

Individual Rights and Democratic Practice

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Abstract

This paper attempts to examine the ways in which rights, particularly individual rights, can serve to undermine democratic values such as meaningful political participation and fair representation—especially when they operate and are practiced within a political culture that valorizes independence and self-reliance while oftentimes punishing policy and activity premised on cooperation and obligation. Ultimately, individual rights tend to empower and protect those already privileged by their race, class, sexuality, and/or gender. For those not so privileged, individual rights can serve to legitimize and reinscribe oppression. The solution I propose is not to jettison individual rights altogether but rather balance them with a form of group recognition that is sensitive to difference and seeks to foster greater participation and more inclusive representation.

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This paper is part of my larger dissertation project on American individualism and democratic representation. In it I contend that if we value *democratic citizenship* (premised on broad-based, deliberative, and active participation) and *democratic rule* (which obtains when democratic citizens jointly determine and take responsibility for the decisions that govern their collective affairs), then we ought to be deeply concerned about the ways in which excessive individualism (which I contend in another chapter is the culturally dominant American self-understanding) inhibits these practices (Turner 1998, Bennett 1998, Hochschild 1996, De la Garza 1995, Elazar 1993, Ellis 1993, Lieske 1993, Gans 1988, Bellah 1985, McClosky and Zaller 1984, and Tocqueville 1969). Instead, American individualism (which is comprised of four related concepts where the individual is an independent, self-reliant, and self-interested bearer of rights) fosters a so-called representative democracy characterized by widespread political apathy, limited and weak forms of participation, a competitive norm, and a government dominated by bureaucratic and business elites and organized interests. In particular, it seems to me that we find democratic representation at the nexus of these two values insofar as democratic citizenship speaks to the question of *who* is to be represented and democratic rule to *how* we are to be represented. Of course representation in the American tradition has predominantly meant the representation of individuals. Nevertheless in the past decade a number of scholars from rather different perspectives have begun to recognize that the representation of individuals may not be (and probably is not) sufficient to secure democratic ends (Guinier 1994 and 1995, Kymlicka 1995, Walzer 1983 and 1992, and Young 1990). My larger project focuses

specifically upon this literature on group representation and the dilemmas it is put forward to remedy. More specifically, I will explore what those dilemmas are according to key scholars, how group representation is conceived of in an effort to remedy those dilemmas, the extent to which the dilemmas highlighted by these diverse scholars are the central ones (are there others, for example, that have been overlooked), and how those identified dilemmas affect the adequacy of competing conceptions of group representation.

In the following pages, I want to explore the problems that rights (which can be thought of as a way in which citizens are recognized, similar to representation) pose for fostering democratic practices.¹ Indeed, I will claim that rights (especially individual rights) can serve to impede democratic citizenship by exacerbating political apathy and obviating the need for participation (especially collective action), limiting and distorting public deliberation, and ultimately serving to mask prejudice. Individual rights also can inhibit democratic rule by celebrating the individual over and above group and/or community concerns and responsibilities—and this, in turn, re-inscribes the individualism already so prevalent in American life. When we are encouraged to think in terms of our individual rights, with obligations a distant concern, those marginalized on the basis of race, ethnicity, gender, class, and/or sexuality may be especially prone to suffer injustice—injustice that

¹ For an excellent analysis on the history of American rights, see Richard Primus, *The American Language of Rights*. New York: Oxford University Press, 1999.

cannot be fully remedied on an individual basis. When this occurs, it becomes increasingly difficult to maintain that we experience anything approaching real democratic rule.

I

In "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989), Kimberle Crenshaw argues that the experience of discrimination against Black females is virtually erased by anti-discrimination doctrine as applied by the courts (and in feminist theory and anti-racist politics generally).² In one of the three cases she uses to support her claim, *DeGraffenreid v. General Motors*, five Black women brought suit against General Motors alleging that "the employer's seniority system perpetuated the effects of past discrimination against Black women." (141). The district court granted summary judgment for the defendant, rejecting the plaintiffs' attempt to bring suit on behalf of *Black women*. The court stated that the lawsuit must be examined "for race discrimination, sex discrimination, or alternatively either, but not a combination of both" (141). I, too, want to employ this example in order to illustrate the deficiency of the ways in which we conceive of, apply, and talk about rights in the American context. While rights are a cornerstone of virtually all

² See also Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law," in Crenshaw, et.al. eds. *Critical Race Theory*. New York: The New Press, 1995 and bell hooks, *Yearning: race, gender, and cultural politics*. Boston: South End Press, 1990, Chapter 7.

theories of democracy, mainstream political scientists and democratic and legal theorists have oftentimes failed to fully interrogate the character of those rights and how they operate in practice. The rights that are defended by these scholars are by and large individual rights (rights accruing to individuals rather than groups) that are regarded as comprehensive both for empowering and protecting. Following a brief review of this literature, I will maintain that individual rights not only silence and disempower but also fail to protect particularly members of marginalized groups. The implication then is that individual rights as they are conceived of and practiced (especially in the American context) may not be sufficient to secure democratic ends, but it certainly points out the necessity for a more self-conscious defense of individual rights and their practice when defended as adequate.

Individual rights are a fundamental component of much of mainstream American legal and political thought.³ Many defenders in democratic theory (Moon 1993, Flathman 1998, and 1976) embrace individual rights on the grounds that they enhance and protect individual autonomy (or the principle of "self-enacted individuality") (Flathman 1998). This value, by no means uncommon, is said to be made possible and encouraged by the existence and celebration of individual rights, as they are the preeminent guarantors of personal independence, equality, and individual liberty. In fact, though John Rawls (1971) was not constructing a theory of democracy but one of justice, individual rights for him seek to protect autonomy and equal value under a set of fair initial conditions.

³ See Gerald Gunther, *Individual Rights in Constitutional Law*. Mineola, NY: Foundation Press, 1986.

Among political scientists, Robert Dahl is perhaps one of the best known and most widely cited for his defense of a theory of democracy in which individual rights play a starring role. For Dahl (1989, 1971, and 1961), individual rights serve to protect and enable citizens in a predominantly procedural form of democracy. That is rights, individually accrued, are regarded as the best (and only form of rights) that protect autonomy as well as pave the way for individuals to seek a meaningful, fulfilled existence. Legal theorists, particularly Ronald Dworkin (1977), make the case that individual rights function favorably as trumps; that individual rights ought to be recognized even when (and often especially when) that recognition goes against the general interest and/or majority opinion.⁴ Along with the aforementioned scholars, Dworkin regards the individual possession of rights as the only form of rights worth discussing. Presumably any other formulation would violate individual autonomy, inhibit if not forestall the pursuit of individual fulfillment, render the individual unprotected from the ravages of other individuals, not to mention the government—and individual rights are the best tools we have, he maintains, for creating and maintaining equality. Thus rights necessarily accrue to individuals as comprehensive

⁴ For interesting and compelling arguments within legal theory that counter Dworkin and other proponents of strong legal foundations, see Stanley Fish, *There's No Such Thing as Free Speech, And It's a Good Thing, Too*. New York: Oxford University Press, 1994, and Richard A. Posner, *The Problems of Jurisprudence*. Cambridge: Harvard University Press, 1990. See also Judith Butler, *Feminists Theorize the Political*. New York: Routledge, 1992 and *Gender Trouble*, New York: Routledge, 1989 for arguments against foundationalism from feminist theory.

guarantors (or as near as we can get) of both empowerment and protection.

II

The stronger claim that I wish to make regarding this literature is that rights, individually practiced and possessed, fail both to empower and protect. They fail to empower because rights are a social practice the exercise of which can serve negatively as trumps to sever dialogue and active participation. They fail to protect in that rights individually conceived (at least predominantly conceived in this way) serve to treat discrimination (or the failure to respect rights on the basis of stereotyping, for example) as a more idiosyncratic phenomenon requiring individual remedy than a group phenomenon in need of group recognition and resolution. Thus individual rights can actually reinforce inequality. The weaker claim is that regardless of whether or not this argument is convincing or even reasonable, mainstream political and legal scholars have failed to make rights a legitimate topic for debate. Individual rights are often assumed to be a basic and normal component of any theory of democracy and/or justice. Little, or only marginal, attention is paid to the content and practice of those rights and what they mean for democratic practice and the pursuit of democratic ends, whatever those might be. At the very least, I want to urge scholars in these fields to deal more self-consciously with the concept of rights and how those rights play out within the social context.

That individual rights, or even rights more generally, can actually serve to disempower is not an entirely new argument (though as I have mentioned, it is not an argument that has become a significant part of the mainstream discussion regarding

democracy and democratic practice). Certainly Marx, early on, discussed this issue by advancing the claim that possession of a right is not meaningful in the absence of a certain level of material well-being.⁵ We are said and commonly regarded to possess certain rights. Yet the right to assemble and worship freely means very little when we must struggle on a daily basis to maintain ourselves and our families. Thus I want to concentrate on the way in which rights can disempower by inhibiting participation as well as halting democratic dialogue. While I regard dialogue as an essential aspect of democratic participation, I want to separate them conceptually here as I think they combine to make my case against a weak and perfunctory defense of rights more emphatic.

Participation, even weak forms of participation such as voting and interest group activity, is often an essential component of any democracy. Participation is most often regarded as a form of consent and contributory to democratic legitimacy. Rights enter this equation by theoretically serving to enable citizens to participate freely and equally in the democratic process. While I acknowledge that this does indeed happen (though I would maintain, and will do so in the following pages, that it occurs regularly only for those already privileged particularly by their race and class⁶), it does not always operate in this

⁵ In *On the Jewish Question* in *The Marx-Engels Reader*, Robert C. Tucker, ed. New York: W.W. Norton and Company, 1978.

⁶ See Verba, et.al. "*Race, Ethnicity, and Political Participation*," in *Peterson 1995*.

fashion. In fact, rights can practically reverse this pattern.

Rather than allowing for and encouraging participation, rights can and do operate as barriers to political engagement. If we are commonly regarded as having particular rights and allege that those rights are not being respected (especially if we allege rights are being denied to members of an entire group of people), those allegations often fall on deaf ears or are met with widespread disbelief. For if we accept such allegations as meritorious, then we find ourselves in the unacceptable position of denying (or at least weakening) the existence of American democracy. In the most basic of terms, the possession rights precludes the necessity for participation. We are certainly free to exercise those rights if we see fit, the argument/dialogue seems to go, but we need not do so. The rhetoric tends to go this way: "Why participate (to pass civil rights legislation, the ERA, or federal hate crimes legislation) to gain equality when we all already possess the same rights?"⁷ The implication is that if we all possess these rights, then the lack of successful attainment of some end must be the fault of the individual misperceiving her rights and/or exercising those rights incorrectly. The responsibility for this outcome then falls back on the individual as a matter of private concern—even if the result has broad public consequences with regard to inclusive citizenship. "American individualism," Bellah notes, "seems determined more than ever to

⁷ See Doug McAdam, *Political Process and the Development of Black Insurgency, 1930-1970*.

Chicago: The University of Chicago Press, 1982 and Anne N. Costain, *Inviting Women's Rebellion*, Baltimore: The Johns Hopkins University Press, 1992.

press ahead with the task of letting go of all criteria other than a radically private validation” (1995, 48). Individual rights, American individualism’s legal manifestation, many times serve in the same capacity.

Rights even serve to impede and distort democratic dialogue. Like Dworkin, I see rights operating as trumps—but not in the positive fashion he envisions. Rather the invocation of rights talk can and does stop further democratic debate.⁸ In the course of a discussion about abortion, the Internet, or school prayer, for example, the conversation has the tendency to come to a screeching halt once a right is invoked. Rather than it being common for the participants to discuss the content or potential content of a right, the tendency is to disengage and retire to respective corners—essentially agreeing to disagree when compromise or even agreement might be possible (or at the very least a plausible option). When one party invokes a right to privacy, free speech, and/or freedom of religion, the debate often arrives at an impasse. “What else can I say,” we are susceptible to replying, “she has the right to her privacy, speech, religion, etc.” I am certainly not arguing that other forms of important democratic dialogue do not occur, or that the content of particular rights is never explored. What I am contending is that rights often do operate as argument stoppers—barriers we erect to forestall encroachment into a inner sanctum that is virtually

⁸ See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse*. New York: The Free Press, 1991, as well as a critique of that work by Cass R. Sustein, “Righttalk,” *The New Republic*. September 2, 1991, 33-6, and Richard Dagger. *Civic Virtues: Rights, Citizenship, and Republican Liberalism*. New York: Oxford University Press, 1997.

beyond democratic debate and judgment.

There is no doubt that we share interests with some citizens in a given realm and in others, we disagree (sometimes vehemently and sometimes only mildly). It seems to me that deliberation must be cultivated in order to ascertain intensity of belief, for example, and demonstrate the consequences that particular decisions will have (whether intended or unintended) on those who find themselves in the minority. Rights talk sometimes encourages and legitimizes halting discussion. Even in the cases when it does not do this, the practice of individual rights tends to encourage and even reward atomization—to think only in terms of oneself, separate and unique, with no obligations (to even listen) to one's fellow citizens (the same kind of claims are made against the prevalence of interest group politics).

This is not to say that uniqueness or particularity should habitually defer to something like “the common good”. Rather the aim is to strike a just balance between the two—a balance that will shift with context. Indeed this is why some form of group recognition is necessary to balance deliberative outcomes. Differences (especially differences possessed by a minority) must not go unrepresented simply for the sake of preserving majoritarian politics. “In a society differentiated by social groups, occupations, political positions, differences of privilege and oppression, regions, and so on, the perception of anything like a common good can only be an outcome of public interaction that expresses rather than submerges particularities” (Young 1990, 119. See also Squires 2000 in response to Young and Phillips 1993, 1995, and 1999).

While I have been speaking thus far about rights (and primarily the rights dialogue)

generally, I now want to turn specifically to *individual* rights, which I find most problematic for democratic practice. Specifically I want to counter the claim that rights, accruing to individuals rather than groups, serve as better protectors of citizens from discrimination (rights denial) by other individuals and, particularly, by the government. As mentioned earlier, most defenders of individual rights defend them partially on the basis that they best protect individual autonomy and dignity. If rights do anything, these thinkers are apt to say, they serve to protect. If we are speaking about persons already privileged by their race and class, for example, then I would agree that individual rights do indeed protect. However members of culturally and historically marginalized groups have not been wholly protected (and not even marginally protected in some cases) by individual rights. I think this is so because of the way in which individual rights necessarily seek to remedy discriminatory practices as if they were an *idiosyncratic* occurrence—that is, as if they were wielded against mere individuals rather than an entire class of citizens.

Of course the courts have come to accept group rights in a very elementary way, recognizing certain classes as "suspect." However such recognition has come grudgingly and only after much debate and earnest participation. Furthermore, suspect classification only applies to a small portion of a number of groups who have experienced and continue to experience discrimination. Thus even when a weak form of group recognition is allowed, it is structured in a highly unsophisticated fashion—almost completely extracted from the social context of discriminatory practice.

III

I now want to return to the example with which I began this discussion. The five

Black women who brought suit against General Motors were unsuccessful because the court rejected their claim (and indeed possessed no foundation upon which to affirm it) that they had any standing as Black women. They must either assert their claim of discrimination on the basis of sex (where sex is only a quasi-suspect class) or race, but not both. The point, as Crenshaw deftly illustrates, is that these women did not experience discrimination solely on the basis of either. Black men had a record of being promoted at General Motors, as had white women. Race discrimination cases, as she points out, tend to illustrate discrimination against *Black men*, while gender discrimination cases more often highlight the experience of *white women*. The experience of Black women is essentially erased. They were discriminated against on the basis of the particular intersection of their race and sex--not as women, not as Blacks, but as *Black women*. The courts are virtually impotent to remedy these kinds of cases.

However it is not just anti-discrimination doctrine that fails here. Rather the difficulty runs more deeply to our doctrine of individual rights—the foundation from which anti-discrimination legislation has been drawn. We are so beholden to the idea that rights ought to accrue to individuals. We like this idea because we rightly value security in our persons as well as the autonomy to pursue a meaningful existence. With these ideas in mind, it is easy to see why we might then conceive of those individual rights in universalistic terms. That is, each person ought to possess the exact same bundle of rights. This strikes me as perfectly reasonable. Yet we know that in practice, rights are not universally respected and, many times, the rights that are disregarded are those of the poor, people of color, women, lesbians, and gays. Individual remedy and a continued reliance on individual

rights do not equal justice. Anti-discrimination legislation and the creation of suspect classes are equally ill-equipped, and I think this is so because those attempted remedies have been extracted from the individual rights repository that permeates American legal doctrine. The presumption is that individual rights work and work well. In the few cases that they do not, we have anti-discrimination legislation to step in. However, our conceptualization of individual rights is not sensitive to the ways in which they are practiced in a given environment. If it is true that we see ourselves as individuals in the strong sense (that individualism is the dominant and preferred American self-understanding), then the practice of individual rights exacerbates or reaffirms the problems associated with individualism. It is not so much that we have misconceived rights at the abstract level (though this may be part of the problem), but rather we are not thoughtful enough about how those rights are exercised.

Individual rights as practiced in the U.S. can certainly not remedy this type of discrimination. It is not discrimination enacted against individuals idiosyncratically that can then be remedied individually, but rather on the basis of membership in a certain class (which may, and most likely will, include crosscutting memberships). Furthermore, the courts are impotent to deal with such cases given their less than sophisticated and comprehensive recognition of group rights in the form of suspect classes. In fact, the American practice of rights can serve to perpetuate a weak but stable liberal order at the expense of true democratic citizenship and rule.

So what is the solution? Many would argue that we continue to go back to the courts until they get it right and/or attempt to craft and institutionalize more sophisticated

legal remedies that would enable the courts to recognize standing in cases like *DeGraffenreid*. But the solution, I think, should not simply be a legal one. Rather than attempting to resolve such issues only in the courts, the dilemma ought to be addressed as a political question.⁹ This means that the correct venue for wrangling with the content and practice of rights is the legislature and, moreover, that those who believe they have experienced discrimination or rights denial ought to be able to decide for themselves the relevant group to which they belong and have suffered as the result of membership in that group. What makes that class legitimate besides self-identification is that the injustice they experienced as the result of membership in some class has had public consequences (that it is a political question that impinges on full and inclusive citizenship).¹⁰ The problem here is a political one, and there ought to be democratic resolutions for it.¹¹

⁹ See Keith J. Bybee, 1998, *Mistaken Identity*.

¹⁰ For an alternative view see Anne Phillips, 1993, particularly Chapter 5, “Democracy and Difference” as well as Iris Marion Young, 1990.

¹¹ We have become such a litigious society that we have bolstered the role of the courts as the most appropriate venue for settling these kinds of issues. Partially as a result of this, “no other country’s courts have exercised their power to declare executive or legislative action unconstitutional with such frequency and boldness as their American counterparts” (Glendon 1995, 28).

Will Kymlicka (1995), for example, argues that liberals have been mistaken to reject forms of group recognition on the basis that it compromises and endangers the commitment to individual liberty. Given that there are enduring cultural differences and many individuals consider themselves to be most free when participating in their “societal cultures”, Kymlicka claims that individual liberty is in fact fortified by acknowledging the importance of groups and the influence they ought to be accorded in the larger society. For Kymlicka there are two broadly defined categories, national minorities and ethnic minorities, and group recognition is not to be a temporary fix to a temporary problem, but rather a permanent remedy for an enduring reality.

There are two related problems with his remedy, however. The first is I am not convinced that national and ethnic minority status cover the range of minority concerns that require representation such as the poor, lesbians, and gays (it is not that he is insensitive to these concerns, but he believes that his categories encompass such groups). This is partially a function of the fact that he has a fixed conception of a given group which neglects the differences within that group. The second is that if group recognition should be understood as a permanent fixture in democratic political life, might we have already given up the possibility that *some* differences (and more importantly the social and political significance we assign to them) may eventually become meaningless. There is no doubt that we want to foster respect (or at the very least tolerance) for difference. Yet by cementing group recognition in place, we might be unintentionally contributing to the balkanization we so

desire to forestall. Both of the problems that I have highlighted here, (1) fixed group membership and (2) permanent group recognition, have the capacity to undermine what Kymlicka most wants to protect: individual liberty.

Though I have made claims against both rights generally as well as individual rights, I want to be clear that I am not opposed to rights as a general concept (or inhibitory in a general sense of the pursuit of democratic ends). Indeed I think rights essential to a strong democratic practice. My contention is twofold. The first is the weaker claim that rights, in the general sense, can potentially serve, and have served, to operate in undemocratic ways by inhibiting democratic participation and severing potentially productive democratic dialogue. Mainstream scholars of politics and legal and democratic theory must begin to engage in a more self-conscious and careful discussion about rights and how they operate, or have the potential to operate, within a given context. The second and stronger claim is that a preference for individual rights over and above some form of group rights can indeed be undemocratic insofar as they fail (through an individual remedy or through recognition as a member of a suspect class) even *to protect* citizens, particularly as members of entire classes of citizens, from discriminatory practices. Better to have individual rights than no rights at all, but even better to have rights that both empower and protect—rights which may need to be substantively expanded to reflect the experiences of its citizens.

We think of rights as accruing only to individuals because of our strongly held belief in the intrinsic value of each person. We have institutionalized and celebrated this understanding of rights, I think, because we understand ourselves to be individuals in the strong sense adumbrated at the beginning of this paper—independent, self-reliant, and self-

interested. We are each, according to this self-conception, capable of knowing and acting upon our own interests. We are each responsible for our own successes and failures. That is, when we succeed, it is often more meaningful when we can say that we have done so on our own. When we fail, it must be the result of some error in judgment or lack of fortitude on our part. However, such attitudes fail to appreciate the ways in which we are all interconnected—and that relying on others need not reveal weakness but may actually be a means to empowerment. Our culture of individualism and its partial manifestation in the practice of individual rights masks the necessity for cooperation, collective deliberation, and responsibility to all sectors of society—all of which impedes our abilities to think and act as democratic citizens. Rights ought to empower and protect. When they fail to do so, especially for those who are among the most marginalized, we must reexamine our commitment to how they are practiced. This does not mean jettisoning rights altogether. But it does, I think, indicate the necessity for cultivating democratic practices (possibly through a real commitment to active participation and the creation of new and innovative public spaces) that are not simply premised on a conception of the self as isolated, self-reliant, and self-interested. “[I]ndividual rights are but one set of elements in a larger constitutional structure” (Glendon 1995, 34). It is time, I think, to turn toward those elements that more fully embody both democratic rule and democratic citizenship.

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