

FACTS, THINGS, AND THE ORPHANS OF GIRARD COLLEGE: FRANCIS LIEBER, PROTOPRAGMATIST

*Aviam Soifer**

Rufus Choate, the dominant and domineering Boston lawyer and orator, once described Francis Lieber as "the most fertile, indomitable, unsleeping, combative and propagandizing person of his race."¹ Lieber was indeed always scrambling, always proposing projects and looking for work, always reading and thinking and investigating. The proud inventor of words such as "penology," "bureaucracy," and "jural," Lieber delighted in terming himself a "publicist," yet another of his English neologisms.² From his arrival in the United States in 1827 to his death in 1872, Lieber was a restless initiator who managed to be influential in myriad ways in his adopted land, in international and comparative law, and in the world of ideas. Historians have credited Lieber for "the most influential formulation of political science before the Civil War,"³ and for repeatedly being a pioneer in "consolidating nationalism in America."⁴ His reform efforts ranged from penology, empiricism, and statistics through the first American military code and the first sustained exploration of interpretation and construction in legal analysis. Yet Lieber's legacy is far from common chatter around law school faculty rooms.

Lieber accomplished all this and much more despite the fact that he retained a thick German accent and spent his most productive years teaching in Columbia, South Carolina, a place he considered an exile from the world of arts and letters. Lieber fervently longed for the Athens of the nineteenth century, remarking plain-

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¹ Letter from Rufus Choate to Charles Sumner (Jan. 7, 1842), *quoted in* DAVID DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 81 (1967).

² Lieber's claim to have introduced many words into the English language was "[o]ne of his proudest achievements," and the list of words coined by this accomplished philologist is indeed impressive. FRANK FREIDEL, FRANCIS LIEBER: NINETEENTH-CENTURY LIBERAL 179 (photo. reprint 1968) (1947); *see also id.* at 101-02, 316.

³ DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 38 (1991).

⁴ MERLE CURTI, PROBING OUR PAST 143 (1955).

tively, "Boston, I say, God grant me Boston."⁵ Yet Lieber had an amazing knack for turning up at the most dramatic moments and for befriending the leading lights of his time. He was a Forrest Gump with brains, a real-life Zelig astride the first three-fourths of the nineteenth century.

Francis Lieber was the tenth of twelve children born into the precarious middle-class existence of a Berlin iron dealer who had lost most of his property after the empire of Frederick the Great crumbled. As a very young soldier,⁶ Lieber was wounded during a skirmish surrounding the Battle of Waterloo, but he went on to join the Greek battle for independence against Turkey and to spend several stints in jail as a suspect in plots against the Prussian government. Lieber was rescued, befriended, and sponsored by the great historian, Barthold G. Niebuhr; he attended the University of Berlin in its infancy; and he helped to popularize the importance of physical education preached by Friedrich Jahn and his *Turners*. Though repeatedly barred from pursuing his studies by the Prussian government, Lieber managed to earn a Ph.D., albeit of somewhat dubious provenance, in four months in 1820. Over the course of a few months on a trip to England that eventually led him to America in 1827, Lieber met with the composer Karl Maria von Weber the day before von Weber died, mingled with John Stuart Mill and other utilitarians as they planned the University of London, worked for a wealthy family as an Italian tutor for his future wife, and studied Lancastrian school techniques that were part of the educational reform fever sweeping Europe.

Two months after Lieber's arrival in Boston to start a swimming school, President John Quincy Adams went swimming with him and endorsed Lieber's innovative techniques. When Alexis de Tocqueville and Gustave Beaumont visited the United States to study penological reform, Lieber became not only one of their primary informants but also their friend. He was ultimately the translator of their work on the penitentiary system, characteristically injecting his own lengthy annotations and arguments within the era's heated debate over rival penal reform systems. Lieber wrote

⁵ Letter from Francis Lieber to Matilda Lieber (1844), *quoted in* LEWIS R. HARLEY, FRANCIS LIEBER: HIS LIFE AND POLITICAL PHILOSOPHY 73 (New York, Columbia Univ. 1899).

⁶ Many writers misdate Lieber's birth, apparently relying on the biography written by Lewis Harley. Frank Freidel's biography is much better on all counts. Freidel states that Lieber was born on March 18, 1798. Still, Francis Lieber had only recently turned 17 when he was severely wounded at Namur. *See* FREIDEL, *supra* note 2, at 2-3, 15-16. The biographical information that follows in the text is drawn largely from FREIDEL, *supra* note 2.

verse and delighted in socializing, and he quickly became an intimate friend of Henry Longfellow, even managing to accompany Longfellow and his new bride on their honeymoon. Among Lieber's distinguished friends and sponsors for some of the many academic and government jobs that he repeatedly sought were Joseph Story, Henry Clay, and Edward Livingston.

Lieber's social and intellectual successes tended to exceed his professional and financial ones. The first American encyclopedia, edited by Lieber with major contributions by Story and other leading scholars, was a great success. Having accepted a lump sum payment, however, Lieber did not benefit from the royalties. Nor was he able to secure any of the steady jobs or contracts that he coveted and needed to support his growing family. The desire for stability at a respectable position and the possibility of earning a \$400 prize from the trustees led Lieber to undertake the planning of Girard College, a then recently (and richly) endowed school for orphans. In late 1833 he produced a 227-page report, entitled *A Constitution and Plan of Education for Girard College for Orphans, with an Introductory Report, Laid Before the Board of Trustees*. The plan proposed a European exploratory trip for the new President, a position for which Lieber seemed uniquely qualified.

Unfortunately for Lieber, who emphasized the need to give rewards and prizes strictly on merit throughout his Girard Plan as well as in much of his other work, the trustees chose as the college's first president one of their own board members, Alexander Dallas Bache, who was also Benjamin Franklin's great-grandson, and they promptly sent Bache on the kind of extensive trip to Europe that Lieber had prescribed.⁷ The extraordinary expenses Bache incurred on his trip, however, convinced the trustees to urge Bache to devote himself more fully to the reorganization of Philadelphia's Central High School. Plans for Girard College were soon swamped by charges of waste, fraud, negligence, and the redirection of Girard College funds to fund police and other public expenditures by the politicians who constituted the Board of Trustees. Though the cornerstone for the college had been laid in 1833, the first ninety-five pupils did not enter until 1848.⁸ Had

⁷ Not only did Bache not have an accent, but he also was a distinguished graduate of West Point who had served as the first President of Central High School in Philadelphia and as a professor at the University of Pennsylvania. Still, it did not hurt that the Dallas family was prominent in Philadelphia society and included several giants of the Philadelphia bar. See generally E. DIGBY BALTZELL, *PURITAN BOSTON AND QUAKER PHILADELPHIA* (1979).

⁸ CHEESMAN A. HERRICK, *HISTORY OF GIRARD COLLEGE* 12-40 (1927).

Francis Lieber been able to remain in Philadelphia to await the arrival of the first orphans whose educational plan he had so carefully outlined in 1833, even his buoyant faith in meritocracy and in the goodness of Americans would have been sorely strained.

Despite its virtually complete obscurity, Lieber's Girard College plan provides a significant resource for anyone interested in the history of American education, as well as for legal and social historians. Moreover, the plan sheds considerable light on Lieber's thoughts in general. Finally, at a time when many current national leaders tout the benefits of orphanages, it is instructive to consider the tangled past of even a well-endowed orphanage, particularly in the early years when no private/public distinction seems to have occurred to its sponsor and leadership.

I. "FACTS AND THINGS, RATHER THAN WORDS OR SIGNS"⁹

In planning Girard College, Lieber faced two conflicting challenges. One was to devise a comprehensive and sound educational program. The second was to explain how the permanent college for "poor white male orphan children,"¹⁰ to which Stephen Girard had left a legacy that truly was munificent for the times, was or was not constrained by the terms of Girard's extraordinarily detailed will. Lieber's articulation of how one ought to interpret and construe the will and which goals a socially useful education ought to pursue helps to ground and to prepare the theories of interpretation and construction Lieber soon put forth in his *Legal and Political Hermeneutics*.¹¹

A. Lieber's Interpretive Rules

After a few brief preliminaries, Lieber began his Girard College plan by emphasizing the historical importance of this under-

⁹ FRANCIS LIEBER, A CONSTITUTION AND PLAN OF EDUCATION FOR GIRARD COLLEGE FOR ORPHANS, WITH AN INTRODUCTORY REPORT, LAID BEFORE THE BOARD OF TRUSTEES 17 (Philadelphia, Carey, Lea & Blanchard 1834) (quoting Stephen Girard's proclamation as to what "I would have them taught" at the orphanage to which he bequeathed the bulk of his fortune).

¹⁰ *Id.* at 2.

¹¹ Lieber's *Legal and Political Hermeneutics* was originally published by his new friend Charles Sumner as two "outtakes" from Lieber's *Manual of Political Ethics* (Boston, Charles C. Little & James Brown 1839) in the *American Jurist and Law Magazine* in 1837-1838. Francis Lieber, *On Political Hermeneutics, or on Political Interpretation and Construction, and also on Precedents*, 18 AM. JURIST & L. MAG. 37 (1837); Francis Lieber, *On Political Hermeneutics—Precedents*, 18 AM. JURIST & L. MAG. 281 (1838). Little and Brown reprinted the articles in 1837, but the standard revised and enlarged edition was not published until 1839 (2d ed., Boston, Charles C. Little & James Brown).

taking in the United States, where no central government would disburse funds in support of science as profusely as in Europe. Moreover, the rapid growth of cities and the threat that "a part of their population may grow up unprepared to discharge the sacred duties of that full and entire citizenship which every one enjoys with us,"¹² made the project more momentous. Lieber praised the testator and stressed the great opportunity and dangers faced by the trustees. He then quickly got to work, proclaiming his first two rules in drawing up his plan:

1. To consider the implicit directions of the testator as the foundation and framework of the whole;
2. To follow conscientiously the wish of the testator, wherever it is clearly to be ascertained by fair interpretation of his testament, and to be guided by the spirit of his provisions in general.¹³

It is worth noting what Lieber specifically did not say: that the language of Girard's will explicitly bound him or anyone else. Lieber's first rule sought the *implicit* directions of the testator. When Lieber broadened the inquiry in his second rule, he clearly recognized that the wish of the testator might not be ascertained "by fair interpretation of his testament" and that it would be necessary to try to be guided "by the spirit of his provisions in general," thereby allowing Lieber and the trustees great latitude.

Lieber then offered three more rules for decision "wherever [Girard] has left us entirely at liberty."¹⁴ These rules entailed providing for the great objects of education in general, the wants of the time, and the wants of the country in particular.¹⁵ Explaining that he never willingly and consciously deviated from the five rules he had just set forth, Lieber enumerated thirty-five directives implicit in Girard's will and indicated a full alphabetical list of broad principles derived from them that Lieber proclaimed would help to "ascertain [Girard's] wishes not implicitly laid down in his instrument."¹⁶ Thus, Lieber affected a systematic approach, while he candidly pronounced the freedom that he and the Board of Trustees ought to have in moving through and beyond what was implicit in the testamentary instrument.

¹² LIEBER, *supra* note 9, at 27.

¹³ *Id.* at 29.

¹⁴ *Id.*

¹⁵ *See id.* at 29-30.

¹⁶ *Id.* at 30.

Lieber was not then, nor did he ever become, a lawyer.¹⁷ Perhaps this helps explain why Lieber's view of the will was anything but formalistic. Nor did he display much of the abstract theorizing often associated with his native Germany.¹⁸ Instead, we find in the Girard College plan clear, early signs of the distinction between construction and interpretation that Lieber developed in his *Legal and Political Hermeneutics*. There was already little concern for exactitude as to what the words being interpreted or construed actually said. There might be one true meaning of the original text, but Lieber obviously spent little time worrying about how to find it. Instead, he concentrated on pragmatic readings derivable from, but not limited to, that text. Throughout the next 120 pages of his detailed and innovative plans for a combined polytechnic school and seminary for teachers, Lieber comfortably concentrated on planning how 300 scholars might "be taught facts and things rather than words and signs."¹⁹

B. *Essences Under All the Varieties*

Edward Livingston, the distinguished secretary of state from Louisiana, praised Lieber's effort as follows: "You have written three lines which ought forever to be impressed upon the minds of all teachers, whether of science, politics, or religion. I know of no truth more happily expressed than that 'there is a religion under all the variety of sects; there is a patriotism under all the variety of parties; there is a love of knowledge and true science under all the variety of theories.'"²⁰ In applying interpretive rules to Girard's will, Lieber pursued the essences under the varieties. For his time—or ours, for that matter—Francis Lieber appeared unusually comfortable with paradox. In this respect, he often seems a precursor of the pragmatists, and a man anxious to appeal to the middle-class and middle-of-the-road instincts of many Americans.

Under the guise of science and in the process of generating rules, Lieber sought to struggle towards what he repeatedly claimed to be unreachable. In *Hermeneutics*, for example, he insisted on the one hand that "[n]o sentence, or form of words, can have more than one 'true sense,' and this only one we have to in-

¹⁷ He finally escaped South Carolina in 1857 for Columbia University in New York City, and spent the last years of his career lecturing there in the law school.

¹⁸ Voltaire is said to have once quipped that, while France ruled the land and England the sea, Germany ruled the clouds. See FREIDEL, *supra* note 2, at 4.

¹⁹ LIEBER, *supra* note 9, at 33.

²⁰ Edward Livingston's 1834 letter from Paris is quoted in HARLEY, *supra* note 5, at 61.

quire for.”²¹ Yet, on the other hand, with the exception of mathematics, true meaning always remains inaccessible. Thus, “good faith and common sense are indispensable in the application of the principles furnished by hermeneutics, to the complex cases of practical life.”²² Actually, Lieber disdained those who insist on fixed meanings, “for words, as is well known, have different meanings in different contexts.”²³ It may seem anomalous that Lieber also warned, “It is far easier indeed to establish a few general rules and pedantically to adhere to them, even in cases of conflicts, than to do what is essentially right and unequivocally true.”²⁴ To modern eyes, the anomaly seems to lie in Lieber’s insistence on the possibility of actually doing “what is essentially right and unequivocally true.” Lieber was a dogmatic contextualist who yet remained impressively open to the notion of inevitable change in language, law, and politics. Thus he maintained that “[m]oral obligations are eternal and immutable, though the acts which the same obligations require, may differ in different situations.”²⁵

This apparently paradoxical stance is made clearer when we focus on Lieber’s Girard College Plan. Central to Lieber’s educational ideas, as well as to his hermeneutic theories, was the disjunction between the thing and its expression. He argued that there was underlying truth, but that words could never capture that truth nor could thought ever freeze it. Nonetheless, the practical thought which was the overriding goal of education obliged one always to seek that truth. This intellectual stance helped him, for example, to explain Girard’s famous restriction that “*no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall*

²¹ FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS* 86 [at 1943] (photo. reprint 1970) (2d ed., Boston, Charles C. Little & James Brown 1839) [Pin cites to the third edition (William G. Hammond ed., 3d ed., St. Louis, F.H. Thomas & Co. 1880) as republished in this issue of the *Cardozo Law Review* will be shown in brackets following the page citation to the *second* edition.] Although I have used the 1839 edition because it best reflects Lieber’s careful thought close in time to his Girard College plan, only one of the passages that I cite was altered in the 1880 edition. A reprint of the second edition is readily available as volume 5 of the *The Classics in Legal History* series, edited by Roy M. Mersky and J. Myron Jacobstein (1970).

²² *Id.* at 65 [at 1928].

²³ *Id.* at 119 [at 1965]. Thus, Lieber warned of the tendency of those who sought to justify reproachful acts to rely on “this shuffling on the ground of literal interpretation,” *id.* at 99 [at 1952], and insisted that “the authority of precedents” must be “rationally limited, and not carried to an idolatry of the past or the established.” *Id.* at 205 [at 2026].

²⁴ *Id.* at 80-81 [at 1939].

²⁵ *Id.* at 92 [at 1947].

any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college."²⁶ Lieber interpreted this as simply the exclusion of "dogmatics—and their variety," and most assuredly not the exclusion of religion.²⁷ Emphasizing that Girard had required instruction in morals, Lieber insisted that Girard could not have intended to deny a fundamental truth that he knew perfectly well: "that morals cannot be taught to youth without founding them upon man's relation to God—without religion."²⁸ Thus morality and worthy social goals could neatly coalesce. Indeed, Lieber probably purposefully assayed a pun when he drew an analogy between the absurdity of deferring to a rich benefactor, who insists on a heart-chilling benefaction "for the support and education of poor and parentless infants, on condition that their feet should always be tied," and honoring the even more absurd prescription "of crippling their souls."²⁹

The other striking prescription in Girard's will confronting Lieber was, of course, the restriction to "male white orphan children." Lieber thought it important to explain why Girard thus limited admission. Lieber asserted that Girard "was not ignorant of the circumstances that poverty exposes the female child still more to moral ruin than the male, and that their education, as future

²⁶ This provision in Girard's 1831 will, reprinted with emphases in Lieber's plan, LIEBER, *supra* note 9, at 18-19, became the focus of one of the best known and most contentious law suits in the antebellum period, *Vidal v. Mayor, Aldermen and Citizens of Philadelphia*, 43 U.S. (2 How.) 127 (1845) (unanimous decision upholding will). See generally 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 124-33 (1926) (describing the 10 days of oral argument, which featured three full days of "Daniel Webster's sermon" attacking the will as unChristian). The Girard Will controversy was "a major cultural event of the 1840s, one of sufficient constitutive power to help define a decade and the years beyond"; it also "demonstrates how peculiarly American notions of philanthropy have contributed to national character." Robert A. Ferguson, *The Girard Will Case: Charity and Inheritance in the City of Brotherly Love*, in *PHILANTHROPY AND AMERICAN SOCIETY* 1 (Jack Salzman ed., 1987).

²⁷ LIEBER, *supra* note 9, at 39.

²⁸ *Id.* at 36.

²⁹ *Id.* at 37 (emphasis added). One cannot be confident that this was an intentional pun, of course. The evidence may be scanty, but I have found at least some additional evidence of an admirable propensity for punning in Lieber's work. In *Legal and Political Hermeneutics*, for example, Lieber resorted to esoteric references, as he often did, to explain about extremely ambiguous laws that were nevertheless sometimes the basis of criminal punishment. He then dropped the following footnote containing a triple pun, as I read it: "It may be observed here, that the blows in the Chinese Code, are frequently mentioned as the expression of value, as it were. A fine of so much is substituted for a certain number of blows. They are the pound sterling of penal valuation. However, the compounding ceases with the lowest classes, where real pounding takes place." LIEBER, *supra* note 21, at 164 n.1 [at 2001 n.20].

wives and mothers, is of the most vital importance to society."³⁰ Moreover, he acknowledged the need for "better education of the African race," and the force behind claims that a broader target group might better benefit society in general. Yet, Lieber argued, by limiting his sphere of action, Girard sought to set an example, and thereby to create "a different" and "a better" education.³¹ Thus the focus on "the ruling part of the ruling race"; thus the guarantee that, if accepted, an orphan "endowed with fair talents, and conducting himself well, has a right and title to a superior education; which we dare not deny to the adopted child of the testator."³²

Forced to determine what was meant by the term "orphan," Lieber revealed much about his practical, moderate, and reforming approach to the problem that all language, except mathematical language, is but approximation.³³ As he often did, Lieber decided to rely largely on the meaning assigned the word "orphan" by the people at large, which he took to be "a fatherless child."³⁴ Though he conceded "the paramount importance of the mother in the education of a child," which increases as we descend the scale in social relations, "our whole social system would nevertheless be overturned, were we no longer to consider the father the chief of the house, the 'lord' of the family."³⁵ In fact, like others Lieber anticipated both the language and the thought generally associated with the era of *Bradwell v. Illinois*,³⁶ when he proclaimed: "The respective relations of the father and the mother to the child are founded in the necessity of things, and therefore established by him, who assigned different spheres of activity to every being in the universe—relations and conditions against which we never can act

³⁰ LIEBER, *supra* note 9, at 43.

³¹ *Id.* at 44.

³² *Id.* The limitation to white orphans was challenged briefly in the 1890s, but the city solicitor determined that the board of trustees could not depart from the express limitation in the will and the board accepted his opinion. HERRICK, *supra* note 8, at 352. The issue of racial exclusion resurfaced in the 1950s, when the Pennsylvania Supreme Court allowed the substitution of private trustees for public officials to maintain the limitation of the school to whites in accord with the testator's wishes. *In re Girard College Trusteeship*, 138 A.2d 844, *cert. denied*, 357 U.S. 570 (1958). This state action barrier finally was rejected in *Pennsylvania v. Brown*, 393 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968).

³³ See LIEBER, *supra* note 9, at 128-29.

³⁴ *Id.* at 128; see also LIEBER, *supra* note 21, at 106-07 [at 1957] ("the word 'orphan' must be taken in the sense in which it is understood by nearly all nations, namely, as meaning a fatherless child").

³⁵ LIEBER, *supra* note 9, at 132.

³⁶ 83 U.S. (16 Wall.) 130 (1873).

with impunity.”³⁷ Ironically, Lieber elsewhere argued forcefully that it was a mistake to conflate metaphors, and to extend the sense of justice in the family to larger society and vice versa.³⁸ For example, in *Hermeneutics* he several times criticized those who would dispense with lawyers and establish “a patriarchal administration of justice,” which Lieber termed “the worst of all justice beyond the family circle and in a society at all advanced in civilization.”³⁹ What is natural and appropriate in the household amounts to tyranny in the state.⁴⁰

In arguing for separate spheres for men and women as a matter of natural law, Lieber was hardly unusual for his era. Some had been willing to go even further in the context of Girard College’s admissions policy. For example, John Quincy Adams was asked by a federal judge in 1833 for his opinion of the definition of “orphan.” Adams responded that at first he thought an orphan had to be without both parents, but he then had determined that being fatherless would suffice and ultimately moved to the view that being motherless should be considered sufficient.⁴¹ Though Lieber was more restrictive than his old swimming companion, he nevertheless stretched the definition of “orphan” in other ways. He proposed provisions with great latitudinarian potential that would allow admitting children who were “fatherless in the eye of the college,” where, for example, “the father is crippled or infirm, [or] he cannot work.”⁴² Moreover, exhibiting the dynamic understanding of textual meaning that pervades *Hermeneutics*, Lieber went so far as to argue that it was both just and expedient to admit illegitimate children, on the grounds that “[t]he times have passed when it was believed that an actual stain existed in the blood of an illegitimate child.”⁴³ While Lieber would admit a child whose father was permanently infirm and disabled due to intemperance, however, he drew the line at the children of convicts.

³⁷ LIEBER, *supra* note 9, at 132.

³⁸ *Id.* at 68.

³⁹ LIEBER, *supra* note 21, at 50-51 [at 1919].

⁴⁰ *Id.* at 165 [at 2001] (principle “that the emperor is the father, the whole country but a family . . . necessarily always leads to absolutism and tyranny, the moment we go beyond the family, in which affection is the base, and not the right”) (passage altered in 1880 edition).

⁴¹ HERRICK, *supra* note 8, at 340-41.

⁴² LIEBER, *supra* note 9, at 132.

⁴³ *Id.* at 134.

C. "A 'Sound Education' for All, and a Superior One for the Meritorious"⁴⁴

One of the advantages enjoyed by Girard College, according to Lieber, was that formal admission required that anyone with authority over a child sign that authority over to the college. Thus, education could be free of the interference of parents or guardians, who mean well for the children in their care, but who harm the child's education within an institutional setting. Lieber proposed three levels for the school: the preparatory, for ages six to ten years; the common, for ages ten to fourteen; and the high school, for the talented scholars who could benefit by remaining in school until they reached eighteen. Thus Girard College was never in fact to be what we commonly mean by a "college." Rather, it was a grand experiment in the education of orphans from the ages of six to eighteen.

By definition, this program of education was to be for "poor" children. Lieber objected to the European term "working class" and argued that the very phrase suggested artificial divisions that "not infrequently [become] a ground of political division."⁴⁵ He stressed that in the United States, by contrast, "[W]e are all working men, and many individuals who do not belong to the industrial class are much harder working men, indeed, than those who do belong to it."⁴⁶ Though Lieber here and elsewhere asserted that America was and ought to be a classless society, he proclaimed that the goal of Girard College ought to be to prepare scholars for "those professions, arts, and occupations chiefly, which generally are not included in the so called learned professions."⁴⁷ He stressed mechanical education, for example, not to teach the specific skills that scholars could acquire when later bound out to labor, but rather to amuse and to produce self-sufficiency, a general practical knowledge, and to "place ourselves in contact with the world around us."⁴⁸ At the same time, Lieber proposed dividing the students into squads to teach other students. He maintained that, "[T]eaching what the scholar has learned to others, and his own practice of what is taught to him, is of paramount importance in education."⁴⁹

⁴⁴ *Id.* at 44.

⁴⁵ *Id.* at 28 n.*.

⁴⁶ *Id.* at 29 n.*.

⁴⁷ *Id.* at 41.

⁴⁸ *Id.* at 85.

⁴⁹ *Id.* at 65.

A central trope throughout Lieber's work was to create a choice between antithetical poles, and then to find a safer, more sensible solution.⁵⁰ This approach was explicit in regard to education. Lieber wrote, "As to the sciences and subjects in general which are to be taught in the college, we ought to guard against too [sic] kinds of extremes into which those who are charged with the education of youth, not unfrequently fall."⁵¹ He then attacked the scientific spirit in Germany, which sometimes induces people "to consider usefulness . . . with a kind of disdain." In the United States, on the other hand, "some persons attach value to nothing which they do not consider useful, and by useful they understand that only which can be turned immediately to account, or which stands in a direct connexion with physical well-being."⁵² Lieber characteristically offered a middle ground "which shall induce the scholar to great exertion, without neglecting a due regard to his faculties."⁵³

Lieber then described in considerable detail a course of study that emphasized how students could learn by teaching other students, that stressed the importance of physical education, allowed only mild and predictable punishments, and contained a multitude of specific curricular innovations and suggestions. In his Girard plan and in his own teaching practices, Lieber used current newspapers and what, for the period, constituted a multimedia and interactive pedagogic approach. The pragmatic core of his plan was to: "let everything be done which is of real use, however novel it may appear, and give up everything which is not really useful, however pleasant its theory or appearance may be, or however flattering the contrivance may be to its inventor."⁵⁴ For this young radical turned moderate reformer who constantly sought to appeal to those who might give him a permanent job, a principle that held "true in education as every where else" could be summed up as:

⁵⁰ For one of many examples of this tendency in his writing about legal interpretation, see 2 FRANCIS LIEBER, *Amendments to the Constitution*, in THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER 137, 142 (Daniel C. Gilman ed., Philadelphia, J.B. Lippincott & Co. 1881) ("Laws are in this respect [i.e., with regard to change] like languages. The lexicographer who thinks that, by his dictionary, he can shut the gate upon his language and imprison it, and the forward and licentious innovator, are alike presumptuous, and equally to be discounted.")

⁵¹ LIEBER, *supra* note 9, at 60.

⁵² *Id.*

⁵³ *Id.* at 62.

⁵⁴ *Id.* at 66; see also LIEBER, *supra* note 21, at 205 [at 2026] (warning against "an idolatry of the past or the established").

“Obtain the best and greatest possible effect by the given means in the given time.”⁵⁵

Characteristically, Lieber insisted on instruction in the rights and duties of citizens, which he saw as inextricably linked concepts. Also characteristically, he dealt meticulously with countless details ranging from the requirement of swimming suits and sex education through the requirement of daily washing “hands, face, neck and chest, if health permits,” and twice a week washing of “feet, or the whole body if possible.”⁵⁶ No detail seemed too small, but Lieber insisted on an approach that viewed all the scholars as “members of one family, [who] ought to behave toward each other accordingly.”⁵⁷

In education, Lieber argued, “We always elevate ourselves from the special and concrete to the general and absolute.”⁵⁸ He emphasized the need for the concrete particularly for younger scholars, but insisted that all education, like all language, must be contextual. According to Lieber, “The scholar will thus only learn according to his capacity, and learn the thing, not the name; and to obtain this latter end, it is of the greatest importance that the knowledge of the thing ought always to precede its sign.”⁵⁹ Thus, for example, a teacher ought not to teach morality and religion as sciences are taught or in hortatory fashion, “but rather by joining with the scholars as friends, who, though more experienced in the application of morals, and possessed of a more extensive and a more connected view of our obligations, yet are but their equals in the presence of him, in whom all morals and all knowledge find their principle and end.”⁶⁰

It was crucially important to Francis Lieber that he be perceived as an American. At the same time, he saw himself as far ahead of his countrymen in his learning and in his ability to lead. Unquestionably, Lieber associated himself with thinkers such as Montesquieu and, most particularly, Grotius. Yet his approach to education was insistently democratic. To Lieber, the goal was to escape from “the stiff, unyielding and shackling form, to the free empire of the mind.”⁶¹ This was a particular duty of all citizens of the United States, and of unique importance in a vast country that

⁵⁵ LIEBER, *supra* note 9, at 47.

⁵⁶ *Id.* at 211 (Rule 30).

⁵⁷ *Id.* at 210 (Rule 19).

⁵⁸ *Id.* at 217 (Rule 53).

⁵⁹ *Id.* at 216 (Rule 52).

⁶⁰ *Id.* at 157-58 (Article 26).

⁶¹ *Id.* at 138.

could be “impartial” toward Europe and where, uniquely, knowledge “is . . . the very life and soul of our whole national existence.”⁶² Simultaneously, Lieber—whose political “fetish” was the slogan “No Right without its Duty; No Duty without its Right”⁶³—argued that the guarantee of liberty is in the breast of the citizen, because “constitutions do not make liberty.”⁶⁴ A practical education, an education in the duties of citizenship, was therefore essential for American citizens—at least for white male citizens. After all, this fervently patriotic, German-accented American argued out of his own experience, “Every citizen may become an executor of a will, in which he may be called upon to interpret provisions, which materially affect the well being of large numbers of unprotected orphans, he may, in times of great importance, find himself in an office of a delicate character, and he may at any day be charged to decide upon matters of grave importance, in the most sacred character a citizen can assume, namely, as a juror.”⁶⁵

CONCLUSION

Francis Lieber lost his eldest son during the Civil War. Oscar, a geologist who had gone to Germany to fight at the barricades in the Revolution of 1848, died fighting for the Confederacy in Wade Hampton’s unit at the Battle of Williamsburg. Hamilton, the second of Lieber’s three sons, volunteered in the Ninth Illinois Regiment and lost an arm in the Union cause after he was badly wounded at Fort Donelson. Guido Norman, Lieber’s youngest son, graduated from Harvard Law School in 1859, was decorated several times for bravery on the Union side during the Civil War, joined his father in the Archives Office of the War Department, taught at West Point, and became the Judge-Advocate General of the U.S. Army. Thus Francis Lieber gave much in many ways to his adopted country.

Lieber’s initial plans and hopes for Girard College came to naught, but many of his ideas ultimately were adopted. By 1927, Girard College’s president could boast that the school had become the largest orphanage in the world. The school continues to exist today. A new vision statement looks to the next century and boasts of a long history of providing “needy children with a sound

⁶² *Id.* at 56.

⁶³ FREIDEL, *supra* note 2, at 154 n.24. Lieber emblazoned this slogan on his stationery, his books, and in many other places, and he was furious when Marxists appropriated it.

⁶⁴ LIEBER, *supra* note 21, at 178-79 [at 2011].

⁶⁵ *Id.* at 76-77 [at 1936].

education and an orientation towards productive citizenship and service, envisioned by its founder."⁶⁶

At best, Francis Lieber plays only a minor role in the stories of origins told for Girard College and for the nation at large. He was crusty, egocentric, and often desperate to ingratiate himself, while also constantly compelled to flaunt his learning. Lieber was hardly a saint: though he loathed slavery, he was willing to lease a slave for house work during his South Carolina sojourn; he enthusiastically claimed that military necessity ought to trump constitutional niceties during the Civil War; and he attempted to pull up the gangplank to forestall further immigration, at least when it involved nonwhite races he considered a threat to mongrelize the country.

Still Lieber is worth reckoning with for several reasons, however. His restless curiosity, his intellectual rigor and openness, and his very Zeliglike qualities make him remarkable. Lieber merits particular attention for his protopragsmatism and his efforts to blend head and heart. As he spun out his hermeneutic theories, for example, Lieber insisted more than once that "[w]henver a decision between the powerful and the weak depends upon our construction, the benefit of the doubt is given to the weak."⁶⁷ For all the learned examples in his Girard Plan and in the rest of his monumental output, Francis Lieber managed to capture and to reflect widely-shared American characteristics.

Through Lieber's many, many words, one can glimpse the middle-class optimism and practicality that still dominates so much of American life. If only the idea of orphanages bruited about today as a simple solution to complex problems might have at least some of the careful attention and concern for children reflected in Francis Lieber's plan for Girard College. Have we really overcome his tendency to rely on biased classificatory schemes as if they were natural? We might wish our political leadership had some of Lieber's sense of nuance and complexity, and of how they are linked inextricably to seeking justice.

⁶⁶ Girard College Vision Statement, Girard College (Dec. 8, 1994) (generously provided to me by Professor Lawrence Cunningham of the Benjamin N. Cardozo School of Law). Professor Cunningham graduated from Girard College and informs me that the school now has a diverse student body, fully integrated along racial and gender lines.

⁶⁷ LIEBER, *supra* note 21, at 141 [at 1986-87].

