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GROUPS IN PERSPECTIVES

CAROL WEISBROD*

The following comment is in effect part of a continuing conversation with Avi Soifer, Milner Ball and others, on problems of groups and communities and the American legal system. The specific citations here to Soifer's previous work only begin to show my intellectual indebtedness.

The basic argument in the principal paper is to the effect that increased sensitivity to group history by judges will result in better decisions concerning groups, and particularly involuntary groups which have been victimized by the larger society.

This comment takes as its text several sentences in the principal paper in order to raise questions which go in somewhat different directions from the main paper.

ONE: Judges sometimes show a "willed obliviousness towards history" which "co-exists awkwardly with recent judicial activism in constructing the very categories the judges elsewhere consider immutable, natural groupings, that is, race, tribes and families."¹

This proposition invokes the idiom of social construction and raises this question: are there natural immutable groups and the problem is that the judiciary has been inadequately sensitive in locating them? or are there no such things in fact, (so that everything is a social construction and there is nothing to locate but only something to create) so that the problem becomes which construction should judges reinforce and with what degree of candor should they make these choices?

Initially, one might raise a question about the meaning of the term "involuntary group" From whose point of view are such groups involuntary? We could say that we are born into many natural groups, and that the job of courts is to identify and sometimes assign priorities to our memberships. Or we could say, with David Copperfield, that we were simply born, and that social constructions start immediately, with "time" and "place" and "people" in roles around us.

Let us look briefly at the situation of the family. It is what is called the natural family, Avi Soifer points out, which underlies the court's opinion in a recent case on a presumption of legitimacy². A broader view of history, he suggests, would yield the point that there are many kinds of family in America. But a still broader view might suggest that it is not merely that there are many kinds of family but also that the immediate relations between

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1. Soifer, *On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition*, 48 WASH. & LEE L. REV. 381, 395 (1991).

2. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (giving particularly interesting discussion of explicit problem of which level of generality should be used when courts look for relevant traditions and forms).

parents and children—the natural biological family—are not as quite as solid and unconstructed as the discussion of the biological family typically suggests. It is not necessary to go to science fiction or the inquiries of anthropologists—looking perhaps for tribes with two sexes but five genders, or groups that locate themselves in families in time (ancestor connections, descendent connections) rather than in space—to find the suggestion that the nuclear family itself is not to be taken as given. If you don't have a good father, Nietzsche wrote, acquire another one.³ Sterne offered a legal debate over the relationship, if any, between mother and child.⁴ And fifteenth and sixteenth century paintings show the family of Jesus as a matriarchal line from the grandmother to her daughters as mothers and their children.⁵

The naturalness of the grouping, then, may always be in question. And there is nothing necessarily immutable about it. Lawrence Friedman has argued that in this culture more and more appears to be voluntary,⁶ and where the situation is not voluntarily chosen initially, we understand the relation as something which we can avoid. In the same way that husbands and wives can divorce, children can be emancipated, and can be adopted, even as adults.

Certainly one can argue that some affiliations are involuntary from the point of view of some particular group. And perhaps not merely involuntary to begin with, but irrevocable. But from another point of view—that quite possibly of the state, for example—even these affiliations are understood as voluntary to a considerable degree. We see religious affiliation in terms of volition. Gender identification is subject to change.⁷

And of course, even the natural biological fact—for example, skin color—has a constructed social meaning. All the red-haired left-handed, green-eyed people of the world could be natural groups, stigmatized or worse, yet in this culture are not. (In some other culture, of course, they may be.) In a sense groups are always constructed. Out of the countless

3. F. NIETZSCHE, *HUMAN ALL TOO HUMAN* 381 (1878). If one does not have a good father, he should acquire one. *Id.* at 382. Fathers have much to do to make amends for the fact that they have sons. So, even the good father one has acquired, standing in the (social) role of father, has much to be sorry about. The critical point being not the biological (natural) but the social role?

4. L. STERNE, *THE LIFE AND OPINIONS OF TRISTRAM SHANDY* (1950). "It has not only been a question, Captain Shandy, amongst the best lawyers and civilians in this land . . . '[w]hether the mother be of kin to her child,'—but after much dispassionate enquiry and actitation of the arguments on all sides—it has been adjudged for the negative—namely, That the mother is not of kin to her child." *Id.* at 339 (footnotes omitted). Uncle Toby (and the vulgar) remain of the opinion, however, that there is "some sort of consanguinity" between the mother and her son. *Id.* at 342. This suggests that the learned, including the judges, are not the final authorities on such questions.

5. See P. SHEINGORN, *APPROPRIATING THE HOLY KINSHIP* IN K. ASHLEY & P. SHEINGORN EDS, *INTERPRETING CULTURAL SYMBOLS: SAINT ANNE IN LATE MEDIEVAL SOCIETY* 173 (1990).

6. L. FRIEDMAN, *THE REPUBLIC OF CHOICE* (1990).

7. See generally L. FRIEDMAN, *supra* note 6, at 89-90 (noting that immutability is "not so obvious a concept as it seems at first glance.").

relations into which a human being is born, these particular relations are identified by some culture, larger or smaller, as important.

If everything is constructed, courts, like the rest of us, cannot look "at" society.⁸ Courts, like the rest of us, are always in effect looking *through* society and culture *at* something (or nothing). And the problem judges have in dealing with the real truth of the world and the image of the world in law is rather similar to the problem judges have in dealing with the idea of law in general. For it seems to me that it is really quite like the question whether judges discover or make law. Judges may be more or less sympathetic to litigants, more or less appreciative of historical materials. They also may be more or less engaged in prudential calculations involved in the emphasis on the socially conventional as natural rather than as constructed. Another way to say this is that when we start using the language of social construction, we might recall that the role of the judge is also a social construction, one which at times may impose its own conditions.⁹

Consideration of the outer reaches of social construction takes us past reformist and even utopian thinking into science fiction and metaphysics, speculative writing that considers whether ultimate reality involves eternal recurrence,¹⁰ or whether our memories have been implanted by a robotics engineer,¹¹ or whether time in fact runs in the direction opposite to that of our ordinary understanding.¹² And in the same way that these speculations are not the basis of most utopian writing—utopian blueprints are in a sense practical—they are not, finally, the basis of legal writing. Simmel, comparing Law and Fashion, said that in effect they were both based on the externals of life, those parts turned to society.¹³ Fashion was a framework, he said, within which we seek our inner lives. So too is law. The law behaves as though what we sit on is a solid chair, as if time runs forward, as if the raw data¹⁴ of the past is to a significant degree knowable, whether or not

8. K. LLEWELLYN, *BRAMBLE BUSH* (1960). "Courts sometimes look directly at society, sometimes at the work of other courts." *Id.* at 59.

9. For one description of that social construction, see P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 76-77 (1967).

10. See P. OUSPENSKY, *STRANGE LIFE OF IVAN OSOKIN* (1947). For the same theme in another idiom, see also M. BISHOP, *We Have Been Here Before*, *THE BEST OF BISHOP* 39 (1980).

11. P. DICK, *BLADE RUNNER (DO ANDROIDS DREAM OF ELECTRIC SHEEP)* (1968).

12. B. ALDISS, *CRYPTOZOIC!* (1967).

13. G. SIMMEL, *ON INDIVIDUALITY AND SOCIAL FORMS* 314 (1971).

14. We can and do talk and even debate about who "won" a war without raising the possibility of entirely alternate universes in which variant parties might have said (be saying) on variant facts that they "won."

Changing interpretations and perspectives are imposed on the raw facts. We are always asking new questions of the data. We can talk about senses in which people who say they won did not really win. Or we can look at things with different eyes. Thus, Bellamy's *EQUALITY* contains a conversation in which the interrogator asks about settlements upon nationalization of property and is told that the people waived a settlement: There were no executions. E. BELLAMY, *EQUALITY* 373-74 (1897).

it is usable. Law is about the daily understanding of things, and operates at the level at which people do or do not sleep under bridges and steal bread. But the loosening of our categories which the science fiction questions make possible may perform a serious function for us, because it facilitates a consideration of the world in which the state is not the only significant power and in which groups may be seen as having sovereignty of their own.¹⁵

TWO: "Deciding who is a member of a family or a tribe is basic, yet such a question is never free of difficulty." Moreover, "deference to tribal or family norms, at least as judges perceive such norms to be, may defeat principles as important as the elimination of gender discrimination."¹⁶

This point inevitably raises the conflict of norms between the group and the larger society. The context which Soifer addresses in this paper is largely that of a larger society involved in the persecution of a minority group. Soifer here sees minorities as oppressed and victimized—as of course they often are—and his paper is, in a way, about the urgency that misery gives to politics and to law.¹⁷

In other contexts, of course, we might see groups less benignly, and even as oppressive.¹⁸ When we are concerned with protecting the rights of minorities, which rights are we concerned about? Those rights may have to do with ideas of security and freedom from persecution, or with ideas of preservation of minority culture.¹⁹

The American system does not assume that differences will go away in a perfect world. Nor does it assume that in a perfect world the social construction of biological characteristics will tend to ignore differences. Its conception of a group therefore implicates the problem of group autonomy, the right of the group itself to maintain its separateness. With this there is

15. On the model of competing sovereignties, see Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741 (1987). The idea of sovereignty in groups other than the state requires that "willing suspension of disbelief for the moment" to which Coleridge referred. See S. COLERIDGE, 2 BIOGRAPHIA LITERARIA XIV (1817, Shawcross ed. 1907, 1968). In this context, as in others (most obviously narrative scholarship), the suspension of disbelief is for the purpose of seeing something which might otherwise be missed. The work of critical analysis is still to be done. In the present context, one must raise questions about the kinds of groups we might be talking about (churches, unions, races, assemblages on a street corner), and consider what self-regulation might mean in different contexts.

16. Soifer, *supra* note 1, at 406.

17. See Soifer, *Towards a Generalized Notion of the Right of Freedom of Association: An Essay for Tom Emerson*, 38 CASE W. R. 641, 653 (1988) (using this "misery and politics" as part of a subheading).

18. "Small groups may be far more oppressive to the individual than larger ones," Morris R. Cohen wrote. And again, "the evils of an absolute state are not cured by the multiplication of absolutes." See Soifer, *Freedom of Association: Indian Tribes, Workers and Communal Ghosts*, 48 MD. L. REV. 350 (1989). Compare Cohen's later view on groups and the state in M. COHEN, *THE MEANING OF HUMAN HISTORY* (1947).

19. See A. PEKELIS, *LAW AND SOCIAL ACTION* 223 (1950) (noting that the first and basic right of minorities was that of "fully preserving their minority characteristics.").

a major difficulty. The group itself may be operating as a small government. This government may be doing things which the larger group thinks are bad. As a small government it impacts on its own citizens (its members) in ways that the larger society believes are harmful to them. Shall we say that small group autonomy should be restricted so that the individual shall be saved? that the individual should be sacrificed so that small group autonomy shall be saved?²⁰ At bottom, it surely depends on whether we are more concerned about the power of the group or the power of the state. Have we gone much further than Chafee in leaving the matter in the form of a construction noting that on the one hand there was one argument and on the other, another argument?²¹

The problems of the group and the larger society go beyond the important issue of possible oppression of individuals in the group by the group itself. Thus, the principal paper notes that the judges may have difficulty in figuring out what the norms of the groups actually, authentically, are.²² A further difficulty is that even when we do somehow feel confident about knowing what the tribal rules are, we may be preserving group autonomy for the sake of dubious objectives of the larger society, for example institutionalizing second class citizenship for members of the group.²³ The insistence that group law, and in fact meaning of any kind, must be rooted in a particular historically formed community can be made in a political context that makes it an argument with troublesome and even fearful consequences.²⁴ If it is a mistake to declare a situation of factual equality prematurely, as Soifer has argued, it is equally dangerous (as Soifer would certainly agree) to be sensitive to manifestations of group life without

20. See L. TRIBE, *CONSTITUTIONAL LAW* 898 (1st ed. 1978).

21. See Chafee, *The Internal Affairs of Associations Not for Profit*, 43 *HARV. L. REV.* 993 (1930) The tension Chafee sets up is between a view of the state as ruler or arbiter over all other groups and the view of the state as one more association, which charges rather high dues. Note that Chafee wrote in 1930, before the expansion of federal power through the New Deal. Our expectations of the federal government in general are much greater now than when he wrote.

22. Soifer, *supra* note 1, at 406 (citing Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 *U. CHI. L. REV.* 671 (1989)).

23. See L. SCHAPIRO, *RUSSIAN STUDIES* 57-58 (1986) (discussing freeing of serfs and problem of legal status of peasant commune). "Within this commune the peasants were preserved in a status which set them apart from the rest of society. . . . Subject to special courts and special laws euphemistically called customary law, and in practice often little more than arbitrary rough and ready paternal management, the Russian peasant remained largely untouched by the newly established legal order." *Id.*

24. See 3 S. SIMPSON & J. STONE, *CASES AND READINGS ON LAW AND SOCIETY* 1627 (1949) (quoting Ernst Krieck). Ernst Krieck, a Nazi philosopher, stated: "There is no [absolute] truth which is the same for the German, the Chinese, the Hindu, the Jew, the Negro or American Indian—not even in mathematics or in the presence of natural laws. There is, however, a truth begotten and born, brought to the light of consciousness by creative men, conforming to the obligatory [racial] conception of the nature of man and the world—a truth valid for fellow-members of the race, for men who live as part of the same folkish community and under the same historic destiny." *Id.* (brackets in original).

some underlying regard for the universal human values associated with individualism and egalitarianism. Those interested in groups and in group life must somehow deal with issues arising from the large difference between those who see issues of pluralism (for example, religious exemption) as something almost inevitably involving (ultimately, if not immediately) license to steal or kill and those who see such questions in terms of making room wherever possible for creativity and autonomous expression in a mass society.²⁵ In general, the conversation on pluralism must somehow begin with the acknowledgement that, as Harold Isaacs put it, "with all the beauty goes all the blood."²⁶

Debate in the United States on these issues (which looks to the discussion in international settings) is very much alive, some of it taking place in the context of a discussion of the free exercise clause,²⁷ some of it taking the form of thinking about the utility of state action ideas, some in discussion of the "cultural defense."²⁸ We are still discussing as a matter of state, federal, statutory and constitutional law, the complex issues of whether private organizations can discriminate on the basis of race or religion, or whether, for example, the desire to marry within your own racial or religious group is a form of racist behavior. Do "we" think anything on these subjects, or are these issues, like other difficult problems in the society, questions about which there is no consensus?

I suspect the latter. And the problem is made worse by the fact that at a certain level, we are not comfortable discussing it.²⁹ We are deeply interested in the phenomenon of groups and the role of groups in the society, while being deeply distrustful of any idea of group characteristics, and we focus often on gray areas.³⁰ In response to a form of argument

25. Lon Fuller suggested in the 1930s that one's view of folk-ways, for example, might be quite different depending on whether one was looking through the optic of commercial law, or the criminal law. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 461 (1934). See Milner Ball on the point that the danger is not anarchy but majoritarian power. Ball, *Soifer's Vision and Three Questions About Images*, 48 WASH. & LEE L. REV. 429, 430-32 (1991).

26. H. ISAACS, *IDOLS OF THE TRIBE: GROUP IDENTITY AND POLITICAL CHANGE* 216 (1989).

27. See generally McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); P. Hamburger, *A Constitutional Right to Religious Exemptions: An Historical Perspective* (unpublished manuscript).

28. See Schwarzschild, *Value Pluralism and the Constitution: In Defense of the State Action Doctrine*, 1988 SUP. CT. REV. 129. Attacks on significance of the state action limitation in theory (not, of course, in judicial practice) in various contexts emerge from Critical Legal Studies and Feminist materials. See, e.g., Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985) This approach has often been related to the argument of the legal realists on state action, to the effect that "private" behavior which the state permitted was also a form state action.

29. As Soifer once noted, we are reluctant to discuss what Cohen called group-marks. Soifer has in other papers discussed the danger of certain forms of group life. See Soifer, *supra* note 18, at 353.

30. European integration and international trade generally, however, has brought a new immediacy to discussions of national character in a commercial context. See, e.g., G. KENNEDY,

which tends in the opposite direction, and suggests that all deviation is major, dangerous and a threat to the social order, we focus on the arguably normless middle range. One way or another it seems that the strongest conventional examples of religious behavior that might be condemned under an action-belief dichotomy have become problematic. Our leading example had been, traditionally, 19th century Mormon polygamy. Under the impact of current events in the area of divorce and nonmarital living arrangements, it is relatively simple to say that 19th century Mormon marriage was not given a fair hearing.³¹ But what case has replaced that case on the spectrum? Other examples of free exercise problems seem relatively nonthreatening. The recently decided *Smith* case³² involved religious use of peyote. As McConnell suggested recently, some of the horrors in these discussions are not horrors.³³ The Sikh turban cases surely involve behavior we could live with.

Perhaps for this reason, to put back on the table the possibility of religious groups not of the middle range, we might recall Carthage.³⁴ Will we say that even here, the culture must be judged against its reasons, so that the infanticide of Carthage was perhaps merely on balance wrong, and that *Delenda est Carthago* was perhaps a somewhat excessive reaction?³⁵ Whatever the answer to the problem of the sources of our moral judgments, clearly we do not gain much, for example, by discussing the free exercise problems as though all our cases involved small and apparently innocuous deviations from standard dress codes (apparently, of course, because we live by symbols, and the smallest may invoke the largest). Clearly Carthage—or the questions involved, for example, in medical care for children of religious groups—presents rather different issues.

The problem of the respect to be paid to group life involves serious questions for a political society. We can say that we focus on the issues of conflict of standards not so much because these conflicts occur frequently,

NEGOTIATE ANYWHERE! 83 (1985) (discussing many cultural approaches to negotiation, including American approaches, under heading: "Have a good day in the US of A or wham bam it's a deal, Sam.>").

31. On the current discussion, see Johnson, *Polygamists Emerge from Secrecy*, N.Y. Times, Apr. 9, 1991, at 22, col. 1; Joseph, *My Husband's Nine Wives*, N.Y. Times, May 23, 1991, at A31, col. 1.

32. *Employment Div. v. Smith*, 110 S. Ct. 1595 (1990).

33. See McConnell, *supra* note 26, at 1141. Note that Jonestown, a generally conceded "horrible," is also a case understood in terms of pathology so extreme that it is out of the range of ordinary discussion.

34. See G.K. CHESTERTON, *EVERLASTING MAN* 145 (18th printing 1955). Chesterton wrote, "These highly civilized people really met together to invoke the blessing of heaven on their empire by throwing hundreds of their infants into a large furnace. We can only realize the combination by imagining a number of Manchester merchants with chimney-pot hats and mutton-chop whiskers, going to church every Sunday at eleven o'clock to see a baby roasted alive." *Id.*

35. See J. DRYDEN, *PLUTARCH'S LIVES* (A. Clough ed. 1910). Note also that another Roman thought that Carthage should stand. The film director Jean Renois said, "You see, in this world, there is one awful thing, and that is that everyone has his reasons." *Quoted in* Soifer, *Complicity and Constitutional Law*, 42 OHIO ST. L.J. 383, 397 (1981).

but because they "stick out."³⁶ But we do best, I think, discussing groups with an eye on both positive and negative aspects. And we cannot, as Martha Minow suggested in another context, end with the implication that hard problems would go away if we all behaved well towards each other.³⁷

The Soifer work takes us to the need for sophisticated analysis, historical and theoretical, in dealing with these questions. Certainly we should know more. We must know more about the experience of groups with the larger culture, more about the way groups view their own culture and, for example, the way they locate themselves in the history of the world.³⁸ But knowing more, while making our judicial texts less vulnerable to attack by (other) mandarins, will not necessarily make the decisions we must make more obvious to us. History may, in fact, suggest that our decisions, formal judicial decisions, are less significant over the long run than we might think. I doubt, for example, that the Supreme Court has precluded actual contacts between father and biological daughter in the *Michael H* case. (Soifer's discussion focuses on a legal relation.) It was presumably poor relations between the relevant adults that created the problem to start with. And better relations should make association between the adults and the child possible, no matter what the Supreme Court says.³⁹ Family law cases are well-known in which a court said X and the parties one way or another—responding to the Court which was to begin with responding to them—said Y.⁴⁰ The Morgan case,⁴¹ most recently litigated in New Zealand, involved a good deal of self-help, one way and another. The courts are not the only ones to decide these questions.

This brings me to the last point, the problem of determining group membership. As Soifer says, we want to know who is asking and why. This possibility, that different people may be asking, raises the point that membership is decided by many different groups. The Jewish legal tradition defines Jews. So does the state of Israel. So does an individual testator.⁴²

36. See G.D.H. COLE, *Loyalties* PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 151, 155 (1926); see also Weisbrod, *Practical Polyphony*, 24 GA. L. REV. 985 (1990) (discussing English pluralism).

37. Minow, *Speaking and Writing Against Hate*, 11 CARDOZO L. REV. 1393, 1402 (1990).

38. The larger group may be incidentally benefitted from such awareness of group history. Knowledge of Indian legends may for example help us locate ourselves in geologic time. See Blakeslee, *Geologists See Huge Quake Risk in the Northwest*, N.Y. Times, Apr. 5, 1991, at 12, col. 1 (discussing possibility of earthquakes in Northwest). No such quakes have occurred since the European settlement, but Indians legends speak of them.

39. Thus, there seems to be an essential realism in Justice Stevens observation in *Michael H. v. Gerald D.* that the case was basically about whether the mother would be allowed "to decide whether the child's best interest would be served by allowing the natural father visitation privileges." 491 U.S. 110, 112 (1989).

40. See, e.g., *Painter v. Bannister*, 258 Iowa 1390 (1966), in which the grandparents won and the grandson nonetheless returned to his father later.

41. *Morgan v. Foretich*, 546 A.2d 407 (D.C. App. 1988), cert. denied, 488 U.S. 1007 (1989).

42. K. SHAPIRO, *POEMS OF A JEW* (1958). "No one has been able to define *Jew*, and in essence this defiance of definition is the central meaning of Jewish consciousness." M. GALANTER, *A Dissent on Brother Daniel* COMMENTARY 10-17 (1963).

So did the Nazis.⁴³ The question is how the definition is enforced, in what context, by what group. The state does not decide a membership question as a general matter, once and for all, but only who is a member for some particular state purpose⁴⁴ as to which, in theory, it has effective remedies. As to the multiple enforcement mechanisms, some will be "private" and allowed, some will be tortious (for example, shunning, the sanction of a private religious group which may also be a tort under state law, with or without a free exercise defense),⁴⁵ some will be criminal. Some will be public and administered by state agencies, which already reflect a good deal of interpenetration of private group interest as part of the political process. A basic point here is that these ideas of membership have some relation to ideas of citizenship, perhaps, as Nisbet argued, because they are a kind of citizenship. This idea of citizenship is, Nisbet said, "rooted in the groups and communities within which human beings actually live."⁴⁶

Perhaps I can conclude with a comment addressing the direct framework of Avi Soifer's paper, the American constitutional system and the American conception of rights protected within a rule of law. Of course I agree with Avi Soifer that it is necessary to remember group life, the life of our own groups, natural as we often think them, and involuntary as we also sometimes think them. Also, we might remember another way of thinking about our groups, which includes our groups by identification and appropriation,⁴⁷ as Robert Cover once put it, those groups which we claim as part of our past and our understanding of ourselves. With this broader set of group identifications in our minds, it may become clearer to us that as a general matter, the special protection of minorities in the sense that Avi Soifer has discussed it is a prime directive for countries that are governed by the rule of law.⁴⁸ Other questions are raised in other dimensions of this problem, however, particularly in relation to pluralist theory. John Hostetler, in a discussion held at Washington and Lee some years ago, commented on the issue of the Amish and the larger society, making *inter alia* the following

43. See on Nazi definitions, *NAZISM: A HISTORY IN DOCUMENTS AND EYEWITNESS ACCOUNTS* 530 (J. Noakes & G. Pridham ed. 1983); I. MULLER, *HITLER'S JUSTICE* 98-99 (1991); R. WEISBERG, *THE FAILURE OF THE WORD* (1984). On the definitions of individuals, see *Gordon v. Gordon*, 124 N.E.2d 228 (1955).

44. See Galanter, *Hinduism, Secularism, and the Indian Judiciary*, *PHILOSOPHY EAST & WEST*, 467-87, vol. 21, no. 4 (Oct. 1971).

45. See *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105 (1975).

46. R. NISBET, *THE TWILIGHT OF AUTHORITY* 286 (1975) (noting that this idea which he identifies as Aristotelian—as opposed to unitary citizenship idea of Plato—was involved in the work of Burke, Hegel but also Kropotkin). In *THE SOCIOLOGICAL TRADITION* Nisbet notes that decentralization is similarly of interest to thinkers conventionally classified on the right and left. R. NISBET, *THE SOCIOLOGICAL TRADITION* 111-15 (1966).

47. See Cover, *Obligations*, 5 *J.L. & RELIGION* 65, 103 (1987). The word "appropriation," with its questioning of "right," suggests that there may be issues of suitability in these appropriations.

48. See Lipson, *Piety and Revision: How Will the Mandarins Survive Under the Rule of Law?*, 23 *CORNELL INT'L L.J.* 191, 197 (1990) (discussing responsibility of majoritarian regimes towards minorities, addressing particularly events in Soviet public life).

points: "It is clear that the Amish will not tolerate the removal of their children from their homes to distant schools where they are placed in large groups with narrow age limits, taught skills useless to their way of life and exposed to values contradictory to their culture."⁴⁹ And: "There have been no studies of acts of violence against the Amish. Amish are frequently helpless, as pacifists, to defend themselves or their property. Members typically do not report acts of violence or destruction of private property to law enforcement officials."⁵⁰ In these points about the Amish we see the major themes of the problem of groups: the group as a private government, and the group as a victim of other private governments and possibly of the official government itself. If we are discussing the place of group life in a constitutional system, all of these issues must be discussed together.

49. Hostetler, *The Amish and the Law: A Religious Minority and Its Legal Encounters*, 41 WASH. & LEE L. REV. 33, 44 (1984).

50. *Id.* at 46.