

Liberalistic Order: The Work of Gottfried Dietze

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SOME SCHOLARS are fashionable for their times. Others are less acceptable to their contemporaries, and their work is appreciated only later. Such was the case with economist Friedrich Hayek, for example, who was honored with the Nobel Prize only after being scorned for his critique of the welfare state. The same might be said of the work of conservative political thinker Gottfried Dietze (b. 1922). Profoundly influenced by Hayek's thoughts on liberty in the modern state, Professor Dietze's contributions to the study of liberal government have been much neglected.

When it was clearly unfashionable to do so, Dietze criticized the rise of "unlimited democracy" in America and wrote in defense of property rights and ordered liberty. He was dismissed by many in academia as a reactionary thinker. Political science in the 1960s, while claiming to be value-free in its methodology, was hardly value-free in assessing the work of its practitioners. Dietze's conclusions about the importance of the rule of law did not conform to the liberal ideology of the day. However, with the recrudescence of conservative politics, Dietze's observations about the state of modern liberalism have become respectable, if not *au courant*.

Dietze's academic career spans several decades, beginning with the publication of *The Federalist: A Classic in Free Government* in 1960. Dietze's examina-

tion of the political theory of the *Federalist* papers anticipated what would be a fruitful area of scholarly investigation. His discussion of the sources of American liberalism would be continued by distinguished historians such as Bernard Bailyn, Gordon Wood, and Forrest McDonald.¹ Study of the American constitutional period profoundly influenced Dietze's subsequent writings. He explored the nature of free government and its balance between liberty and authority. In *America's Political Dilemma* (1969) he concluded that the founders' vision of a constitutional democracy was in jeopardy. Dietze offered criticism of the trend toward democratic excess in the United States and discussed the negative impact of such excess on the institutions of American government.²

The concept of unlimited democracy, what Dietze identified as democratic "permissiveness," matured in his most recent work, *Liberalism Proper and Proper Liberalism* (1985). The themes of his earlier studies—the neglect of property rights, the contemporary decline of federalism and national judicial review, the tension between democracy and liberalism—had moved America closer to a system of mass democracy. Dietze endorsed an alternative which he called "proper liberalism." This term, and the political values it incorporates, summarizes best the message that pervades Dietze's work: the challenge of modern liberal government is to re-

emphasize "propriety" and order over individualistic licentiousness.

The preceding summary of Gottfried Dietze's work does not do justice to the subtlety of his thought. But this brief summary does indicate that if there is a common theme in his writings, it is the theme of "liberalistic order." In this article I propose to explore the meaning of this term, emphasizing the work I think is essential to an understanding of Dietze's thought, the 1973 monograph *Two Concepts of the Rule of Law*. Dietze's conception of the rule of law is the foundation for his idea of proper liberalism.

The theme of liberalistic order will be examined from a different perspective: that of Dietze's equation of pure democracy and permissiveness and the dangers therein. A case study of the dangers to liberalistic order will be taken from Dietze's discussion of democracy and the university community, his 1970 monograph *Youth, University and Democracy*. Dietze's analysis of the changes in university structure and mission and of the dissension of campus youth in the 1960s bears close resemblance to the arguments of the celebrated book by Allan Bloom, *The Closing of the American Mind*. Although the two writers come from somewhat different ideological perspectives, Bloom's commentary on the state of American higher education addresses developments first mentioned by Dietze over fifteen years earlier. The similarity of Bloom's and Dietze's recommendations for the modern university demonstrate not only that Dietze's critique was ahead of its time, but also that his view of liberalistic order has great import for contemporary political debate.

Propriety, the Rule of Law, and Proper Liberalism

THE IMPORTANCE of property rights and their protection in the rise of liberal government was identified by Dietze in two studies published in the early 1960s, *In Defense of Property* (1963) and *Magna Carta*

and *Property* (1965). When Dietze uses the term "propriety" in speaking of a system of ordered liberty, he is often referring to the older sense of the word that implied property.³ For Dietze, then, proper liberalism includes protection of all rights that are an aspect of freedom, property rights to the same degree as civil rights.

The rule of law, properly construed, is conducive to proper liberalism. In *Two Concepts of the Rule of Law* Dietze distinguishes between the Law State (*Rechtsstaat*) and State Law (*Staatsrecht*). Dietze argues that the Law State was a reaction to, but never entirely free from, the ideology of the Police State and State Law.⁴ The Law State implied substantive restrictions on the sovereign, a system of constitutionalism. The Law State of Kant, for instance, presumed that "law" meant justice, not man-made decrees (*Gesetz*).⁵ German constitutionalists of the nineteenth century such as Robert von Mohl refined the Kantian conception of the rule of law. Dietze mentions von Mohl because the latter admired the American constitutional system and its separation between law and legislation. This separation facilitated the Law State and its benefit of the "free sphere" offered to its citizens.

Dietze admires von Mohl and his wedding of justice and reason to the Law State. But von Mohl left open the possibility of the formalization of constitutionalism. In the hands of his contemporary Friedrich Stahl such formalization contributed to the Law State's decline in Germany.⁶ Law, Dietze observes, became a neutral apparatus which referred to the state's conception of public welfare. With the rise of nationalist democracy in the twentieth century, the people became the sovereign and the "Social State" replaced the idea of the Law State. This development introduced tension between democracy and the rule of law. Dietze uses the example of the Weimar constitution to illustrate the danger when State Law reappears as democracy unrestrained.

Rather than the Police State of one man, democracy risks the despotism of the com-

pact majority. The democratic Social State also endangers the Law State through improper permissiveness which drifts toward pluralistic anarchy, representing an atomistic, licentious society.⁷ The permissiveness of Weimar and the mutability of its Law State led to the Nazis' nationalistic perversion of State Law. Dietze sees in the German example both applications and implications for the American constitutional system. He notes that, in the 1860s, von Mohl commented on the trends in the United States toward democratic despotism and anarchy.⁸ Dietze confirms this observation in what he sees as a decline of judicial review in the nation of its origin: the Supreme Court's less frequent invalidation of acts of Congress and of democratic State Law.⁹

The paradox of *Two Concepts of the Rule of Law* is that the Law State is the ideal and State Law is the real. State Law can either be detrimental or conducive to the Law State. Dietze feels that it is important to separate the two—to distinguish the two concepts of the rule of law and to clarify that democracy can either complement or challenge liberalism. The great allure of liberalism—permissiveness—is also its greatest threat.¹⁰

Permissiveness is to be contrasted with propriety. In *Liberalism Proper and Proper Liberalism*, Dietze argues that the rule of law, the Law State, defines both proper liberalism and proper democracy. From his examination of four liberal thinkers, Montesquieu, Smith, Kant, and Jefferson, Dietze concludes that the essence of proper liberalism lies in law that protects rights and enforces order, or defends those rights. But when some rights are preferred over others, the security of all is compromised. Dietze is critical of the contemporary emphasis on civil liberties as opposed to property rights.¹¹ A hierarchy of rights in the name of social welfare opens the door to a diminution of all rights, because it replaces the order of the Law State with the vicissitudes of democratic State Law. It is in this context that Dietze notes the disparagement of federalism as a component of the Law State.

Critics of states' rights wanted faster progress in civil rights reform; federalism was a mere obstruction since its primary *raison d'être* had been the protection of property rights. It was this picking and choosing among substantive restrictions on State Law that, Dietze argues, contributed to the demise of judicial review as a tool of the rule of law.¹²

Propriety, then, is ordered liberty that shows no preference for some rights over others. Permissiveness consists in a denial of ordered liberty in the name of democracy, or democratic positivism. In *Two Concepts of the Rule of Law*, Dietze identified the positivism and the formalism of Kelson's "pure theory of law" as contributing to the formalization and the denudation of the Law State. The Law State is not simply that which promulgates State Law; it is the Just State because it is under law.¹³ Dietze harks back to Corwin's notion of the "higher law" background of the Constitution.¹⁴ Dietze is denying that the Constitution, and the rule of law for which it provides, is legitimate solely because of its democratic passage. Constitutionalism antedates democracy, and for Dietze liberal principles are prior to democratic principles. This is simply another way of saying that the Law State has priority over State Law.

If the Law State is the ideal to be served by State Law, then "liberalistic" encapsulates the ideal qualities of liberalism. Liberalistic order refers to those aspects of freedom, including democratic principles, which are compatible with propriety.¹⁵ In maintaining liberalistic order it is important that no enumerated rights be disparaged; disparagement of property rights in the precarious system that is liberal democracy encourages a decline of law and order generally. The erosion of the protection of property and contracts by State Law increases democratic permissiveness by destroying public trust and a sense of obligation.¹⁶ Dietze's notion of liberalistic order shows the influence of Hayek's model of liberal government in *The Constitution of Liberty*. Hayek, too, emphasizes the importance of freedom

with security and of stable expectations if individuals are to exercise their rights.¹⁷

Dietze's contrast between propriety and permissiveness in modern liberal government fails, however, to address a key problem of constitutionalism. The Law State must protect individual liberties if it is to achieve proper liberalism. But what of the case of conflicts between different liberties—how is the balance between them to be assessed? Indeed, this is a problem often faced by the Supreme Court in interpreting the Constitution. Dietze has little to say concerning how the Court is to adjudicate contests between property rights and freedom of speech, for example, except to say that no right should be either preferred or demoted. To be sure, he is not a constitutional law specialist and so he is less concerned with judicial doctrines than with the Court's role in maintaining limited government. But a definition of proper liberalism or proper democracy requires some attention to the precise content of substantive restrictions on State Law, especially when State Law represents majority will.¹⁸

Dietze's de-emphasis of the conflicts between rights seems to be a manifestation of his understanding of a constitution. In *Liberalism Proper and Proper Liberalism* he quotes Justice Jackson's dissent in *Terminiello v. Chicago*, that "a constitution is not a suicide pact."¹⁹ The context in which this particular reference is made is telling. Dietze is emphasizing that proper democracy must not neglect the importance of order and must defend the principle of legal obligation against anarchy.²⁰ Again, permissiveness is contrasted with propriety. But here Dietze equates propriety with democratic self-restraint. Restraint, or moderation and reasonable exercise of rights, is part of proper liberalism. No doubt this is the reason that Dietze does not discuss in detail the balancing among individual rights. He obviously feels that the balance has swung too far in the direction of rights of the *demos* and away from rights protecting the individual private sphere. This is also the reason for his condemnation of the modern Ameri-

can Supreme Court. The Warren Court, in particular, condoned a hierarchy of preferred freedoms; property, contract, and economic liberty were not among them. (One wonders what Dietze would make of the Burger Court's more solicitous view of property rights and, at times, of federalism.)

Dietze views a constitution as the means by which a popular government properly defends its order. He is unambiguous on what constitutes a proper defense: liberalistic order is a defense "not of any kind of a way of life, but of the proper way of life."²¹ He is a classical liberal who seeks the Just State in the Law State, and finds the proper way of life to be the virtuous way of life, the way of "measure and mean."²²

His recommendation of democratic restraint may have little resonance for a society that already celebrates plurality. But his mention of "the proper way of life" is revealing. Liberal political thought has often concerned itself with the role of education in shaping the citizen. Dietze's discussion of restraint and liberal propriety suggests that he views education as a conduit for the values of proper liberalism. Academic freedom is not only essential for an institution of education, it is for Dietze an example of liberalistic order. He views academic freedom as an element of ordered liberty and is concerned with the mission of the university in a liberal democracy.

A detailed discussion of the contest between liberalistic order and pure democracy is found in his study of the modern university, *Youth, University and Democracy* (1970). In this work Dietze locates the foundation of proper liberalism in education. As in *Two Concepts of the Rule of Law*, so, too, in *Youth and University* he draws parallels between Germany and the United States in order to shed light on the tension between propriety and permissiveness. Dietze's analysis of the modern university shows that pure democracy threatens to destroy its educational mission, just as pure democracy wedded with State Law threatens to destroy the Law

State. His discussion of the university community should be seen as an elaboration of the meaning of a proper way of life and of the balance between order and democracy in proper liberalism.

*Law, Order, and the
University Community*

DIETZE CALLS universities "concrete legal orders." As such, they are microcosms of the Law State and are concerned with the defense of their free, liberal character. The freedom of the university is of course academic freedom and the pursuit of learning. Independence from public power, Dietze feels, is essential to this freedom. Yet with the benefits of this independence comes an obligation on the part of the university community: the obligation to order its internal affairs in a way that guarantees maximal advancement of learning in freedom.²³ To do this, universities cannot be democratic.

Dietze views the university as the opposite of democracy. But it is because of its elitist character that the university is beneficial to the democratic community. Equality may be the ideal of modern democracy, but liberty is still the ideal of the university.²⁴ This liberty consists in the freedom to search for the truth and must include freedom from popularization. In other words, the university must remain free to question democratic tenets.²⁵ When the university additionally embraces a mission of commitment to community beliefs, it weakens its own purpose and also fails to provide the necessary counterpoint to democratic permissiveness.

A change in the character of liberal education and concomitant change in the structure of the university have threatened to destroy the latter's traditional mission. Dietze argues that the Romantic movement had two effects on educational institutions. First, the youth-oriented manifestation of Romanticism, *Sturm und Drang*, desired liberation from the bondage of traditional values. This longing for change and rejection of fixed ideas influ-

enced educational reformers. Humanistic education had emphasized discipline, decorum, and duty in the achievement of virtue, an educational mission Dietze identifies as *paideia*.²⁶ Wedded to democratic sentiments of equality, the romantic reform of education replaced this educational goal with a less disciplined and more egalitarian notion. Dietze sees such reform typified by the writings of John Dewey, although the trend away from *paideia* began with Rousseau's *Emile*. Equality in the educational context excluded values, or, rather, asserted the parity of all values. Dietze describes two implications of this change. First, it led to a trend for public education to displace private, elitist education with the risk that all individuals would be molded into the same intellectual pattern.²⁷ Second, reformed education failed to instruct youth in values at precisely the time that mass democracy desperately needed some sort of counterbalance.

The Romantic movement had an added effect on the university's structure. Education as free and independent inquiry was replaced by the idea of a university that is community-conscious. The prototype of the university in the service of popular needs was the Free University of Berlin. To Dietze it was no accident that popularization in education—broadened enrollments, laxer standards, greater student participation in university affairs—led to the student riots of the 1960s.²⁸

The devolution of humanist virtue to a state Dietze calls "occasionality" was thus combined with a breakdown in the university's concrete legal order.²⁹ Dietze's general point is that freedom in a democracy is more vulnerable than in other types of régimes, precisely because the ideology of equality allows freedom to be threatened in more ways.³⁰ Dietze's specific point is that certain aspects of mass democracy do not belong in the university. By preserving their unique law and order, universities prove and justify their elitist character and their mission of education in values.

Dietze uses the youth riots in the univer-

sity as a further illustration of the unacknowledged tension between propriety and permissiveness in modern liberal democracy. If the university is a microcosm of a legal order within the community, it is also a microcosm of that community itself. Its purpose, the protection of a special sort of liberty, is of course unique. But its "constitution" parallels that of proper liberalism. Dietze's chief problem with the student protests at Berkeley, Columbia, and the Free University, among others, is that the students violated the obligations of a voluntary contractual relationship.³¹ This violation of public trust, with "public" here referring to the university community, Dietze sees as a manifestation of the loss of a sense of obligation in the body politic. The cause of the breakdown of both types of Law "States" is the elevation of permissive rights over legal duties and restraints. The problem is compounded when the university's dedication to learning does not include education in values such as personal discipline, obligation, and the proper exercise of academic freedom.

In 1970 Dietze was alone in his plea for traditional values in the curriculum and for order in university regulations. Since *Youth, University and Democracy* appeared at the culmination of the long saga of student protests, it is not surprising that his book was not well-received. But its themes, especially the idea of *paideia*, have recently surfaced again in Allan Bloom's treatise on contemporary higher education. Bloom's *The Closing of the American Mind* is similar to Dietze's discussion in that both writers wish to reassert the order in university structure and curricula destroyed in the wake of the 1960s campus uprisings. Bloom treats the student revolt at Cornell as a lawless violation by students and some faculty of the mission of the university and a distortion of its academic freedom. Paralleling Dietze, Bloom claims that the result of the campus disruptions was that "the university was incorporated more firmly into the system of democratic public opinion."³² Both Dietze and Bloom see the mission of

the university as one of offering direction and guidance to youth; both see a great need for such instruction in values. By "values" both are implying the notion of "the proper way of life"; what Dietze calls modern "occasionalism" Bloom laments as relativism.³³

One does not wish to overstate the parallels between these works or to suggest that Bloom's book is derivative of Dietze's. The sad irony is that Bloom has probably not read *Youth, University and Democracy* because of its chilly reception in 1970. Bloom would probably find much to sympathize with in Dietze's analysis of the importance of order to academic freedom. Bloom's project, however, is less of an emphasis on the legal structure of the university than on the state of modern instruction in philosophy. To mention Bloom here is only to show that Dietze's premonitions of unlimited democracy in the university are currently a topic undergoing examination. Because Dietze couched his criticisms of the youth protest movement in terms of the need for legal order, he was dismissed as too authoritarian. Bloom's observations, that the modern university is a rudderless institution producing "homogenous persons" may indicate that Dietze's comments should have been heeded.

The concept of liberalistic order figures prominently in all of Dietze's work. The concept has greatest import for modern democracy, though its apt application to the university community shows that it is far from a dubious recommendation. Proper liberalism requires discernment of the proper way of life, when "proper" is construed as respect for one's obligations and security in one's freedom. Dietze's contribution to the study of liberal government is his renewed emphasis on the rule of law, not as a formal, legalistic requirement, but as an element of personal, political commitment. After all, as Dietze himself is fond of pointing out, the rule of law implies and cannot disassociate itself from the rule of men. Proper liberalism, and especially proper democracy, requires proper citizens to maintain it.

American conservative thought has made something of a comeback in the renewed interest in classical liberalism. Dietze's unique insights include, but are not limited to, the similarity he observes in the democratic permissiveness of Weimar Germany and modern America. The value of ordered liberty is due for re-examination.

In a section of his book devoted to American-style nihilism, Bloom comments on the influence of Weimar popular culture on the American identity. His example is Louis Armstrong's "Mack the Knife," which Bloom identifies as an anthem to value-relativism. He points out that the song is a translation of "Mackie Messer" from the Weimar-period musical *The Threepenny Opera*. The parallel Bloom seems to be suggesting is that of two societies' abandonment of the good life and the just régime. Dietze's commentary on the move toward mass democracy through State Law, first in Weimar and currently in America, is a more scholarly version of the same point Bloom is making with his "Mack the Knife" example. Unlimited democracy, with its passion for equality, and the permissiveness it unleashes and finally celebrates in popular culture, is dangerous to the Law State that depends on the value of propriety.

The message behind Dietze's concept of liberalistic order can be viewed in terms of the moral he sees in the Weimar odyssey: the tragedy of the Weimar Republic was caused by its inclination toward egalitarian permissiveness and "sentimentalizing constitutional-

ism out of existence."³⁴ Clearly the time has come to attend to Dietze's message of democratic "measure and mean."

¹See Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass., 1967); Wood, *The Creation of the American Republic* (Chapel Hill, N.C., 1969); McDonald, *Novus Ordo Seclorum* (Lawrence, Kans., 1985). ²See Gottfried Dietze, *America's Political Dilemma: From Limited to Unlimited Democracy* (Lanham, Md., 1985/1968), p. 261ff. Dietze's point is that "the greater the democratic action, the smaller the constitutional option." ³Dietze, *Liberalism Proper and Proper Liberalism* (Baltimore, Md., 1985), p. 12. ⁴Dietze, *Two Concepts of the Rule of Law* (Indianapolis, Ind., 1973), p. 16. ⁵*Ibid.*, pp. 18-19. ⁶*Ibid.*, pp. 27-28. ⁷*Ibid.*, p. 54. ⁸*Ibid.*, p. 86. ⁹*Liberalism Proper*, p. 38; *America's Political Dilemma*, p. 152ff. See, also, Dietze, "Decline and Emergence of Judicial Review," *Virginia Law Review*, vol. 44 (1958). ¹⁰*Two Concepts*, p. 54; *Liberalism Proper*, p. 9. ¹¹See *Liberalism Proper*, pp. 237-38. ¹²*Ibid.*, p. 254. ¹³*Ibid.*, pp. 19-20; *Two Concepts*, p. 33. ¹⁴*Liberalism Proper*, p. 34. ¹⁵See *Ibid.*, p. 9. ¹⁶Dietze, *Youth, University and Democracy* (Baltimore, Md., 1970), p. 108. ¹⁷Friedrich Hayek, *The Constitution of Liberty* (Chicago, Ill., 1960), p. 13ff. ¹⁸Dietze has specified elsewhere those which are "right rights." He seems to agree with Hayek that the passion for equality is simply "idealized envy" and cannot be the basis for interfering with individual property rights that facilitate stability. See Dietze, "Right Rights," *American Journal of Jurisprudence*, vol. 25 (1980), 38-74. See Hayek, *The Constitution of Liberty*, p. 85. ¹⁹337 U.S. 1, 37 (1948). ²⁰*Liberalism Proper*, p. 245. ²¹*Ibid.*, p. 245. ²²*Two Concepts*, p. 97. ²³*Youth, University and Democracy*, p. 100. ²⁴*Ibid.*, p. 35. ²⁵*Ibid.*, p. 59. Dietze says that "a university 'committed' to totalitarian democracy must be as dubious as one committed to other forms of totalitarianism, especially if its commitment implies a reluctance to question democratic tenets." ²⁶*Ibid.*, pp. 25, 27. ²⁷*Ibid.*, p. 28. ²⁸*Ibid.*, pp. 60-61. ²⁹*Ibid.*, pp. 23, 31. ³⁰*Ibid.*, p. 114. ³¹*Ibid.*, p. 103. ³²Allan Bloom, *The Closing of the American Mind* (New York, 1986), p. 319. ³³*Ibid.*, p. 25ff. ³⁴Dietze, *Two Concepts*, p. 60.