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# THE GENERALITY OF RIGHTS

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Looked at from the perspective of an American constitutionalist, *individual rights* is a familiar phrase. In its reference to the idea that individuals have rights against the government and against the majority,[1] the phrase "individual rights" has a meaning that is now relatively well understood. In a different sense, however, the phrase "individual rights" might be taken to suggest that there is something necessarily or essentially individual, and thus *particular*, about the very idea of a right. Harking back to the Legal Realist positions that, first, a right is nothing more than a statement that a particular individual has an enforceable claim against another particular individual (or entity),[2] and, second, that a right is simply the ex post statement of the outcome of a particular lawsuit,[3] the idea has spread that rights are particular, individual, and contextual. Indeed, a recent article entitled *Rights Against Rules: The Moral Structure of American Constitutional Law*[4] announced in its title a conception of rights suggesting that rights are in their nature particular, and are thus to be contrasted with, and counterpoised against, necessarily general rules.

That this picture of rights is increasingly prevalent does not make it sound. Part of my goal here is to examine the concept of rights from the perspective of issues of generality and particularity, and then to show that

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1. *See, e.g.*, Ronald Dworkin, TAKING RIGHTS SERIOUSLY 184–205 (1977).

2. *See, e.g.*, Wesley Newcomb Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (Walter Wheeler Cook ed., 1964); Arthur Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 165 (1919); Roscoe Pound, *Legal Rights*, 26 INT'L J. ETHICS 92 (1916); Max Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1149 (1938).

3. *See* John Chipman Gray, THE NATURE AND SOURCES OF LAW (R. Gray ed., 2d ed. 1921); Oliver Wendell Holmes, THE COMMON LAW (1881); William Twining, KARL LLEWELLYN AND THE REALIST MOVEMENT 381 (1973); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). The theme is also prominent in the work of the Scandinavian Realists. *See, e.g.*, Axel Hägerström, INQUIRIES INTO THE NATURE OF LAW AND MORALS (1953); A. Villem Lundstedt, LEGAL THINKING REVISED (1956); Karl Olivecrona, LAW AS FACT (2d ed. 1971); Alf Ross, DIRECTIVES AND NORMS (1968); Alf Ross, ON LAW AND JUSTICE (1958); Karl Olivecrona, *Legal Language and Reality*, in ESSAYS IN HONOR OF ROSCOE POUND 151 (F. Newman ed., 1962); Alf Ross, *Tû-tû*, 70 HARV. L. REV. 812 (1957).

4. Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998).

although rights might be more or less general, a degree of generality is a necessary feature of all rights. To imagine a right that was as particular as the Realists supposed rights to be would, I hope to demonstrate in the earlier portions of this Article, make no sense at all.

My larger aim, however, is broader than that of merely serving as conceptual constable, stepping in to remedy cases of conceptual confusion and chastise the perpetrators. Rather, I want to explore the normative dimensions of recognizing the generality of rights. For once we recognize that rights are general, we recognize as well that a right-holder shares something in common with other holders of the same right. In a society in which rights are relatively unimportant, this may be inconsequential. But in societies in which rights are themselves important, the rights that people have are a substantial part of the definitions of the communities of which they are members. To see rights in general terms, therefore, is to see the important community-creating and affinity-creating function of rights.

Even more broadly yet, the rights we have, when seen in general terms, can become important parts of our descriptions, and indeed of our identities. To the extent that some or all of our identity exists at the intersection of the groups we join and the groups to which we are assigned, rights, necessarily possessing this grouping and thus group-making function, are important parts of the identities of people in any rights-soaked society.[5] To understand rights only in particular terms, therefore, is not only to make a conceptual mistake, but is also, as I shall seek to show, to miss an important dimension of contemporary social existence in rights-laden societies.

## I. THE REALISTS ON RIGHTS

It may not be clear from my introductory statements just where the issue is joined, or even whether there is an issue to be joined at all. In order to clarify the issue, therefore, as well as to emphasize that my target is not made of straw, I will in this section describe and develop the Legal Realist view of the nature of rights. This position, important in its own right, is even more so in terms of its persistent influence. If we can see the flaws in the Realist account, and even in the best version of that account, then we may be better able to recognize those flaws when they reappear in more modern clothing.

The Realist view of the nature of legal rights exists at the intersection of two strong Realist themes. The first of these is the Realist belief in the necessary particularity of legal decision making, and the second is a profound skepticism about the value or even the coherence of legal abstrac-

5. *Cf.* Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959 (1992).

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tions.[6] I will take these up in turn, and then combine the two themes to produce what I take to be the characteristic, but mistaken, Realist[7] understanding of rights.

It is well known that the Realist account of legal decision making stressed a focus on the particulars of the case at hand, and on the form of all-things-considered and contextual decision making that can be called "particularism."[8] When John Chipman Gray, who can be understood either as an early Realist or as an important precursor of Realism, distinguished between law and sources of law, with only what judges decide constituting the former,[9] he committed himself to the proposition that "even a judicial decision is 'law' only for the parties in the instant dispute and thereafter becomes a 'source of law,' since everything will depend on the interpretation that is put upon it in a later decision."[10] Similarly, Wesley Sturges was concerned to stress how each case was different from every other case, and warned against the dangers of attempting to "overstimulate [law students] with confidence that a deduction from what judges said in one case with its setting can be used to fix what they will decide in another case."[11] Much of Jerome Frank's *Law and the Modern Mind* was preoccupied with the importance of recognizing that decisions are based primarily on the particular facts of particular cases.[12] And of course Karl Llewellyn's focus on "situation

6. I disclaim any goal of locating a "central" theme of Legal Realism, of presenting a view of what is most important about Legal Realism, or of identifying the most important Realists. Legal Realism is itself a contested symbol, and thus it comes as no surprise that there are people who see the central importance of Legal Realism as being about empirical investigation into the nature of law and legal decision, *see, e.g.*, John Henry Schlegel, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995), others who focus on the Realist attack on laissez-faire baselines, *see, e.g.*, Barbara Fried, DISCREDITING THE FREE MARKET: THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998), and many others who focus on the more traditional "indeterminacy" and "particularist" themes of some of the Realists. *See* Brian Leiter, *Naturalism and Naturalized Jurisprudence*, in ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 79 (Brian Bix ed., 1998). For present purposes, I make only the claim that some people were concerned to stress the particularity of legal rights and the manipulability and consequent relative unimportance of legal rules, and that some of those people have often been called Legal Realists.

7. I will use the term "Realist" as shorthand for Legal Realism, noting, en passant, that Legal Realism bears no relationship to the position in (philosophical) metaphysics known as "realism," for the two are in fact polar opposites. Metaphysical realism stresses the existence of natural kinds and the existence of categories and concepts antecedent to human construction, a position that is quite close to just what many branches of Legal Realism deny.

8. For a more complete philosophical development of the idea of particularism, see Frederick Schauer, PLAYING BY THE RULES: A PHILOSOPHICAL ANALYSIS OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991). *See also* Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773 (1998).

9. Gray, *supra* note 3, passim.

10. R.W.M. Dias, JURISPRUDENCE 449 (5th ed. 1985).

11. Wesley Sturges, Book Review, 40 HARV. L. REV. 513 (1931), as quoted in Laura Kalman, LEGAL REALISM AT YALE 1927–1960, pp. 80, 256 n.47 (1986).

12. Jerome Frank, LAW AND THE MODERN MIND 100–04 (1930). "The chief obstacle to prophesying a trial court decision is . . . the inability . . . to foresee what a particular trial judge or jury will believe to be the facts." *Id.* at 186. For related themes, see Joseph Bingham, *Joseph Walter Bingham*, in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 7, 13, 20 (1941); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L. REV. 274 (1929).

sense" and the power of the particular articulated the same themes of the importance of looking at particular cases or particular transactions, and not at large groupings of largely different situations.[13]

The Realist claim with which I am concerned here is not initially the normative one that legal rules *should* be seen in particular terms. Rather, it is the descriptive claim that legal decision making is *necessarily* particular, and that accounts of law, or programs for training of prospective lawyers, that fail to understand this fundamental descriptive point about how decisions are actually reached are premised on an empirical mistake. The normative claim of the Realists, therefore, was only that legal education and legal understanding should, more than was then[14] the case, be more focused on the empirical reality (hence the name Legal Realism) of what judges, lawyers, and other legal actors actually do.

The focus on the empirical dimension provides the transition to the other important Realist claim. This is the claim that the standard legal abstractions—rights, duties, obligations, corporation, possession, property, agreement, responsibility, and many, many more—are simultaneously empty and misleading. A pithy and characteristic statement of the position comes from Felix Cohen:

> *Legal concepts* (for example, *corporations* or *property rights*) are supernatural entities which do not have a verifiable existence except to the eyes of faith. *Rules of law,* which refer to these legal concepts, are not descriptions of empirical social facts (such as the customs of men or the customs of judges) nor yet statements of moral ideals, but are rather theorems in an independent system. It follows that a *legal argument* can never be refuted by a moral principle nor yet by any empirical fact. *Jurisprudence,* as an autonomous system of legal concepts, rules, and arguments, must be independent both of ethics and of such positive sciences as economics or psychology. In effect, it is a special branch of the science of transcendental nonsense.[15]

And further,

> The realistic judge, finally, will not fool himself or anyone else by basing decisions upon circular reasoning from the presence or absence of corporations, conspiracies, property rights, titles, contracts, proximate causes, or other legal derivatives from the legal decision itself. Rather, he will frankly assess the conflicting human values that are opposed in every controversy, appraise the social importance of the precedents to which each claim appeals, open the courtroom to all evidence that will bring light to this delicate practical task of social adjustment, and consign to Von Jhering's heaven of legal concepts all attorneys whose only skill is that of conceptual acrobat.[16]

13. Karl N. Llewellyn, THE COMMON LAW TRADITION: DECIDING APPEALS 268–77 (1960). *See* William Twining, KARL LLEWELLYN AND THE REALIST MOVEMENT 216–27 (1973).

14. Or is still now. But that is for another day.

15. Felix Cohen, *Transcendental Nonsense and the Functional Approach,* 35 COLUM. L. REV. 809, 821 (1935).

16. *Id.* at 837.

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Cohen's views can be understood as a further development of Holmes's aphorism that "General propositions do not decide concrete cases."[17] Thus, we see John Dewey relying on Holmes in claiming that "general principles emerge as statements of generic ways in which it has been helpful to treat concrete cases"[18] and that "[t]he real force of the proposition that all men are mortal is found in the expectancy tables of insurance companies."[19] Similarly, Llewellyn characterized a central Realist position as the "[d]istrust of traditional legal rules and concepts insofar as they purport to *describe* what either courts or people are actually doing."[20] And a host of other Realists, including Herman Oliphant,[21] Thurman Arnold,[22] William O. Douglas,[23] and Max Radin,[24] all chimed in with their castigation of the reliance on abstract legal concepts to the exclusion or denigration of the particular facts in particular cases.

The distrust of abstractions was even more prominent in the work of the Scandinavian Realists. Applying to legal theory many of the views of Logical Positivism,[25] the Scandinavian Realists took the category of the empirically verifiable to be coextensive with the category of the meaningful, and consequently believed that most legal abstractions were meaningless. For Axel Hägerström, rights were mere ritual.[26] Villem Lunstedt paralleled the American Realists in wanting to see law and legal rules only in empirical sociological terms.[27] Alf Ross followed the Logical Positivists in believing that conceptual statements can always be reduced to factual statements.[28] And Karl Olivecrona sought to explain legal concepts, including the concept of legal right, largely in terms of the effect of certain words on people's thought processes, thus reducing legal concepts to psychological phenomena.[29] As with their American Realist counterparts, the Scandinavian Real-

17. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).
18. John Dewey, *Logical Method and Law*, 10 CORNELL L. Q. 17, 28 (1924).
19. *Id.*
20. Karl Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1236 (1931).
21. Herman Oliphant, *Facts, Opinions, and Value-Judgments*, 10 TEX. L. REV. 136, 138 (1932) (stressing importance of "investigations markedly particular"); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 161 (1928).
22. Thurman Arnold, *Apologia for Jurisprudence*, 44 YALE L.J. 730 (1935).
23. William O. Douglas, *Some Functional Aspects of Bankruptcy*, 41 YALE L.J. 329 (1932); William O. Douglas, *A Functional Approach to the Law of Business Associations*, 23 ILL. L. REV. 675 (1929).
24. Max Radin, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika*, 33 COLUM. L. REV. 199 (1933).
25. On Logical Positivism generally, see, for example, A.J. Ayer, LANGUAGE, TRUTH, AND LOGIC (2d ed. 1946); Rudolf Carnap, THE LOGICAL STRUCTURE OF THE WORLD (R. George trans., 1965); LOGICAL POSITIVISM (A.J. Ayer ed., 1959); THE PHILOSOPHY OF RUDOLF CARNAP (P.A. Schlipp ed., 1963); READINGS IN PHILOSOPHICAL ANALYSIS (H. Feigl & W. Sellars eds., 1949); Rudolf Carnap, *Testability and Meaning*, 3 PHIL. & SCI. 419 (1936).
26. Axel Hägerström, INQUIRIES INTO THE NATURE OF LAW AND MORALS (1953). *See* Lord Lloyd of Hampstead and M.D.A. Freeman, LLOYD'S INTRODUCTION TO JURISPRUDENCE 807 (5th ed. 1985).
27. A. Villem Lundstedt, LEGAL THINKING REVISED (1956).
28. Alf Ross, DIRECTIVES AND NORMS (1968); Alf Ross, ON LAW AND JUSTICE (1958).
29. Karl Olivecrona, LAW AS FACT (2d ed. 1971).

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ists advanced the proposition that the array of typical legal abstractions and concepts were of little if any assistance in understanding how legal actors and legal institutions actually operated.

If one combines the Realist belief in the emptiness of legal abstractions with the Realist belief in the essential particularity of legal decision making, what emerges is a view that reduces the idea of a legal right to a necessarily particular and contextual statement applicable only to particular litigants making particular claims on particular facts in particular tribunals. And although this characterization is itself a bit of a caricature, it has produced a contemporary legal environment in which it seems sensible and plausible to say things like: "To say that X's constitutional rights have been violated entails that a reviewing court should at X's instance invalidate, in some measure, a particular rule. It does *not* entail that any other rule should be invalidated, in any measure."[30] Similar statements abound in the legal literature, including the conclusion that "rights . . . have force and meaning only . . . in actual instances,"[31] and a panoply of writings all more or less sympathetic to the view that rights are largely unhelpful when seen only as "reified abstractions."[32] Throughout modern legal thought, and from very different political, ideological, and jurisprudential perspectives, we see frequently reappearing the view that rights have an essentially specific or particular aspect, and that understanding or formulating rights at a general level will lead only to confusion both about what rights are and the way in which they operate.

## II. RIGHTS, RULES, AND REASONS

The Realist belief in the particularity of rights, a belief that has spread through much of American legal thought, makes some sense if rights are seen as ex post descriptions. That some plaintiff prevailed in some case can certainly be understood in the language or rights, for we can say that in that case the court determined that this plaintiff ought to prevail. The plaintiff made a claim, and his claim having been judicially vindicated it is not unreasonable to conclude ex post that the plaintiff had a right in that case or on those facts. In this sense, rights are plausibly understood as being particular.

To have such an ex post view about rights, however, is to have a view of rights that tells us virtually nothing about the process that led to the

30. Adler, *supra* note 4, at 14 (footnotes omitted).

31. Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1357 (1996).

32. Adam Hirsch, *The Problem of the Insolvent Heir,* 74 CORNELL L. REV. 587, 604 (1989). For similar themes, see M. Ethan Katsch, THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW 262–72 (1989), *discussed in* James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading,* 80 CAL. L. REV. 1413 (1992); Cass R. Sunstein, *Response: From Theory to Practice,* 29 ARIZ. ST. L.J. 389 (1997).

decision to recognize, vindicate, or enforce the right. Just as the standard critique of law as (simply) prediction emphasizes the way in which the predictive theory gives us no guidance about what one might say to a legal decision maker or how that decision maker might understand what she is doing,[33] so too does an ex post view about rights tell us virtually nothing about what ex ante led to the recognition of what ex post could plausibly be called a right. If we wish to understand the role of legal rights in legal argument and in legal decision making, we have to understand what it means to make an appeal to a right, and what it means to appeal to a right under conditions in which the appeal or claim has yet to be accepted.

The cumbersome form of presentation in the previous paragraph was designed to suggest that the only sensible way in which rights can operate in legal argument is by way of being both temporally and logically antecedent to the particular case in which a claimant's success might be deemed to be the recognition of a right. In other words, a right which functions as the ex post label for the outcome in some case is quite different from a right which provides (or at least is thought by the rights-based arguer as providing) ex ante a reason, even if not a conclusive one,[34] for one outcome rather than another. And a right which provides an ex ante reason is, for this reason, best analyzed in terms of its reason-providing (or justification-providing, or argument-providing) capacity.

For a right to provide a reason for a decision, as in "the Ku Klux Klan ought to be allowed to march in Manhattan" or "members of the Ku Klux Klan ought to be allowed to march in Manhattan with their hoods on and their identities shielded,"[35] the right must necessarily be broader and more general than the outcome it supports. So when we say that "the members of the Ku Klux Klan ought to be allowed to march in Manhattan with their hoods on and their identities shielded *because* there is a right to exercise one's First Amendment rights anonymously,"[36] we rely on a form of argument in which "the right$_1$ to exercise one's First Amendment rights anony-

33. Ronald Dworkin, LAW'S EMPIRE 36–37 (1987); H.L.A. Hart, THE CONCEPT OF LAW 124–54 (2d ed. 1994).

34. One of the (many) problems with understanding rights in case-specific and event-specific ways is that such an understanding gives us no way of comprehending the way in which rights, like reasons, duties, and obligations, may have nondispositive force. It makes little sense to say that this plaintiff had a right but did not win unless rights function as ex ante and defeasible reasons or arguments rather than as ex post descriptions of highly particular claims. On the general question of the overridability of rights, the property of rights that generates the foregoing sentences, see Alan Gewirth, *Are There Any Absolute Rights?*, 31 PHIL. Q. 1 (1981); Robert Nozick, *Moral Complications and Moral Structures*, 13 NAT. L. F. 1 (1968); Frederick Schauer, *On the Supposed Defeasibility of Legal Rules*, 51 CURRENT LEG. PROBS. 223 (1998); Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415 (1993); Judith J. Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV. 45 (1977).

35. The example comes from a very recent and still unreported Second Circuit opinion and its surrounding events. *See* Benjamin Weiser, *Appeals Court Bars Klan Masks: Group Still Plans to Stage Rally*, N.Y. TIMES, LATE EDITION, October 23, 1999, at A1.

36. *See* McIntyre v. Ohio Elections Commission, 115 S. Ct. 1511 (1995); Talley v. California, 362 U.S. 60 (1960).

mously" is logically and necessarily more general than the right$_2$ of particular members of the Klan (or even all members of the Klan) to engage in certain practices at certain times and in certain context. By virtue of giving a reason, we make a statement necessarily more general than the conclusion that the statement is a reason for.[37] And this is because to give a reason just is, in most contexts that concern us here, to call forth a general statement under which the proposed conclusion is argued to fall. Consequently, for a right to serve as a reason for action or a reason for decision is for the right necessarily and logically to be more general than the right-based result, even if, as with many of the Realists, we choose to use the label "right" for what I prefer to call a "right-based result." When we make an appeal to a legal or constitutional right, we make an appeal to something general under which the particular facts of particular cases are claimed to be encompassed.

The upshot of this is that an essential feature of rights is their generality, for a right must be at least more general than any particular result. This does not mean that rights cannot vary in their degree of generality. The right of members of the Ku Klux Klan to march with hoods as part of a political rally is less general than the right of members of the Ku Klux Klan to march with hoods, which is in turn less general than the right of people to march with their identities disguised. But although there are degrees of generality, with more general rights often being the reasons or arguments that support the creation or recognition of less general ones, a maximally particular specification of a right loses its ability to operate as a reason for decision, and consequently loses almost all of the characteristics that would lead people to use rights in legal, constitutional, political, or moral argument or that would lead people to insert right-descriptions in statutes and constitutions. Following this understanding, rights do not function *against* rules, for rights *are* rules, at least if we understand the generality of rules as their defining and most important characteristic.[38] And further following this understanding, the frequent particularistic characterizations of the idea of a right, while at times usefully stressing the role of specific facts in legal decision making, run the risk of leading us to ignore the necessary generality of both rights and the words in which they are described.

## III. GENERALITY AND AFFINITY

Once we see that rights and rights-descriptions are at least somewhat general, it follows that a right must have more than one right-holder, or at least must have more than one right-exercising event. Putting aside the latter as

37. For the more sustained argument to this effect, see Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

38. *See* Schauer, *supra* note 8; Frederick Schauer, *Rights as Rules*, 5 LAW & PHIL. 115 (1987).

epiphenomenal,[39] I want to focus on the former, and on the fact that rights ordinarily have numerous right-holders. If the right of members of the Ku Klux Klan to march with hoods and concealed identities in Manhattan is justified by the right to engage in anonymous political speech, as both *Talley v. California*[40] and *McIntyre v. Ohio Elections Commission*[41] appear to support, then the category of holders of the right includes all of those encompassed by the justification as well as all of those encompassed by the outcome. That being so, the category of the "protected class," as we might call it, is a category that includes not only hooded Klansmen in Manhattan but hooded Klansmen everywhere else, and, more importantly, includes not only hooded Klansmen but also masked political demonstrators with different agendas and different political views, distributors of unsigned political pamphlets, anonymous telephone pollsters and solicitors for political causes, as well as a host of others who would seek to engage in anonymous political activity.

Most of us would doubt that the antischool tax pamphleteers in *McIntyre*, the civil-rights boycotters in *Talley*, and the Klansmen in Manhattan had much in common. Anachronism aside, it is unlikely that the members of the three groups would have belonged to overlapping organizations, frequented the same social establishments, attended the same dinner parties, or shared very many of the same cultural experiences. Insofar as we exist in at least a partly socially differentiated society,[42] the claimants in these three cases appear quite likely to inhabit different segments of the differentiated social world.

But it may be too quick to say that the members of these three groups have little in common, for of course they do have something potentially important in common. Insofar as the right exists, or at least insofar as the right is plausible enough to provide an argument,[43] then the members of the three groups do have something in common, and what they have in common is that they are all protected by, and actively wish to exercise, the same right, a right whose specification includes all of them, even if it does not include, except as counterfactual contingency, large numbers of other people. By creating or recognizing a right to engage in anonymous political activity, therefore, we (or the creators) have constructed a grouping or

39. That is, a right that protected only one person could still satisfy my requirement of generality by protecting a multiplicity of that one person's activities, as in "Lucy and no one else has a right to free speech." But such rights are sufficiently rare that I will not spend any time on this logical, but unlikely, possibility.

40. 362 U.S. 60 (1960).

41. 115 S. Ct. 1511 (1995).

42. Social differentiation as a sociological phenomenon is a perspective largely associated with Niklas Luhmann. *See, e.g.*, Niklas Luhmann, SOZIALE SYSTEME—GRUNDRISS EINER ALLGEMEINEN THEORIE (1984); Niklas Luhmann, THE DIFFERENTIATION OF SOCIETY (1982).

43. The affinity-creating potential of rights discourse is only partially dependent on official or authoritative recognition of the right. People are often joined by their common attachment to an unsuccessful cause.

category that groups people who would otherwise not be grouped together, or at least not be grouped together in as close a way.[44]

Although others have talked about the collective aspects of legal rights,[45] my focus here is different. I am not concerned primarily with the ways in which rights might advance collective as well as individual interests. Instead, the concern is with the way in which rights, by virtue of their generality, can be the vehicles for constructing affinities among those whom we think of as otherwise unconnected or less connected individuals. In this respect the claim has both a logical and an empirical dimension. In terms of the logical dimension, the claim is straightforward. Logical affinities are a function of shared properties. As a logical matter, I have an affinity not only with members of my own species, but with all other two-legged animals (and thus with birds), all others with brown hair (and thus with donkeys), all other residents of Cambridge (and thus with raccoons), all other Yankee fans, and so on ad infinitum. And insofar as most, or at least many, of the categories in our conceptual apparatus are socially constructed,[46] it is a very modest claim and an equally modest observation to note that rights can serve this purpose and can thus be the vehicles for the creation of logical (or formal) affinities that would without the presence of those rights not have existed.

The logical claim is a precursor to more important issues, but by itself may not be of much interest. Not much of my consciousness is devoted to the logical affinities I have with two-legged birds, brown-haired donkeys, and Cambridge-resident raccoons. On the other hand, much of my consciousness (too much, many people—including some of whom I am otherwise quite fond—would say) is devoted to the logical affinities I share with other Yankee fans. But what distinguishes my Yankee-fan-ness from my two-leggedness is not a logical matter, for the two are logically equivalent. Rather, this distinction is an empirical one, and the question of which logical affinities are culturally, politically, and socially salient is an empirical question of great importance.

From this perspective, the interesting thing about rights-generated affinities is the possibility that they might reflect, or, more importantly, create,

44. The qualification recognizes the fact that even without the right to engage in anonymous political speech all of these people share in common the fact that they are people, that they are Americans, and numerous other characteristics. My point is not that there are no affinity-creating groups for typically unconnected people. It is that many of these groupings are nonsalient, and that rights may create salient groupings where previously none, or fewer, existed.

45. *See especially* Eric J. Mitnick, *Taking Rights Spherically: Formal and Collective Aspects of Legal Rights*, 34 WAKE FOREST L. REV. 409 (1999).

46. The words "social construction" are for some a rallying cry and for others fighting words. Here I make only the modest claim that many of our categories are socially constructed, which is not the claim that all or even most of our categories are socially constructed. One can believe in the social construction of the game of bridge, or even of the George Washington Bridge, without believing in the social construction of the categories of ants or volcanoes, or of the concepts of gravity and color. On some of these issues, see JOHN SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1992).

empirically salient social, cultural, and political affinities. Insofar as the members of the Ku Klux Klan and the civil-rights protesters in *Talley* share in common a certain type of First Amendment claim, and insofar as making that claim is empirically important to each, the affinity of being grouped under the same right may turn out to be much more than a naked logical affinity.[47] It may turn out to be something that creates a certain form of community, that creates a certain form of political alliance, that creates a shared goal in the face of otherwise divergent ones, and that creates a group that bridges otherwise salient social cleavages.

The claim does not seem to be empirically implausible. Are not otherwise divergent religious groups joined by their claiming of free exercise rights? Do not affinities between otherwise different racial or ethnic groups come into being because of their shared claims of right under the Equal Protection Clause? Do not the politically heterogeneous groups who oppose campaign finance reform on First Amendment grounds (what do Ralph Nader and Senator McConnell have in common but for this?) become ever so slightly more homogeneous because of *Buckley v. Valeo*?[48] More broadly, and more speculatively, what are the affinities that might be created by being grouped as claimants of a right to privacy, the freedom of association, the right to petition, the right to counsel, or even the right to keep and bear arms? In some of these cases, the answer might be very little. But in other cases it may turn out that the affinities created, the associations compelled, and the claimants grouped may be more than simple logical affinities; they may be affinities that have important social and cultural consequences for the people and organizations who are part of the rights-generated groupings. Indeed, it is possible that the culture of rights that some bemoan precisely because of its excessively individualistic orientation[49] has a less well-noticed but possibly equally important nonindividualistic dimension just because of the community of rights-holders that that culture creates. Those who lament that we have a culture of rights, and lament the consequences of the culture of rights, might wish to contemplate the possibility that a culture of rights, even for all of its occasional negative consequences, and even putting aside the debates about the advantages and disadvantages of the rights themselves, is nevertheless still a *culture*, and is thus nevertheless still a community.

Now it may still be that community is itself overvalued, or that in this or many other modern societies what we need is not more grouping and more

47. The example is extreme but intentional, and not totally unrealistic. One of the supporters of the Klan's claim in New York was the Reverend Al Sharpton, relying heavily, but not exclusively, on the argument that he is against anything that Mayor Giuliani is for. But insofar as someone like Sharpton, for whatever reason, finds himself in a political alliance that is, at least in part, generated by the desire to benefit from the right that an otherwise different person or group is claiming, there remains the potential of rights-created affinities that will break down or span otherwise wide social barriers.

48. 424 U.S. 1 (1976).

49. Most prominently, see Mary Ann Glendon, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

affinities, but less grouping, fewer affinities, and deeper individualism. These are plausible arguments. But in the context of this article I will avoid this issue. For now, the claim is only one about the group-creating, affinity-generating, and community-building capacities of rights themselves. These capacities arise initially as a logical matter and then as an empirical matter, independent of the substance of those rights, because of the very generality of the rights, and thus because of their frequent empirical tendency to build groups across, rather than along, otherwise-extant social divisions. Examining whether this is itself a good thing must wait for another day.[50]

## IV. RIGHTS AND IDENTITY

As I suggested at the outset, there is a yet deeper implication of all of this. There are numerous ways of thinking about the question of personal identity, and it would be implausible to contemplate all of them here. Still, one understanding of personal identity focuses less on the personal dimensions of personal identity, and looks instead at the way in which personal identity may be largely constituted by numerous social, and thus necessarily collective, institutions, mechanisms, and devices.[51]

If this perspective on personal identity has some value, then it, too, can be filtered through the discussion of the generality of rights. Much, or all, of our identity is constituted by the affiliations we have, the connections we make, and the properties we share with others, such that our identity and our uniqueness exist at the intersection of a multiplicity of affiliations and shared properties. As I describe myself, I use descriptions that are themselves general. My race, my gender, my age, my religion, my profession, my interests, and even much of my genetic description are not unique to me. Instead, each of them are properties I share with many others, although the peculiar and particular array of these shared properties are mine alone, or,

50. It is important to recognize that the substance and the specification of the right may still have an important effect on the nature of the groups or affinities created. The ability of a right to free speech to create affinities across wide political divisions, for example, is significantly a function of the strong American rule requiring viewpoint-neutrality in the specification of free speech rules and doctrines. *See* R.A.V. v. St. Paul, 505 U.S. 377 (1992); Dawson v. Delaware, 503 U.S. 159 (1992); Texas v. Johnson, 491 U.S. 397 (1989); Steven Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America,* 80 CORNELL L. REV. 43 (1994). But if the rules were specified differently and less agnostically about morally and politically important viewpoint differences, as, for example, with racist speech, *see, e.g.,* Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story,* 87 MICH. L. REV. 2320 (1989), the nature of the affinities created by free speech rules, rights, and doctrines would be quite different. Because nothing in the very idea of a right requires that it be "neutral" in a certain substantive way, *see* Gerald Dworkin, *Non-Neutral Principles,* in READING RAWLS: CRITICAL STUDIES OF A THEORY OF JUSTICE 124 (N. Daniels ed., 1975); Frederick Schauer, *Exceptions,* 58 U. CHI. L. REV. 871 (1991), my larger point here about the affinity-creating capacity of rights is radically indiscriminate about the types of affinities that might be created.

51. When applied to the necessarily communal and collective question of responsibility (you cannot be responsible all by yourself, because, at the least, you must be responsible *to* someone), this is the basic insight of Dan-Cohen, *supra* note 5.

more extremely just *are* me. Much of what I am, and maybe all of what I am, therefore, is the sum of my connections, to put it crudely, and the sum of the categories and groupings of which I am only a part.

If, as I argued in the previous section, rights in this and many other societies constitute an important portion of these connections, categories, groupings, and affiliations, then, through a multistep reasoning process, the rights I have, and especially the rights that are salient to me in light of the rights that are salient in the culture in which I live, are important components of generating my affinities with others, and these affinities with others are important components of generating what I am.

As noted above, the important dimension of this is less a logical claim than it is an empirical one. Not all of us are constituted by our rights in the same way, or to an equivalent degree. But it is at least worth considering whether the phenomenon that now goes by the name of "identity politics," a phenomenon that some celebrate and others excoriate, is itself an empirically rights-generated phenomenon. Are the identity groups that constitute identity politics formed by antecedent understandings of what and who we are, or are they formed by legally, politically, and socially constructed, and thus contingent, claims of right that the members of the various groups have found to be socially, legally, and politically validated? What is the empirical connection between the social category of disabled persons and the Americans With Disabilities Act? What is the empirical connection between a person who sees herself as a member of a minority group and the existence of a culture that purports to take minority *rights* seriously?[52]

I do not have easy answers to these empirical questions, nor do I venture views about when the hypothesized phenomenon is a good or bad thing,

52. A large recent literature has usefully focused on a number of complex issues surrounding "as-applied" and "facial" constitutional challenges to legislation. This includes not only Adler, *supra* note 4, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994), Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991), and Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM U.L. REV. 359 (1998), but also a number of the papers for this Symposium. *E.g.*, Larry Alexander, *Rules, Rights, Options, and Time*, 6 LEGAL THEORY (forthcoming 2000); Michael C. Dorf, *The Heterogeneity of Rights*, 6 LEGAL THEORY (present issue); Richard Fallon, *As Applied, Facial and Overbreadth Challenges*, 113 HARV. L. REV. (forthcoming 2000); Emily Sherwin, *Rules and Judicial Review*, 6 LEGAL THEORY (present issue). In light of this, it is worth noting that the decision by a court to accept a facial challenge, or to understand (and accept) a challenge in facial rather than in "as-applied" terms, is a decision by that court to adopt a more, rather than less, general understanding of the right, and to produce a more, rather than less, general outcome. In this sense, therefore, as-applied challenges are likely far less affinity- and identity-creating, because as-applied challenges, by their very particularity, try to avoid placing a particular plaintiff or a particular situation within a much larger grouping. By contrast, facial challenges decide in advance (nothing wrong with that, *see* Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71; Schauer, *Giving Reasons*, *supra* note 37) that a particular case, a particular event, and a particular plaintiff are to be grouped with a potentially much larger group of other potential cases, other events, and other plaintiffs. In this sense, therefore, the acceptance of a facial challenge creates a large group of beneficiaries of that challenge, and consequently creates the category and generalization of all of those who would be such beneficiaries.

even assuming that it does exist. What I have ventured, however, is a way of understanding rights and generality that may be best explained by a play on words. We are as familiar with the phrase *constitutional rights* as we are with the phrase "individual rights," and we have little question, at the conceptual level, about what we mean when we say "constitutional rights." But what I have attempted to suggest here is not only that rights are constitutional in the familiar sense, but also that they are constitutional in the sense that they constitute who and what we are. Without going anywhere near the implausible claim that rights are all of what we are, one can still venture that rights are some of what we are, and for some people may be much of what they are. If and when this suggestion is correct, then rights have an important but often ignored constitutive function, and rights are thus constitutional in a different but perhaps more profound way.

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