also values the lessons of athletic competition as appropriately connected with democratic discourse.<sup>390</sup> Lieber would surely have agreed that the self-discipline of competitors abiding by the rules of their game is good preparation for democratic politics, for he urged the value of competitive sports long before they became central to American life.<sup>391</sup> Because Gutmann recognizes these democratic values as transmissible in the setting of an American university, she holds, with Lieber, that the education of office-holders is the primary function of the university in a democratic society.<sup>392</sup>

## VII. Conclusion

Though Lieber's conception of political and legal patriotism is afflicted with troubling complexities at almost every margin, it is a cogent statement of the educational mission assigned by Jefferson to Wythe, and pursued by most of the men who taught law in American colleges in the century beginning in 1779. It is a conception that pairs duty with right and elevates the values of process as the means by which the nation can achieve relativist justice and thereby unite its diverse and often conflicting interests to save the whole. The practice of such virtue is a healing art, but it employs verbal and intellectual aggression operating within self-imposed constraints to assure that interests of co-citizens are properly accounted, in accordance with our national values, when collective action is taken affecting those interests.

386. *Id.* at 34 (citing Immanuel Kant, *On Education*, trans. Annette Churton (Boston, 1900), and Jeremy Bentham, *Christomathia* (1816), in *The Works of Jeremy Bentham* 10 (Edinburgh, 1843)).

387. Gutmann, *supra* note 247, at 35 (citing Michael J. Sandel, *Liberalism and the Limits of Justice* 161-65, 168-83 (New York, 1982)).

388. Pangle, *supra* note 372, at 163-82.

389. Gutmann, *supra* note 247, at 50; see also *id.* at 173:

While not a substitute for character training, learning how to think carefully and critically about political problems, to articulate one's views and defend them before people with whom one disagrees is a form of moral education to which young adults are more receptive and for which universities are well-suited.

390. *Id.* at 51.

391. Freidel, *supra* note 106, at 60-61. He also advocated eurythmics as a useful means to achieve female health and grace.

392. Gutmann, *supra* note 247, at 181, 282-91.

It was Lieber's premise, as it was Jefferson's, that we are not equally suited to the practice of the arts of citizenship.<sup>393</sup> It was, however, the genius of the American Constitution that it was shaped by recognition of that reality. By making place for so many diverse offices and constituencies, it established the need and perhaps a market demand for the services that both Wythe, the Jeffersonian, and Lieber, the Hamiltonian, sought to provide.<sup>394</sup>

Surely the need, if not the demand, abides for persons of whatever political persuasion who are prepared to exercise power in a self-disciplined manner that evokes trust on the part of the governed, including those whose selfish interests may be diminished to secure a common advantage. Lieber's antebellum rhetoric is rightly echoed and elaborated in our time.

It is not clear that Lieber would have taken an interest in the present academic discourse regarding the tension between republicanism and classical liberalism.<sup>395</sup> Lieber did not present *Political Ethics* as a solvent of deep ideological differences or as a means of determining "the values that ought to control public and private life."<sup>396</sup> If pressed, he probably would have acknowledged both labels—*republican* and *liberal*—and perhaps *conservative* as well.<sup>397</sup> In his republicanism, or patriotism, what he offered was more limited in its pretense: it was a morality, a discipline, an emotional and intellectual process enabling his students to join in the making of decisions that sometimes reflected "liberal" values and sometimes not, depending on the circumstances and the terrain.

The discipline that Lieber taught has, it seems, been a factor in American law from his time to our own, although the demonstration of this is a topic for another day. It is perhaps arguable that Lieber's aims, and Jefferson's, may be better served now than they have been at most times in the present century. Moreover, from Lieber's view, the future could be better than the recent past.

This may be so for several reasons. One is that some of the alienation observed in recent decades was the product of the Vietnam war; the alienation and cynicism generated by that event have been serious impediments to the attainment of public virtue. Happily, the Vietnam era seems now to be drawing to a close.

Also, a few years ago, Suzanna Sherry made the arresting suggestion that on the whole women are better suited to practice public virtue than are men.<sup>398</sup> Her argument rests upon psychological studies reporting that women are

393. 2 Manual, *supra* note 55, at 284-94.

394. See generally Michelman, *supra* note 57; Sherry, *supra* note 89; Sunstein, *supra* note 67; Ackerman, *supra* note 256; Diggins, *supra* note 85; Janowitz, *supra* note 256.

395. See, e.g., C. Edwin Baker, Republican Liberalism: Liberal Rights and Republican Politics, 41 Fla. L. Rev. 491 (1989); Terrance Sandalow, A Skeptical Look at Contemporary Republicanism, 41 Fla. L. Rev. 523 (1989).

396. Geoffrey R. Stone et al., Constitutional Law, 2d ed., 5 (Boston, 1991).

397. Thus, Bernard Brown can describe Lieber as a German liberal, but an American conservative. Brown, *supra* note 106, at 7.

398. Cf. Sherry, *supra* note 89, at 580-91.

more likely to see themselves as connected to others,<sup>399</sup> and therefore more willing to cherish community and accept duty. It is also possible that the unfortunate side effects of testosterone may unfit a significant number of males, at least in their early adulthood, for work that entails concession and compromise, both of which require mature self-knowledge or self-restraint.<sup>400</sup> Perhaps Hugh Henry Brackenridge, a judge-novelist and classmate of Madison's, was right when he argued that young men tend to be captivated by the glare of eminence, and hence are the least fit for it.<sup>401</sup> If these things are so, then the increasing number of roles played by women in the law and in public life may contribute to an enhancement of our public virtue, or, in Lieber's term, our patriotism.

Lieber might have been surprised by this last prospect, but if it should come to pass, we can be certain that he would have proudly accepted the designation of his 1837-38 work as prefeminist. And whatever his predilections about gender roles, he would have welcomed with special warmth the inclusion of women among those who profess law for our republic. For the essence of Lieber's teaching, as of that of other early American law teachers, was a conception expressed two millenia earlier:

[Glaucon:] . . . [A]nd when [the students] have thus beheld the good itself they shall use it as a pattern for the right ordering of the state and the citizens and themselves throughout the remainder of their lives, each in his turn, . . . toiling in the service of the state and holding office for the city's sake, regarding the task not as a fine thing but as a necessity . . . . And the state shall establish public memorials and sacrifices for them as to divinities . . . .

....

And on the women too, Glaucon, said I, for you must not suppose that my words apply to the men more than to all women who arise among them endowed with the requisite qualities.<sup>402</sup>

399. *Id.* at 580 (citing Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (Berkeley, 1978), and Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass., 1982)).

400. See Carrington, *supra* note 237, at 877-81.

401. *Modern Chivalry*, ed. Claude M. Newlin, 779 (New York, 1937).

402. Plato, *Republic*, bk. VII, in *Collected Dialogues*, *supra* note 333, at 771-72.