Introduction

✦ "Today we take the state for granted," writes Joseph Strayer. "We grumble about its demands; we complain that it is encroaching more and more on what used to be our private concerns."[1] At the same time, he says, we can hardly conceive of life without the state. "The old forms of social identification are no longer absolutely necessary. A man can lead a reasonably full life without a family, a fixed local residence, or a religious affiliation, but if he is stateless he is nothing." Such a person has "no rights, no security, and little opportunity for a useful career." The conclusion is there "is no salvation on earth outside the framework of an organized state."

We shape our experiences as citizens of the state. At the same time we are members of other groups. The norms to which we are subject as citizens are called law. The norms of groups other than the state are, at least initially, often called roles or frames. When these solidify, when the group is identified and the relationship between the individual and the group is seen as structural, we call these normative systems group codes or rules.

This book consists of essays on the subject of individuals, groups, and the state, focusing on the state's response to cultural difference, a response that often takes the form of law.

There is no attempt here to define culture. A useful starting point for discussion is Raymond Williams's *Keywords,* which notes that *culture* is one of the most complicated words in the language.[2] Clearly, the term can be defined from within a discipline or a usage. A familiar anthropological definition, for example, is "[that] complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society."[3] As Terry Eagleton notes, this seems to mean that "[c]ulture is just everything which is not genetically transmissible."[4] The idea of culture adds to the scholarly conversation about law and society an opportunity to invoke materials beyond the

[1] Joseph Strayer, *On the Medieval Origins of the Modern State* (Princeton: Princeton University Press, 1970), 3; cf. W. H. Auden, "September 1, 1939," in *Selected Poems,* ed. Edward Mendelson (New York: Vintage Books, 1979), 88: "There is no such thing as the State / And no one exists alone."

[2] Raymond Williams, *Keywords: A Vocabulary of Culture and Society,* rev. ed. (Oxford: Oxford University Press, 1985).

[3] Terry Eagleton, *The Idea of Culture* (Oxford: Blackwell, 2000), 34.

[4] Eagleton, *The Idea of Culture*.

social science familiar to the sociologist, or the literature, however defined, used by law-and-literature scholars. In effect, the idea of culture allows a connection between law and anything that people do.

The effort to relate law and culture looks at official law, state law, from a stance outside law and its personnel. It uses *culture* to invoke literary, artistic, and journalistic worlds. To the extent that the effort relates law to "cultural studies," a question arises beyond those ordinarily associated with interdisciplinary work in law: Current work in cultural studies often identifies itself with a particularly intense form of boundary breaking, a challenge to givens that regularly invokes the transgressive. How could law, often taken to express all that is orderly, authoritative, and powerful, have anything to contribute to the destabilizing agendas and strategies associated with cultural studies?

Various answers are possible here. One relates to the point that law to some degree creates the conditions of culture. Another notes that law, as a cultural product, has something in common with other cultural products.[5] In the anthropologist's definition, laws are part of culture. Still another focuses on the point that while law is to some extent a mandarin text, it is itself a subject of popular culture.[6]

This book builds on another answer, however, to the effect that the familiar description of law posited originally—those norms emanating from and enforced by the state—while a view of law that is certainly common, is not the only characterization available to us. In the same way that cultural studies tries to break open the concept of culture, this book tries to open some ideas relating to law and the state.[7]

Although the book uses an idea of difference illustrated largely by ethnic and religious difference, it also discusses other sorts of difference and stresses that what counts as difference is not constant. The social (or attributed) meanings of difference change, as do individuals' and groups' ideas about the meanings and importance of differences. The book assumes that representations of group life can be found in judicial opinions as well as in television programs or novels, and these representations are not independent of each other. Moreover, relations between law and cul-

[5] See Carol Weisbrod, "Fusion Folk: A Comment on Law and Music," *Cardozo Law Review* 1999:1439.

[6] Lawrence Friedman, "Lawyers and Popular Culture," *Yale Law Journal* 98 (1989): 1579.

[7] This effort may be seen as writing "against law," in the sense that it writes against a particular idea of law. On law/culture and the idea of writing against, see Austin Sarat and Thomas R. Kearns, eds., *Law in the Domains of Culture* (Ann Arbor: University of Michigan Press, 1998), intro. See also the comment of Rosemary Coombe, "Contingent Articulations," in the same volume, p. 22 n. 1.

ture exist over time, so that the same legal event may have a first life and then a second and a third.

The book argues that the ideas of individual identities, groups, and states are not fixed, either in themselves or in relation to each other. A "state" may be stronger or weaker than internal groups, and groups may be internal or external to states—or both, existing as subgroup and as supranational organization. The relative distribution of power differs in different contexts and is not determined a priori. So too the "self."

For Ludwig von Mises, writing in 1944, the American and the German views of government and state were radically different. "To the American mind the notion of an *Obrigkeit,* a government the authority of which was not derived from the people, was and is unknown. It is extremely difficult to explain to a man to whom the writings of Milton, Paine, the Declaration of Independence, the Constitution and the Gettysburg Address are the fountain springs of political education what is meant by this German term *obrigkeit*." Mises illustrates with a Prussian quotation from 1838: "[I]t is not seemly for a subject to apply the yardstick of his wretched intellect to the acts of the chief of state and arrogate to himself, in haughty insolence, a public judgment about their fairness."[8]

State, in short, is not a word with one meaning. At the same time, we moderns are committed to the importance of the state, just as we are committed to law. In fact, according to one view the state and the law are basically one thing. If we look for the state, we find officials: "For the jurist, the State can be nothing other than the body of laws in force at a given time and place. The State itself is created by the law. State and law coincide: the State *is* the legal system."[9]

The emphasis on the state is parallel to the historical tendency of American law toward centralization. "One basic, critical fact of 19th century law," Lawrence Friedman writes, "was that the official legal system began to penetrate deeper into society."[10] The master trend is "to create one legal culture out of many; to reduce legal pluralism; . . . to increase the proportion of persons, relative to the whole population, who are consumers or objects of that law. This master trend continues, and accelerates."

[8] Ludwig von Mises, *Bureaucracy* (Grove City, Pa.: Libertarian Press, 1944), iv. He also uses material from 1891: "Our officials . . . will never tolerate anybody's wresting the power from their hands, certainly not parliamentary majorities whom we know how to deal with in a masterly way. No kind of rule is endured so easily or accepted so gratefully as that of high-minded and highly educated civil servants. The German state is a State of the supremacy of officialdom--let us hope, that it will remain so."

[9] Alessandro D'Entreves, *The Notion of the State: An Introduction to Political Theory* (Oxford: Oxford University Press, 1967), 5. In effect, there is no state other than officials. And for the jurist, these officials are created by and act under the law.

[10] Lawrence M. Friedman, *A History of American Law* (New York: Simon and Schuster, 1973), 99.

As part of this master trend and the corresponding emphasis on the state, we can see official law as uniquely important. Thus, Ronald Dworkin begins *Law's Empire* by saying that "[w]e live in and by the law. It makes us what we are: citizens and employees and doctors and spouses and people who own things."[11] Given this view of law's importance, it is no wonder that much legal theory has focused on issues of official adjudication.

But there are other views, in which, for example, state law itself is bounded by other rulers and other "law." We have the familiar and opaque statement of John Chipman Gray: "[T]he real rulers of a political society are undiscoverable."[12] And pluralist tendencies continue. In America, Lawrence Friedman tells us, the struggle between centralism and decentralism is persistent and continuing. "[D]ecentralization does not vanish," he says, "even in the teeth of the master trend of American legal history."[13]

In his discussion of America as a "plastic" and "malleable" society, Merle Curti refers to a "widespread commitment to anti-statism and voluntary associations."[14] Thus, there is a tension between the lawyer's story of American history (in the beginning, America was founded under the Constitution, Blackstone was important,[15] and the Marshall Court undertook national consolidation) and that told by others (in the beginning, America had little sense of the state[16] and did not follow Blackstone).[17] For lawyers, the master trend of centralization and vertical relationships almost entirely ignores, if it does not conceal, the pluralist or horizontal counterstory.

[11] Preface to Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press of Harvard University Press, 1986), vii; see also Alexander M. Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975), 5 (discussing law as the value of values).

[12] John Chipman Gray, *Nature and Sources of the Law* (New York: Columbia University Press, 1909), 77.

[13] Friedman, *History of American Law,* 572.

[14] Merle Curti, "Robert Owen in American Thought," in *Robert Owen's American Legacy: Proceedings of the Robert Owen Bicentennial Conference,* ed. D. Pitzer (Indianapolis: Indiana Historical Society, 1972), 57.

[15] But what did Blackstone represent? For the ambiguity of Blackstone on significant issues, e.g., natural law and legislative sovereignty, see Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975), 25.

[16] See, e.g., Samuel Huntington, *American Politics: The Promise of Disharmony* (Cambridge: Belknap Press of Harvard University Press, 1981), 35. Huntington indicates that the idea of the state "never took hold among the English North American colonists," despite "fulminations of Blackstone." The state, he says, appears in American political thought only at the end of the nineteenth century. See also S. Skowponek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (New York: Cambridge University Press, 1982) (Early America had little idea of the state, but, instead, a sense of "courts and parties" (28)).

[17] Huntington, *American Politics*.

By contrast, the pluralist story would not surprise a legal anthropologist. In a review article on work in legal anthropology, Sally Engle Merry describes two orientations as to pluralism, the first beginning with research derived from the colonial situation and focused on the interaction between the indigenous legal system and the law brought by the colonial power, the second, more recent, centered on work acknowledging that the phenomenon of legal pluralism is more generalized.[18]

One might say that legal anthropology stands to pluralism as Freud stood to the unconscious. Responding to the idea that he had discovered the unconscious, Freud noted that philosophers and poets had been well aware of the unconscious; what he had contributed was a way of studying it scientifically.[19]

Those in political theory or law who have studied pluralism and written on the question have ordinarily addressed others who approached the question in a comparable way, focusing on the literatures familiar in those particular conversations. But, of course, there are various ways of studying things scientifically, and even ways of thinking about things that may not qualify as "scientific."

Conversations about pluralism go on within many fields and even, quite generally, in forums that are not in "fields" (or "disciplines") at all, but simply discussions among people who think about their environments. Montaigne, in assessing the sovereignty of custom, was thinking about pluralism, as was Montesquieu in thinking about law in different settings and climates.

The idea that legal pluralism is ubiquitous was reinforced by another source of legal pluralist thinking that derives from studies in legal history, and particularly the work of F. W. Maitland on Gierke. This material was linked to historical studies in the field of church and state, a field that, as Marc Galanter once commented, is the locus classicus of pluralist thinking. Political theory, and particularly the work of the English pluralists in the 1930s, was also built on an exploration of the relationship between individuals, groups, and states. Yet another set of ideas rejecting the state as sole source of normative thinking and power comes from Foucault, who argued generally for a diffuse sense of the sources of power and coercion, some public, some private.

Montesquieu much earlier noted that "many things govern men," "Climate, religion, laws, the maxims of the government, examples of past things, mores and manner." These formed the general spirit. He believed

[18] Sally Engle Merry, "Legal Pluralism," *Law and Society Review* 22 (1988): 869–96.

[19] Freud quoted in Lionel Trilling, "Freud and Literature," in *The Liberal Imagination: Essays on Literature and Society* (New York: Viking Press, 1951), 34.

that to the extent that any one of these dominated, the others would yield. In some places it would be one thing, in some another.[20]

This book draws widely on these different discussions, stressing that the questions treated here are understood as important in many different contexts, and that debates over these universal questions are conducted in different vocabularies.

A central issue in many discussions is the idea of state sovereignty. Austinian positivism, with its emphasis on the command of the sovereign, and the idea of law as founded in the state, took hold in the modern world. In America, for example, legal pluralist tendencies within the state system itself are presented as minimized by rules of priority. These rules appear on the surface to resolve conflicts by reference to the differing degrees of "rank formality" of the competing laws. Thus in America we say that the federal Constitution is supreme and stands over all contrary law, that federal statutes stand over state law, and so on.[21] Leon Lipson has offered a conventional map of a legal system.

> According to that map, the accuracy of which need not yet concern us, law is prescribed by a single, known official organ, or by two or more of them in compliance with a process that itself has been officially prescribed; law is interpreted and applied to disputes by a court or a set of courts, or by sets of courts linked through secondary rules that are calculated to reconcile or harmonize conflicts; the statutes and regulations emanate from agencies coordinated closely or loosely under central authority.

And finally, "compliance is known to be enforced where necessary by official authority whose physical power is in general adequate to the purpose."[22]

If we do raise questions about the accuracy of the map, we find that it is highly idealized. There are irregularities in the legal system itself that have been flattened out, and the people, individuals and groups who are the objects of the official gaze, who observe it as it is observing them, are not yet in the picture.

[20] Montesquieu, *Spirit of the Laws,* trans. and ed. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (Cambridge: Cambridge University Press, 1989), bk. 19, chap. 4, p. 310; see also p. 494. As Isaiah Berlin pointed out, this idea underlies historical jurisprudence and modern sociology of law. Isaiah Berlin, "Montesquieu," in *Against the Current: Essays in the History of Ideas* (London: Hogarth Press, 1980), 130–61, 154.

[21] See Patrick Atiyah and Robert Summers, *Form and Substance in American Law: A Comparative Study of Legal Reasoning* (Oxford: Oxford University Press, 1987), 56.

[22] Leon Lipson, "International Law," in *Handbook of Political Science,* ed. F. Greenstein and N. Polsby (Reading, Mass.: Addison-Wesley, 1975), 415–16.

This book is an attempt to offer a more complete account of certain phases of the relations between individuals, groups, and the state, with a continuing emphasis on cultural resonances of those relationships and with a focus on the American experience as an illustration of certain ideas.

The discussion here is offered in two parts, each part represented by a nineteenth-century American folk painting, the emblems referred to in the book's title. The first painting is the *Historical Monument of the American Republic,* by Erastus Field. It is used to introduce state-centered hierarchical versions of the relationship between groups and the state. The second is the more familiar *Peaceable Kingdom,* by the Quaker Edward Hicks, used here (as it has been used by others) to represent a more horizontal relation between groups and the state, one in which groups are accorded more recognition and more autonomy but in which the state still has a role, sometimes larger, sometimes smaller.

Part 1 begins with a short essay on Field's *Historical Monument* that serves as an introduction to the first four chapters, which focus on American material and describe aspects of relations between groups and the state within a hierarchical, state-centered theory of state and government. Each of the first four chapters tries to go into or behind a reification, whether it is the "state" (chap. 1) or "sovereignty" (chap. 2) or the representation by the state of a particular religious group (Mormons, Amish in chapters 3 and 4). The description of the Field painting emphasizes the preoccupation with height and the stress on political events, conventionally understood. In effect, the individuals are "flat-affect" units in the structure, which is the dominant thing. The first chapters comment on this political architecture.

Chapter 1 describes the visit to the United States of the English utopian Robert Owen in 1825. Owen's address to the American Congress is particularly stressed to make the point that the encounter strikes us today as odd—our utopian theorists do not have that much to do with our politicians. It seems that we are much more accustomed to interaction between reformers and politicians.[23] But a conversation between politician and utopian was not so odd then, and the United States was an experiment almost as innovative as Owen's New Harmony. The lines between public and private were not so fixed, and the meaning of federalism was still very much being explored.

The second chapter deals broadly with the early history of sovereignty in the United States and suggests that in nineteenth-century America it was attached to other groups; to the individual states, in Calhoun's theo-

[23] On the distinction, see Russell Jacoby, *The End of Utopia: Politics and Culture in an Age of Apathy* (New York: Basic Books, 1999), 25–27. "Over the years and against the conventional wisdom, utopians sustained a vision of life beyond the market" (27).

ries of sectionalism; to such groups as the Indian tribes; and even to individuals in the theories of radical individualists. Chapter 2 concludes a description of a short American case in which again the idea of groups and the issues of overlapping identities and memberships are presented historically as having complexities that are often lost in discussions that focus on a single membership.

The third chapter explores the idea that groups are a threat, as an *imperium in imperio*. The idea that there can be only one undivided sovereignty is most obviously challenged, in the history of Western political organization, by the claims of the church. Chapter 3 treats the Mormon Church in America as a particularly complicated example of how a modern state deals with the issue of an *imperium in imperio*. It opens with an overview of the field of church and state against which the history of the Latter-day Saints in America is described. An analytical framework that was used in earlier work of mine[24] (which resonates most obviously with the church-sect distinction offered by Troeltsch) is used here to trace the history of the Mormons from persecuted group, an overgrown utopia in effect, to a state within a federal system of states. A part of that story is an account of law's direct intervention in the life of an internal group, shaping its inner life, its religion and practice. Another part concerns the limits of law, demonstrated by the point that among fundamentalist Mormons polygamy was not wiped out, even though the practice was denounced by the federal government, the government of Utah, and the Mormon Church. The chapter concludes with a treatment of two films, used to evoke a continuing discomfort over the Mormon polygamous past.

Another aspect of the group-state problem is reviewed in the fourth chapter; this time the focus is on the dissenting individual within the group and the problem of the role of the state, which because it is there has an important voice in the story, whatever it does or does not do. One stress here is again on the images of the Amish in American culture, including films, and in judicial opinions. The general point is that law is not freestanding and inevitably triumphant but is in fact limited in what it can do, at least in some instances. The chapter uses a particularly tragic legal encounter from the 1940s in which an individual Amishman sued his community and then, from an entirely formal point of view, "won" his case. The uncertain meaning of that victory is made plain in the newspaper coverage of the case.

[24] Weisbrod, "Family, Church, and State: An Essay on Constitutionalism and Religious Authority," *Journal of Family Law* 26 (1987–88): 741.

Chapter 5 opens with a discussion of the Mennonites in Germany to introduce the theme of corporatism.[25] The chapter moves from a description of the privileges of the Mennonites to the issue of the pariah people. The legal status of the Jewish community of czarist Russia is used as an example here. The chapter concludes with a discussion of group issues in early-twentieth-century New York City as these related to Catholics. The chapter creates the background to the theoretical discussions of part 2, which introduce ideas of state power and group power as less hierarchically related.

The description of the Hicks painting of *The Peaceable Kingdom* that opens part 2 makes the point that more horizontal relations can be envisioned between groups (including the state as a kind of group). Horizontal discussions have often invoked the biblical images of Isaiah and the idea of harmony in the *Peaceable Kingdom*. But one must see that even in the peaceable kingdom as imagined by Hicks, the lion is a central commanding figure that, in some versions of the painting, is so dominant as to threaten the peace of the peaceable kingdom. The earlier chapters of part 2 consider some of the theories and some of the structures that address the problem of the lion. Later chapters relate the lion to the human figures in the painting, children—future adult selves.

Chapter 6 opens with a review of philosophical and political theories of sovereignty and proceeds to a description of theories that both challenge the monist idea of sovereignty and respond to the liberal lack of interest in group or associational life. The chapter describes the ideas of two pluralist theorists who were visitors to the United States in the late nineteenth century (the Dutch prime minister Kuyper and the anarchist prince Peter Kropotkin) as well as the English pluralists. The chapter then moves to a discussion of Alexander Pekelis. Born in Odessa in 1902, and an Italian law professor when he emigrated to the United States in 1941, Pekelis drew on his early experience in czarist Russia in describing his understandings of the American position on religious liberty and on the place of group autonomy in a liberal state.

The effort of the League of Nations to protect minority rights through treaties is described in chapter 7, along with the problems left open by the system. Here the state is both the League of Nations, considered as a kind of international state, and smaller sovereignties, the states under the treaties and the minorities that are also typically linked to national states. The chapter includes a discussion of the ways in which groups were identi-

[25] An issue that haunts discussions of group rights. See Elizabeth B. Clark, "Breaking the Mold of Citizenship: The Natural Person as Citizen in Nineteenth Century America (a Fragment)," in *Cultural Pluralism, Identity Politics, and the Law,* ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1999).

fied under the treaties and a review of problems that the treaties did not resolve. Most important among the treaties' weaknesses was an assumption that identities were clear and self-evident, and that certain identities could be used as the basis of the pluralist structure. The argument here is that identities are overlapping and shifting, and that the institutionalizing of a pluralism based on one form of identity freezes one moment of social and cultural history. The chapter ends with one of the most important cases to be adjudicated under the Minorities Treaties system, upholding the right of minority schools to exist and rejecting a state monopoly on education. This idea, that the state must be the sole educational voice, did not die, however, and we see a version of it again in the next chapter in the arguments of Julian Huxley.

Law, as has been observed, works not exclusively or even primarily through direct sanctioning of deviant behavior but through orienting or reorienting thought and consciousness, accomplished in large part through education. The largest form of the lion is represented in chapter 8 by Julian Huxley, who as director of UNESCO was interested in an internationally agreed-upon educational structure. This approach is juxtaposed with two other theoretical perspectives, that of Ludwig von Mises, who urged a minimal role for the state, and that of Hannah Arendt, who on the basis of her own distinctions between public and private realms considered certain actions inappropriate for state systems. Arendt's controversial piece on school segregation is the prime text for the discussion, which focuses on racial groups particularly. The chapter concludes with a treatment of *Pierce v. Society of Sisters*, a case from the 1920s that is foundational for the rights of religious and private schools.

The discussion of education makes plain that issues of identity and group life within larger states are centrally involved with the issues of children and the formation of identity and values in children. Schools are one aspect of this process, but not the only one. Chapter 9 discusses the involvement of the state in early identity formation when it removes a child from the family of origin and places the child with a second family. This may be done in the context of divorce, or death, or child neglect proceedings, or international upheaval. It may be done out of religious conviction (as in the Mortara episode in the nineteen-century Papal States) or out of what is perceived as simple necessity, as in the case of the Dutch Jewish orphans after the Second World War. The issues involved here are highly complex, resting on not only different memberships but also different ideas of membership.

Chapter 10 brings together two kinds of relations among the individual, the state, and the group. The first sees the individual at the center of various affiliations and offers a discussion of how an individual orders these group memberships and norms. This question is illustrated by the

story of Susanna and the Elders. The second sees the individual self as having a social or plural interior. The groups that the individual creates or joins (according to liberal theory) might then be seen as participants in interior dialogues within each individual. A discussion of names and naming practices illustrates this idea. The chapter concludes with a discussion of the complex self and law, suggesting that this is one of the points at which law invokes a critical fiction.

Although it is organized around two paintings and although other pictures are from time to time described, this is not an emblem book in the technical sense.[26] To begin with, there are not enough pictures. And there are no mottos providing a reading of the pictures. One reason for the absence of such mottos may be suggested here: mottos relating to the meaning of the emblems are inevitably limiting, while pictures here are used to evoke rather than define. The treatment of the specific interactions and frameworks should open and not close the discussion.

[26] Rosemary Freeman, *English Emblem Books* (New York: Octagon, 1970). Certain characteristics are "commonly agreed to be essential by the emblem writers themselves." "1. An emblem book should be a collection of moral symbols. 2. It should have pictures, or . . . should postulate the existence of pictures. 3. Attached to each picture should be a motto or brief *sententia* . . . 4. there should be an explanatory poem or passage of prose in which the picture and motto are interpreted and a moral . . . is drawn" (238–39).