Communal Groups and the Larger Society: Legal Dilemmas[1]

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THIS PAPER DISCUSSES some tensions between communal groups and the larger society, identifying particular points of conflict and accommodation which are currently visible between the normative ordering systems of small groups and those of the larger culture. While I will not be attempting here to define a "communal society," some working definition was necessary to consider the topic of this paper. In thinking about communal groups, which groups would one use as subjects? The obvious candidates would be agreed-upon historical Utopias or perhaps contemporary groups deriving from the Anabaptist movement. In fact, this paper includes illustrative material from a much larger range of groups, not all spatially located, geographic communities, not all small enclosed "intentional" communities, not all societies holding all things in common. What these groups share is a sense of ordering, a normative system which encloses them. It is this characteristic, for present purposes, which justifies the present treatment. Typically, we might say, communal groups stand analytically in opposition to states, part of Society rather than the State.[2] (For the moment, at least, we put state itself aside, and concentrate on associations which are not the state.) In short, I would like to take a loose approach to the question "What

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2. The distinction in those terms was invoked by the *London Times,* with reference to the coronation of the Queen: "In her is incarnate on her coronation the whole of society, of which the state is no more than a political manifestation." Quoted in Christopher Hitchens, "Windsor Knot," *New York Times Magazine,* 12 May 1991, 47.

counts as a communal group?" For the present, I will follow the example of Frances FitzGerald, who in her book *Cities on a Hill* discussed an intentional community (the Rajneeshpuram commune in Oregon), a homosexual neighborhood in San Francisco, a Sun Belt community of the elderly, and Jerry Falwell's church. All of these, she said, "were more than collections of people bound together by a set of beliefs and programs. They were more like single organisms or personalities: they had manners and morals as well as beliefs, aesthetic sensibilities as well as political goals . . . they were carrying on social experiments. . . ."[3]

We might say, initially, that conflict between the state and internal communities or normative orders arises when the state is somehow threatened by small communities, typically either because the community is perceived as violent or because it is perceived as immoral, particularly in sexual matters. Certainly these have been issues. The case of the 19th century Mormons is exemplary, though perhaps the classic case of the 19th century is not the classic case today. Polygamy, itself, for example, is being reexamined.[4] Further, some communal groups are, in contemporary America, practicing a sexual morality which is entirely traditional (including, for example, opposition to divorce)[5] in a society which they view as operating almost without restraint on this issue. The basic point is that as one considers examples of conflict between groups and the outside society today, cases that come to mind are not primarily those involving the sexual behavior of presumptively consenting adults, but rather cases involving children, particularly questions touching medical care for children, and education.[6] These questions—health care and education—are discussed by the legal system not primarily in terms of group rights but in terms of parental rights, the rights of parents

3. Frances FitzGerald, *Cities on a Hill: A Journey Through Contemporary American Cultures* (New York: Simon and Schuster, 1986), 19. For overviews of some of the conceptual issues, see Joseph R. Gusfield, *Community: A Critical Response* (New York: Harper & Row, 1975); Calvin Redekop, "Communal Groups: Inside or Outside the Community," in *The American Community, Creation and Revival: A multidisciplinary Perspective,* ed., Jack Kinton (Aurora, 111.: Social Science and Sociological Resources, 1975), 135.

4. See discussion in Carol Weisbrod, "Groups in Perspectives," *Washington and Lee Law Review,* 48 (1991): 437 (comment on Aviam Soifer, "On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition," *Washington and Lee Law Review,* 48 (1991): 381).

5. Though it may be that the divorce mores of the outside society are having an impact here. See Calvin Redekop, *Mennonite Society* (Baltimore: Johns Hopkins University Press, 1989), 169.

6. There are, of course, many other issues.

to choose care for children, and the right of parents to educate their children.

These issues are discussed here as a kind of introduction to a more general problem raised by a conflict between communities and states which relates to group definition and autonomy. That larger problem is explored through the issue of shunning, a discipline of adults which takes the form of behavior which might give rise to a state remedy.

I The Child and the State: Overview

Running through this paper is the image of a young child, perhaps in need. What is the relation of the state to that child? One version of that relationship sees it as a kind of ownership.

> A child is primarily a ward of the state. The sovereign has the inherent power to legislate for its welfare, and to place it with either parent at will, or take it from both parents and to place it elsewhere. . . . The rights of the parent in his child are just such rights as the law gives him; no more, no less. His duties toward his child are just such as the law places upon him.[7]

More typically, however, the law expresses a strong interest in parental rights. The state's interest in the child is less proprietary than protective. The state moves only when parents have failed in some significant way. The legal rules today are clear. Homer Clark, a leading authority in the field of domestic relations, has said that: "The general principle with which we begin an account of medical and psychiatric care for children is that the parent decides whether care is to be provided and what that care is to be."[8] Reviewing a number of particular examples of the problem in litigation, he notes that cases in which blood transfusions or medical interventions are authorized by courts to save the life of the child—or to avoid serious health impairments—"are certainly correct in refusing to permit a child to die or to suffer serious impairment of health solely to vindicate the parents' religious beliefs, no matter how firmly or sincerely held."[9] In some cases, Clark suggests, parents may be "properly held criminally responsible." He then notes that "courts are not surprisingly more reluctant to order medical treatment for children over the objections of their parents when the proposed treatment involves

7. Allison v. Bryan, 21 Okla. 557, 569, 97 P. 282, 286 (1908).

8. Homer H. Clark, Jr., *The Law of Domestic Relations in the United States,* 2d ed. (St. Paul, Minn.: West, 1987) 1:581.

9. Ibid., 582-83.

substantial risk or suffering and when the condition being treated does not threaten a comparatively greater probability of harm to life or health."

Relating these general propositions to the practices of communal societies, we can begin with Carden's account of John Humphrey Noyes' interest in faith healing. It had initially seemed to Noyes that

Perfectionists could triumph over disease. By praying with the sick he and several other members of the Putney Community produced a number of apparently spectacular cures, including that of Mrs. Harriet Hall, who had been both blind and bedridden. Mrs. Hall joined Oneida and survived for many years, but she was never completely cured. Other patients, like children with winter colds, did not respond to prayer or remedial "criticisms." Modifying his earlier statements, Noyes said that the mind could not *yet* triumph over disease, and announced to the Community that it was "to have a Dr. of our own folks, who shall be well established in faith principles & then acquaint himself with all that is good & valuable in the Profession of Medicine."[10]

What issues would this problem involve today? What if one of the children had died? What if the community, committed to faith healing, had refused to pray over the sick member?[11]

A well known Pennsylvania case demonstrates the law's approach to these cases in instances in which the case does not involve life and death, in which the child is older and the medical result unclear.[12] In *In Re Green* (1972), the director of the State Hospital for crippled children at Elizabethtown, Pennsylvania filed to declare a fifteen year old child neglected so that he could have surgery for a curvature of the spine. The case was sent back so that the wishes of the child of Jehovah's Witnesses—parents who had refused to authorize the blood transfusions necessary for the surgery—could be ascertained. The child ultimately refused the medical treatment, in part

10. Maren Lockwood Carden, *Oneida: Utopian Community to Modern Corporation* (1969; reprint, New York: Harper & Row, Harper Torchbooks, 1971), 69 (footnotes omitted). This concern might have been added to others which the outside world had about the Oneida Community. See Carol Weisbrod, "On the Break-up of Oneida," *Connecticut Law Review* 14 (1982): 717. On healing under the name "hygienic criticism" at Oneida, see [Oneida Association], *Mutual Criticism,* with an Introduction by Murray Levine & Barbara Benedict Bunker (1876; reprint, Syracuse, N.Y.: Syracuse University Press, 1975), 71-79 (including discussion of criticism as a treatment of diphtheria).

11. This possibility is suggested by the facts of a Maine case involving the Shiloh community of Dr. Sandford. State v. Sandford, 99 Me. 441, 59 A. 597 (1905). On Shiloh, see Shirley Nelson, *Fair, Clear, and Terrible: The Story of Shiloh, Maine* (Latham, N.Y.: British American Publishing Co., 1989).

12. In Re Green, 448 Pa. 338, 292 A.2d 387 (1972).

because its success could not be guaranteed. His refusal was honored by the court.[13]

The emphasis on the choice of the child here presents the questions which arise inevitably when older children who have been intensely and idiosyncratically socialized by their families are asked to choose in a way which is potentially adverse to the teachings of the family. Perhaps these are cases in which we should not rest on the choice of the children, on the theory that they are not able to make "free" choices on these issues. Or perhaps we should say that all children are intensely socialized by their families, and that until we declare certain teachings altogether out of bounds, we must respect even "conditioned" responses.

Additional questions arise when the situation is life threatening, or when the children are younger, entirely vulnerable, and separated from the larger society. While cases involving medical problems frequently involve Jehovah's Witnesses and Christian Scientists, such litigation has also involved communes in the strict sense. Recently, such a case arose in a group in Arizona,[14] in which a child died for lack of medical treatment and the state authorities were concerned that something similar might happen to other children in the family. (The children of the group as a whole were equally threatened, though the judicial discussion proceeds as though only one family and its individual children were involved.) Among the problems suggested by this case are the following: how is the state to learn of the group, its children, or its practices? How is the state or its officials (for example its school teachers) to monitor the health of children to know when interventions are appropriate? In the Arizona case, the attempt was made to give legal custody to the state in advance of any particular problem, while leaving physical custody with the parents. But how helpful could this be in the absence of information? If a child is treated and returned home, what are the costs of the intervention in terms of the parent—child relation? We run the risk of trivializing religious beliefs which may result, for example, in the group's rejection of the healed child when the state has completed its temporary intervention. Finally on this point, we can note that the legal mate-

13. In Re Green, 452 Pa. 373, 307 A.2d 279 (1973).

14. Matter of Appeal in Cochise County Juvenile Action, 133 Ariz. 157, 650 P.2d 459 (1982), finding that while children could not be declared dependent on the basis of future (rather than present) need of medical care, the State would and could keep close watch on children who might be in danger. See account in *The Arizona Republic*, 30 July 1982, "High Court Rejects State Bid for Medical Care of Miracle Valley Children." Note also the interest of some groups (e.g., the Amish) in folk-medicine.

rials on the medical care problem include a Jehovah's Witness case[15] in which a judge went to the bedside of the patient—the mother of a young child—to interview her. The judge understood the mother to say, in effect, "You, the judge can authorize the treatment where I cannot.[16] But this solution—let the sin be on the head of the legal system—may not be available in all cases.

The issues of medical care can be litigated in terms of state neglect statutes which are general and of potentially broad application. Education also can raise an issue of parental neglect, as well as possible conflicts with compulsory education laws.

We should note initially that the education issues do not arise because sub-groups are uninterested in education. Rather, they are litigated because groups have such specific ideas about what education should be. The interest of the historical Utopian communities in education is well known, from Robert Owen's view of education as the key to the new moral world, to Oneida's sending its children to Yale and hoping to open a college of its own. And, of course, one can trace the association of communes and schools much further back than that. The schools of Epicurus were once compared to the communities of early Christianity in their emphasis on the community of interests of the members.[17]

Materials from the American Utopians anticipate some of the contemporary issues: George Rapp, later of the Harmony Society, refused to send his children to schools in Germany. The Separatists claimed "that they had no right to send their children to a school in which they would be open to the seductive influence of other children."[18] The language is significant. The Separatists did not say that from the point of view of (for example) German subjects they had no obligation to send their children to school, but rather that they had no *right* under the normative order to which they were committed. Seth Wells, of the Shakers, wrote on the education of the Shaker children and stressed the "importance of strict obedience and true submission to their Elders and caretakers, as the only means to enable them to be useful to themselves and others, and of securing to

15. Application of the President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964).

16. See ibid., 1007.

17. William Wallace, *Epicureanism* (New York: Pott, Young & Co; London: Society for Promoting Christian Knowledge, 1880), 63.

18. Karl J.R. Arndt, *George Rapp's Harmony Society (1785-1847)*, rev. ed. (Rutherford, N.J.: Fairleigh Dickenson University Press, 1972), 34.

them their everlasting happiness."[19] This emphasis is suggestive of the present position of the Amish.

The difficulty is that between the time of the Shaker statement and the time of the contemporary Amish, the state has become vastly more concerned (inter alia) with the area of education. We see some of the interaction between the State and smaller groups in the leading Supreme Court case, *Wisconsin v. Yoder*,[20] in which the Amish were granted a two year exemption from the compulsory education law, in part because of the high value the Court placed on the general characteristics of the Amish and the particular effectiveness of the group's system of alternative education.[21]

One way of looking at the education issue was suggested by Lee Teitelbaum, who distinguishes between those children's rights which involve claims which we might view as in effect compulsory entitlements, not to be rejected, and those which we might view as involving autonomy claims, and which therefore can be waived.[22] Teitelbaum quotes the United Nations Declaration of the Rights of the Child as an example of an approach which suggests not only a right in the child, but also a duty in the parents or the State:

19. Quoted in Priscilla J. Brewer, *Shaker Communities, Shaker Lives* (Hanover, N.H.: University Press of New England, 1986), 75 (footnote omitted).

20. Wisconsin v. Yoder, 406 U.S. 205 (1972). See generally, Franklin H. Littell, "Sectarian Protestantism and the Pursuit of Wisdom: Must Technological Objectives Prevail?" in *Public Controls for Non-Public Schools,* ed., Donald A. Erickson (Chicago: University of Chicago Press, 1969), 61.

21. The court said of the Amish:

> Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education. In light of this convincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish (Wisconsin v. Yoder, 406 U.S. 205, 235-36 (1972)).

22. Lee E. Teitelbaum, "Foreword: The Meanings of Rights of Children," *New Mexico Law Review* 10 (1980): 235.

Principle 7. The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment and his sense of moral and social responsibility, and to become a useful member of society.[23]

A rights claim which is also a duty is presumably not to be abandoned at the option of the child or even his or her parents. This may be true despite the fact that some children or their parents or the groups with which they are affiliated may reject the statement of goals and purposes with which the declaration on education identifies itself. (It should be obvious that the right to develop individual judgment is not the goal of groups whose orientation is that of following a path laid down by authority or tradition. Further, the goal of becoming a useful member of society depends very much for its interpretation on the meaning one gives to the words "useful" and "society.") It seems that education can also be viewed to some degree as non-waivable because it is the precondition of other choices, particularly the choice to leave the community.[24] The link between education and exit was suggested in the state court proceedings in *Wisconsin v. Yoder* in Justice Heffernan's dissent:

The state's interest and obligation runs to each and every child in the state. In the context of the public law of the state, no child's education is below the concern of the law. The principal opinion bolsters the *de minimis* argument by making the unsupported tacit assumption that all or most of the Amish children will forever remain in their communities. This is not necessarily a fact. Large numbers of young people voluntarily leave the Amish community each year and are thereafter forced to make their way in the world.[25]

The specific concern that the child may for one reason or another leave the community later is related to but different from the concern underlying Justice Douglas's opinion in *Yoder,* which saw that the exemption for the Amish jeopardized the future of the student. "If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing

23. Ibid., 237 (quoting U.N. Resolution 1386 (XIV)).

24. Ordinarily called the Exit Option, following Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge: Harvard University Press, 1970). Life and health are in a similar way preconditions to choice about other things, and in its pervasive impact on these questions in relation to children, the family may be seen as the most immediate private government to which individuals are subject.

25. State v. Yoder, 49 Wis. 2d 430, 451, 182, N.W.2d 539, 549 (1970) (Heffernan, *}.,* dissenting).

world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel."[26] Douglas would have given the [older] child the opportunity to be heard and thus to accept or reject the larger world as a matter of individual rather than parental choice.

But general questions remain. Doubts are raised in many quarters about the efficacy of uniform compulsory education for older children. Two years really might not matter, and in any case, the American educational system, unlike the systems of some other countries, is open to late entries to a remarkable degree, and the Amish children might pick up the two years later. More deeply, free choice here may not protect (later) autonomy. If we do believe that two years of high school will protect the exit opinion, then perhaps the choice of children socialized in a closed world (as Douglas suggested) should not determine the issue.[27]

The point is that the children are in effect members of the group and the state, the latter membership referred to as citizenship. Whatever their entitlements from the group, they have, as children, a right to protection by the state from others at certain times, even their parents. The language which is repeatedly quoted comes from the Supreme Court in *Prince v. Massachusetts,* a 1940's Jehovah's Witness case: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[28] But when is it martyrdom and when is it parental control? When is state intervention appropriate and when does it evoke that aspect of tyranny which uses as punishment the removal of children from their parents?

The problem as to education is not made simpler by an awareness of the general possibility that well-intentioned state interventions in the interest of children may be experienced as coercive and oppressive by both parents and children. It is not made simpler by skepticism about the capacity of the state to decide any issues of child rearing to be applied across the board for (or to) all children.[29] Nor,

26. Wisconsin v. Yoder, 406 U.S. 205, 245 (1972) (Douglas, J., dissenting).

27. Some of these problems are discussed in a broader context in John E. Coons, "Intellectual Liberty and the Schools," *Journal of Law, Ethics & Public Policy* 1 (1985): 517.

28. Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

29. The discussions offered by critics of current educational systems may sometimes imply clear alternatives. Sometimes, however, the point is not that but rather the idea

finally, is the problem made simpler by the feeling—which cuts in a different direction from the two points above—that there must somewhere be a center which holds all the diversity together[30] and makes it possible.

The language of *Prince* makes plain that adults can choose things which children cannot, and they can choose to subject themselves to pain from which the state will insist that children be protected. But what are the limits of adult choices here? And what sort of problems are we talking about? This opens the issue of discipline and group definition and autonomy.

II *Group Discipline*

Perhaps I can begin here with a quotation not from the Utopian tradition but from the anarchist literature. Max Stirner's description of the shift from family to state authority stresses that the individual owes obedience to the family which has a kind of judicial function.[31] Thus a person may be expelled from the family as punishment. Writing in the first half of the 19th century, Stirner noted that

> the arm of family power seldom reaches far enough to take seriously in hand the punishment of apostates . . . The criminal against the family (family-criminal) flees into the domain of the State and is free, as the State criminal who gets away to America is no longer reached by the punishments of his State.[32]

Today, after Stirner, we associate the issue of discipline of children almost entirely with family pathology or disfunction. We hardly relate it to the problem of the disciplinary power (working often through families) of intermediate groups within the state;[33] unless the state intervention is seen as somehow too great. A large protective role for the state is generally conceded as to children.

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that needs and goals educationally are different for different people. This results in an interest in mechanisms for funding a variety of educational programs.

30. For a recent argument on this point, see E.D. Hirsch, Jr., *Cultural Literacy: What Every American Needs to Know* (1987; reprint, New York: Vintage Books, 1988).

31. Max Stirner, *The Ego and His Own,* trans. Steven T. Byington (New York: Boni and Liveright, n.d.), 230ff.

32. Stirner, *Ego and His Own,* 232.

33. Note the recent case of the Island Pond community in Vermont involving allegations of child abuse. See Richard Ewald, "Building Bridges at Island Pond," *Vermont Magazine,* March/April 1991, 45.

More difficult issues arise when the group disciplines an adult member of the group, since here the state protective role is smaller. Even here, however, some cases are clear. Some sanctions would, for example, be forbidden by the legal system entirely. Thus, we begin with the assumption that a crime is not excused even when described as a group sanction.[34] Private executions, whether as the sanction of the family or a criminal group, are forbidden by the state. So too private incarceration. But other cases, less extreme, present more difficulties.

One form of a hard case would involve an individual who either withdraws from a community or is expelled from it, who is shunned by the community, and who then sues in tort.[35] Recent cases have involved religious groups, but the tort claims could in theory be raised with reference to shunning by secular groups. The claim might be, for example, conspiracy to boycott, alienation of affections (where that action survives), defamation, or tortious interference with contract. The defenses by the community (if religious) would include a first amendment religious liberty defense—to the effect that the shunning was a religious practice protected by federal and state constitutions—or a common law tort defense to the effect that the behavior, if tortious, was privileged. (The defense of privilege would be applicable whether or not the group is religiously based.) In this instance, as in others in which questions of pluralism are raised,

34. See for one exposition, James Willard Hurst, *Law and Social Process in United States History* (1960; reprint, New York: Da Capo Press, 1972), 267-68, "to take life, inflict physical pain, or confine the body were ways of enforcing rules which this legal order recognized as properly held only at the command of law." Ibid., 268. Violence is [presumably] allowed only to the state because it is the more effective means.

35. Bear v. Reformed Mennonite Church, 462 Pa. 330, 341 A.2d 105 (1975). The claim was that the shunning involved the torts of injury to economic relations and alienation of affections of his family. The Reformed Mennonites argued that they had a complete defense in the free exercise clause. This claim was accepted in the lower court, but rejected by the Supreme Court of Pennsylvania, which sent the case to trial. The conflict between Robert Bear and the Reformed Mennonites continued in various forms, including a federal case (dismissed) in 1986. See " 'Shunned' Mennonite Loses Another Court Battle," *United Press International*, 28 Feb. 1986.

In general, cases go back at least to 1898. Such cases are discussed in the law reviews, in the newspapers, and in scholarship on the Amish. See John Howard Yoder, "Caesar and the Meidung," *Mennonite Quarterly Review* 23 (1949): 76; John A. Hostetler, *Amish Society*, rev. ed. (Baltimore: Johns Hopkins Press, 1968); John A. Hostetler, "The Amish and the Law: A Religious Minority and Its Legal Encounters," *Washington and Lee Law Review*, 41 (1984): 33, 36-40; Justin K. Miller, "Damned if You Do, Damned if You Don't: Religious Shunning and the Free Exercise Clause," *University of Pennsylvania Law Review*, 137 1988): 271.

religious groups are a particularly useful illustration of the problem because the issues of interaction with the state are posed so intensely.

Religious shunning cases, while unusual,[36] are well known and particularly difficult to think about and resolve. My interest here is less in the technical legal categories in which these problems are discussed (outlined above) than in the issues which underlie those categories. The shunning cases seem to be of special interest and even importance, despite their rarity, because they involve the conflict of two legal systems, that of the larger state system and that of the groups usually seen as internal and smaller.[37] The cases test our commitments to pluralism and diversity. Because these seem to be instances in which the state's power is limited by the ability of the group to simply refuse to comply with the orders a court might issue, we can also see the issues in terms of the limits of law.

A particularly interesting shunning case was decided in Ohio in 1947. Although it did not result in elaborated judicial discussion, the facts of the case are useful for present purposes, first because the plaintiff said that he was no longer a member of the group which shunned him, and second because the case, which was not appealed, resulted in the award of damages and an injunction directed against the shunning.[38]

Andrew Yoder had been a member of a conservative Amish group. Disagreeing with them over several matters (including his need of a car to get a sick child to medical treatment) he left the church for a more liberal group. He was then shunned by his first group. He claimed $40,000 in damages and requested an injunction.

The general claim by Yoder was that the boycott violated his civil

36. In part because of a reluctance of some groups to use official law. On law jobs among the Amish, see Donald B. Kraybill, *The Riddle of Amish Culture* (Baltimore: Johns Hopkins University Press, 1989).

37. Groups crossing national boundaries may not in fact be smaller. See generally on multiple sovereignties, Carol Weisbrod, "Family, Church & State: An Essay on Constitutionalism and Religious Authority," *Journal of Family Law* 26 (1987-88): 741.

38. Yoder v. Helmuth, No. 35747, (C.P. Wayne Count Ct., Ohio, Nov. 7, 1947). The case is unreported but extensively described in William I. Schreiber, *Our Amish Neighbors* (Chicago: University of Chicago Press, 1962), 97-116, and in Yoder, "Caesar and the Meidung,"; see also "Note, The Right Not to Be Modern Men: The Amish and Compulsory Education," Virginia Law Review 53 (1967): 936. See generally on shunning Hostetler, *Amish Society.* Note that issues of shunning or disfellowship can arise in conventional custody cases. See, e.g., Johnson v. Johnson, 564 P.2d 71 (Alaska 1977), in which an Alaska court believed that liberal visitation rights would overcome the problems of a non-custodial father who had been disfellowshipped by the Jehovah's Witnesses.

rights.[39] A jury awarded damages (only part of the damages requested). Schreiber writes "the verdict was not appealed, but neither were steps taken to comply with the court order."[40] Some Amish property was sold to pay the damages, though in fact some of the award was in fact paid by a third party.[41] The judge also issued an injunction against the defendants, ordering them to give up the boycott of Yoder.[42]

As noted, a general question raised by this case and others like it is whether these interventions will serve the function of dispute settlement. It seems clear that the controversy went on after the law had spoken in the Yoder case and that it was predictable that this would be true.

A jury found for the victim in the 1947 *Yoder* case, but a ruling in favor of the shunned member or former member—a distinction to which I will return—is not inevitable. This is an area in which many rules exist and a great deal of legal language is available. But as is true in any complex case, the rules and the language do not dictate a single answer.

We might say that the larger state should defer to the community on this issue either on the theory of a free exercise defense or on the theory that on the basis of common law tort approaches, the behavior was privileged. We might reinforce this conclusion with language using the categories of the law of contracts. The point here would be that the member knowingly joined a church which used shunning as a sanction as an exercise of his freedom of religion and was now subject to that sanction. John Howard Yoder put it this way: "In contractual terms, Andrew Yoder was suing the church for consis-

39. See Charles E. Westervelt, Jr., "Torts—Disciplinary Action by Religious Society as Infringement of Civil Liberty," *Ohio State Law Journal 9* (1948): 370, approving the result in these terms:

> Under no circumstances can a religious group be permitted to resort to concerted action in derogation of an individual's civil rights. It seems evident that the "mite" was an intentional and coercive interference with the plaintiff's right to be unmolested in business and society, and was, therefore, properly enjoined (Ibid., 371).

40. Schreiber, *Amish Neighbors,* 113.

41. Schreiber says that a local businessman who had business dealings with the Amish paid. Ibid., 115.

42. The order is quoted in Schreiber, *Amish Neighbors,* 112-113. See "Note," *Virginia Law Review,* 936 n.62, which reports that "the consequences of this interference with a religious practice were truly tragic. One of the ministers against whom the judgment was rendered lost his farm at a forced sale to provide money to satisfy the judgment. He subsequently died, his wife claims, of a broken heart. Andy Yoder's daughter died shortly after the trial, and Andy Yoder hung himself."

tently applying a forfeiture clause in a contract which he had freely made (in awareness of the existence of a forfeiture clause) and had intentionally broken."[43] We can, then, consider the individual subjected to discipline as a member of the smaller community without an appeal to the larger authority. We might do this because we believe it effectuates the choices of individuals, because it strengthens power of intermediate communities against the state and/or because we believe that the state's role here would not be efficacious.

Or we could find for the individual on the theory that he had rights as a member of the larger community, that these rights had been infringed by a group claiming greater power than it was entitled to and that the interests of the larger community require protection of the individual. We may do this because we feel that the tyranny of small groups is more intense and dangerous than the tyranny of large ones, or because we are not sympathetic to the one particular group and assume that a person victimized by that group must be protected. This might be true whether or not the victim was individually sympathetic. (Of course there is no reason to assume that the victim in a shunning case is fighting for democratic principles or a more open society. It is just as possible that the person shunned is denouncing a reformist group for having deviated from the true faith).

A 1913 opinion on the boycott problem considered the issue in terms which present a counterpoint to the familiar positive image of the Amish given in 1972 by the United States Supreme Court in *Wisconsin v. Yoder*. The 1913 Ohio court was highly critical of shunning and of the group which practiced it:

> But what right is more sacred than that a man shall not have his right to full enjoyment of the natural intercourse with his wife, his children and his brothers interfered with and cut off by fossilized religious doctrines and antiquated literal interpretation of portions of the Bible which make it compulsive upon wife, daughter and brother to literally shun the husband, father, and brother because some strange and peculiar sect composed of Low Germans 397 years ago construed portions of the Bible as shown by Art. 16 of the Amish Confession of Faith.[44]

This Ohio court was not impressed with the history of the group:

> Some things become more precious by age, but the crude and unnatural conceptions as disclosed are in sharp conflict with modern legal civil rights,

43. Yoder, "Caesar and the Meidung," 88.

44. Ginerich v. Swartzentruber, et. al., 22 Ohio N.P. (n.s.) 1, 16 (C.P. Holmes County Ct., decided 1913; published 1919).

which tend to infringe upon inherent family and business life, and which harmonizes better with the views of his Satanic Majesty and his satellites or representatives on earth.[45]

The court concluded that while "courts have nothing to do with men's religious views howsoever antiquated," still, "no religious views can be the means of infringing civil rights."[46]

On this basis many religious groups which use strong forms of shunning might be found unsympathetic by the larger culture. Their commitment to unusual religious beliefs (assuming them to be unusual) and their willingness to engage in social ostracism at a level which requires rejection of family members in a way that seems unnatural, might well seem to create wrongs which need righting.

But even if the outside world is sympathetic to the member rather than the group, does this mean that intervention by the State is the proper response? Initially, one wonders whether these are cases in which we expect a certain amount of self-help from the object of the boycott. Why doesn't the victim move away and do business with others?

Even if he did, it might be that the church had the power to injure. A church might, for example, not only shun, but denounce and defame on the theory that it was disciplining a present member for the [ultimate] good of the member and for the good of the others, who observe and are fortified by that example.[47] Moreover, a church might deny the possibility of exit.

If a church takes the position that one cannot renounce membership[48] and that therefore jurisdiction over members is perpetual, what position may/should the State take? On a contract analysis, much might turn on whether the individual, in joining the

45. Ibid.

46. Ibid.

47. All of this in the interest of purification of the membership. See on shunning John T. Noonan, Jr., *The Believers and The Powers That Are: Cases, History, and Other Data Bearing on the Relation of Religion and Government* (New York: Macmillan, 1987) ("Preserving the Purity of the Membership"), 288. In sociological terms, this issue relates to issues of deviance and community self-definition. See generally Kai T. Erikson, *Wayward Puritans: A Study in the Sociology of Deviance* (New York: John Wiley & Sons, 1966); R. I. Moore, *Formation of A Persecuting Society: Power and Deviance in Western Europe, 950-1250* (1987; paperback, Oxford: Basil Blackwell, 1990).

48. Membership questions are often but not always associated with contract ideas on the issue of entrance and exit. Different groups may have different conventions on the issue of membership and the state also may have an interest in the question.

church, knew of the position of the group on this specific issue. Or we might care about the degree of injury. But it is clear that the fact that the church sees membership as irrevocable is not the end of the question. We know that one can join different groups. From the point of view of the original group this may be apostasy. From the point of view of the new group, it is conversion. And from the point of view of the state? Surely the state's perspective will depend on the context in which the question is asked, and not on some automatic conclusion that one identification or another must control.

Whether or not exit is an individual possibility, financially or psychologically, in these cases—John Hostetler has discussed the issue of travel as a way of avoiding the strict meidung among the Amish[49]—and whether or not we see the membership issue in the way that a church might see it, serious questions remain as to what sort of interventions in these cases would in fact resolve the disputes.[50]

The damage awards, if they are ordered, may or may not be paid by the individuals held liable. Others may come forward to pay or more stringent measures may be taken by the State to enforce the awards, possibly creating a new victim class. Repeated losses in litigation would under-cut the economic strength of the community, creating an injury to the community beyond any individual's remedy. Injunctive relief, orders directed against the behavior itself, is likely to be futile.[51] Intimate relations cannot be mandated by courts, and avoidance tactics might make it difficult to know whether or not an order had been respected for purposes of possible contempt proceedings. It does not take much to imagine the shift from collective ostracism under the command of a religious authority to individual [permitted] ostracism after a religious directive had been withdrawn under state coercion. Further, even respect for a procedural remedial order might not change the outcome, since procedures properly followed could easily result in the same expulsion which resulted (hypothetically) from procedures improperly followed. It is tempting to

49. Hostetler, *Amish Society*, 311.

50. That is, we can view the law as something involving the application of rules, but it is generally thought that law also has something to do with resolving disputes. The idea of dispute resolution has in it the assumption that the law's power is sufficient to the enterprise, and that the dispute is somehow over. A different view of the relation of law and society might see the judicial intervention as one step—of course an important step—in the total picture of power adjustment.

51. See generally Roscoe Pound, "The Limits of Effective Legal Action," *American Bar Association Journal*, 3 (1917): 55.

think that the state legal system, faced with these problems, turns to the defense of privilege as a way of avoiding difficulties of the issue generally.

Perhaps we can advance our understanding of what is involved in shunning cases by raising some related cases, related because they all involve the strategy of boycott, avoidance, the so-called passive remedy[52] (but of course passive/aggressive) of exclusion from community. We might start with political boycotts, e.g. feminists or others shunning movie houses showing pornographic films, or consumer groups shunning certain products for reasons having to do with consumer protection issues. These are often viewed as political expressions. We assume that the fact that they may also be intentional inflictions of emotional distress, for example, should not subject them to tort liability. The tort in these cases is seen as an exercise of a first amendment right. Perhaps, as has recently been suggested, it is boycott as "popular republican politics."[53]

But in some cases of boycott, state intervention would generally be thought to be appropriate and necessary. For example, a fourth grade child, black, distributes Valentines to her classmates. The cards are torn up and returned to her as an aspect of her exclusion from the classroom community of white children.[54] I think that we feel that, whether or not this is popular politics, it should be stopped. Not perhaps that an injunction should issue, but that the teacher should do something (the teacher would be seen here as a state actor, so that this could be seen as a low-level of state intervention). Why do we feel this? Because the victim is a child; because the child's injury is personal and immediate; because love has been met by hate; because the racism of the story is palpable and shocking and we are trying as a society to rid ourselves of historic racism; because there is a continuity in purposes between the school room and the people in it and the state; because we doubt that the wooden chairs in the classroom create a group whose autonomy should be protected by the state; and because we feel that the exit option is either not avail-

52. See State v. Glidden, 55 Conn. 46, 8 A. 890 (1887), for a description of the original Captain Boycott, a representative of the landlord, and the boycott instituted against him by angry tenants in 19th century Ireland. Much discussion of strikes and boycotts is found in connection with labor disputes.

53. See, e.g., discussion of *NAACP v. Claiborne Hardware* [458 U.S. 886 (1982)] in James Gray Pope, "Republican Moments: The Role of Direct Popular Power in the American Constitutional Order," *University of Pennsylvania Law Review,* 139 (1990): 348.

54. See Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991), 89, describing the experience of her sister.

able to the child—the state, after all, insists that she should be in school—or if it is (through private education, for example) it is too expensive to consider realistically.
. In considering boycott cases, in short, we might look at a range of factors and try to see why some cases are more likely candidates for state intervention than others. The factors to be considered would include, for example, the nature of the injury, the possibility and costs of exit or self-help, and the efficacy of state interventions.[55] The result of the common law torts analysis will be a balancing of the injury to the individual (and or the state interest) and the interest of the community. This will be the question also in an analysis which raises the problem of protected rights under the federal constitution. Another discussion, in the vocabulary of political theory, would raise the issue in terms of the relation of the liberal state, with its traditional concern for tolerance, to groups which are themselves intolerant.[56]

This brings us to Zechariah Chafee, who in 1930, in an earlier period of pluralist inquiry,[57] analyzed issues of groups and the state as a fundamental problem of political science. I can do no better here than to quote his final lines:

Our reaction toward any particular dispute in a club or trade union or church or college is almost sure to be influenced by our inclination toward one side or the other in this undying controversy. We shall be a bit more favorable to

55. These are in part reformulations of two of Chafee's concerns, the stranglehold and the hot potato. Zechariah Chafee, Jr., "The Internal Affairs of Associations Not for Profit," *Harvard Law Review* 43 (1930): 993.

56. This is not of course a new discussion. Once it was illustrated conventionally by the question of the civil liberties properly to be accorded those political groups that would, if in power politically, deny civil liberties. Now the discussion focuses typically on those who are intolerant because their world views are not those of the Enlightenment (i.e., religious groups refusing to use secular textbooks who are in that sense intolerant towards the values of the larger society of which both that group and other groups are a part).

See Martha Minow, "Putting Up and Putting Down: Tolerance Reconsidered," in *Comparative Constitutional Federalism: Europe and America,* ed., Mark Tushnet (New York: Greenwood Press, 1990), *77.* See also "Symposium: The Republican Civic Tradition," *Yale Law Journal* 97. (July 1988), and particularly Kathleen M. Sullivan, "Rainbow Republicanism," ibid., p. 1713, discussing the attempt of some to assimilate intermediate institutions to state purposes, in effect colonizing them by turning them into small scale public institutions. It may be that we do not seek the perfect state because, as Robert Dahl suggested in a discussion of Plato's Republic, we find the costs too great. See Robert A. Dahl, *After the Revolution? Authority in A Good Society,* rev. ed. (New Haven: Yale University Press, 1990), 36-37.

57. See on earlier pluralism Carol Weisbrod, "Practical Polyphony: Theories of the State and Feminist Jurisprudence," *George Law Review,* 24 (1990): 985.

judicial intervention if we believe that the state is the sole ruler of all that goes on within its borders, and is the necessary safeguard of the individual against the closely pressed tyranny of associations. We shall be more doubtful of the probable wisdom of state participation in the affairs of such a group if we are accustomed to think of the state itself as just one more kind of association, which, like the others, should keep to its own functions, and which must be judged according to the value and efficiency of the services it renders us in return for rather high annual dues.[58]

Conclusion

The problem of the State as Utopia is of course ancient, though perhaps something has happened in the debate fairly recently. That is the feeling that the ideal state may not be one which embodies all good values, but rather is a place in which a diversity of possibilities may be considered and tested. Thus, recent formulations of the problem, conscious of the issues of pluralism which the Utopias and communal societies have always raised, have stressed the possibilities of federalism, or the issues of possible tensions between state, community and individual. Here is Martha Minow's statement of the question: "What mix of concerns for group rights or cultural preservation, on the one hand, and individual rights and freedoms, on the other, should a given society pursue if it hopes to respect cultural diversity without colluding in the domination or oppression of some of its own members?"[59]

No answers have been provided here, though I hope that I have outlined some of the questions which officials or legal commentators would use in discussing the problem of communal societies and the law. I would note in conclusion that while communities may or may not be fixed in their views, the law often is not. Within a broad framework of things taken as settled, those concerned with law are often in the process of examining or reexamining particular questions. As it happens, questions of groups and group autonomy are, at this moment, very much under consideration.

58. Chafee, "Associations Not for Profit," 1029 (footnote omitted).

59. Minow, "Tolerance Reconsidered," 102 (noting immediately that this statement of the issue is too simple, since it omits problems of political and economic organization, coordination etc.).